IN THE FLORIDA SUPREME COURT
CASE NO. SC05-1558

ERIC SCOTT BRANCH, *Petitioner*

v.

JAMES V. CROSBY, JR., *Respondent.*

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, James V. Crosby, Jr., by and through undersigned counsel and responds as follows to the petition for writ of habeas corpus. For the reasons discussed, the petition should be denied.

Statement of the Facts

The facts underlying petitioner's convictions, as found by this Court on direct appeal, are as follows:

> Eric Branch was wanted by police in Indiana and because the car he was driving, a Pontiac, could be traced to him, he decided to steal a car from the campus of the University of West Florida in Pensacola. When Susan Morris, a young college student, approached her car after attending an evening class, January 11, 1993, Branch accosted her and stole her red Toyota. Morris' nude body was found

later in nearby woods; she had been beaten, stomped, sexually assaulted and strangled. She bore numerous bruises and lacerations, both eyes were swollen shut, and a wooden stick was broken off in her vagina. Branch was arrested several days later in Indiana and charged with first-degree murder, sexual battery, and grand theft.

Evidence introduced at trial showed the following: On the night of the murder, a friend saw Branch with a cut hand, which Branch said he had gotten in a bar fight; that same night, Branch was seen on campus wearing a pair of black and white checkered shorts and driving a "smallish red vehicle"; Branch was sighted in Bowling Green, Kentucky, two days later, and Morris's car was recovered the next day in a parking lot there; when Branch was arrested, he had in his possession a pair of black and white checkered shorts stained with his own blood; a bloodstain matching Morris was found on the back of the passenger seat of the red Toyota; when Branch's Pontiac was discovered abandoned in the Pensacola airport parking lot, "medium velocity splatter" bloodstains matching Morris's DNA profile were found on boots and socks inside. Branch testified on his own behalf and was convicted as charged.

Branch v. State, 685 So. 2d 1250, 1251-1252 (Fla. 1996), cert. denied, 520 U.S. 1218 (1997).

Statement of the Case

Branch was charged by indictment on February 23, 1993, with the first-degree murder of Susan Morris, sexual battery, and grand theft. R.-I, at 1-2.[1]

[1]Based on the nature of petitioner's claims for relief, the State relies upon the direct appeal record and therefore respectfully requests that the Court take judicial notice of its file in cause number 83,805. Reference to the direct appeal record will be to the record ("R.") and the trial transcript ("T.Tr."), with the applicable volume

Branch pled not guilty to the charges and proceeded to a jury trial. The jury, following a three-day trial, found him guilty as charged on March 10, 1994. Id. at I-4-5; T.Tr.-V, at 935-936. The penalty phase was held on March 11, 1994, for which the jury returned its advisory verdict for death by a vote of 10-2 on that date. R.-II, at 334; T.Tr.-VI, at 1032. The trial court requested written memoranda from the parties concerning sentencing, held a hearing on April 26, 1994, and then conducted the final sentencing on May 3, 1994. See R.-III, at 449. In regard to sentencing, as summarized by this Court,

> [t]he trial court followed the jury's ten-to-two vote and imposed a sentence of death on the first-degree murder count based on three aggravating circumstances n1 and several nonstatutory mitigating circumstances. n2 The court imposed life imprisonment on the sexual battery count and five years imprisonment on the grand theft charge. . . .
>
> n1 The court found the following aggravating circumstances: The murder was committed in the course of a sexual battery; Branch had been convicted of a prior violent felony; and the murder was especially heinous, atrocious, or cruel.
>
> n2 The court found the following mitigating circumstances: remorse; unstable childhood; positive personality traits; acceptable conduct at trial.
>
> * * * * *

---

and page citations. In addition, reference to the parties' briefs on direct appeal will include the citation "D.A."

Branch, 685 So. 2d at 1252.

Branch was represented on direct appeal by Assistant Public Defender David A. Davis, a board certified criminal appellate specialist who was admitted to the Florida Bar in 1979. He raised the following nine issues in the direct appeal: (1) the trial court erred in denying Branch's repeated requests to continue the guilt and penalty phases of trial; (2) the trial court erred in failing to hold a hearing regarding trial counsel's competency after Branch wrote a letter complaining about counsel; (3) the trial court erred in refusing to give the requested circumstantial evidence jury instruction; (4) insufficiency of the evidence on the murder charge; (5) the trial court erred in denying Branch's motion for mistrial made during the prosecutor's closing argument; (6) the trial court erred in admitting a photograph of the victim during the penalty phase; (7) the trial court erred in refusing to give the requested jury instruction defining mitigation; (8) the trial court erred in admitting evidence during the penalty phase that Branch had committed a "sexual battery" in Indiana without proof that it was a crime of violence under Florida law; and (9) the trial court erred in admitting victim impact evidence. Appellate counsel's reply brief further addressed seven of the nine issues.

Statement of Legal Standard

This Court has stated that a habeas petition is the proper vehicle to assert ineffective assistance of appellate counsel. Davis v. State, 875 So. 2d 359, 372 (Fla. 2003). In Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000), this Court explained that the standard for proving ineffective assistance of appellate counsel mirrors the standard for proving ineffective assistance of trial counsel established in Strickland v. Washington, 466 U.S. 668 (1984). Rutherford, 772 So. 2d at 642.

To demonstrate prejudice, petitioner must show that the appellate process was compromised to such a degree as to undermine confidence in the correctness of the result. Id. at 643; see also Downs v. Wainwright, 476 So. 2d 654, 655-657 (Fla. 1985). Appellate counsel's performance will not be deficient if the legal issue that appellate counsel failed to raise was meritless. Spencer v. State, 842 So. 2d 52, 74 (Fla. 2003) (observing that appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success). Indeed, appellate counsel has a "professional duty to winnow out weaker arguments in order to concentrate on key issues," even in capital cases. Thompson v. State, 759 So. 2d 650, 656 n.5 (Fla. 2000) (citing Cave v. State, 476 So. 2d 180, 183 n. 1 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986)). The standard of review of an ineffectiveness claim is *de novo*. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999).

Argument

Issue I

WHETHER APPELLATE COUNSEL WAS NOT INEFFECTIVE WHEN HE DID NOT ARGUE THAT THE INDIANA CONVICTION USED AS AN AGGRAVATOR WAS NOT A FELONY UNDER FLORIDA LAW AND THE INADMISSIBILITY OF THE ABSTRACT OF JUDGMENT?

Branch contends that appellate counsel was ineffective in challenging the Indiana conviction for "sexual battery," having failed to argue that the Abstract of Judgment was not admissible and that the conviction was not a felony under Florida law. Petition, at 7-8.

Petitioner acknowledges, however, that appellate counsel did argue that the trial court "'allowed the state to introduce, without any further proof, the Indiana judgment (T975). That was error.'" Petition, at 7 (quoting Appellant's Initial Brief (hereinafter "IB(D.A."), at 55). That argument was made in furtherance of the defense's claim that the admission was improper because the State did not establish that the Indiana conviction was a "violent" felony as defined under Florida law. IB(D.A.) at 56; see also "Reply Brief Of Appellant (D.A.)" at 18. To the extent that Branch does not agree with how his appellate counsel raised the issue on direct appeal, see Petition, at 11-18 (arguing anew that the Indiana conviction was not a violent felony under Florida law and that "[a]ppellate counsel was ineffective for

failing to fully argue the issue."), he should not be heard now in habeas. Brown v. State, 894 So. 2d 137, 159 (Fla. 2004) ("Habeas petitions, however, should not serve as a second or substitute appeal and may not be used as a variant to an issue already raised."); see also Teffeteller v. Dugger, 734 So. 2d 1009, 1027 n.23 (Fla. 1999) ("After appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance.") (internal citation and quotation marks omitted).

Even if petitioner may now properly argue that appellate counsel provided ineffective assistance on the basis that he did not challenge the admission of the Abstract itself, Branch nonetheless is not entitled to relief.

The Court reviews the claim as follows:

> With regard to evidentiary objections which trial counsel made during the trial and which appellate counsel did not raise on direct appeal, this Court evaluates the prejudice or second prong of the *Strickland* test first. In doing so, we begin our review of the prejudice prong by examining the specific objection made by trial counsel for harmful error. A successful petition must demonstrate that the erroneous ruling prejudiced the petitioner. If we conclude that the trial court's ruling was not erroneous, then it naturally follows that habeas petitioner was not prejudiced on account of appellate counsel's failure to raise that issue. If we do conclude that the trial court's evidentiary ruling was erroneous, we then consider whether such error is harmful error. If that error was harmless, the petitioner likewise would not have been prejudiced.

Patton v. State, 878 So. 2d 368, 379 (Fla. 2004).

As the foregoing implies, the Court must first determine whether the issue as to the admissibility of the Abstract was preserved for appellate review. Id. It was not, as even petitioner recognized before the postconviction motion court, where he argued in his Rule 3.850 motion that trial counsel was ineffective for failing to object at trial to admission of an abstract "that the State purported to be a prior violent offense." PCR.R.-V, at 923.[2] And contrary to petitioner's conclusion that "the State must believe the issued [sic] was preserved," Petition, at 9, he misconstrues the State's argument before the motion court in response to the ineffective assistance of counsel claim. The State did not concede that the claim as to the admissibility of the Abstract "could have been" decided on its *merits* on direct appeal as implied by petitioner, id., but argued that

> defendant failed to present this issue on direct appeal, and is now *procedurally barred* from doing so in this collateral proceeding. See Porter, 788 So. 2d 917, 921, 921 n.6 (Fla. 2001) (claim that trial court considered nonstatutory aggravating circumstance should be brought on direct appeal); Atwater v. State, 788 So.2d 223, 228 n.5 (Fla. 2001). . . . The fact that direct appeal counsel did not also challenge the aggravator as to whether it was a "felony" under § 921.141(5)(b) does not otherwise permit defendant to now raise the claim as one of ineffective assistance to avoid his default.

PCR.R.-VI, at 1023-1024 (emphasis added).

---

[2]Because of the nature of this claim, Respondent respectfully requests that the Court also take judicial notice of the appellate record in petitioner's postconviction appeal, case number SC05-433.

At trial, during the penalty phase, the State presented the testimony of Bruce Fairburn with the Florida Department of Law Enforcement concerning the Indiana conviction. Mr. Fairburn testified as follows:

> Q. Mr. Fairburn, did you have occasion to obtain some records regarding the defendant's prior record?
>
> A. Yes, sir, I have.
>
> Q. And do you have one of those marked State's exhibit 1-H here today?
>
> A. Yes, sir, this document.
>
> Q. Can you describe to me what that is?
>
> A. Yes, sir, it is an abstract of judgment from the State of Indiana vs. Eric Branch, the defendant.
>
> Q. And with regard to that judgment, was it certified in front of you?
>
> A. Yes, sir, it was.
>
> MR. PATTERSON: I have no further questions, Your Honor.
>
> MR. ALLBRITTON: *No questions.*

T.Tr.-VI, at 976 (emphasis added). Thus the admission of the Abstract was not objected to at trial and the issue not preserved for appellate review. Rodriguez v. State, 2005 Fla. LEXIS 1169 *81 (Fla. May 26, 2005). "Appellate counsel has no

obligation to raise issues on appeal that were not preserved for review." Wright v. State, 857 So. 2d 861, 875 (Fla. 2003), cert. denied, 541 U.S. 961 (2004). Moreover, had appellate counsel raised the issue on direct appeal, it would have only been reviewable for fundamental error and therefore appellate counsel will only be deemed ineffective if the admission of the Abstract was fundamental error.[3] See Patton, 878 So. 2d at 379. Petitioner does not address this point but instead argues the admissibility issue on the merits as though a proper objection had been made. Compare Petition, at 9-11. In either event, appellate counsel did not render ineffective assistance.

First, petitioner's reliance upon Sinkfield v. State, 592 So. 2d 322 (Fla. 1st DCA 1992), Petition, at 10, is inapposite. While Sinkfield and related cases stand for the proposition that substantive evidence establishing that a defendant is a convicted felon cannot rest upon similarity of name alone, see Mason v. State, 853 So. 2d 544, 546 (Fla. 1st DCA 2003), those cases involved the State's burden of proving the prior conviction as an *element of the offense charged*. See, e.g., id. at 545 (conviction for possession of a firearm by a convicted felon); Monson v. State,

[3]"Fundamental error is defined as error that reaches 'down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" Patton, 878 So. 2d at 380 (internal citations omitted).

627 So. 2d 1301, 1302 (Fla. 1st DCA 1993); Sinkfield, 592 So. 2d at 323 (same). In comparison, here the State did not offer the Indiana conviction to establish an element of the charged crime of first degree murder and was not so required. See § 782.04(1), Fla. Stat. Instead, the State introduced evidence that petitioner had committed a prior violent felony pursuant to § 921.141(5)(b), which was for purposes of sentencing only. Thus Sinkfield has no bearing on this case.

Moreover, during the Spencer[4] hearing the State introduced a certified copy of the circuit court file of petitioner's Indiana case. R.-III, at 424. Nothing precludes the State from presenting additional evidence during a Spencer hearing to establish aggravating factors. Spencer, 615 So. 2d at 691. Thus had appellate counsel challenged the evidence of the aggravator on appeal, the claim would have failed. That is, even if the Abstract itself was insufficient to establish the aggravating circumstance, the State was entitled to present additional evidence before final sentencing, Spencer, 615 So. 2d at 691, and did so. See also Lockhart v. Fretwell, 506 U.S. 364, 372 (1993) (prejudice prong of Strickland analysis "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. . . . [and u]nreliability or unfairness does not result if the ineffectiveness of counsel does not

[4]Spencer v. State, 615 So. 2d 688 (Fla. 1993).

deprive the defendant of any substantive or procedural right to which the law entitles him."). And besides the prior violent felony aggravator, evidence was presented during the penalty phase that the murder was committed in the course of a sexual battery and that the murder was especially heinous, atrocious, or cruel. Petitioner fails to demonstrate Strickland prejudice.

Similarly, even if petitioner may now properly argue that appellate counsel provided ineffective assistance on the basis that he did not challenge the Indiana conviction on the basis that it was not a felony under Florida law, Branch nonetheless is not entitled to relief.

According to petitioner, only the elements of the foreign offense are relevant to determining whether it constitutes a felony under Florida law. See Petition, at 13-14. Petitioner thereafter undertakes such a comparison and concludes that because the Indiana offense was neither a sexual battery, aggravated battery, or aggravated assault under Florida law, appellate counsel was ineffective for not raising it on direct appeal. Id. at 12, 14-18.

While the Court will compare the elements of the foreign crime to that of Florida law, Carpenter v. State, 785 So. 2d 1182, 1205 (Fla. 2001), that does not end the inquiry. In addition, "[w]hether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime." Spann

v. State, 857 So. 2d 845, 855 (Fla. 2003); Dufour v. State, 905 So. 2d 42, 73 (Fla. 2005). Given that the penalty phase is concerned with the particularized characteristics of the defendant, Sochor v. State, 883 So. 2d 766, 794 (Fla. 2004) (internal citation and quotation marks omitted), such consideration of petitioner's conduct in respect to the actual prior crime he committed can only make sense. See Lockhart v. State, 655 So. 2d 69, 72 (Fla.) ("Details of prior violent felony convictions involving the use or threat of violence to the victim are admissible in the penalty phase of a capital trial."), cert. denied, 516 U.S. 896 (1995), Indeed, in Mann v. State, 603 So. 2d 1141 (Fla. 1992), modified on denial of rehearing on other grounds, 1992 Fla. LEXIS 1430 (Aug. 27, 1992), cert. denied, 506 U.S. 1085 (1993) -- upon a claim that the State failed to prove beyond a reasonable doubt that the prior violent felony for purposes of § 921.141(5)(b) was "violent" -- this Court rejected the claim where the victim of the out-of-state offense "testified to the circumstances of that crime to prove that it was a crime of violence." Id., 603 So. 2d at 1142, 1143. Accordingly, the facts underlying the Indiana conviction in this case were properly before the trial court and established that petitioner had in fact committed a felony.[1]

[1] Spann, Dufour, Lockhart, and Mann reflect that the Court's language in Carpenter relying only upon the elements of the foreign conviction, id., 785 So. 2d at 1204-1205, fails to account for the difference between the use of a foreign

Appellant was charged in Indiana with five counts, including Rape, Child Molestation, Criminal Deviate Conduct, Battery, and Sexual Battery, and the underlying conduct involved petitioner using physical force to have sexual intercourse with a fourteen-year-old girl. R.-III, at 359-361. The fact that Branch was permitted to plead to only the latter offense, see PCR.R.-VII, at 1165-1166, does not negate the facts underlying his conduct, which establish the felonies for which he was charged and a variety of felonies under Florida law. See, e.g., §§ 794.011(1)((h) (Sexual Battery); 800.04(4)(a) (Lewd Or Lascivious Battery); 800.05(a), (c)2. (Lewd Or Lascivious Molestation). Thus the Indiana conviction qualified as a prior violent felony under § 921.141(5)(b). Furthermore, Branch's Indiana conviction was upon a felony (see Burns Ind. Code Ann. § 35-42-4-8(a), defining offense as a class D felony).[2] Compare Carpenter, 785 So. 2d at 1205 ("[W]e determine that an out-of-state conviction related to an offense that has only similar but different elements *and does not constitute a 'felony' in that state* does

---

conviction to calculate points for a sentencing guidelines scoresheet versus achieving particularized sentencing a capital case, which of necessity requires consideration of the crime and circumstances of a defendant's life in order for the jury and court to weigh the aggravating and mitigating circumstances. That is, the surrounding facts to the prior violent felony give meaning to the aggravator.

[2] Indiana law provides in pertinent part that a "'[c]lass D felony conviction' means a conviction of a Class D felony in Indiana and a conviction, in any other jurisdiction at any time, with respect to which the convicted person might have been

not amount to a felony in Florida as a matter of law for purposes of establishing the prior violent felony aggravating circumstance under the present statute.") (emphasis added).

Even if the Indiana conviction did not qualify as a prior violent felony to support the aggravating circumstance, any error would be harmless, see Peterka v. State, 640 So. 2d 59, 71 (Fla. 1994) (Reversal "is permitted only if this Court finds that the errors in weighing the aggravating and mitigating circumstances, if corrected, reasonably could have resulted in a lesser sentence."), and thus appellate counsel will not be held ineffective for failing to raise a nonmeritorious issue. Petitioner does not address this point, arguing simply that "Appellate Counsel was ineffective for failing to fully argue on direct appeal . . . the court's instruction to the jury that the offense was a violent felony, and the trial court's finding that the Indiana offense was a violent felony." Petition, at 18.

Here, the trial court found two other significant aggravators: that the murder was committed in the course of a sexual battery (and which the jury had found beyond a reasonable doubt that defendant committed), and that the murder was especially heinous, atrocious, or cruel. R.-III, at 451-452; T.Tr.-III, at 441-442.[3]

---

imprisoned for more than one (1) year. . . ." Burns Ind. Code Ann. § 35-50-2-1.

[3] The State also notes that evidence presented at the evidentiary hearing -- i.e., the testimony of petitioner's victim from the Bay County, Florida, sexual assault for

Mitigating evidence, on the other hand, was marginal. In fact, the lower court rejected petitioner's two statutory mitigators, concluding that Branch's age and that he was an accomplice and his participation was relatively minor were not mitigating factors in this case. R.-III, at 452. Regarding nonstatutory mitigating factors, the trial court gave some weight to Branch's expressed remorse and that he had an unstable childhood, and gave only slight weight to his positive personality traits and acceptable behavior at trial. R.-III, at 452-453. The mitigating evidence presented at the evidentiary hearing adds little more than previously presented, see Answer Brief of Appellee (PCR), at 43, 46-54, and opens the door to the type of evidence that typically does more harm than good – i.e., antisocial personality disorder (Id. at 54-55). Cummings-El v. State, 863 So. 2d 246, 268 (Fla. 2003) ("The consensus of the expert testimony is that Defendant has an antisocial personality disorder, which *is not a mitigating factor*. They all agree that antisocial personality disorder does not cause criminal behavior, it explains it.") (emphasis added); Asay v. State, 769 So. 2d 974, 986 (Fla. 2000) (antisocial personality disorder is an unfavorable diagnosis); see also Hamilton v. State, 875 So. 2d 586, 593 (Fla. 2004) (discussing

---

which he was convicted of sexual battery in the fall of 1994, PCR.Tr.-III, at 451-453 -- established that Branch had been convicted of another violent felony after his murder trial. Upon a resentencing, that evidence would of course be presented, in addition to the conviction for sexual battery and evidence establishing the HAC aggravating factor.

antisocial personality disorder in the context of ineffective assistance of trial counsel for not presenting mental health expert testimony).

Thus to the extent that the Indiana conviction constitutes an improper aggravator, the error was harmless in light of the HAC, one of the two most serious of the aggravating circumstances included in the statutory sentencing scheme, Morton v. State, 789 So. 2d 324, 331 (Fla. 2001), and committed in the commission of a sexual battery aggravators. In addition, upon resentencing the State would establish petitioner's prior violent felony arising from his conviction in Bay County, Florida.[4] Accord Armstrong v. State, 642 So. 2d 730, 738-739 (Fla. 1994); see Peterka, 640 So. 2d at 70 (error deemed harmless where "the trial court improperly allowed the State to present testimony about unverified prior juvenile convictions."). Therefore, Branch cannot demonstrate that confidence in the result on appeal is undermined and appellate counsel will not be held ineffective for not raising a non-meritorious issue.

Based upon the foregoing, petitioner's Issue I should be denied.

Issue II

WHETHER APPELLATE COUNSEL RENDERED EFFECTIVE ASSISTANCE NOTWITHSTANDING NOT RAISING THE ISSUE

[4] See supra, at 15-16 n.2.

OF THE TRIAL COURT'S ADMISSION OF DNA PROBABILITY STATISTICS WITHOUT HOLDING A PROPER FRYE HEARING?

Branch argues that his appellate counsel was ineffective for failing to raise on appeal the issue of the trial court's error in admitting into evidence DNA probability statistics without conducting a proper Frye hearing. Petition, at 18-19, 21-22.

> Under Florida law, a *Frye* hearing is utilized in order to determine if an expert scientific opinion is admissible. See *Flanagan v. State*, 625 So. 2d 827, 829 (Fla. 1993). Such opinion must be based on techniques that have been generally accepted by the relevant scientific community and found to be reliable. See *Frye*, 293 F. at 1014. However, *Frye* is only utilized where the science at issue is new or novel. *Brim v. State*, 695 So. 2d 268 (Fla. 1997).

Zack v. State, 2005 Fla. LEXIS 1456 *8 (Fla. Jul. 7, 2005). At trial, defense counsel argued that the statistical conclusions should not come in because the State had not established that the witness "participated" in the compilation of the data sets that he relied upon in calculating the population frequency:

> MR. ALLBRITTON: Your Honor, at this time as it relates to testimony from Dr. Pollock involving the probability of random matches -- conclusions that he made with his DNA profile matches, I am going to move in limine that he not be allowed to testify -- or I'm filing a motion in limine asking that his testimony be limited to simply that a match was made and not to the probability.
>
> It's my understanding from talking with Dr. Pollock that this probability of -- in this case he said conservatively one in a million as it relates to caucasians, was *based upon a data set that was prepared by someone other than himself*. He has indicated to me earlier today that he is not an expert and cannot vouch for the reliability of that data

> set upon which that conclusion is reached. That being the case, we would ask that his testimony be -- that portion of his testimony be limited, that it not be allowed to come in.
>
> If it is not reliable, then of course it's not admissible, and he cannot testify as to the reliability of the data set upon which he reached his conclusion. And based upon that, we would ask that his testimony as relates to the probability not be included.
>
> * * * * *

T.Tr.-III, at 492-493 (emphasis added); see also id. at III-495-497.

In contending that "[t]he trial court made no determination as to the qualifications of Mr. Pollock or mentioned specifically that the data base satisfied the Frye test," Petition, at 23, petitioner argues that the trial court improperly admitted the DNA statistical evidence. Id. at 25. Review of governing case law reflects that the witness's testimony was properly admitted and thus appellate counsel did not render ineffective assistance in not raising a nonmeritorious claim.

The expert need not be a statistician himself to testify as to the statistical results. Darling v. State, 808 So. 2d 145, 158 (Fla.) (citing Murray v. State, 692 So. 2d 157, 164 (Fla. 1997)), cert. denied, 537 U.S. 848 (2002). Nor is admissibility contingent upon the expert having compiled the database himself. See Darling, 808 So. 2d at 158 (citing Lomax v. State, 727 So. 2d 376 (Fla. 5th DCA 1999)). Instead, "a sufficient knowledge of the authorities pertinent to the database is an

adequate basis on which to render an opinion." Butler v. State, 842 So. 2d 817, 828 (Fla. 2003).

Here, Dr. Pollock testified as to his knowledge of the data set and its use:

> Q. Dr. Pollock, the tables that you have discussed, the probability tables, can you tell us -- describe them to us a little bit.
>
> A. The population data base tables that I use are ones which are used by other crime laboratories throughout the country, like ours, for the purposes of developing approximate population frequencies for a given DNA profile. The population data set was -- all of the data that we use came from compilation of information that was developed, compiled by the FBI from samples that were taken from various populations around the United States. For instance, the caucasian population data set consisted primarily, at least initially, of national academy students that were going through the FBI research and training center in Quantico, random samples taken in that nature. Now, they took extreme measures so that those samples were not duplicated, so there was only one sample from one individual in that data base. Now, that started in 1988.
>
> * * * * *
>
> Q. (By Mr. Patterson) Doctor, I guess in a nutshell, I would ask you is the data set that you used well recognized in the relevant scientific community as being one that has validity and reliability?
>
> A. Absolutely.
>
> * * * * *
>
> THE COURT: Is it commonly relied on by people who practice your profession?
>
> THE WITNESS: Yes, sir, it is, in every state in the United States and also in the country of Canada. Now, the particular data set

> that we use is only used in the United States. There is some Canadian-U.S. data which is mingled. Of course, we don't use the same data sets. Other countries in the world rely on their own data sets.
>
> * * * * *

T.Tr.-III, 495, 498. In response to defense cross-examination during the State's proffer, the witness further testified:

> Q. Dr. Pollock, are there other data sets used by other laboratories?
>
> A. By other laboratories in the United States, yes. Some of the private laboratories have their own compiled data sets that they use.
>
> Q. Okay. Is there a disagreement in the scientific community as it relates to the reliability of data sets between different companies and different laboratories?
>
> A. Well, I would say no. And in fact, when the world population data study was published, which is primarily brought forward by the FBI again, this is about six volumes or approximately a foot thick on all that data. When that data is compared, data sets from not only around the United States, from various states, such as Florida -- we've done our own portion of that study in Jacksonville and also in Orlando, but when you compare other states and, in fact, when you compare other nations, such as Canada and even European nations, the difference between the distributions among caucasians in the United States, for instance, and caucasians in Canada and caucasians in Europe vary only by a small amount. So in other words, they're very close to one another. . . .

Id. at III-499-500. And before the jury, Dr. Pollock testified concerning the population data sets, generally explaining their compilation and use for DNA

frequency determination. Id. at III-518-519. Based upon the foregoing, the witness's testimony was properly admitted. Accordingly, appellate counsel will not be held ineffective for failing to raise a claim that would have been without merit. Issue II should be denied.

Issue III

WHETHER APPELLATE COUNSEL WAS EFFECTIVE THOUGH HE DID NOT RAISE THE ISSUE OF THE TRIAL COURT'S ORDER DENYING THE DEFENSE REQUEST FOR A RECESS SO THAT TRIAL COUNSEL COULD CONFER WITH PETITIONER IN THE MIDDLE OF HIS TESTIMONY?

Branch asserts that his appellate counsel was ineffective for failing to raise the issue that the trial court ultimately denied his request for a recess so that counsel could confer with petitioner before beginning redirect examination of Branch.

Petitioner apparently believes that the right to counsel entails an absolute, unqualified right to a recess any time counsel wants to confer with his client, see Petition, at 31, and that once the trial court agrees to grant a recess, he cannot change his mind. See id. at 32. In support of his position, petitioner cites Amos v. State, 618 So. 2d 157, 161 (Fla. 1993). Amos relied upon Bova v. State, 410 So. 2d 1343 (Fla. 1982), which held that a trial court could not, without violating the constitutional right to counsel, preclude attorney-client consultation during a recess.

Id. at 1344-1345. Neither petitioner nor the majority opinion in Amos address Perry v. Leeke, 488 U.S. 272, 283-284 (1989), however. In Perry, the United States Supreme Court held that the Sixth Amendment right to counsel is not violated when a trial court denies such access during a short recess, on the basis that

> when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying. He has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice.

Id. at 281.

Petitioner further ignores that there is not a constitutional right to a recess and whether to grant one is a matter of discretion to be exercised by the trial court. Perry, 488 U.S. at 283; Bova, 410 So. 2d at 1344("[T]he trial court has complete discretion in permitting recesses and in controlling recess duration."); see also Thompson v. State, 507 So. 2d 1074, 1078 (Fla. 1987) ("Refusal of a request for recess does not, per se, constitute a denial of the right to counsel. Second, recesses are granted for specific purposes and the time allowed is for those specific purposes.") (Shaw, J., specially concurring in result only). Thus even if there exists a right to consult with counsel under the Florida Constitution to which Perry is inapplicable, see Leerdam v. State, 891 So. 2d 1046, 1049 (Fla. 2d DCA 2004), this Court has never held that the denial of a recess in order for counsel to confer with a

client that is testifying violates a defendant's right to counsel under state law.

And finally, harmless error analysis applies where a trial court erroneously precludes counsel from conferring with his criminal client. Bova, 410 So. 2d at 1344; Leerdam, 891 So. 2d at 1050. In conclusory fashion, petitioner argues that he was harmed because counsel wanted "to discuss questions regarding his defense." Petition, at 32. How this establishes harm petitioner does not elaborate, while failing to acknowledge the strong evidence of guilt. See supra, at 1-2. Under such circumstances, any error in being denied the right to consult was harmless.

Based upon the foregoing, appellate counsel cannot be deemed to have rendered ineffective assistance in not raising an issue that is without merit. Issue III should be denied.

Issue IV

WHETHER APPELLATE COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE WHEN HE DID NOT RAISE THE ISSUE THAT A TRIAL COURT'S INQUIRY UNDER NELSON v. STATE, 274 So. 2d 256 (FLA. 4TH DCA 1973) IS UNCONSTITUTIONAL AND DID NOT CLARIFY THE FACTS CONCERNING THE CLAIM OF INCOMPETENT COUNSEL IN A MOTION FOR REHEARING?

Branch asserts that his appellate counsel, who had argued on appeal that the trial court had failed to conduct a proper inquiry under Nelson v. State, 274 So. 2d

256 (Fla. 4th DCA 1973), was ineffective for failing "to argue that a Nelson inquiry is unconstitutional as applied, because it only requires an inquiry of court-appointed counsel and fails to protect a defendant's Sixth Amendment right to competent private counsel." Petition, at 33. Petitioner further argues that appellate counsel should have pointed out in the motion for rehearing that "Petitioner's grandfather requested counsel to withdraw and the allegations in Petitioner's letter to the trial court was of the same nature as those expressed in Nelson, and more." Petition, at 35.

First, petitioner's argument in actuality is a challenge to the manner in which appellate counsel argued the issue, i.e., that he did not argue it sufficiently. That is not a proper ground in a petition for writ of habeas corpus. Happ v. Moore, 784 So. 2d 1091, 1097 (Fla. 2001) ("The writ of habeas corpus is not to be used to reargue issues which have been raised and ruled upon by this Court."); Teffeteller, 734 So. 2d at 1027 n.23 ("After appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance.") (internal citation and quotation marks omitted); see also Brown, 894 So. 2d at 159 ("Habeas petitions, however, should not serve as a second or substitute appeal and may not be used as a variant to an issue already raised."). Review of petitioner's direct appeal brief and the argument now made by defense counsel reflects that the

arguments are the same. Compare IB(D.A.), at 23 ("This court should reject any distinction between private and public counsel.") with Petition, at 36 ("An inquiry should also apply to privately retained counsel.").

Secondly, there was no necessity for a Nelson inquiry, as no action by the trial court was required if petitioner wanted to discharge retained counsel. The rationale for a Nelson hearing is that, because a defendant does not have a right to appointed counsel of his choice, Weaver v. State, 894 So. 2d 178, 187 (Fla. 2004), cert. denied, 125 S.Ct. 2297 (2005), an inquiry into the effectiveness of counsel is required when a defendant seeks to discharge appointed counsel for appointment of another. See Jones v. State, 612 So. 2d 1370, 1373 (Fla. 1992), cert. denied, 510 U.S. 836 (1993); Capehart v. State, 583 So. 2d 1009, 1014 (Fla. 1991), cert. denied, 502 U.S. 1065 (1992); Hardwick v. State, 521 So. 2d 1071, 1074-1075 (Fla.), cert. denied, 488 U.S. 871 (1988). Here, defendant did not discharge counsel and made no attempt to demonstrate indigency in order for the public defender to be reappointed. Defense counsel's apparent argument that the trial court had a duty to advise petitioner of his options, see Petition, at 38, is without legal support. Similarly, petitioner cites no support for his apparent belief that the trial court has a duty to interfere with the attorney-client relationship where the defendant has not sought to have counsel withdraw.

Third, petitioner's suggestion that appellate counsel had a duty to correct this Court's understanding of the factual record would have required that appellate counsel misstate the record. While petitioner contends that the facts "established that Petitioner's grandfather requested counsel to withdraw and the allegations in Petitioner's letter to the trial court was of the same nature as those expressed in Nelson, and more," Petition, at 35, Petitioner offers no citation to the record to establish that anyone had requested that retained trial counsel withdraw.[5] As this Court found on direct appeal, ". . . 2) Branch was not seeking to discharge counsel; and 3) Branch's comments seemed to be a general complaint, not a formal allegation of incompetence." Branch, 685 So. 2d at 1252. This case is similar to that of Davis v. State, 703 So. 2d 1055 (Fla. 1997), cert. denied, 524 U.S. 930 (1998), to the extent that the defendant "never made an unequivocal request to discharge his court-appointed counsel; he subsequently allowed his attorney to represent him throughout the trial." Id. at 1058. Indeed, in Davis the defendant had at least filed a motion to discharge, id., whereas here petitioner simply sought court inquiry as to counsel's representation. And unlike Davis, petitioner could have but

[5]That petitioner presented evidence at the postconviction evidentiary hearing that his grandfather asked trial counsel to withdraw, see PCR.Tr.-III, at 487 (and which is contrary to trial counsel evidentiary hearing testimony, PCR.Tr.-II, at 219), it is irrelevant to evaluating appellate counsel's performance in respect to the trial court record.

did not discharge retained counsel. See Fratcher v. State, 842 So. 2d 1044, 1046 (Fla. 4th DCA 2003) ("A criminal defendant has the right to select his own private counsel, so long as he is not seeking to delay or otherwise subvert judicial proceedings.") (internal citation omitted).[6] Finally, current counsel fails to point to any facts supported by the record similar to those cited in Nelson.

Based upon the foregoing, Issue IV should be denied.

[6]It bears noting that at no time did petitioner argue that counsel was ineffective for failing to withdraw when he purportedly was requested to do so. Nor did petitioner file a motion seeking that retained counsel be granted leave to withdraw.

CONCLUSION

The State respectfully requests that this Honorable Court deny the habeas petition.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
CASSANDRA K. DOLGIN
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0644390

Office of the Attorney General
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3579
(850) 487-0997 (fax)

Counsel for Respondent

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of the foregoing was mailed, postage prepaid, on this 3rd day of November, 2005, to:

Michael P. Reiter, Esq.
4543 Hedgewood Dr.
Tallahassee, FL 32309

CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel hereby certifies that this brief was typed using Times New Roman 14-point font, in conformity with Fla. R. App. P. 9.210(a).

_____
CASSANDRA K. DOLGIN