IN THE SUPREME COURT OF FLORIDA

ERIC SCOTT BRANCH,

Appellant,

vs. **Case No. SC 05-433**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT, IN AND FOR
ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Eric Scott Branch, appeals from the denial of his Rule 3.850 postconviction relief motion by the Circuit Court of the First Judicial Circuit, Escambia County, Florida, following an evidentiary hearing. The "Initial Brief Of Appellant" will hereinafter be cited to as "IB" with the applicable page. References to appellant will be to "Branch" or "appellant," and references to appellee will be to "the State" or "appellee." The record on appeal consists of Volumes I-IX (pleadings, record excerpts), Volumes I-III (postconviction evidentiary hearing), and the Index. Reference will be made to the postconviction record as follows: "PCR.R." and "PCR.Tr.," respectively, with citation to the applicable volume and page. In addition, based on the nature of appellant's claims for relief, Appellee relies upon the direct appeal record, which consists of a total nine volumes. The State therefore respectfully requests that the Court take judicial notice of its file in appellant's direct appeal, 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 and page citations. Where the record pleadings from trial are available in both the trial record on direct appeal and the postconviction record on appeal, citation will be to the latter for convenience.

STATEMENT OF THE CASE AND OF THE FACTS

Original Trial Proceedings

Branch was charged by indictment on February 23, 1993, with the first-degree murder of Susan Morris, sexual battery, and grand theft. PCR.R.-I, at 1-2. Branch pled not guilty to the charges and proceeded to a jury trial. The jury, following a three-day trial, on March 10, 1994, found him guilty as charged. Id. at I-4-5; T.Tr.-V at 935-936.

The facts underlying defendant's convictions, as found by this Court, 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).

The penalty phase was held on March 11, 1994, and the jury returned its advisory verdict for death by a vote of 10-2 on that date. PCR.R.-I, at 20; 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. PCR.R.-I, at 98. 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.

* * * * *

Branch, 685 So. 2d at 1252.

Direct Appeal

Following entry of judgment of conviction and sentence, Branch filed his notice of appeal on June 1, 1994, PCR.R.-I, at 128, and subsequently raised the following nine issues as error on direct appeal:

> 1) failure to grant a continuance; 2) failure to conduct a hearing into counsel's competence; 3) failure to give a requested instruction on circumstantial evidence; 4) insufficient evidence; 5) comment on right to silence; 6) photo of the victim; 7) failure to give a requested instruction defining mitigating circumstances; 8) evidence of another crime; 9) victim impact evidence.

Branch, 685 So. 2d at 1252 n.3.

This Court affirmed appellant's sentences in a corrected opinion released on January 8, 1997 upon denial of rehearing. Id. at 1250. The United States Supreme Court denied Branch's petition for writ of certiorari on May 12, 1997. Branch v. Florida, 520 U.S. 1218 (1997).

Rule 3.850 Proceedings

On May 7, 1998, Branch through counsel filed his "Motion To Vacate Judgment Of Conviction And Sentence With Special Request For Leave To

Amend." PCR.R.-I, at 137. Appellant thereafter filed his "Amended Motion To Vacate Judgments Of Conviction And Sentence With Special Request For Leave To Amend" on April 1, 2003. Id. at IV-601. The State filed its "Response To 'Second Amended Motion To Vacate Judgment Of Conviction And Sentence With Special Request For Leave To Amend'" on May 9, 2003. Id. at V-750. A second amended Rule 3.850 motion was then filed on October 10, 2003, id. at V-882, raising the following issues: I. Ineffective assistance of trial counsel at the guilt/innocence phase of trial[1] and/or a violation of Brady v. Maryland, 373 U.S. 83 (1963) and/or a violation of Giglio v. United States, 405 U.S. 150 (1972); II. Ineffective assistance of trial counsel for failing to object and adequately investigate and prepare additional mitigating evidence and to challenge the State's case or newly discovered evidence and/or a violation of Brady and/or a violation of Giglio; III. Newly discovered evidence shows that the jury and trial court considered a non-statutory aggravating circumstance of an improper prior violent felony; IV.

[1] Within his allegation of ineffective assistance under Claim I, appellant asserted that counsel's performance was constitutionally deficient for failure to do the following: A. file motions to suppress a line up and a later photo-pack line up; B. hire experts (a forensic pathologist and a crime scene/blood splatter expert); C. seek out fingerprint evidence; D. file a motion to discharge; E. investigate; F. impeach the testimony of Melissa Cowden and Joshua Flaum; G. investigate to support circumstantial evidence instruction; and H. object to several of the prosecutor's comments and closing argument.

Violation of Ake v. Oklahoma, 470 U.S. 68 (1985); V. Ineffective assistance of postconviction relief counsel based upon the rules prohibiting counsel from interviewing jurors; VI. Violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), and ineffective assistance of counsel for failing to object to the jury instructions; VII. Florida's death penalty sentencing scheme is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002); VIII. Unconstitutionality of execution by electrocution and lethal injection; IX. Incompetency to be executed; X. Felony underlying felony-murder was an automatic aggravating circumstance; XI. Improper direct appeal and ineffective assistance of appellate counsel; XII. Chapter 119 violation; XIII. Florida's capital punishment statute is unconstitutional as the death penalty is cruel and unusual or ineffective assistance of direct appeal counsel; and XIV. Cumulative error. The lower court ordered the second amended motion "as the only postconviction motion at issue in the instant proceeding. . . . ," PCR.R.-VI, at 1014, and the State thereafter responded to that motion on November 18, 2003. Id. at VI-1016.

Following a Huff hearing held on December 8, 2003, see id. at VI-1044 n.1, the circuit court issued its "Order Granting Evidentiary Hearing" on December 12, 2003, id., denying a hearing as to Claims IV thru XIII, granting a hearing as to A1, B1, C, D, E, F, G, and H of Claim I, and Claim II, and holding Claim XIV under

advisement until after the hearing. PCR.R.-VI, at 1044-1047. The hearing was held the week of April 26, 2004. See id. at IX-1592. Appellant presented the following witnesses: P. Michael Patterson, the prosecutor in appellant's case; Bruce Fairburn, with the Florida Department of Law Enforcement (hereinafter "FDLE"); Henry L. Dee, a clinical psychologist/neuropsychologist; John Allbritton, appellant's trial counsel; Earl Loveless, appellant's initial trial counsel; Fred Wimberly, a former investigator for John Allbritton in appellant's case; Dr. Jack Daniel, M.D., a pathologist; Paul Erwin Kish, a forensic consultant; Michael Glanz, an investigator on postconviction; Connie Branch, appellant's aunt; and Alfred Branch, appellant's grandfather. The State presented the testimony of James D. Larson, a psychologist; Dr. Gary Cumberland, M.D., the pathologist that testified at appellant's trial; and Lisa Lea Humpich, the victim for whom appellant was subsequently convicted of sexual battery.[2]

Following the evidentiary hearing, the parties each filed post-hearing memorandum. Id. at X-1515-1576, 1578-1590. The circuit court denied appellant's Rule 3.850 second amended motion on March 4, 2005. Id. at IX-1591-1616. Branch filed his notice of appeal on that same date. Id. at IX-1617.

[2] Individual testimony is addressed in detail as it relates to the specific grounds for relief raised on appeal.

SUMMARY OF THE ARGUMENT

I.

Trial counsel did not perform ineffectively for not filing a motion to suppress evidence seized from appellant's car as properly found by the lower court. Law enforcement lawfully seized Branch's car based upon exigent, safety circumstances based upon the totality of information known to them. In addition, Branch neither owned nor possessed the vehicle at the time, and thus did not have standing to challenge the seizure and subsequent search. Even with a possessory interest, appellant had abandoned the car. Finally, the search warrants upon which the actual search of the vehicle and seizure of appellant's clothes, boots, and other evidence were proper.

II.

The lower court properly held that trial counsel did not render ineffective assistance of counsel while preparing for and in representing Branch during the penalty phase of trial. The additional information presented at the evidentiary hearing was either cumulative to that presented at trial, or unsubstantiated and based upon hearsay, or contrary to competent evidence. Thus appellant was not deprived of a fair penalty phase.

III.

The lower court properly rejected appellant's claim of ineffective assistance based upon counsel's failure to hire experts. First, the defense experts at the evidentiary hearing could not conclusively refute the State's experts' testimony, which supported at least in part the defense theory. And after reviewing the evidence and the State experts' depositions, trial counsel had decided to not pursue defense experts because he felt he could effectively conduct cross-examination, the physical evidence that those witnesses would testify to supported in part the defense theory, and counsel could also retain opening and closing argument.

IV.

Appellant's challenge to his conviction from Indiana as not constituting a felony under Florida law is procedurally barred, having not been objected to at trial on that basis and not raised on direct appeal. In addition, the foreign conviction is a felony as defined under Indiana law, and under Florida law based upon the facts and circumstances of that conviction, which is a proper consideration during the penalty phase inquiring into appellant's conduct for purposes of determining aggravating factors. Any error would be harmless in any event, in light of the additional aggravators of HAC and that the murder was committed in the course of a sexual battery, and that the State can prove another prior violent felony.

V.

Appellant procedurally defaulted on his claim that the abstract of his Indiana conviction was improperly admitted and relied upon in sentencing, having not objected at trial and not raised on direct appeal. Thus appellant's transformation of the claim to one of ineffective assistance of counsel should be rejected. Moreover, appellant could not show prejudice where the State presented evidence during the Spencer hearing that unquestionably established his identity.

VI.

The trial court did not err in determining that counsel's decision to not cross-examine State witnesses Melissa Cowden and Joshua Flaum with their pretrial depositions did not constitute ineffective assistance. Trial counsel testified at the evidentiary hearing that he did not believe the matters that he could have impeached the witnesses on were important to appellant's defense. Nor has appellant demonstrated prejudice for the following reasons: in respect to Ms. Cowden, Branch admitted that he was present at the crime scene when she was murdered and thus appellant made no showing how impeaching Ms. Cowden concerning what she remembered appellant wearing and how quickly she could recall the events of that day would have effected the outcome of the proceeding; in respect to Mr. Flaum, Branch admitted that he had stolen the victim's car, thus whether Mr. Flaum

identified the vehicle he saw appellant in as red is immaterial.

VII.

The lower court properly held that trial counsel did not render ineffective assistance of counsel while preparing for and in representing Branch during the guilt phase of trial. The record refutes appellant's contentions that counsel had little contact with him and did not investigate Branch's "other Eric" version of what occurred the night Susan Morris was murdered. Nor did appellant establish that his "other Eric" in fact existed. Concerning the use of expert witnesses, trial counsel testified at the evidentiary hearing that he felt that rather than presenting the testimony of experts that would have supported Branch's version of what occurred, he could and did use the State's experts to do just that and therefore was able to retain the right to give opening and closing argument. In addition, Branch's pathologist could not rule out that the stick was forcibly inserted into the victim, and his blood splatter expert's testimony was at least partially inconsistent with appellant's story of what happened.

VIII.

Branch's contention that trial counsel's failure to object to various closing arguments or statements during the guilt phase -- eliciting testimony without a good faith basis, seeking to invoke the jury's sympathy for the victim, improperly

vouching for a witnesses' credibility, and arguing facts not in evidence -- constituted ineffective assistance of trial counsel. First, having failed to object to these closing arguments at trial, Branch is now seeking to avoid his procedural defaults by couching the issues as claims of ineffective assistance of counsel. The claims should be denied accordingly. Secondly, the motion court properly rejected Branch's claim for relief where trial counsel testified that he did not object as a matter of trial strategy. Appellant's disagreement with counsel's strategy does not establish that counsel performed ineffectively. Third, the arguments and statements were not improper, and counsel will not be held to have provided ineffective assistance for failing to make nonmeritorious objections. And finally, even if objectionable, Branch failed to establish Strickland prejudice thereby warranting relief.

IX.

Consistent with binding precedent, the lower court properly rejected appellant's claim of "cumulative error" because Branch failed to demonstrate any individual claims of error. Absent such a showing, there simply was nothing for the trial court to consider.

ARGUMENTS

I.

THE POSTCONVICTION MOTION COURT PROPERLY HELD THAT COUNSEL WAS NOT INEFFECTIVE WHERE HE ACCURATELY DETERMINED THAT A MOTION TO SUPPRESS WOULD HAVE BEEN FUTILE.

Branch contends that the trial court erroneously determined that counsel was not ineffective for not filing a motion to suppress evidence seized from appellant's vehicle, on the following grounds: former trial counsel "testified that he planned on filing a Motion to Suppress at the close of discovery [PC-T. Vol. II, p302]," IB at 17[3]; the facts set forth in affidavits upon which the search warrants issued were insufficient and false, id. at 17-18, 22-34; the seizure of the vehicle in the first instance was unlawful, id. at 19-21; improper determination of inevitable discovery, id. at 34-36; and the vehicle was not abandoned. Id. at 36-37.

A. Standard of Review

Following an evidentiary hearing, this Court has held that "the performance and prejudice prongs are mixed questions of law and fact subject to a de novo review standard but that the trial court's factual findings are to be given deference." Porter v. State, 788 So. 2d 917, 923 (Fla.) (internal citation omitted), cert. denied,

[3] Appellant's page citation does not support his assertion. See infra at 20-24.

534 U.S. 1004 (2001); see also Stephens v. State, 748 So. 2d 1028, 1031-1033 (Fla.1999).

The standard governing appellant's claim of ineffective assistance of counsel is well-established:

> In order to prevail on a claim of ineffective assistance of counsel, however, a defendant must demonstrate that (1) counsel's performance was deficient and (2) there is a reasonable probability that the outcome of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *see Cherry v. State*, 659 So.2d 1069, 1072 (Fla.1995). For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 695, 104 S.Ct. 2052; *see also Valle v. State*, 705 So.2d 1331, 1333 (Fla.1997). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

Moore v. State, 820 So. 2d 199, 207-208 (Fla. 2002). Counsel's performance is presumed constitutionally adequate, Strickland v. Washington, 466 U.S. 668, 689 (1984), and "[r]easoned trial tactics do not amount to ineffective assistance of counsel." Gorby v. State, 819 So. 2d 664, 678 (Fla. 2002).

B. Counsel's decision not to file a motion to suppress

The State initially notes that appellant failed to challenge the search and seizure of his car at trial and before this Court on direct appeal, thereby defaulting the issue, and any incidental allegation of ineffective assistance of counsel is insufficient to overcome the procedural bar. See Stewart v. State, 801 So. 2d 59, 64 n.6 (Fla. 2001) (claim of "overbroad prosecutorial argument on aggravating circumstances and *ineffectiveness of counsel for failing to object to the same*" held procedurally defaulted as not raised on direct appeal) (emphasis added).

In any event, having reviewed the claim as raised, the trial court properly denied relief, stating as follows:

> Regarding evidence found in the vehicle left by the Defendant at the airport, a review of the affidavits and search warrants is helpful. The first affidavit for search warrant, sworn to by Charles Griffith on January 14, 1993, laid out these pertinent facts to support the issuance of the search warrant:
>
> 1. Susan Morris was reported missing on January 12, 1993;
>
> 2. Later that afternoon, the Defendant was reported driving Miss Morris' vehicle by his brother, Robert Branch;
>
> 3. The Defendant had previously been driving the 1982 Pontiac Bonneville in question;
>
> 4. That Branch was a fugitive from charges out of Evansville, Indiana, and was also wanted by the Bay County Sheriffs Office for charges of Sexual Battery;
>
> 5. Presumably on the afternoon of January 12, 1993, Florida Department of Law Enforcement was dispatched to the Pensacola

Airport to investigate an identification of the Pontiac Bonneville in question;

6. The FDLE officer confirmed the identification of the Bonneville and observed that the rear end of the vehicle appeared lower to the ground than the front, consistent with weight being in the trunk;

7. The FDLE officer opened the trunk to determine whether it contained Miss Morris;

8. Miss Morris was not in the trunk;

9. The Bonneville was sealed and transported to the Escambia County Sheriffs Office where it was stored in a secure garage;

10. The only reference to items inside the vehicle prior to the issuance of the search warrant was the sentence "there appeared to be suitcases and clothing throughout the vehicle";

11. Around 5:00 p.m. January 13, 1993, Susan Morris's body was found unclothed and crudely covered with woodland debris; and

12. FDLE believed that evidence existed in the car, to wit: "trace evidence including human blood, hair, fiber, fingerprints, and other trace evidence."

The Court issued a search warrant on these facts on January 14, 1993. A second affidavit of search warrant was submitted by Bruce Fairburn on February 18, 1993, which added "a pair of brown pants and cleaning materials" to the evidence that existed in the car. A second search warrant was issued on that second affidavit. An inventory list of items seized by Fairburn on February 18, 1993, was also filed with the search warrants.

The Defendant concedes that the exigent circumstances justified opening the trunk. However, the Defendant does contend no probable

cause existed for seizing the Bonneville after the trunk was opened and no body was discovered, that all of the evidence found within the car was "fruit of the poisonous tree," and counsel was therefore ineffective for failing to move to suppress that evidence.

The Court finds the police conduct in this case (moving the Bonneville into a secure garage) was legal. As testified to by both Officer Harbuck[5] and Robert Branch[6] at trial, the Bonneville had been reported missing by the Branch family. Although Connie Branch did testify at the evidentiary hearing that the car was not reported stolen and the Defendant had permission to use the car, she did not refute the trial testimony that the car was reported missing. As mentioned above, exigent circumstances justified the opening of the trunk. The formerly missing vehicle was not searched beyond that without a warrant, but was moved to a secure garage. Moving the vehicle from a public parking lot to an impound lot was entirely reasonable.[7]

Even if the police's actions were improper, the Defendant's claim fails. The "fruit of the poisonous tree" doctrine forbids the use of evidence in court if it is the product or fruit of a search or seizure or interrogation carried out in violation of constitutional rights. Craig v. State, 510 So.2d 857, 862 (Fla. 1987). However, this exclusionary rule has its exceptions, including the "Inevitable Discovery Doctrine." A summary of the "Inevitable Discovery Doctrine" can be

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[5] Trial transcripts, pgs. 581,583.

[6] Trial transcripts, pgs. 564-565.

[7] Although unnecessary to resolve this claim, the Court notes that the Defendant was on the run from charges in two separate states at the time. There is a reasonable legal conclusion that the Bonneville may have been abandoned. Branch, 685 So.2d at 1251 ("Branch's Pontiac was discovered *abandoned* in the Pensacola airport parking lot")(emphasis added).

found in Moody v. State, 842 So.2d 754, 759 (Fla. 2003):

> Although the stop was illegal, the fruit of the poisonous tree doctrine does not automatically render any and all evidence inadmissible. A court may admit such evidence if the State can show that (1) an independent source existed for the discovery of the evidence, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); or (2) the evidence would have inevitably been discovered in the course of a legitimate investigation, Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); or (3) sufficient attenuation existed between the challenged evidence and the illegal conduct, Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The Moody Court goes on to describe the elements needed to prove that the evidence would have inevitably been discovered in the course of a legitimate investigation:

> In making a case for inevitable discovery, the State must show "that at the time of the constitutional violation an investigation was already under way." Nix v. Williams, 467 U.S. 431, 457,104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (Stevens, J., concurring). "[I]nevitable discovery involves no speculative elements ...." Id. at 444 n. 5, 104 S.Ct. 2501. In other words, the State cannot argue that some possible further investigation would have revealed the evidence. *See* State v. Duggins, 691 So.2d 566,568 (Fla. 2d DCA 1997); Bowen v. State, 685 So.2d 942 (Fla. 5th DCA 1996) (holding that speculation may not play a part in the inevitable discovery rule and that the focus must be on demonstrated fact capable of verification). In other words, the case must be in such a posture that the facts already in the possession of the police would have led to this evidence notwithstanding the police misconduct.

In the instant case, an investigation was clearly ongoing at the time the car had been seized. The trunk had been opened in search of

the victim. Although the car was moved to a secure garage, there has been no evidence presented to this Court that it was further searched prior to the issuance of the warrant-beyond the notation of "suitcases and clothing throughout the vehicle" which were presumably in plain view. There certainly was probable cause to support the issuance of the search warrant, which was applied for only a day or two after the car was seized. There is no evidence that the car would have been removed from that lot by the Defendant, who was on the run in Miss Morris' car at the time. The police's alleged misconduct-the seizure of the car-did not provide them with any extra evidence that was obtained without a valid search warrant.

The evidence before the Court does not, under a preponderance of the evidence standard, demonstrate that a motion to suppress had the slightest probability of success. The Court does not find persuasive Public Defender Loveless' testimony that he "would expect" to have filed motions to suppress the evidence in question.[8] It was ultimately Mr. Allbritton's opinion that there was not a sufficient legal basis to file such a motion. Based on the testimony given at the evidentiary hearing, the Court's independent review of the record regarding this issue, and the lack of viable substantive evidence to support the defense's allegation, the Court finds that the Defendant has not overcome the strong presumption that counsel provided effective representation regarding this issue. Counsel cannot be ineffective for failing to file a motion which would have been properly denied. *See* Gettel v. State, 449 So.2d 413 (Fla. 2nd DCA 1984); Ramos v. State, 559 So.2d 705 (Fla. 4th DCA 1990); State v. Freeman, 796 So.2d 574 (Fla. 2nd DCA 2001); *see*, *generally*,

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[8] Evidentiary hearing transcripts, p. 297. Mr. Loveless could not recall any specifics regarding the affidavits, the search warrant, the seizure, or the conversation he had with the subsequently retained trial counsel, Mr. Allbritton. In fact, Mr. Loveless had access to the search warrants and affidavits from his appointment in June until Mr. Allbritton took the case over in late October or November-and he did not move to suppress the evidence in question.

> Rogers v. State, 567 So.2d 483 (Fla. 1st DCA 1990) (the defendant is not prejudiced by counsel failing to move for judgement of acquittal if the motion had no likelihood of success). Prevailing professional norms do not require counsel to grasp at straws. Further, the Court finds the Defendant's arguments that the affidavits were unconstitutionally vague are without merit.

PCR.R.-IX, at 1595-1599.

1. Testimony of Earl Loveless

First, notwithstanding appellant's citation to PCR.Tr.-II, at 302, Mr. Loveless, former defense counsel for Branch, did not testify there that he would have filed a motion to suppress following discovery. The substance of his testimony from pages 301-303 pertained to whether he would have hired his own experts. Concerning the suppression of physical evidence, Mr. Loveless testified on direct examination as follows:

> Q. (By Mr. Reiter) I guess what I'm saying, though, is given the fact there are affidavits and the search warrant was filed February 23rd of 1993, you were appointed in June, would you have expected you would have seen it?
>
> A. Yes. No question I would have seen it and if I didn't see it, I would have demanded it at some point in time.
>
> Q. And given those affidavits, would you have filed motions to suppress the evidence that was obtained from the Pontiac?
>
> A. I would expect that I would have, yes.
>
> Q. Do you have a recollection of speaking with Mr. Allbritton regarding this case?

A. Yes. Mr. Allbritton and I met probably, I think on more than one occasion but I do know specifically one time that he came to my office.

Q. Do you have a specific recollection of the conversation?

A. No.

Q. Do you have any inclination as to whether you would have said to Mr. Allbritton not to file a motion to suppress?

* * * * *

A. I cannot imagine any reason why I would have made such a statement.

PCR.Tr.-II, at 298-299. And on cross-examination, Mr. Loveless addressed the suppression issue as follows:

Q. And is it your opinion that any time that a search warrant is executed, whether it is a car or house that automatically a motion to suppress must be filed?

A. No.

Q. Do you have any specific recollection as to when during your representation of the defendant, between, I assume June and October of '93, any specific recollection as to when, if at all, you received those affidavits for a search warrant?

A. No, I don't.

* * * * *

Q. And in your preparation for this case, isn't it true that you filed a number of these motions prior to Mr. Allbritton taking over the

case?

A. I think all of the motions that I filed were prior to Mr. Allbritton taking over, yes.

Q. And do you find that there was any strategic advantage in representing any defendant to wait until the eave of trial to file motions to suppress search warrants?

A. Well, there can be, yes. It is a touchy practice but yes, there can be strategic advantages to doing that. You've got to remember that you're going to get on the bad side of the Judge when you do it.

Q. And is being on the bad side of the Court something that would be helpful to you if you're representing a client before the Court?

A. No.

Q. And I mean obviously a jury would still be the finder of fact.

A. From a defense attorneys [sic] point of view you're always on the bad side of the Judge.

PCR.Tr.-II, at 305, 306-307. And finally, on redirect Mr. Loveless testified in respect to suppression as follows:

Q. With regard to filing a motion to suppress on the eave of trial, there are rules of procedure showing the limitations and time following that motion, isn't there?

A. Well, not specifically but I think the rule says that it should be filed in a reasonable time before trial if possible.

Q. Okay. And other than – well, when it says if possible, we know they were filed, the affidavits and the warrants February 23rd,

1993 shortly before trial in March, 1994?

A. Right.

Q. Are you aware of any impediments to do so?

A. I'm sorry, say that again.

Q. Are you aware of any impediments in filing a motion to suppress before the eave of trial?

A. No.

PCR.Tr.-II, at 313-314.

In fact, in addition to having been involved in the case since June through November, 1993,[4] having the affidavits but not filing a motion to suppress, Mr. Loveless had taken the depositions of the two affiants on October 5, 1993, PCR.R.-VIII, at 1360, 1392, more than a month before Mr. Allbritton became counsel of record. Thus contrary to appellant's representation, IB at 17, the trial court did not, based upon an erroneous view of the record, reject former trial counsel's representation that he would have expected to file a motion to suppress.

2. John Allbritton's Testimony

Trial counsel testified that he does not file motions where there is no legal merit to support the motion, and he did not believe here that there was a basis for

[4] Mr. Allbritton entered his appearance in the case on November 22, 1993. PCR.R.-I, at Progress Docket Printout, p. 7.

challenging the search and seizure of appellant's car. PCR.Tr.-II, at 227-228. Mr. Allbritton had reviewed the affidavits submitted in support of the search warrants, talked with former counsel, and then with the defendant who agreed with counsel's advice. Id. at I-137; II-225, 227-228. And as the lower court observed, former counsel, who represented appellant and had the affidavits from June to late October or November, did not himself file any motion to suppress. PCR.R.-IX, at 1599 n.8. Counsel is not ineffective for not filing a motion to suppress when he believed it would be futile. See Zakrzewski v. State, 866 So. 2d 688, 694 (2003).

3. Warrantless Seizure of the Pontiac

Notwithstanding the foregoing, appellant argues that "[t]he seizure of the Pontiac without a warrant was a violation of the automobile exception and violated [his] constitutional right to be free from unreasonable search and seizures." IB at 20. According to appellant, the lower court "misapprehended the concept of the invalid seizure. . . . [and t]he fact that the car itself wasn't introduced into evidence is irrelevant, because the seizing of the vehicle deprived the owner of access to his or her vehicle and belongings therein." Id. at 20-21.

On its face Branch's argument must fail:

First, while he refers to the Pontiac as "Appellant's vehicle," id. at 21, Branch ignores the fact that he admittedly did not own the car but was only using it.

T.Tr.-V, at 773; see also id. at III-563-565, 573-575 (trial testimony of appellant's brother and cousin, respectively). Nor was he in possession of the vehicle at the time it was seized.[5] Accordingly, Branch did not have standing to challenge the seizure of the vehicle itself in the first place. Jones v. State, 648 So. 2d 669, 675 (Fla. 1994) ("[I]n order to challenge a search, a defendant must demonstrate that he or she had a reasonable expectation of privacy in the premises or property searched. . . . However, to challenge a seizure, the defendant only need establish that the seizure interfered with his or her constitutionally protected possessory interests") (internal citations omitted), cert. denied, 515 U.S. 1147 (1995); State v. Singleton, 595 So. 2d 44, 44-45 (Fla. 1992) (defendant neither owned the vehicle searched nor was in possession of it at the time that the owner consented to its search by police); Nelson v. State, 578 So. 2d 694, 695 (Fla. 1991) (a defendant lacks standing to raise a fourth amendment challenge to the search and seizure of property "in which the defendant had no ownership or possessory interest. . . .").[6]

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[5] And while appellant testified that he had permission to use the Pontiac when he initially traveled to Florida, see T.Tr.-V, at 773, he made no such showing as to his later use of the vehicle. Rather, his brother and cousin retrieved the car from the impound lot, id. at III-564-565, 574, and appellant did not tell anyone when he later took it, prompting the missing car call to police. See id. at III-565, 574-575.

[6] Appellant may, however, have had standing to challenge the seizure of his property within the vehicle, to the extent that he had a reasonable expectation of privacy. Based upon his abandonment of the vehicle, however, as discussed infra,

Secondly, even if Branch had a possessory interest in the vehicle itself,[7] the trial court noted that appellant had abandoned the car. PCR.R.-IX, at 1597 n.7 (citing this Court's opinion on direct appeal, Branch, 685 So. 2d at 1251).[8] Therefore, Branch can hardly claim a deprivation of access thereto. State v. Terzado, 513 So. 2d 741, 742 (Fla. 3d DCA 1987) ("If Terzado abandoned his car, he lost his reasonable expectation of privacy in it, and may not claim a violation of his fourth amendment rights.").

And while Branch disputes that he abandoned the car, IB at 36-37, he relies upon his unexpressed intent that his brother Robert "could have the brown Bonneville that would be sitting in the parking lot waiting for him after I flew back to Indiana." Compare IB at 37 (quoting T.Tr.-V, at 816) with T.Tr.-III, at 563-569, 574-577 (neither Robert or appellant's cousin Alex testified as to appellant's intent

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at 26-27, any such motion to suppress would have been without merit.

[7] Appellant relies upon the evidentiary hearing testimony of Connie Branch that he had been given the Pontiac to drive, had keys to the car, and that she did not tell phone that appellant took the car without permission. IB at 26. What appellant neglects to acknowledge is the trial testimony of his brother and cousin that the car was reported as missing. T.Tr.-III, at 563-565, 573-575. One must wonder why the car was reported as missing if appellant was known to have permission to use it and that he had the vehicle. See id. at III-573-575.

[8] While Branch argues that "neither the State nor the Court argued abandonment," IB at 36, on appeal, he cites no authority for his apparent belief that the lower court cannot alternatively, in considering a claim of ineffective assistance of counsel for failing to file a motion to suppress, consider any lawful basis to support the search.

that Robert take the car). Branch neglects to address the fact that his intent was both unexpressed and, in combination with the fact that he left the vehicle in a long-term, public parking lot without any objective evidence that he was coming back for it,[9] is an abandonment of the property. See State v. Lampley, 817 So. 2d 989, 991 (Fla. 4th DCA 2002) ("The test for abandonment is whether a defendant voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.") (internal citations and quotation marks omitted).

Finally, Branch does not address that the automobile was initially seized and the trunk opened based upon exigent circumstances, a fact that he conceded, as found by the trial court. See PCR.R.-IX, at 1596; see also PCR.R.-V, at 892-893 ("Likewise, exigent circumstances were lacking *once law enforcement pried open the trunk* and did not find Ms. Morris. No articulation was made that law enforcement observed blood or any other visible evidence of crime in, on, or near the car. No reason existed to justify seizure of the car after the trunk was pried open. . . .") (emphasis added). Appellant failed to present any evidence that he had

[9] In addition to the fact that appellant had been seen driving the victim's car the day the Pontiac was discovered at the airport, a set of keys were observed in plain view within the abandoned car. PCR.R.-VIII, at 1381-1382.

not so conceded; in fact, appellant did not address that issue in his post-hearing memorandum, compare PCR.R.-IX, at 1519-1529, and fails to do so on appeal as well. Compare IB at 16-39.[10]

In any event, "[t]he right of police to enter and investigate an emergency, without an accompanying intent either to seize or arrest, is inherent in the very nature of their duties as peace officers and derives from the common law." Zeigler v. State, 402 So. 2d 365, 371 (Fla. 1981), cert. denied, 455 U.S. 1035 (1982). The emergency doctrine, under the exigency exception to the warrant requirement, has been defined generally as follows:

> Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided,

[10] Appellant's discussion of the "automobile exception" is limited to the circumstance where the vehicle is known to contain "contraband." See IB at 19-20. An emergency seizure of the car to determine if a missing person is hidden within obviously is not the same. And seizure of the vehicle itself as contraband was proper, as § 932.701(2)(a)(5), Fla. Stat., "defines 'contraband' to include any 'vehicle of any kind, . . . which was used . . . as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony.'" See Florida v. White, 526 U.S. 559, 565 n.3 (1999). And § 932.702(2) provides that "[i]t is unlawful: . . . [t]o . . . possess any contraband article." Here FDLE had information Ms. Morris was missing, appellant had been seen driving her car later that day, the car he had been driving was left parked in a long-term airport parking lot, and the trunk appeared to be lower to the ground as if it was weight-bearing.

> further, that they do not enter with an accompanying intent to either arrest or search.

Brinkley v. County of Flagler, 769 So. 2d 468, 471 (Fla. 5th DCA 2000) (internal citation omitted); see also Chambers v. Maroney, 399 U.S. 42, 51 (1970) ("Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search.").

Analogous to an emergency situation giving rise to the right to enter premises, exigent circumstances existed in this case warranting securing the vehicle and opening the trunk: appellant's vehicle was located at the Pensacola Regional Airport parking lot after law enforcement had learned that defendant had been observed driving the victim's car, after Ms. Morris' parents had notified law enforcement that she had not been seen since the night before and she was considered a missing/endangered person. R.-I, at 7. It was further learned that Branch had taken the brown Bonneville without authorization and that he was a fugitive from Evansville, Indiana. Id. at 8. Because the victim was still missing and the rear of the vehicle appeared to be lower to the ground consistent with weight being in the trunk area, the trunk was opened upon concern for the victim's safety. R.-I, at 8-9. Indeed, FDLE Special Agent Dennis Norrad testified in his deposition that he "was told that we needed to get inside the vehicle, into the trunk area to make sure the

body wasn't there." PCR.R.-VIII, at 1385. Thus the initial seizure and opening of the trunk was proper. Cf. State v. Hutchins, 636 So. 2d 552, 553 (Fla. 2nd DCA 1994) (search of defendant's pocket proper based upon medical emergency after defendant was taken into protective custody); see also Barnes v. State, 406 So. 2d 84, 85 (Fla. 1st DCA 1981) (search of vehicle permissible under exigent circumstance exception based upon their inability to identify owner, that defendant had just committed an armed robbery, and public safety dictated immediate continued investigation).

4. Issuance of the Search Warrants

Regarding the searches conducted pursuant to the search warrants, Branch failed to establish any deficiency with the affidavits supporting the issuance of the warrants upon which trial counsel should have sought suppression.

"In determining whether probable cause exists to justify a search, the trial court must make a judgment, based on the totality of the circumstances, as to whether from the information contained in the warrant there is a reasonable probability that contraband will be found at a particular place and time." Pagan v. State, 830 So. 2d 792, 806 (Fla. 2002), cert. denied, 539 U.S. 919 (2003).

Appellant argues that FDLE Agent Griffith made statements in his affidavit that "were either intentionally false or given with reckless disregard for the truth to

deceive the court." IB at 31. Branch relies upon the fact that the affidavit includes matters that Agent Griffith reported he either learned from others or did himself, on January 12, 1993, but that his depositional testimony was that he was assigned to the case on January 13th. Id. While appellant may characterize the discrepancy as "intentionally false or given with reckless disregard for the truth to deceive," he only established a discrepancy. Branch did not present the testimony of Agent Griffith, thus excluding the possibility that Agent Griffith had just forgotten or confused the date from when he testified nearly ten months after preparing the affidavit. "Mere neglect or statements made by innocent mistake are insufficient." Thorp v. State, 777 So. 2d 385, 391 (Fla. 2000). In addition, the affiant does not have to observe the facts relied upon in obtaining the search warrant (compare IB at 31), or be present and observe the item to be searched (Compare IB at 30). State v. Peterson, 739 So. 2d 561, 567 (Fla. 1999) ("We . . . find that the 'fellow officer' rule applies to searches as well as arrests. In light of the need for efficient law enforcement, this finding is both practical and necessary, because it allows reliable informants to be utilized by more than one officer"), cert. denied, 531 U.S. 831 (2000). Branch also makes much of purported differences between the information provided by William Wallace, the taxi driver that transported appellant after he was believed to leave the Pontiac at the airport. IB at 26-27. The affidavits state that Mr. Wallace

"identified Branch as riding in his cab," R.-I, at 9, 18, while Agent Ray Dyal wrote that Mr. Wallace told him "that the photograph looked very much like the while male passenger" he had picked up at the airport "except that his (WALLACE'S) passenger's hair might have possibly been a little longer." PCR.R.-VIII, at 1437. Appellant did not present the testimony of Agent Dyal to establish that he did not consider that an identification or that he did not tell Agents Fairburn and/or Griffith as much.[11] Similarly, appellant did not call Agent Dyal to establish how he learned what Branch was wearing the night he rode in the cab and who he provided that information that it ended up in the affidavits.[12] In addition, Branch ignores the testimony of Agent Fairburn that the information came from "those folks that are mentioned in the documents" including Agent Dyal, and the communications were "[p]robably most of it was by oral." PCR.Tr.-I, at 56. That Agent Dyal did not include a statement as to what Branch was wearing does not establish that he did not say it and that Agent Dyal did not communicate it to Agent Fairburn.

Thus appellant's argument is nothing more than a disagreement that the statements that law enforcement relied upon established the facts supporting

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[11] Appellant also does not acknowledge Mr. Wallace's deposition, wherein he testified that he gave a statement indicating that he believed the person he picked up was the individual identified as Branch. PCR.R.-VII, at 1172-1173.

[12] Mr. Wallace testified at his deposition that appellant was wearing "shorts and a

issuance of the warrants and that the facts support issuance of the warrants. See IB at 22-23, 26-27. Such does not prove that the warrants were improperly issued. The fact that appellant was seen driving a vehicle matching the description of the victim after she went missing,[13] that a criminal records check indicated that appellant was wanted for failure to appear on charges of rape, child molestation, criminal deviation, and battery charges,[14] as well as by Bay County, Florida for a

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short sleeve shirt, tennis shoes." PCR.R.-VII, at 1180.

[13] Appellant inaccurately argues that "[b]oth affidavits state that Robert Branch described the vehicle as a red Toyota Celica with a crack in the left turn indicator light and a short black antenna," citing R-I, at 16 only. IB at 26. To the contrary, the first affidavit references the statement provided by the victim's parents including that the car was damaged, R.-I, at 7, while Robert Branch's statement reflects that he told the agent that the vehicle was red and had a short black antenna. Id. And Robert Branch's statement to police, admitted at the evidentiary hearing, does not establish that he denied that there was damage to the victim's car, but that he denied stating that he thought there was damage and that he did not recall if there was. Compare IB at 26 with PCR.R.-VIII, at 1438. Moreover, that the second affidavit may be inaccurate does not establish misfeasance on the part of FDLE. Appellant did not call Agent Griffith to testify as to the affidavit he executed. The affidavit also contained Robert Branch's statement that appellant had told him the red car belonged to a girl in Pensacola, R.-I, at 8; see also T.Tr.-III, at 566 (Robert Branch's trial testimony). Appellant presented no evidence that it was unreasonable for FDLE to rely upon that statement. Instead of establishing false statements in the affidavits, appellant's own admission, that he had stolen the victim's car, T.Tr.-V, at 847, establishes otherwise.

[14] While Branch contended that the criminal report information was incorrect, PCR.R-V, at 895, he failed to present any evidence at the evidentiary hearing that there was no such reported information or that law enforcement acted unreasonably in relying upon that information.

sexual battery, that the brown Bonneville had been reported missing and was taken without permission, in addition to the fact that the victim's body was found two days after her disappearance, that the victim's vehicle was recovered in Bowling Green, Kentucky, less than one hundred miles from appellant's home in Indiana R.-I, at 7-11, 15-20, sufficient facts clearly existed supporting probable cause to search.[15]

5. Inevitable Discovery

Here, appellant first finds fault with the trial court's inevitable discovery analysis because the State did not argue the theory. IB at 34. Once again, Branch cites no authority for his apparent belief that the lower court cannot alternatively, in considering a claim of ineffective assistance of counsel for failing to file a motion to suppress, consider any lawful basis to support the search. Appellant then complains that the lower court's discussion of the facts to establish inevitable discovery is lacking, IB at 34-35, and that the evidence is otherwise. Id.

Branch misconstrues the ruling of the trial court. Review of its Order reflects that the trial court was not applying "inevitable discovery" to the searches conducted under the warrants, see PCR.R.-IX, at 1598 ("There certainly was

[15] Appellant does not address all of these facts when setting forth his "summary of the facts attempting to establish a nexus between the offense, the Pontiac and Appellant stated within the four corners of the affidavits. . . ." IB at 18-19.

probable cause to support the issuance of the search warrant . . . ."), but was limited to the seizure of the vehicle only:

> In the instant case, an investigation was clearly ongoing *at the time the car had been seized*. . . . There is no evidence that the car would have been removed from that lot by the Defendant, who was on the run in Miss Morris' car at the time. The police's alleged misconduct-*the seizure of the car*-did not provide them with any extra evidence that was obtained without a valid search warrant.

See id. (emphasis added). Based upon the foregoing, the trial court's alternative application of the inevitable discovery doctrine in respect to the seizure of the car, not the subsequent searches pursuant to the valid warrants, was proper. Maulden v. State, 617 So.2d 298, 301 (Fla. 1993) ("[E]vidence obtained as the result of unconstitutional police procedure may still be admissible provided the evidence would ultimately have been discovered by legal means.").

As the above discussion demonstrates, counsel did not perform deficiently. Counsel testified that he would not have filed a frivolous motion, and the facts here support his determination. Accordingly, Argument I should be denied.

II.

THE POSTCONVICTION MOTION COURT PROPERLY HELD THAT TRIAL COUNSEL DID NOT PERFORM INEFFECTIVELY IN RESPECT TO HIS PENALTY PHASE INVESTIGATION AND PRESENTATION OF MITIGATION EVIDENCE, AS BRANCH'S NEW LAY TESTIMONY WAS EITHER CUMULATIVE TO THAT PRESENTED AT THE PENALTY PHASE, OR, AS WAS THE CASE WITH HIS MENTAL HEALTH EXPERT'S TESTIMONY, CONTRARY TO OR UNSUPPORTED BY COMPETENT EVIDENCE.

Before the trial court, Branch argued in his postconviction relief motion that trial counsel had been ineffective in respect to the penalty phase of trial in pertinent part as follows: failure to investigate and present mitigation, including appellant's psycho-social history, mental health experts, and to properly prepare Robert and Alfred Branch to testify. See PCR.R.-V, at 923-933.

In reviewing the claim as presented to it, the lower court discussed the matter as follows:

> The final claim discussed at the evidentiary hearing involved the assertion that counsel was ineffective for failing to present mitigating evidence. However, the Defendant failed to show that he suffered positive, specific, and factual prejudice regarding this claim because no evidence of improperly excluded mitigation was presented at the hearing. In its post-hearing memorandum, the Defendant claims that his expert found three statutory mitigators:
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> 1. "Extreme Emotional Distress" mitigator – based upon the Defendant being on the run from law enforcement both in Indiana and Bay County, Florida. That was coupled with

the fact that he had consumed a substantial amount of alcohol that evening;

2. "Unable to Conform Actions to the Law" mitigator – based upon his opinion that the Defendant suffered from some personality disorders. That was coupled with the fact that he had consumed a substantial amount of alcohol that evening and was running from the police; and

3. "Substantial Domination of Another" mitigator "may have been present" – based upon the size difference between the Defendant and the alleged "other Eric."

The idea that counsel was ineffective for failing to present evidence that *the Defendant was on the run from two separate charges of sexual battery* as mitigation is so absurd that the Court finds that the Defendant could not have suffered any prejudice as a matter of law. Further, the jury and the Court rejected the story that the Defendant had an accomplice, as illustrated in the sentencing order.[26] The Defendant's characterization that the expert's testimony proved the Defendant could not conform his actions to the law is patently incorrect. In fact, the Defendant's expert, Dr. Henry Dee, testified during cross-examination to the exact opposite conclusion on all three of these mitigators:

Q. [by Mr. Pitre] And in this particular instance, based on what you reviewed, there's no clinical diagnosis that the defendant was under any extreme mental or emotional disturbance?

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[26] Page 4 of the sentencing order; Section B. "Mitigating Factors" / "Statutory Mitigators" paragraph 2: "The defendant testified that the actual murder was committed by someone else. The jury apparently rejected this testimony, since it found the defendant guilty of sexual battery. The court likewise finds the defendant's testimony in this regard to be unworthy of belief."

A. [By Dr. Dee] That's correct.

Q. No indication that the defendant was under the duress of any other person?

A. That's correct.

Q. Isn't it true that you found that the defendant was, in fact – had the ability, the capacity, to appreciate the criminality of his conduct?

A. Yes.

Q. He had the ability to conform his conduct to the requirements of the law; isn't that also correct.

A. Yes. I think it was impaired but certainly not obliterated.

In light of the testimony elicited during cross-examination, the Defendant has not demonstrated that a mental health expert would have provided any significant aid to the defense during mitigation. Since the Defendant was not prejudiced by such an omission, the Court need not determine whether Counsel's performance was deficient.

In fact, some of the expert's testimony at the evidentiary hearing would have been harmful to Defendant's position during the penalty phase. The Court found that the Defendant had good personality traits and afforded that mitigator slight weight. Dr. Dee's opinion that the Defendant has several antisocial tendencies would have nullified that mitigator while at the same time failing to establish any diagnosable psychological disorder.

Dr. Dee further testified to several events regarding the Defendant's life history, including incidents of abuse, abandonment and rejection. That testimony was corroborated at the hearing by Connie Branch. During the penalty phase, the Court found the non-statutory mitigator of "the Defendant had an unstable childhood" in its sentencing order, and afforded that mitigator some weight. Upon

> reviewing the testimony before it during the penalty and sentencing phases of trial the Court finds that the additional evidence of abuse, rejection or abandonment would not have had a measurable effect on the Defendant's sentence. In fact, it would not have given this mitigator any more weight than it was attributed in this Court's sentencing order. Therefore, the Defendant has failed to demonstrate that he suffered any prejudice regarding this claim.

PCR.R.-IX, at 1612-1614 (emphasis in original).

Branch now argues that the trial court's disposition of the issue is erroneous because it only focused on the prejudice prong of the Strickland analysis, and did not take into consideration prejudice in respect to the jury's role. IB at 41-42.

As this Court has previously stated,

> because the Strickland standard requires establishment of both prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong. See *Strickland, 466 U.S. at 697* ("There is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."); see also *Downs v. State, 740 So. 2d 506, 518 n.19 (Fla. 1999)* (finding no need to address prejudice prong where defendant failed to establish deficient performance prong).

Ferrell v. State, 2005 Fla. LEXIS 1297 *20 (Fla. Jun. 16, 2005); see also Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) ("A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied."). Thus only if the lower court's consideration and determination is

erroneous that appellant was not prejudiced by counsel's complained-of actions will the Court conclude that relief is warranted.

In respect to claims of ineffectiveness specific to the penalty phase, this Court has stated that the following standard governs:

> With respect to the investigation and presentation of mitigation evidence, the Supreme Court observed in Wiggins that "Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case." *Wiggins, 539 U.S. at 533*. Rather, in deciding whether trial counsel exercised reasonable professional judgment with regard to the investigation and presentation of mitigation evidence, a reviewing court must focus on whether the investigation resulting in counsel's decision not to introduce certain mitigation evidence was itself reasonable. *Id. at 523*; *Strickland, 466 U.S. at 690-91*. When making this assessment, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins, 539 U.S. at 527*.

Ferrell, 2005 Fla. LEXIS 1297 *11-12. Moreover, the Court

> has found ineffectiveness where no attempt was made to investigate mitigation even though **substantial mitigating evidence could have been presented**. See *Rose, 675 So. 2d at 572*; *Hildwin v. Dugger, 654 So. 2d 107, 109-10 (Fla. 1995)* (finding counsel ineffective for failing to investigate and discover substantial mitigation including prior psychiatric hospitalizations and statutory mitigation). At the same time, we have generally upheld cases where counsel has conducted an investigation which uncovered potential mitigation, but made a strategic decision not to present such evidence. See *Jones v. State, 446 So. 2d 1059 (Fla. 1984)* (finding counsel not ineffective for failing to introduce mental health examination which rendered an unfavorable

> diagnosis of defendant); *Rose, 617 So. 2d at 294* (same where psychologist determined defendant had an antisocial personality disorder and not organic brain disorder).

Rodriguez v. State, 2005 Fla. LEXIS 1169 *14-15 (Fla. May 26, 2005) (emphasis added). Finally, specific to the prejudice prong, a defendant "must show that there is a reasonable probability that, absent trial counsel's error, the *sentencer* . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Reaves v. State, 826 So. 2d 932, 941 (Fla. 2002) (internal quotation marks and citations omitted; emphasis added). Stated differently, there is no presumption of prejudice for failing to have a capital defendant examined by a psychiatric or mental health expert or for failure to present such evidence.

As demonstrated below, appellant's claim must fail. While appellant makes much of the fact that trial counsel did not hire a psychiatric expert, travel to Indiana to meet with Branch's family, nor obtain various background records, Pet.Br. at 44-46, the evidence he presented at the evidentiary hearing was either cumulative to that presented at the penalty hearing, unsubstantiated, or presented a double-edged sword to the defense.

First, notwithstanding appellant's observation that "[t]rial counsel did not testify that he had obtained school records, medical records, or any other background records pertaining to Appellant's history," IB at 46, he fails to address

the fact that no such records were presented, let alone introduced and admitted into evidence at the evidentiary hearing. Moreover, appellant's own mental health expert only testified to having reviewed affidavits from family members, two reports by Branch's former probation officer, "comments" from the chief of police of his hometown, interviews from his girlfriend and mother of his child, the principal of a school he attended, and his father, newspaper clippings, personal correspondence, and poetry written by appellant since being incarcerated. PCR.Tr.-I, at 69-70. Having failed to demonstrate the existence or availability of historical records, or that appellant was prejudiced by counsel's failure to obtain such records, Branch's ineffective assistance claim in respect to any such records must be denied.[16]

At the evidentiary hearing, Branch's trial counsel testified concerning his defense preparation as follows: he spent well over 100 hours on appellant's defense, PCR.Tr.-II, at 267; he spoke with Branch concerning his family background and while he did not recall specific facts, concluded that due to appellant's conflict with some family members that the trip to Indiana was not

[16] Interestingly, though Dr. Lee did not testify at the evidentiary hearing concerning any official records obtained by collateral counsel pertaining to appellant's childhood, compare PCR.Tr.-I, at 69-70, he apparently did have access to and did review school and psychiatric records. See PCR.R.-VI, at 1123; see also id. at 1112. Appellant made no attempt to introduce such records into evidence at the hearing, and presented no testimony as to their substance.

justified as they would not be good witnesses based upon what appellant had told counsel, id. at I-147-148; id. at II-211-212, 267-268; and that he had discussed with and prepared appellant's family as to testifying, yet was aware that some family members had information that would be aggravating and for that reason some did not want to testify. Id. at II-215-217, 268.[17] In addition, appellant's former trial counsel testified that he had traveled to Indiana and spoke to family and friends in furtherance of obtaining mitigating evidence, as well as to talk to Branch's Indiana attorney and to look at those court records. Id. at II-294-295, 311. Mr. Loveless also arranged for Dr. Larson to act as a confidential consultant, PCR.Tr.-II, at 295, and had him evaluate Branch. Id. at II-307. When Mr. Allbritton took over the defense, Mr. Loveless provided him with the defense file, id. at II-312-313; see also id. at I-120, and they met at least one time. Id. at II-298-299, 312-313. Counsel

[17] That appellant's aunt, Connie Branch, testified at the evidentiary hearing that attorney Allbritton did not prepare the family to testify, that she was not asked to testify, and did not hear any family member say that they did not want to testify, PCR.Tr.-III, at 462-464, does not establish that trial counsel's testimony was inaccurate. While Ms. Branch testified that she met with Mr. Allbritton one time, no testimony was presented by any other family member as to trial counsel's discussions with them pertaining to the penalty phase of trial. Appellant surely had the opportunity to present such testimony, as, at the very least, his grandfather was present and did testify, albeit a different matter. See id. at III-487. "The postconviction trial judge heard all the evidence and was in a much better position . . . to 'assess[] the credibility of [the] witnesses and . . . make findings of fact.'" Sochor v. State, 883 So. 2d 766, 781 (Fla. 2004) (quoting Porter, 788 So. 2d at 923).

testified he reviewed everything provided. Id. at I-122.

Nor can appellant establish that he was prejudiced in respect to counsel's investigation and presentation of the lay witness testimony or for failure to present mental health testimony.

At the penalty phase of trial, the defense presented the testimony of appellant's brother, Robert Branch, and his grandfather, Alfred Branch. They testified about appellant's childhood: that Branch's parents were divorced when he was very young, and while his brother was raised by their mother, appellant lived mainly with his grandparents, from age six months to third grade, and from eighth grade to tenth grade; appellant did not get along with his stepfather; appellant felt that his brother received preferential treatment from his mother and she did not want appellant; Branch felt that his father had abandoned him, and though his father eventually moved next door to Branch's grandparents, appellant did not get along with him, did not visit him but saw him in passing and when he was at the grandparent's house, did not receive guidance from him but saw him more than his brother did; Branch's father frequently drank and had a drinking problem; Branch was expelled from high school having set the school on fire, but did obtain his GED, and dropped out of college in Evansville before the end of the first semester after getting into trouble; Branch took the blame for things he did not do; once was

hit on the head with a bat; and was enjoyable to be around while growing up and did not really have any bad traits. T.Tr.-VI, at 988-995 (Robert Branch), 995-1006 (Alfred Branch).

During the evidentiary hearing, appellant only presented lay testimony from his aunt, Connie Branch, pertaining to mitigation.[18] Ms. Branch testified that she never saw the family express love, PCR.Tr.-III, at 464; appellant would not fight but would back off, id. at III-465; discipline was erratic when he was growing up, id.; she had seen appellant maybe drink one beer, PCR.Tr.-III, at 465; there were "suspicions" that Branch used drugs and had been sexually abused, id. at III-466, 467-468; as a baby appellant had a "flat head" but did not know the cause, id. at III-467; appellant's father had an alcohol problem and his mother drank occasionally and when she was pregnant with appellant, id. at III-468-469; Branch

[18] While Branch's grandfather was called as a witness, appellant only asked him a question concerning his alleged request that trial counsel withdraw from the case. PCR.Tr.-III, at 487. According to appellant, he did not present the testimony of his brother due to "financial difficulty or work constraints." IB at 48. Irrespective of that reason, however, the burden of proof and persuasion in a postconviction relief proceeding is defendant's alone. Further, there is no record that appellant sought any alternative means of obtaining the testimony of his brother for purposes of his Rule 3.850 motion. See PCR.Tr.-III, at 476-477. Thus any allegation that his brother and grandfather were not properly prepared to testify must be rejected on the basis that Branch failed to present substantive evidence concerning the claim, or prejudice as a result, having failed to present evidence of what they would have testified to had they been prepared differently.

would lie to take the blame for others, id. at III-470; and Branch sustained a knot on his head when Connie Branch's son threw a battery across a room when appellant was very young but medical treatment was not needed, id. at III-470-471. During cross-examination, however, and contrary to appellant's assertion that he had poor intellectual performance, Sec.Am.Mot., at 47, Ms. Branch testified that appellant was intelligent and there was no indication that he was a slow learner, id. at III-478; she had no personal knowledge that appellant was an alcoholic or that he drank heavily since the eighth grade, and she had never seen him drunk, id. at III-482-483, 485; she had no personal knowledge of appellant having been abused, id. at III-485; and had seldom seen appellant. Id. at III-483.[19]

Thus of the information that Ms. Branch testified to that had not presented at the penalty phase, she had no first-hand knowledge of its existence, and the majority of her evidentiary hearing testimony was cumulative to what had been presented at trial through appellant's brother and grandfather.[20] Counsel is not ineffective for failing to present cumulative testimony. Gudinas v. State, 816 So. 2d

[19] Ms. Branch also testified that trial counsel had told the family that "the worst it is the better it will be for Eric. . . . because it would be easier to proceed further on." PCR.Tr.-III, at 463. Review of the actual trial testimony of appellant's grandfather and brother would seem to refute that claim. Compare T.Tr.-VI, at 988-994, 995-1002.

[20] Similarly, at the evidentiary hearing Dr. Dee testified to a number of facts that were presented through appellant's brother and grandfather at trial. See T.Tr.-VI,

1095, 1105-1106 (Fla. 2002); Woods v. State, 531 So. 2d 79, 82 (Fla. 1988) ("The testimony now advanced, while possibly more detailed than that presented at sentencing, is, essentially, just cumulative to the prior testimony. More is not necessarily better."). The fact that current counsel would have presented such information differently does not establish a claim of ineffective assistance. Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993) ("The fact that postconviction counsel would have handled an issue or examined a witness differently does not mean that the methods employed by trial counsel were inadequate or prejudicial."). And of the information that had not been presented previously, any weight that might have been accorded the testimony would have been minimal given the lack of specificity as to the existence of the mitigation – i.e., that there were "suspicions" that appellant had been sexually abused and used drugs. Such unsubstantiated information hardly qualifies as "substantial mitigation" warranting a new penalty phase. Compare State v. Lewis, 838 So. 2d 1102, 1110-1111, 1113-1114 & n.10 (Fla. 2002) (and citing cases); Rose v. State, 675 So. 2d 567, 572-573 (Fla. 1996). Instead, Branch was not deprived of a reliable penalty proceeding. Rutherford v. State, 727 So. 2d 216, 225-226 (Fla. 1998).

Turning to counsel having not presented mental health expert testimony, the

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at 992-993 (Robert Branch); 997-1001 (Alfred Branch).

following principles govern the Court's review. First, "[c]ounsel cannot be deemed ineffective for failing to present evidence that would open the door to damaging cross-examination and rebuttal evidence that would counter any value that might be gained from the evidence." Johnson v. State, 2005 Fla. LEXIS 595 *21 (Fla. Mar. 31, 2005). Nor does counsel have a constitutional duty to "shop around" for an expert that will render a more favorable opinion. Rivera v. State, 859 So. 2d 495, 504 (Fla. 2003); Freeman v. State, 852 So. 2d 216, 224 (Fla. 2003); Cooper v. State, 856 So. 2d 969, 976 n.5 (Fla. 2003), cert. denied, 540 U.S. 1222 (2004).

Here, the essence of appellant's claim is that while he did not commit the murder -- the "other Eric" did -- counsel was ineffective for not presenting evidence that when he committed the murder -- Branch -- was substantially impaired because of alcohol consumption and mental health issues. Besides the fact that Branch has failed to carry his burden of proving the existence of these mitigators, he now seeks a determination that counsel was ineffective for failing to present matters completely inconsistent with his defense of innocence. The claim should be rejected on its face. See Cherry v. State, 781 So. 2d 1040, 1047, 1050 (Fla. 2000), cert. denied, 534 U.S. 878 (2001); cf. Williams v. Wainwright, 503 So. 2d 890, 891 n.1 (Fla. 1987) ("Failing to raise new but unacceptable theories in mitigation for the first time on appeal does not render counsel ineffective.").

Moreover, the defense begins by assuming that Branch was intoxicated at the time of the murder. IB at 48 (mitigators based at least in part on the existence of alcohol impairment). The evidence presented at the evidentiary hearing was to the contrary, however. Other than appellant's self-report to his expert retained for the postconviction proceedings, there was no evidence to support a claim that Branch had been intoxicated at the time of the offense. To the contrary, trial counsel expressly testified as follows:

> Q. Did the defendant ever discuss with you, hey, I was completely drunk, I don't know what I was doing that night, I want this voluntary intoxication defense?
>
> A. No, he did not but Mr. Pitre, certainly if Mr. Branch had been that intoxicated, if there had been evidence of that, I would have raised the Defense of involuntary intoxication. There was no, there was no evidence to support that, sir.
>
> * * * * *
>
> Q. Do you recall if there was any bartenders from UWF who came up and said hey within an hour and a half time according to the defendant's version of events, he consumed 12 to 15 beers. Do you remember whether any bartender testified during the trial?
>
> A. I don't remember that. I don't think that they did but I don't have a recollection.
>
> Q. Based on the evidence, based on what the defendant explained to you in his version of the events, did you see voluntary intoxication as a viable defense?
>
> A. No, sir.

PCR.Tr.-II, at 247-248. Branch did not testify at the evidentiary hearing and did not present anyone that could testify having witnessed his intoxication on the night that he killed Susan Morris. In fact, at trial when he did testify during the guilt phase, Branch made no mention that he had been intoxicated. Compare T.Tr.-V, at 792-793 (no mention of drinking before going to the bar with Melissa Cowden around 4:00 or 5:00 p.m., and then that he got "a beer" after Ms. Cowden left the bar around 6:30 p.m.), 795 (he got "a beer" and shot pool with the "other Eric" and they played pool and drank "for about an hour."). Such information is markedly different from what appellant apparently told Dr. Dee:

> [T]he bartender had cut him off because he'd had too much to drink and wouldn't serve him any more. And he estimated, although he clearly couldn't remember with any accuracy because he'd had so much to drink, that he'd had about 14 beers that evening -- 13 or 14.

PCR.Tr.-I, at 81.

Because Dr. Dee's opinion that appellant was unable to conform his conduct to the requirements of the law because he "was substantially impaired by alcohol," PCR.Tr.-I, at 80-81, 81-82, and there is simply no credible evidence to substantiate that fact, counsel cannot be held ineffective for failing to present that. The same is true in respect to Branch's other mitigator that he contends counsel should have presented -- i.e., that he was under extreme emotional disturbance. "This mitigating

circumstance has been defined as 'less than insanity, but more emotion than the average man, however inflamed.'" Foster v. State, 679 So. 2d 747, 756 (Fla. 1996), cert. denied, 520 U.S. 1122 (1997). Appellant fails to explain why the average person would not be greatly stressed if he or she knew that he was wrongly released from jail and wanted by law enforcement. See IB at 48 (setting forth Dr. Dee's testimony relied upon to establish the mitigator). This is particularly the case where Dr. Dee admitted that Branch did not suffer from any other mental illness, only alcoholism, PCR.Tr.-I, at 87, which of course is based upon Branch's unsubstantiated self-report.[21] And to the extent that Dr. Dee's determination of that mitigating factor derives from appellant's own criminal conduct, see id. at 82, Branch fails to address how such evidence would be viewed by any reasonable attorney as mitigating as compared to damaging.

Moreover, and related to each mitigating factor, Dr. Dee did not testify as to appellant's alleged mental condition specific to the night of the murder (compare PCR.Tr.-I, at 81-82). Geralds v. State, 674 So. 2d 96, 101 (Fla.), cert. denied, 519 U.S. 891 (1996). In addition, Branch failed to demonstrate that the information presented at the evidentiary hearing that was not elicited at the penalty phase was of

[21] Appellant's aunt, Connie Branch, testified that she "may have seen him drank before – drank a beer, but not anything excessive . . . . PCR.Tr.-III, at 465.

such a nature that trial counsel should have discovered it.[22] That is, no evidence was presented that any family member or appellant himself told counsel that Branch had been abused, physically or sexually, that he had experienced a head trauma, drank heavily since eighth grade, had experienced both strict discipline and a lack of discipline, and that his mother was a heavy drinker. See PCR.Tr.-I, at 72-78. Nor did appellant put into the record any record evidence of what counsel should have obtained that would have alerted him to those facts. Moreover, Branch's family members did testify at the penalty phase to much of what Dr. Dee discussed. Appellant's brother testified to how the brothers grew up separately and that appellant felt abandoned by this father who drank heavily, T.Tr.-VI, at 989-993, while his grandfather testified that appellant had been hit on the head with a bat once, did not receive guidance from his mother or father, and that appellant's father

[22] Branch makes much of the fact that counsel had sought a number of continuances to complete his penalty phase investigation that were denied by the trial court, thereby, according to appellant, demonstrating that counsel did not adequately prepare for the penalty phase. IB at 44-46. What appellant does not discuss, however, is that counsel had hired a mitigation specialist, and while she apparently had requested additional time to complete her investigation, see R.-II, at 335-336, Branch did not present the testimony of this individual, thus failing to establish her efforts and whether and what information she had discovered, or for that matter, what she could have discovered, which would lead to the conclusion that counsel rendered ineffective assistance. Instead, appellant's own evidence established that the mitigation specialist's preliminary investigation had not resulted in anything but that with additional time she could continue to "dig." PCR.Tr.-I, at 149.

had a drinking problem. Id. at VI-997-1000. Further, Branch's postconviction evidence from his aunt, Connie Branch, contradicts Dr. Dee's testimony that appellant's mother drank heavily. Compare PCR.Tr.-I, at 72 with id. at III-469 (appellant's mother drank "on occasions" and she thought she drank while pregnant with appellant). So too does Dr. Dee's testimony as to appellant being "a very impulsive person," id. at I-81, seem at odds with that of appellant's brother that as a kid appellant "seemed normal" to him. T.Tr.-VI, at 994.

Similarly, having failed to present any credible evidence that there actually is an individual named Eric St. Pierre and that he was involved in the murder of Susan Morris, counsel cannot be held ineffective for failing to present evidence of the mitigator of substantial domination by another.

Appellant also ignores the fact that he previously had been examined by a mental health expert. Branch made no showing that Dr. Larson, the psychologist retained pre-trial to evaluate defendant, was not qualified. Moreover, trial counsel was aware of that examination and Dr. Larson's conclusions which were quite damaging, including that appellant had Anti-Social Personality Disorder. PCR.Tr.-I, at 109. On this point, Dr. Larson testified as follows:

> Q. Okay. So you just talked to the attorneys, submitted some battery of tests to the defendant, and that's what your report was based upon?

A. Right.

Q. Anything that set off whistle bells to the defense attorney or any reports suggesting there's a major problem here?

A. From a defense point of view, the major problem is a lot of antisocial personality disorder, a long history of criminal conduct and blatant disregard for other people's rights, and a person who doesn't conform his values to the conduct -- to the requirements of the law, sometimes referred to as a criminal personality.

PCR.Tr.-I, at 109. And appellant's own psychological expert, Dr. Dee, concluded that appellant exhibited symptoms of antisocial personality disorder, as well as borderline and histrionic personality disorders. Id. at I-88. Branch made no showing how those disorders, or at least the features of them, would have mitigated against a death sentence.

Based upon the foregoing, the claim should be denied. Accord Reed v. State, 875 So. 2d 415, 437 (Fla.), cert. denied, 125 S.Ct. 481 (2004).

III.

THE POSTCONVICTION MOTION COURT PROPERLY HELD THAT TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BASED UPON HIS DECISION TO NOT PRESENT THE TESTIMONY OF EXPERT WITNESSES BASED UPON HIS REVIEW OF THE EVIDENCE INCLUDING THE DEPOSITIONS OF THE STATE'S EXPERTS, IN CONJUNCTION WITH HIS STRATEGY TO RETAIN OPENING AND CLOSING ARGUMENTS.

Before the trial court, Branch argued that counsel was ineffective for not hiring a pathologist and a blood splatter expert. PCR.R.-V, at 896-901. On appeal, Branch begins with the supposition that trial counsel must hire his own experts to determine whether (1) he need present the testimony of defense experts, (2) the State's experts' testimony supports the defense theory of the case, and (3) counsel can effectively cross-examine the State's witnesses. See IB at 55. Appellant attempts to equate counsel's performance to that in Williams v. State, 507 So. 2d 1122 (Fla. 5th DCA 1987), IB at 56, where the record reflected in that case

> virtually no pretrial investigation and a determination to present no witnesses at trial, all in the name of preserving rebuttal during closing argument. Trial counsel even advised Williams not to testify, which would have meant the state's version of events was uncontradicted. Trial counsel also declined to depose the alleged rape victims prior to trial, ostensibly in order to retain a tactical surprise examination."

Id. at 1123. Appellant's reliance on Williams ignores the facts of this case: that trial

counsel here had the depositions of the State's experts to review and did so, as well as having done research, and on that basis determined that he could effectively cross-examine the State's witnesses. PCR.Tr.-I, at 142; Id. at II-232.

Pathologist

In respect to Branch's claim of ineffectiveness for not hiring a pathologist, appellant argued below that had

> [t]rial counsel retained an expert in the field of forensic pathology, he would have learned of evidence that the unique circumstances in this case surrounding the twig and how it came to be lodged within the vagina of Ms. Morris' body were consistent with the body having been dragged by the feet, and thus, occurring as the result of unintentional and incidental occurrence. Had trial counsel investigated and consulted an expert, he would have also learned that drag marks on the body corroborate the fact that the body was dragged and are consistent with the body having been dragged by the feet. Furthermore, an expert could have affirmatively demonstrated how, based upon the evidence at the scene, it is possible that the twig lodged within the vagina while similar sized trigs and foliage were pushed in and around Ms. Morris' body when she was buried. . . .
>
> Had counsel obtained an independent pathologist or even inquired of Dr. Cumberland on cross-examination it would have been established that: (1) the wound on Mr. Branch's hand occurred after the alleged offense, due to the healing condition at the time of the photographs, or (2) Mr. Branch's wound could not have been acquired while beating Susan Morris because the wound would have bled and would have left DNA evidence upon Susan Morris. . . .

PCR.R.-V, at 898, 899.

In rejecting this allegation of ineffectiveness, the lower court first looked at

the deficient performance prong, stating as follows:

> Regarding the forensic pathologist, testimony was taken at the evidentiary hearing from Dr. Jack Daniel, a forensic pathologist. Dr. Daniel opined that the two-inch "stick" or "twig" found in the victim's vagina was inserted postmortem. He based his opinion "the absence of any injuries that would indicate otherwise . . . Combined with the circumstances under which the body was found, specifically that it was found in a position and with materials on and about the body that were similar to that that was found inside."[9] To form his opinion he relied on the autopsy reports, photographs and video of the crime scene, and Dr. Cumberland's sworn testimony throughout the proceedings. On cross-examination, Dr. Daniel admitted that he could not rule out the possibility that the object could have arrived in the vagina pre-mortem. He also acknowledged that there were some injuries around the fourchette region and even some discoloration inside the vagina. Dr. Daniel did not feel that the autopsy report provided a sufficient basis to support the opinions of Dr. Cumberland during the trial. However, he could not disprove those opinions.
>
> Further, Dr. Daniel could not form an opinion on the injury suffered to the Defendant's hand. Regarding the ligature, Dr. Daniel disagreed with Dr. Cumberland's opinion at trial that the ligature was not the cause of death. Dr. Daniel also disagreed with the State's expert that fractures were present on the victim's voice box.
>
> The forensic pathologist that testified at trial, Dr. Gary Dean Cumberland, also testified at the evidentiary hearing. Dr. Cumberland testified that it was obviously better to examine the body personally as opposed to reviewing autopsy photographs. He also testified that he felt that he could have done a better job on the autopsy reports, on which the opinions of Dr. Daniel were based.
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> * * * * *

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[9] Evidentiary hearing transcripts, p. 342.

> Likewise, the Court finds the testimony of the Defense's forensic pathologist unpersuasive. In his post-hearing memorandum, the Defendant asserts several specific instances where he alleges counsel's cross-examination was deficient. First, he contends that trial counsel did not adequately follow up Dr. Cumberland's statement that placement of the stick inside the victim's vagina was consistent with it being forced there, but "there are some things that would go against that" assertion. However, the forcefulness of penetration of an object is not an element of sexual battery *per se*-although it is used to determine the level of the offense. . . .
>
> Next, the Defendant asserts that a forensic pathologist could have rebutted Dr. Cumberland's opinion that the stick was inserted pre-mortem. The Defendant bases this allegation on his expert's opinion that the body was found nude with debris piled upon it after having been dragged a short distance. Trial counsel did attempt to elicit testimony similar to Dr. Daniel's opinion during the cross-examination of Dr. Cumberland. However, Dr. Cumberland continued to opine that the debris and body movement was unlikely to have caused the stick to become lodged in the victim's vagina.[15] Thus, without calling an expert witness (causing the defense to lose the tactical advantage of first and last closing arguments) counsel could not have elicited any further favorable testimony regarding this circumstance. The Court cannot disagree with Mr. Allbritton's conclusion that any advantage gained from such testimony was outweighed by the tactical loss in closing argument.
>
> * * * * *

PCR.R.-IX, at 1599-1600, 1602 (internal citations omitted).

Appellant apparently believes that to establish ineffectiveness of counsel it is sufficient to present an expert that disagrees with some conclusions made by the State's witness. That is not the standard under Strickland. Branch also argues that

there were instances that trial counsel did not ask additional questions of Dr. Cumberland, IB at 58, 60, but ignores that his own expert could not testify conclusively that the State's expert's opinions were unsupported by the evidence. PCR.Tr.-II, at 358, 370-371. And significantly, Branch ignores trial counsel's cross-examination of Dr. Cumberland where the State's expert admitted that the injuries to the victim's vagina were consistent with contact by a non-sharp object, including for example, an erect penis, a piece of pipe, a broom handle, T.Tr.-IV, at 744, and up to "12 to 18 hours" preceding the victim's death. Id. at 745. Thus trial counsel was able to use Dr. Cumberland's injury testimony to emphasize that the bruises were inconsistent with the stick that was found and minimizing the portion "unless it had been hit in the same area multiple times." See id. at 744-745. Finally, Branch ignores that his own expert could not rule out the State's theory. While Dr. Daniel disagreed with Dr. Cumberland's trial testimony that the stick became inserted in the victim's vagina pre-mortem and forcibly inserted, based upon his characterization of the bruising, PCR.Tr.-II, at 346, during cross-examination he testified as follows:

> Q. I believe he indicated that – well, let me just ask you, did you rule out that it was possible that that stick could have been lodged in the vagina premortem?
>
> A. Did I rule it out?

Q. Yes.

A. No, I didn't rule it out entirely.

Q. So it is possible that it could have been inserted in there prior to death?

A. It may have been inserted in there, but I wouldn't accept the scenario that it was forcefully inserted in there.

Q. Okay. Well, that's two different things.

A. Yes, sir, it is.

Q. So we are dealing with – but I'm just dealing with is it possible that that could have been placed, whether forcefully or not, in the vagina where it was ultimately found prior to death?

A. Yes, it might have been.

* * * * *

Q. (By Mr. Pitre) Could you rule out, based on what you view as the lack of apparent injury, I understand you can rule out or basically are opining that it was not forcefully placed in there, can you rule out that it was intentionally placed in the vaginal vault?

A. I can't exclude that out of hand, no, sir.

* * * * *

PCR.Tr.-II, at 358-359, 370-371.

Appellant's argument amounts to this: the Court should hold counsel ineffective based upon an unsuccessful attempt to use the State's own expert to

raise doubt as to whether the victim was sexually assaulted at the time Branch had abducted her, notwithstanding appellant's own failure to successfully impeach the State's witness with his own. And to the extent that Dr. Daniel may have cast some doubt on Dr. Cumberland's conclusions, the argument "is essentially a hindsight analysis. 'The standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result.' *Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995).*" Brown v. State, 846 So. 2d 1114, 1121 (Fla. 2003). And lastly, in respect to his argument that "[o]nly through another pathologist could doubt have been cast upon the elements of sexual battery," IB at 63, Branch seeks a per se rule of constitutional error and presupposes that cross-examination is inherently ineffective. Appellant cites no authority to support any such notion.

Blood splatter expert

In respect to Branch's claim of ineffectiveness for not hiring a blood splatter expert, appellant argued below that "[h]ad trial counsel done so, he would have known, and thus been able to present expert evidence that in fact, the scenario that Mr. Branch testified to as to how the specks of blood came to be on the boots, was consistent with Ms. Johnson's findings." PCR.R.-V, at 900.

During trial the State presented the testimony of Jan Johnson, with the Florida

Department of Law Enforcement. T.Tr.-III, at 541-542. Ms. Johnson testified that the blood splatter evidence supported a conclusion that it was the result of a beating and that the victim was on the ground and the person "wearing the boots was actually straddling the victim when the bloodshed was occurring." Id. at III-546. Such testimony was consistent in part with appellant's later trial testimony that he was straddling the victim immediately after she was hit as he dropped her from the force of the blow by the "other Eric." Id. at V-804, 833. Ms. Johnson denied, however, that the blood splatter could have been the result of "slinging blood." Id. at III-550. Appellant's expert, on the other hand, testified that there were alternative explanations for the blood splatter patterns on appellant's boots, including "aspirated" blood. PCR.Tr.-III, at 402-403, 405. Significantly, however, he also admitted that the State's expert's conclusion was "possible." Id. at III-403. Thus appellant's argument that "Ms. Johnson's conclusion was speculative at best," IB at 68, is simply incorrect. Once again, then, Branch seeks to hold counsel ineffective for failing to present an expert that, though disagreeing in part with the State's expert, could not conclusively dispute the portion of the evidence that was not favorable to the defense, and where a portion of the State's expert opinion was consistent with Branch's account.

Based upon the foregoing, Argument III should be denied.

IV.

THE CLAIM THAT APPELLANT'S INDIANA CONVICTION WAS NOT A FELONY UNDER FLORIDA LAW WAS IMPROPERLY RAISED BELOW AS IT SHOULD HAVE BEEN RAISED ON DIRECT APPEAL, CONSTITUTES A FELONY UNDER FLORIDA LAW, AND IRRESPECTIVE RESENTENCING IS NOT WARRANTED IN LIGHT OF THE TWO OTHER AGGRAVATING CIRCUMSTANCES.

Appellant argues that the trial court erred in finding that his Indiana conviction established the prior violent felony aggravating circumstance, on the basis that the foreign conviction was not a felony under Florida law. IB at 69.

Branch neither objected at trial and failed to present the issue on direct appeal that the foreign judgment was not a felony under Florida law thereby constituting a nonstatutory aggravator, and is now procedurally barred from doing so in this collateral proceeding. See Porter, 788 So. 2d at 921, 921 n.6 (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). Instead, on direct appeal Branch challenged the aggravator as to whether it involv[ed] the use or threat of violence . . . ." § 921.141(5)(b), Florida Statutes. See Branch's "Initial Brief Of Appellant," Issue VIII, at 55-57, filed in Branch v. State, No. 83,805 (Fla.).[23] In

[23] To avoid this procedural default, appellant has also filed a habeas petition asserting that direct appeal counsel was ineffective for failing to raise the issue as Branch has done on postconviction review. Petition, at 11-18; see IB at 69 n.6.

answer to appellant's challenge on direct appeal, this Court stated that "[t]he remainder of Branch's claims are without merit . . . ." Branch, 685 So. 2d at 1253.

In rejecting relief on the claim as raised, the trial court stated the following:

> The Defendant concedes that trial counsel vehemently argued that the prior Indiana conviction did not qualify as a *violent* felony in Florida. However, the Defendant now claims the counsel should have argued that the Indiana conviction did not constitute a *felony* in Florida. The Defendant bases this claim on the subsequently decided Branch v. State, 671 So.2d 221 (Fla. 1st DCA 1996), where it was held that the Indiana conviction in question did not qualify the Defendant to a sentence enhancement under Habitual Violent Felony Offender statute.
>
> However, the Court finds the Defendant's argument unpersuasive. The Court agrees with the State's position that the decision in Carpenter v. State, 785 So.2d 1182 (Fla. 2001), distinguishes between the Fla. Stat. §921.154(5)(b) statutory aggravator and enhancements to noncapital criminal sentences. Therefore, the decision in Branch v. State, 671 So.2d 221 (Fla. 1st DCA 1996), has no applicable effect to the instant case. The Court further notes that the conviction is considered a felony in Indiana.
>
> As such, this Court finds the Defendant's contention that the Indiana statute for "sexual battery" would not constitute a felony in Florida specious at best. Since the Court previously determined in the sentencing order that the Indiana conviction satisfied this statutory aggravator beyond a reasonable doubt, and the Defendant has been unable to provide a persuasive argument to the contrary, this claim is denied.

PCR.R.-IX, at 1614-1615 (emphasis in original).

Now on appeal, appellant first argues that the lower court did not properly

apply this Court's decision in Carpenter v. State, 785 So. 2d 1182 (Fla. 2001), as "[t]he language in Carpenter, Id., is clear regarding a prior violent felony aggravator under Section 921.141(5)(b)." IB at 71. The State agrees with that general proposition, but disputes appellant's contention that the basis for his challenge to the aggravator in this case being a felony under Florida law was not his reliance upon Branch v. State, 671 So. 2d 224 (Fla. 1st DCA 1996), wherein the court there was presented with the issue whether the Indiana conviction for sexual battery constituted a qualifying felony under Florida law for purposes of the "habitual violent felony offender" statute. Id. at 224. While Branch argues before this Court that he "certainly relies on Branch, Id., the Appellant also relied on Carpenter as well as other authorities cited in Appellant's 2nd amended 3.850 Motion," IB at 70, review of that motion reflects, in pertinent part, the following argument:

> In fact, the Florida District Court of Appeal for the First District ruled that this Indiana prior offense did not qualify as a predicate violent felony for purposes of violent habitual offender status:
>
> > Our review of the statutes in question leads us to the conclusions that the crime of sexual battery in Florida is not analogous to the crime of sexual battery in Indiana for purposes of the habitual violent felony sentencing. Each crime requires elements that the other does not.[fn1: Indiana has a separate crime of "Rape." *Ind.Code Sec. 35-42-41.] See, e.g., Dautel v. State, 658 So.2d 88 (Fla. 1995); Forehand v. State, 537 SO.2d 103 (Fla. 1989).*

* * * * *

> In determining whether a conviction of a crime in another state qualifies as a prior violent felony for purposes of aggravation in a death penalty case, the court should look to the First District Court of Appeals decision in Mr. Branch's other case cited above (Branch v. State, 671 So2d 224 (Fla. 1st DCA 1996)) and cases addressing similar issues such as Dautel v. State, 658 So. 2d 88, 89 (Fla. 1995) and Forehand v. State, 537 So. 2d 103 (Fla. 1989).

PCR.R.-V, at 934, 936. Though the State also agrees that the elements of the crime are relevant, there simply was no reason to recite the district court of appeals' determination if in fact appellant had not relied upon Branch v. State, 671 So. 2d 224 (Fla. 1st DCA 1996) for the proposition that the issue has been decided.

Thus while the Court will compare the elements of the foreign crime to that of Florida law, Carpenter, 785 So. 2d at 1205, that does not end the inquiry as appellant argues. IB at 71. 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, 883 So. 2d at 794 (internal citation and quotation marks omitted), such consideration of appellant'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 defendant had in fact committed a felony.[24]

Branch was charged with five counts, including Rape, Child Molestation, Criminal Deviate Conduct, Battery, and Sexual Battery, and the underlying conduct involved him using physical force to have sexual intercourse with a fourteen-year-old girl. R.-III, at 359-361; see also R.-III, at 363-364. The fact that appellant was

[24] 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 -- did not take account of the difference between the use of a foreign conviction to calculate points for a sentencing guidelines score sheet versus the goal of achieving particularized sentencing in 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

permitted to plead only to the latter offense 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).[25] 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 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

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is, the surrounding facts to the prior violent felony give meaning to the aggravator.

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

corrected, reasonably could have resulted in a lesser sentence."). Appellant does not address this point, arguing simply that the "[t]rial court committed reversible error when it found that the Indiana offense is a felony." IB at 76.

Here, the trial court found two other significant aggravators: the murder was committed in the course of a sexual battery (and which the jury had found beyond a reasonable doubt that defendant committed, R-II, at 319), R.-III, at 449-450, and was especially heinous, atrocious, or cruel. R.-III, at 451-452.[26] And mitigating evidence was marginal: the lower court rejected appellant's two statutory mitigators, concluding that his age and that he was an accomplice and his participation was relatively minor were not mitigating factors in this case. R.-III, at 452. As for nonstatutory mitigating factors, the trial court gave some weight to appellant'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, as discussed under Argument II, adds little more than previously presented, supra, at 42, 44-53,

[26] The State also notes that evidence presented at the evidentiary hearing -- i.e., the testimony of appellant's victim from the Bay County, Florida, sexual assault for which he was convicted of sexual battery in the fall of 1994, PCR.Tr.-III, at 451-453 -- established that defendant 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.

and opens the door to evidence that typically does more harm than good – i.e., antisocial personality disorder (see supra, at 54). 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*. . . . [A]ntisocial 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) (failure to present mental health expert which would have included antisocial personality disorder diagnosis not ineffective).

Thus to the extent that the Indiana conviction constitutes an improper aggravator, the error was harmless in light of 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 aggravator. And upon resentencing the State would establish appellant's prior violent felony arising from his sexual assault conviction in Bay County, Florida. See also supra, at 67 n.24. Accord Armstrong v. State, 642 So. 2d 730, 738-739 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995); 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.").

Argument IV should be denied.

V.

THE POSTCONVICTION MOTION COURT PROPERLY REJECTED APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT OBJECTING TO THE ADMISSIBILITY OF THE ABSTRACT OF JUDGMENT; IN ADDITION TO FAILING TO SHOW PREJUDICE, THE CLAIM WAS PROCEDURALLY DEFAULTED.

Appellant argues that the trial court erroneously denied his claim that counsel was ineffective for failing to object to the introduction at sentencing of the Abstract Of Judgment. IB at 78. According to Branch, "[h]ad trial counsel objected, the jury would not have been permitted to consider the prior violent felony aggravator." Id.

The lower court denied relief as follows:

> . . . . A review of the record indicates that Mr. Allbritton did not object to the abstract on the grounds that it was inadmissible under Sinkfield [v. State, 592 So.2d 322 (Fla. 1st DCA 1992)]. However, the holding in Sinkfield is distinguishable and does not permit relief in the instant case. In Sinkfield, trial counsel also failed to object to the admissibility of an abstract, but chose instead to move for acquittal on the basis that the State had failed to meet its burden to prove that the individual named in the abstract was the same as the defendant in the case. The District Court held that the State must provide more information than a similar name to establish that the crime represented in foreign abstract involved the defendant. In the instant case, such information was eventually provided. At the sentencing hearing-where trial counsel could have still moved to either strike that aggravator or for a new penalty phase-the State effectively precluded any further argument by submitting further documentation regarding the Indiana conviction. That documentation contained the Defendant's name,

> race, gender, date of birth, social security number, height, weight, hair color, eye color, and former address. Therefore, the Court finds the Defendant's claim that counsel should have objected to the abstract under Sinkfield is entirely without merit.

PCR.R.-IX, at 1611.

First, the State notes that appellant did not challenge the admissibility of the abstract at trial nor raise the issue on direct appeal.[27] Thus any incidental allegation of ineffective assistance of counsel is insufficient to overcome the procedural bar. See Stewart, 801 So. 2d at 64 n.6 (claim of "overbroad prosecutorial argument on aggravating circumstances and *ineffectiveness of counsel for failing to object to the same*" held procedurally defaulted as not raised on direct appeal) (emphasis added).

Secondly, petitioner's reliance upon Sinkfield v. State, 592 So. 2d 322 (Fla. 1st DCA 1992), IB at 78, is misplaced. 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

[27] Appellant also raises the present claim in his habeas petition in the event that this Court holds that the claim of ineffectiveness as to trial counsel is procedurally barred. See Petition, at 8-11. While not specifically addressed in his initial brief but argued in his habeas petition, at 9, the State's argument that the claim could have been raised on appeal was not a concession that the issue was preserved, but a recognition that is was defaulted. PCR.R.-VIII, at 1488.

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, 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 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 v. State, 615 So. 2d 688, 691 (Fla. 1993). 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, id., 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 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. [28]

Based upon the foregoing, petitioner's Argument V should be denied.

[28] See also supra, at 67 n.24.

VI.

THE POSTCONVICTION MOTION COURT PROPERLY HELD THAT TRIAL COUNSEL'S DECISION NOT TO IMPEACH STATE WITNESSES MELISSA COWDEN AND JOSHUA FLAUM WAS BASED UPON REASONABLE TRIAL STRATEGY AND THUS DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

Branch contends that counsel's failure to impeach State witnesses Melissa Cowden and Joshua Flaum constituted ineffective assistance. IB at 79-83.

In rejecting this claim, the trial court stated the following:

> The Defendant next alleges that counsel performed deficiently when he failed to properly impeach Melissa Cowden and Joshua Flaum. At the evidentiary hearing, trial counsel testified that he felt that the impeachment proposed in this allegation was relatively unimportant. Counsel feared that if he had vigorously impeached upon these issues that he could "lose the jury."[18] Counsel's actions and omissions clearly constituted a reasonable trial strategy, and therefore cannot be ineffective assistance of counsel. *See* Engel v. Dagger, 576 So.2d 696 (Fla. 1991) (limiting cross-examination so as to not inflame the jury can constitute a reasonable trial tactic).
>
> [18] Evidentiary hearing transcripts, pgs. 164-165.
>
> * * * * *

PCR.R.-IX, at 1605.

Branch first addresses counsel's failure to impeach Melissa Cowden based upon the differences between her depositional testimony and that at trial. IB at 81-

82. While appellant sets forth what he believes are matters that counsel should have cross-examined Ms. Cowden over, he offers nothing more than his conclusory statement that "[t]rial counsel's failure to impeach witnesses that had changed their testimony at trial amounts to deficient performance and prejudiced Appellant by implying the State's witnesses' memories were reliable. . . ." IB at 82-83 (internal citation omitted).

Appellant's contention ignores trial counsel's testimony that he was aware of the differences between Ms. Cowden's deposition and trial testimony, but would not impeach her on matters that he thought were not important because of the effect that would have on the jury. PCR.Tr.-I, at 164-166; id. at II-238-242; see also id. at I-123 (trial counsel generally would impeach a witness's trial testimony based upon different testimony in a deposition depending "on whether or not it would benefit my client."). In addition, Branch makes no attempt to demonstrate how he could have possibly been prejudiced when he testified at trial as to his involvement with the victim and presence at the crime scene the night that Susan Morris was murdered. Duckett v. State, 2005 Fla. LEXIS 1986 *20-21 (Fla. Oct. 6, 2005).

Similarly, while Branch sets forth what he believes are matters that counsel should have cross-examined Mr. Flaum over, he only states in conclusory fashion that counsel was ineffective for not doing so. IB at 82-83.

While appellant argues that counsel should have impeached Mr. Flaum with his statement to police, IB at 82, no such statement was offered into evidence at the hearing; nor was Mr. Flaum called to testify. And in any event, the fact that a witnesses' initial statement to law enforcement might not include all details of what they observed does not prove the nonexistence of those facts. Moreover, the trial court record reflects that a deposition of Joshua Flaum was filed with the Court on January 10, 1994, after Mr. Allbritton had made his entry of appearance on appellant's behalf, and review of that deposition clearly reflects that Mr. Flaum testified then that he had seen defendant putting something in a smallish car that while he was not "sure" he thought was red. PCR.R.-VII, at 1245. And given Branch's own testimony at trial admitting to having stolen the victim's car, T.Tr.-V, at 847, as well as the fact that his brother and cousin testified that they saw him in a red Toyota, T.Tr.-III, at 565, 575, respectively, he surely cannot establish that he was prejudiced by the lack of impeachment of Mr. Flaum as to whether the vehicle was red or not. Duckett, 2005 Fla. LEXIS 1986 *20-21.

VII.

THE POSTCONVICTION MOTION COURT PROPERLY HELD THAT TRIAL COUNSEL DID NOT PERFORM INEFFECTIVELY CONCERNING HIS INVESTIGATION INTO APPELLANT'S CASE IN RESPECT TO THE GUILT PHASE OF TRIAL, WHERE THE RECORD REFLECTS OTHERWISE AND APPELLANT FAILED TO PRESENT EVIDENCE TO THE CONTRARY AT THE EVIDENTIARY HEARING.

Branch contends that trial counsel was ineffective based upon his failure to investigate in relation to the guilt phase of trial. IB at 83-86.[29]

In rejecting relief on this claim, the court below stated the following:

> Next, the Defendant asserts that counsel failed to th[o]roughly

[29] While Branch also cites various facts pertaining to his grandfather's relationship with the attorney that he hired to represent appellant, IB, at 84-85, the State is unclear of the relevance of those facts upon a claim of failure to investigate. Appellant now apparently seeks to add a claim of conflict of interest, see IB, at 86, but it was not raised below, compare PCR.R.-V, at 886, 890, 891-892, 896, 899, 900, 901, 902, 905, 911, 914, 915, 921, 922, 923, 934, 939, 941, 942, 944, 948, 950, 952, 953, 954, 955, and the claim is not properly before this Court. Gudinas, 816 So. 2d at 1111 n.4; Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988). Moreover, the fact that Branch's grandfather was dissatisfied with retained counsel does not establish a conflict between appellant and counsel. See Brown v. State, 894 So. 2d 137, 157 (Fla. 2004) (to warrant relief upon an alleged conflict of interest, defendant must establish an actual conflict of interest that adversely affected counsel's performance; an actual conflict is one where the attorney actively represents conflicting interests and "to demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests his interests were impaired or compromised *for the benefit of the lawyer or another party*.") (emphasis added). Appellant failed to present any such evidence, and while he references the fact that he and his grandfather had previously complained of counsel's representation, he fails to identify record citations to establish that "his interests were impaired or compromised *for the benefit of the lawyer or another party*." Id.

> investigate his case and properly prepare for trial. However, the Defendant failed to present any substantive evidence at the hearing to support this claim, instead relying on speculation. This is especially significant because the Defendant has had over ten years between the time of his trial and the date the evidentiary hearing to further investigate his case. Yet, the Defendant could not produce one single piece of material evidence which went undiscovered by his trial counsel.
>
> Moreover, the Court finds Mr. Allbritton's testimony as to his hours spent in preparation and the investigation are completely credible and went unrefuted at the hearing. Therefore, the Court further finds that the Defendant's claim that counsel failed to investigate, and was not prepared for, the guilt phase of trial is entirely without merit. . . .

PCR.R.-IX, at 1605-1606.

Consideration of this claim first requires a complete rendition of the surrounding facts. Notwithstanding appellant's implication otherwise, the defense preparation was not limited to a four and one-half month period. Rather, while the indictment was handed down on February 23, 1993, Chief Assistant Public Defender Earl Loveless was appointed to represent appellant when Branch made his first appearance in June, 1993.[30] Mr. Loveless testified at the evidentiary hearing as to his background and experience in handling capital cases. Though he had no specific recollection, he testified that he would have reviewed all discovery in the

[30] Branch left the State of Florida following the murder and was ultimately arrested in Rockport, Indiana. See T.Tr.-IV, at 675. Appellant then was taken into custody by Bay County, Florida authorities, and subsequently, on June 10, 1993, was taken into custody by the Florida Department of Law Enforcement and delivered to

case, that he traveled to Indiana to interview family, friends, and to seek out penalty phase materials, and had arranged for the appointment of a confidential expert, psychologist Dr. Larson. PCR.Tr.-II, at 294-295. Mr. Loveless further testified that he traveled to Bowling Green, Kentucky to investigate, and that his office would have attempted to locate the "Eric" that appellant had implicated. Id. at II-309-311. On November 22, 1993, Mr. Allbritton made his entry of appearance on appellant's behalf. PCR.R.-I, at Progress Docket Printout, p. 7. Mr. Loveless testified that he provided Mr. Allbritton with the defense file and talked to him regarding the case. PCR.Tr.-II, at 312-313. Numerous depositions had been taken by Mr. Loveless and were filed with the trial court. See PCR.R.-I, at Progress Docket Printout, pp. 7-8. Obviously the depositions would have been part of the defense file, and appellant presented no evidence at the evidentiary hearing to reflect otherwise or to demonstrate that trial counsel had not been familiar with or had not availed himself of the depositions.

Mr. Allbritton testified as to his efforts in representing appellant. He obtained the defense file from the public defender and received discovery. PCR.Tr.-I, at 120. Defense counsel testified that he reviewed all discovery, including depositions, id. at I-121-122, and decided not to hire experts. Specifically, Mr. Allbritton

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Escambia County, Florida. See Tr.R.-I, at 4.

elected not to hire a pathologist or a blood splatter expert, as he felt competent to cross-examine the State's witnesses based upon his research he conducted and the depositions taken. Id. at I-142. And because counsel believed that the State's expert's testimony supported the defense theory, he did not want to put on an expert to testify to the same and loss the right to keep opening and closing argument. Id. at II-228, 234-236. Indeed, appellant's pathology expert could not testify that the stick was not forcibly inserted into the victim, id. at II-370, and his blood splatter expert testified that the State's theory was possible. See id. at III-410. Mr. Allbritton also was aware that Branch had previously been examined by a mental health professional hired by the public defender and was familiar with his opinion of a lack of psychiatric problems. Id. at I-143. For that reason he did not seek to hire another psychiatrist. Id. Mr. Allbritton testified that he would not file a motion that lacked legal merit. Id., at II-223-225, 227-228. Counsel also testified that he met with Branch on a number of times, PCR.Tr.-I, at 151-152; id. at II-243-244, notwithstanding Branch's representation that "arguably, he had little contact with Appellant." IB at 85. Branch presented no evidence concerning what counsel did not learn or do based upon the extent of his pretrial contact with appellant.

In respect to Branch's story of another "Eric," trial counsel testified that he did a preliminary investigation and after not being able to locate Eric St. Pierre,

hired Mr. Wimberly. Id., at I-155-157; id. at II-244-246. Trial counsel testified as follows concerning what Mr. Wimberly's investigation turned up:

> Q. And didn't he [Mr. Wimberly] identify to you at that time an individual known as Eric St. Pierre?
>
> A. Now, he – why he put on his bill Eric St. Pierre, I don't know. He identified an individual as the name of Eric. I carried this photograph --
>
> Q. Let me have this back.
>
> A. -- to the county jail, and Mr. Branch could not identify anybody in there as being Eric St. Pierre.
>
> Q. Isn't it true, sir, that your investigator indicated that that person that he believed to be Eric St. Pierre indicated knowing Mr. Branch?
>
> A. No, absolutely not. In fact, the investigator told me that the individual that he thought would be Eric said he didn't know Eric Branch, had no idea who he was, and that would be his testimony. And that's why I did not use that photograph. I did not need for the person that he's claiming to be Eric to get on the witness stand and say he's never seen him before.
>
> Q. And you're saying that Mr. Branch said he did not identify him as being – one of those individuals as being Eric St. Pierre?
>
> A. That's what I just said.
>
> Q. And you're also saying that Mr. Wimberly said the same thing, that he didn't say it was Eric St. Pierre?
>
> A. No, he said that he had found an Eric, if I remember correctly, that drives a red Pontiac or drives a car, some – I don't remember exactly what he said, but the individual said he did not know

Eric Branch.

* * * * *

PCR.Tr.-I, at 158-159.

Notwithstanding the above, Branch appears to argue that the trial court should have been held ineffective based upon the testimony of trial counsel's investigator, Fred Wimberly. IB at 84. Specifically, appellant argues as follows:

> . . . . Mr. Wimberly testified he had submitted a detailed bill (Clerk's docket item #256, filed May 13, 1994) describing the functions he performed in finding Eric St. Pierre, the person who actually killed Ms. Morris, according to Appellant's trial testimony. Mr. Wimberly testified he met with Appellant, who provided him with the addresses and persons to contact in order to find Eric St. Pierre. He further testified that he indeed spoke to Eric St. Pierre on the phone and met with him at an apartment complex and took photographs of him, one of which was introduced as Exhibit E [PC-R. Vol. VIII, p1433]. He also had the impression that Eric St. Pierre knew Appellant and disliked him, but Mr. Wimberly couldn't remember why he had that impression. He testified that on March 7, 1994, the date the trial began, he notified trial counsel that he had found Eric St. Pierre and identified who he was in Exhibit E. He testified that he was not requested to do anything further. The trial court made no mention of Mr. Wimberly's testimony whatsoever in its order.

IB at 84.

Irrespective of appellant's recitation of Fred Wimberly's testimony, the record does not establish the existence of an "Eric St. Pierre," and that he was with appellant in Escambia County, Florida, on January 11, 1993. Mr. Wimberly could

not recall if the "Eric" he found knew appellant, PCR.Tr.-II, at 325, that while he believed so he was not positive, id., and that he had no recollection of what the "other Eric" told him. Id. at II-330. Appellant did not present Mr. St. Pierre at the evidentiary hearing, notwithstanding his present investigator's representation that this "other Eric" was believed to be in Windham, Maine. Id. at III-440-441, 444. In addition, appellant does not address the fact that while he was represented by the public defender's office, they were aware of appellant's "other Eric" version, would have considered it important to find the "other Eric," yet it was believed that Eric St. Pierre was not located. Id. at II-309-311, 315. Finally, and most significant, is the fact that upon being shown the photograph with this "other Eric," appellant himself was unable to identify him. Id. at I-158; id. at II-269, 271-272. Appellant did not testify at the evidentiary hearing and thus has not refuted that evidence. It also bears noting that at the evidentiary hearing Branch did not present the flier or any other evidence establishing the existence of the "other Eric" though promised in his second amended motion. Compare PCR.R.-V, at 908-909.

Based upon the foregoing, Argument VII should be denied.

VIII.

THE POSTCONVICTION MOTION COURT PROPERLY HELD THAT TRIAL COUNSEL'S LACK OF OBJECTIONS TO PORTIONS OF THE PROSECUTOR'S CLOSING ARGUMENT AND A QUESTION TO A WITNESS DURING THE GUILT PHASE OF TRIAL, BASED UPON TRIAL STRATEGY, DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

Branch contends that defense counsel's failure to object to various closing arguments by the prosecutor during the guilt phase of trial rose to the level of ineffective assistance of counsel. IB, at 87. Defendant also argues that the prosecutor requested that a State witness "speculate on an event without a good-faith basis to believe the event occurred." Id. at 87-88.

First, any challenge to the prosecutor's closing argument and to the question of a witness is procedurally defaulted, Moore, 820 So. 2d at 210 n.10; Evans v. State, 808 So. 2d 92, 107 (Fla. 2001), cert. denied, 537 U.S. 951 (2002), as appellant failed to raise such a challenge on direct appeal. Compare Branch, 685 So. 2d at 1252 n.3. Because appellant continues to attempt to circumvent the procedural bar by couching this issue as one of ineffective assistance of counsel, the claim on appeal should be denied. Brown v. State, 755 So. 2d 616, 637 n.7 (Fla. 2000); Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995).

Secondly, Branch fails to establish that trial counsel performed deficiently.

Initially, the State notes that defense counsel testified that, as a matter of trial tactics, he did not object to the statements during the State's closing argument that appellant contends were objectionable, while making objections to what he thought was important, major, substantial. PCR.Tr.-I, at 186-187, 190; id. at II-276-277. Accordingly, no relief is warranted. Zakrzewski, 866 So. 2d at 692-693; Gorby, 819 So. 2d at 678; Muhammad v. State, 426 So. 2d 533, 538 (Fla. 1982) ("Whether to object is a matter of trial tactics which are left to the discretion of the attorney so long as his performance is within the range of what is expected of reasonably competent counsel."), cert. denied, 464 U.S. 865 (1983). That postconviction counsel may disagree with defense counsel's tactics does not negate that trial counsel acted as a matter of strategy or establish that such tactics were not reasonable. Rose, 675 So. 2d at 571; Cherry, 659 So. 2d at 1073.

Next, turning to the arguments at issue, appellant failed to demonstrate that they were improper.

Appellant first argues that the prosecutor, during his examination of the pathologist, "requested the doctor to speculate on an event without a good-faith basis to believe that the event occurred." IB, at 87-88. Specifically, appellant quotes the following:

> MR. PATTERSON: If the soft – the ligature around her neck was not sufficient to cause the strangulation that you saw, from

> the placement of the sock and the injuries relative to it, would it have been sufficient to have been used as a device to control that person?
>
> DR. CUMBERLAND: Yes, it would have been - . . . So based on that and the circumstances of the death, it would be a reasonable interpretation that the sock was used as a means of control where if the person involved was not – did not like the attitude or the direction that the person was going, that sock could be tightened up, which would cause the person to feel their wind being cut off and a constriction around their neck and panic and would be more likely to comply with what the perpetrator would like them to do.

IB, at 88 (quoting T.Tr.-VI, at 954-955).[31]

Branch makes no attempt to demonstrate why the question was improper, compare IB, at 87-88, as he similarly failed to do below. PCR.R.-V, at 915-916, 1546-1547. A conclusory argument that a statement is not proper does not make it so. And contrary to being an improper question, Dr. Cumberland's prior testimony supports the prosecutor's follow-up inquiry, where the pathologist had opined that

> . . . the injuries that I saw was the type of fracture that we commonly see with a compression of the larynx from either side to side or a direct force head on. The sock that was around the neck would have applied a force that was over too broad an area to have resulted in these isolated fractures of both this horseshoe bone that's formed at the base of the tongue, as well as the voice box.
>
> So it would be my opinion that the injuries that I saw internally of the neck to the hyoid bone and to the voice box or larynx were due either to a manual compression where the hands are put on both sides of the neck and the soft tissues are squeezed together resulting in a fracture of the voice box, of the hyoid bone are due to a stomp-type

[31] Appellant erroneously cites the volume number as "V" and the page as 955 only.

> injury to the neck when the head and the neck gives a relatively firm surface like laying on the ground supine or on their back.

T.Tr.-VI, at 954. The factual basis for the prosecutor's question had also arose previously during the guilt phase, when Dr. Cumberland had testified that while the ligature "could have caused the death or attributed to it; however, it would not have been responsible for the injuries of the neck that" he observed. Id. at IV-745. Finally, of most significance and as held by the lower court, appellant cannot establish prejudice, as his own expert at the evidentiary hearing, Dr. Daniel, testified that it was quite possible that the ligature was used to control the victim. PCR.R.-IX, at 1607-1708 & n.21 (citing PCR.Tr.-II, at 355-356).

The three remaining statements that appellant identified below[32] as objectionable arose during the State's guilt phase closing argument. "The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985). As this Court has held, "the rule against inflammatory and abusive argument by a state's attorney is clear, each case must be

[32] Though not raised in his second amended motion brought under Rule 3.850, appellant now cites a different, additional prosecutorial argument to further support his claim. Compare PCR.R.-V, at 915-920 with IB at 90 (quoting T.Tr.-VI, at 1014). Having failed to raise the specific allegation of ineffective assistance for failing to object to that argument before the trial court, the issue is not properly before this Court. Gudinas, 816 So. 2d at 1111 n.4; Doyle, 526 So. 2d at 911.

considered upon its own merits and within the circumstances pertaining when the questionable statements were made." Muehleman v. State, 503 So. 2d 310, 317 (Fla.) (internal citations and quotation marks omitted), cert. denied, 484 U.S. 882 (1987). Moreover, "[w]ide latitude is permitted in arguing to a jury . . . [and] logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." Bonifay v. State, 680 So. 2d 413, 418 (Fla. 1996) (internal citation and quotation marks omitted). Closing argument may not, however, "be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Bertolotti, 476 So. 2d at 134.

Appellant argues that the prosecutor "improperly invoked sympathy for the victim during closing argument . . . . ," citing his reference to her as "this poor girl" and "look at what happened to that poor girl." IB, at 88.

Reviewing the arguments in context, it becomes apparent that appellant's objection must be to the word "poor," as the prosecutor otherwise properly argued the viciousness of the circumstances of the murder in furtherance of the charge of first degree murder:

> Do not be confused by the jury instructions or the argument. Third-degree murder is not what happened in this case. Second-degree murder, the killing by doing an act that's imminently dangerous, evincing a depraved mind regardless of human life, that's not what

> happened. This was a cold, vicious, premeditated murder and the purpose of the murder was sexual battery. *All you have to do is look at what happened to that poor girl to know what the intent was.* She's found completely nude. This wasn't a car theft.
>
> She's found completely nude, beaten, with a stick up her. Now, why is she like that? Because the intent -- the purpose of attacking her, the purpose of the defendant attacking her, was not her car. That was a secondary thought. That was a benny. That was a gee, I'll take her car, too. The purpose in him attacking her was to do that, was to take her into the woods, overpower her, do unspeakable things to her and leave her for dead.
>
> First-degree murder can be committed in one of two ways: premeditated murder, and that is murder when the person who does the killing has in his mind the intent to murder at the time of the killing. The law does not affix any specific period of time that must pass. In other words, premeditated murder does not have to have a drawn-out plan or scheme or last for weeks. *It simply means that you must have time to reflect in your own mind when you are kicking and hitting and choking this poor girl that you know what you're doing is going to kill her.* That's premeditated murder.
>
> * * * * *

T.Tr.-V, at 892-894 (emphasis added). To the extent that the use of the word "poor" was improper, trial counsel testified during the evidentiary hearing, as found by the court below, PCR.R.-IX, at 1608-1609, that he confronted the issue of sympathy directly, rather than objecting to the two minor references. See PCR.Tr.-II, at 251-253. In fact, review of defense counsel's closing argument reflects that he did address the sympathy factor head-on in his initial closing argument, before

the prosecutor's closing:

> What we have, ladies and gentlemen, is a case in which a young lady, Susan Morris, is dead. There is no question that somebody on January the 11th, 1993, killed Susan Morris, a young lady with a lot of promise, a young lady that's a student. And quite frankly, it's a situation that probably invokes sympathy in all of us, but unfortunately, that sympathy cannot come into play in your decision.
>
> One of the difficulties of being a juror is the fact that you have to put those things out of your mind and you have to end up being what I call the cold, hard triers of the facts, because the only thin you can consider is the evidence that was presented here in this courtroom. I do expect the Judge to tell you when he gives you the instructions that sympathy, bias, prejudice, your feelings toward any individual, whether it be sympathy or anger, cannot come into play in your obligation, your solemn obligation as jurors.

T.Tr.-V, at 880-881. Appellant has made no showing that trial counsel's strategy was unreasonable under the circumstances of the case, including the brutality of the murder, that the victim was a young female college student, appellant's admitted involvement in the crime, and counsel's concern with antagonizing the jury. Appellant fails to explain how the fact that trial counsel sought pretrial to exclude comments intended to elicit sympathy somehow renders counsel's trial strategy unreasonable. Compare IB at 89. Finally, while appellant argues that "[t]rial counsel agreed that many of the comments by the prosecutor could only be characterized as gaining sympathy of the jury," id. at 90, he fails to cite to the record in support of his assertion, and before the court below only identified two

such instances himself for the proposition that prosecutor's argument was for that improper purpose. PCR.R.-V, at 918; see also id. at IX-1547.

Branch next argues that trial counsel was ineffective for failing "to object to the prosecutor's improper bolstering of the testimony of Melissa Cowden and improper vouching for her credibility." IB at 89. He quotes the following argument:

> You had an opportunity to see Melissa Cowden testify, to be careful to tell you the truth regarding what she saw and she heard. She held nothing back. I'm sure her testimony was embarrassing for her with regard to some aspects of it but she told the truth. The Eric that killed Susan Morris had a cut on his hand [sic]

Id. (quoting T.Tr.-V, at 889). Once again, appellant made no attempt to demonstrate how he was prejudiced by the lack of objection. Compare IB at 89.

Trial counsel testified at the evidentiary hearing that there were a number of things that Ms. Cowden testified to that supported appellant's defense:

> A. Yeah, as a matter of fact her testimony basically supported his time line, which is what I was interested in. It also gets to the point that you don't want to completely tear down her credibility because I'm relying on her for certain aspects of support for my client's case.

PCR.Tr.-II, at 265. Thus to the extent that the prosecutor's argument was improper,[33] an objection by the defense would have been contrary to his trial

[33] The trial court indicated that it found during the hearing that the prosecutor's

strategy – i.e., both to not destroy the helpful aspects of her testimony and to not alienate the jury. And to the extent that Ms. Cowden's testimony was not helpful to the defense, trial counsel attacked it on rebuttal:

> You know, Mr. Patterson talks about Melissa Cowden's testimony. Well, I would suggest to you that there are some things that Melissa probably had added to her story: the cut on the hand, the fight, the torn pants. Where are the torn pants? What happened to the torn pants? She indicated that Eric had on those black-and-white-check shorts. And where are those shorts? They're in evidence. They may be torn now when you look at them because FDLE has cut them up. Remember, they told you they took spots all out of them. But where were the FDLE people to tell you that when we took those shorts from Eric Branch, they were torn? There was no torn pants.
>
> Could it be, and I submit to you, that Melissa feels that Eric did this? She's embarrassed because he's on campus with her. Remember, she's still out at the University of West Florida where Susan Morris was a student. Do you feel that she'll say what is necessary to help the police so that she'll feel less guilty, that she's got no responsibility or she may have some guilt feelings that she may be responsible for Susan's death, especially if she truly believes that Eric did it? There was no cut on his hands.
>
> * * * * *

T.Tr.-V, at 900-901.

Finally, appellant argues that counsel was ineffective for not objecting to the prosecutor's argument that Branch "has a car that he's been driving around for

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argument was not improper. PCR.R.-IX, at 1609. Counsel, of course, will not be held ineffective for failing to make a nonmeritorious objection. See Jones v. State, 845 So. 2d 55, 70 n.29 (Fla. 2003).

some time ***that he basically stole***, but he wants to steal another now." IB at 89 (quoting T.Tr.-V, at 889) (emphasis added by appellant).

While appellant contends that the argument was not supported by the evidence at trial, he is mistaken. As the trial court found in rejecting the claim,

> evidence was introduced at trial through the testimony of Officer Steven C. Harbuck that the Bonneville was reported missing by the Branch family, but a "stolen car report" was not issued at the request of Ms. Branch.[23] From that testimony, the Prosecutor does not argue that Defendant actually stole the Bonneville, but that he did act in a way that was akin to stealing it-a reasonable inference in light of Officer Harbuck's unrefuted testimony. Moreover, Mr. Allbritton testified at the evidentiary hearing[24] that he felt the comment was not worthy of an objection. . . .
>
> _____
>
> [23] Trial transcripts, pgs. 581,583.
>
> [24] Evidentiary hearing transcripts, pgs. 253-254.

PCR.R.-IX, at 1609. Trial counsel testified at the evidentiary hearing that he did not object because he believed the evidence supported the argument. PCR.Tr.-III, at 289. In any event, given appellant's admission that he stole the victim's car, T.Tr.-V, at 847, that he was on the run and that his family did not know he had taken the Bonneville, id. at V-828-829, of his prior record of three felony convictions, id. at V-849-850, as well as the physical evidence surrounding the victim's death,

appellant cannot not demonstrate Strickland prejudice.

Based upon the foregoing discussion, the postconviction motion court properly rejected these claims of ineffective assistance of counsel, and Argument VIII should be denied.

IX.

THE POSTCONVICTION MOTION COURT PROPERLY REJECTED THE CLAIM OF "CUMULATIVE ERROR" IN THE ABSENSE OF ANY INDIVIDUAL ERRORS.

The trial court rejected appellant's claim of "cumulative error" on the basis that it had failed to find any individual error. PCR.R.-IX, at 1615. That result is entirely consistent with this Court's prior determinations of the same claim. See, e.g., Mansfield v. State, 2005 Fla. LEXIS 1453 *10 n.6 (Fla. Jul. 7, 2005) (lack of any individual error defeats claim of cumulative error, citing Griffin v. State, 866 So. 2d 1, 22 (Fla. 2003), cert. denied, 125 S.Ct. 413 (2004)); Rodriguez, 2005 Fla. LEXIS 1169 *65-66 (same); Bryant v. State, 901 So. 2d 810, 820 n.6 (Fla. 2005) (same). While acknowledging the foregoing rule of law, see IB at 92, appellant disagrees with the determination of a lack of individual error. Id. at 92-94. As discussed supra, under Arguments I-VIII, however, the alleged instances of ineffective assistance of trial counsel and other errors are individually without merit and there simply is no basis for a determination of cumulative error there from.

Appellant also relies upon inapposite precedent. While citing direct appeal decisions requiring reversal based upon "cumulative error," IB at 91-92 (citing Jones v. State, 569 So. 2d 1234 (Fla. 1990); Nowitzke v. State, 572 So. 2d 1346

(Fla. 1990); Jackson v. State, 575 So. 2d 181 (Fla. 1991); Ellis v. State, 622 So. 2d 991 (Fla. 1993); and Taylor v. State, 640 So. 2d 1127 (Fla. 4th DCA 1994)), appellant ignores the fact that this Court affirmed his judgment of conviction and sentences on direct appeal, *without any finding of individual error*. Branch, 685 So. 2d at 1252-1253. Once again, then, cumulative error is not relevant under the circumstances of this case.

Argument IX should therefore be denied.

CONCLUSION

Based on the foregoing arguments and authorities, the lower court's Order denying appellant's motion for postconviction relief under Rules 3.850/3.851 should be affirmed.

Respectfully submitted,

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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).

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