IN THE SUPREME COURT OF FLORIDA

GLEN EDWARD ROGERS,

Appellant,

v. Case No. SC05-732

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

A. Trial Stage

On December 13, 1995, the Grand Jury of Hillsborough County indicted Glen Edward Rogers and charged him with first degree murder, robbery with a weapon, and grand theft of a motor vehicle. (DAR V1:32-34).[1] After his original counsel withdrew, the trial court appointed Nick Sinardi to represent Rogers. (DAR V1:55-57; 61). The court subsequently appointed Robert Fraser as penalty phase counsel. (DAR V1:84). The case proceeded to a jury trial presided over by the Honorable Judge Diana Allen.

The facts of the case are recited in this Court's opinion on the direct appeal of Rogers' convictions and sentences, Rogers v. State, 783 So. 2d 980, 985-87 (Fla. 2001) (footnote omitted):

> Rogers was convicted of first-degree murder, armed robbery, and grand theft of a motor vehicle and sentenced to death for the brutal stabbing of Tina Marie Cribbs in a Tampa motel room. Cribbs was last seen alive leaving the Showtown Bar in Tampa with Rogers on Sunday, November 5, 1995. A bartender testified that Rogers arrived at the bar around 11 a.m. Cribbs and three female friends arrived a few hours later. Rogers purchased the women a round of drinks and introduced himself to several bar patrons

[1] Citations to the direct appeal record will be referred to by "DAR," followed by the appropriate volume and page number. Citations to the postconviction record on appeal will be referred to by "PCR," followed by the appropriate volume and page number.

as “Randy.” Rogers informed Cribbs and her friends that he had no interest in married women or women with boyfriends. Rogers asked Cribbs, the only single woman of the group, for “a ride” and she agreed. Upon leaving the bar with Rogers, Cribbs told one of her friends that she would be back in fifteen or twenty minutes to meet her mother.

When Cribbs’ mother, Mary Dicke, arrived twenty minutes later to meet her daughter as they had planned, Cribbs had not yet returned. Dicke waited for her daughter at the bar for nearly an hour and a half. Then Dicke began paging Cribbs, but received no response despite thirty pages. According to Dicke, it was unusual for her daughter not to return her calls. The next morning, Cribbs did not show up for work.

A motel clerk testified that Rogers had arrived at the motel by cab on Saturday, November 4, 1995. Rogers told the motel clerk that he was a truck driver whose truck had broken down. At that time, Rogers paid for a two-night stay. A desk clerk testified that Rogers returned to the motel office on Sunday evening, November 5, 1995. Shortly before Rogers entered the motel office, the clerk had observed Rogers with two suitcases near his motel room. According to the clerk, it appeared as if Rogers was packing a white Ford Festiva automobile. Rogers then entered the motel office, paid for an additional night's stay at the motel, informed the clerk that he did not want anyone going into his room, and requested a “Do Not Disturb” sign. When the clerk informed Rogers that the motel did not have such signs, Rogers requested that the clerk leave a note for the cleaning crew not to enter and clean his room. The next morning, at approximately 9 a.m., the clerk saw Rogers leaving the motel alone in the same white automobile. The evidence at trial established that the white vehicle belonged to Cribbs.

On Tuesday, November 7, 1995, a cleaning person at the motel went into the room that Rogers had rented. The cleaning person noticed a handwritten “Do Not Disturb” sign hanging on the doorknob. She testified that she had observed the same sign hanging on the door on Monday morning and thus did not enter the room to clean it. Upon entering the room on Tuesday, the cleaning person found Cribbs' body in the bathroom. Cribbs was found lying on her back in the

bathtub. She was clothed, wearing a damp T-shirt, underwear, and socks. On the bathroom floor, authorities found a damp pile of clothes and bloodstained towels. A pager and black wristwatch were lying at Cribbs' feet in the bathtub. Although Cribbs' mother testified that her daughter habitually wore a sapphire and diamond square ring and a gold heart-shaped watch, no such jewelry was recovered from Cribbs' body.

The State's forensic pathologist estimated that Cribbs could have been dead for one to three days before she was found. He testified that Cribbs died as a result of two stabs wounds, one to the chest and one to the buttocks. In addition to these injuries, Cribbs had several bruises and abrasions, and a shallow wound to her left arm, which the pathologist believed was a defensive wound. The evidence showed that Cribbs had been wearing her clothing when she was stabbed.

A senior forensic serologist with the Florida Department of Law Enforcement ("FDLE") also testified for the State. He found no evidence of semen in Cribbs' body. An FBI agent who was an expert in the field of forensic serology also testified that the blue jean shorts and T-shirts found in the motel bathroom tested positive for blood. In addition, a biological forensic examiner for the DNA unit of the FBI testified that neither Cribbs nor Rogers could be excluded as a contributor to the blood stains on the jean shorts. He also stated that Rogers was a potential contributor to the DNA samples found on a T-shirt recovered from Cribbs' vehicle.

The State established through the testimony of maintenance workers that Cribbs' wallet was found early in the afternoon of Monday, November 6, 1995, at a rest area on Interstate-10 ("I-10") near Tallahassee, Florida. A crime lab analysis revealed that two latent fingerprints belonging to Rogers were inside the wallet. Fingerprints lifted from the motel room also matched Rogers' fingerprints.

Rogers was eventually apprehended in Kentucky on November 13, 1995, a week after Cribbs was murdered. After being informed that Rogers was in the area, Detective Robert Stephens saw Rogers driving a white Ford Festiva and requested back-up. A high speed chase ensued, and during this pursuit, Rogers threw

beer cans at the pursuing officers as he tried to elude them. Authorities set up a roadblock and successfully forced Rogers off the roadway.

A subsequent inventory of Cribbs' vehicle revealed a substantial amount of food, a cooler, a duffel bag, a comforter, two pillows, Mississippi and Florida license plates, a key to the motel room where Cribbs' body was found, and a bloodstained T-shirt. A small smear on the inside driver's door tested positive for blood. Police also found a pair of blue jeans, which contained blood.

During an interview with Kentucky Police, Rogers claimed that "a girl," whom he could not describe, loaned him the vehicle. Rogers stated that he met the "girl" in a bar and brought her to his motel room. After dropping the "girl" off at the motel, Rogers left to get some beer and cigarettes. According to Rogers, the "girl" was alive when he left and Rogers claimed that he never returned, or intended to return, to the motel. This statement contradicted the testimony of the motel desk clerk, who testified that he saw Rogers leaving the motel on Monday morning. When the investigating officer stated that he just wanted Rogers to tell the truth, Rogers replied, "I can't tell you the truth."

In his defense, Rogers attempted to establish that someone else was the perpetrator of Cribbs' murder. First, the defense introduced the testimony of Tampa police officers who stated that the surrounding area of the motel was a high crime area and that many of the residents of that motel and the motel located across the street had criminal records. The defense established that the Tampa Police did not investigate any of these individuals as potential suspects in the murder. According to the defense, this supported the defense's theory that the Tampa police "rushed to judgment" in this case.

Second, the defense called another highway maintenance worker who testified that Cribbs' wallet was not recovered on Monday afternoon, but that it was found around 10:30 a.m. According to the defense, the time the wallet was found was crucial because if Rogers had left the Tampa area at 9 a.m., as the motel desk clerk testified, he could not have disposed of the wallet at the highway rest stop near Tallahassee any earlier than 1 p.m.

> Finally, the defense also called several expert witnesses, including Dr. John Feegel, a forensic pathologist, consulting medical examiner and practicing attorney. Doctor Feegel estimated that Cribbs died approximately twenty-nine or thirty hours before she was found. Contrary to the State expert's estimate, Dr. Feegel opined that it was unlikely that Cribbs had been dead for forty-eight hours before her body was discovered.

After the jury convicted Rogers of the three charged offenses as alleged in the indictment, the trial judge followed the jury's unanimous recommendation for the death penalty, and sentenced Rogers to death. (DAR V3:411). The court found two aggravating factors: (1) the murder was committed while the Defendant was engaged in the commission of a robbery and was committed for pecuniary gain; and (2) the capital felony was especially heinous, atrocious, or cruel. (DAR V3:488-91). In mitigation, the court found the statutory mitigating circumstance that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The court also found the following nonstatutory mitigating circumstances: (1) Rogers had a childhood deprived of love, affection or moral guidance and lacked a moral upbringing of good family values; (2) Rogers' father was an alcoholic who physically abused Rogers' mother in the presence of Rogers and his siblings; (3) Rogers was introduced to controlled substances at a young age

and encouraged by his older brother to participate in burglaries; (4) Rogers has been lawfully and gainfully employed at various times in his adult life; (5) Rogers was solely responsible for the care of his two children at one time in his adult life; and (6) Rogers had been drinking alcohol for a few hours on the day he came into contact with the victim. (DAR V3:491-93).

On direct appeal to this Court, Rogers raised ten issues in his 100-page brief:

> (1) THE TRIAL COURT ERRED BY FAILING TO GRANT A JUDGMENT OF ACQUITTAL AS TO FIRST-DEGREE MURDER BECAUSE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE (1) THAT ROGERS INTENDED TO ROB TINA CRIBBS AT THE TIME OF HER MURDER, OR (2) THAT HE PREMEDITATED THE MURDER.
>
> (2) THE TRIAL JUDGE ERRED BY DENYING THE DEFENSE MOTION TO DISQUALIFY THE HILLSBOROUGH COUNTY STATE ATTORNEY'S OFFICE AFTER THE PROSECUTORS SEIZED ATTORNEY/CLIENT PRIVILEGED DOCUMENTS FROM ROGERS' CELL, A MONTH PRIOR TO TRIAL.
>
> (3) THE TRIAL COURT ERRED BY DENYING DEFENSE COUNSEL'S MOTIONS TO HAVE A PET SCAN PERFORMED ON ROGERS BEFORE THE COMMENCEMENT OF TRIAL.
>
> (4) THE TRIAL COURT ERRED BY ALLOWING WITNESSES FROM CALIFORNIA TO TESTIFY, DURING THE PENALTY PHASE, ABOUT THE DETAILS OF A MISDEMEANOR OF WHICH ROGERS WAS CONVICTED, BECAUSE IT WAS NOT A PRIOR VIOLENT FELONY AND THUS DID NOT SUPPORT THE "PRIOR VIOLENT FELONY" AGGRAVATOR.
>
> (5) THE PROSECUTOR MADE OUTRAGEOUS AND IMPROPER ARGUMENTS IN PENALTY PHASE CLOSING, IN ADDITION TO OTHER PROSECUTORIAL MISCONDUCT.

> (6) THE TRIAL COURT ERRED BY DENYING A DEFENSE MOTION FOR A NEW TRIAL BECAUSE OF NEWLY DISCOVERED EVIDENCE, WHEN A NEW DEFENSE WITNESS CAME FORWARD AFTER TRIAL.
>
> (7) THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON, AND FINDING, THE TWO STATUTORY AGGRAVATORS: THAT (1) THE HOMICIDE WAS COMMITTED DURING A ROBBERY OR FOR PECUNIARY GAIN; AND (2) THE HOMICIDE WAS HEINOUS, ATROCIOUS OR CRUEL.
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> (8) THE TRIAL COURT ERRED BY (1) FAILING TO FIND THE "MENTAL AND EMOTIONAL DISTRESS" MITIGATOR, AND (2) FAILING TO GIVE BOTH MENTAL MITIGATORS GREAT OR SIGNIFICANT WEIGHT.
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> (9) THE TRIAL COURT ERRED BY FAILING TO CONSIDER AND APPROPRIATELY WEIGH ALL MITIGATORS SHOWN BY THE EVIDENCE, IN ACCORDANCE WITH CAMPBELL.
>
> (10) THE TRIAL COURT ERRED IN SENTENCING ROGERS TO DEATH BECAUSE THE DEATH SENTENCE WAS NOT PROPORTIONALLY WARRANTED.

Initial Brief of Appellant, Rogers v. State (Case No. 91,384). After hearing argument in the case, this Court affirmed Rogers' convictions and sentence of death. Rogers v. State, 783 So. 2d 980 (Fla. 2001).

B. Postconviction Proceedings

On September 28, 2001, Appellant filed a Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend. (PCR Supp. V1:26-53). Appellant filed numerous amendments to his postconviction motion, and after the Honorable Rex Barbas presided over a case management conference, the court entered an order denying, in part, Appellant's amended postconviction motion. The court granted an evidentiary hearing

on Claims I(A), I(B), I(C), I(E) in part, IV(A) and VIII. (PCR V5:883-97).

On June 4, 2004, Appellant filed a motion to reconsider the trial court's denial of an evidentiary hearing on Claim II of his amended postconviction motion, or in the alternative, to proffer evidence regarding the claim.[2] (PCR Supp. V1:70-193). The trial court conducted an evidentiary hearing on June 18, 2004, and on August 3, 2004. At the outset of the hearing, the judge heard argument on Appellant's motion to reconsider claim II and a proffer of evidence from defense expert Dr. Acton. After collateral counsel argued for reconsideration of the denial of an evidentiary hearing on his newly discovered evidence claim, counsel proffered the testimony of Dr. Ronald Acton, a defense expert who had testified at Appellant's 1997 trial. (PCR V3:558-86).

Dr. Acton testified that he recalled the testimony of the State's expert from the FBI laboratory, Dr. Baechtel. At the time of Appellant's trial, Dr. Acton was aware that Dr. Baechtel had not performed any DNA testing on a pair of Appellant's blue shorts, but had merely reviewed the FBI technician's report and

[2] In Claim II of his motion, Appellant alleged that newly discovered evidence surrounding the FBI laboratory created a substantial likelihood that he would have been acquitted of the murder had the jury been aware of the alleged problems with the laboratory.

signed it. (PCR V3:560). Dr. Acton testified that he did not have any problems with the methodology utilized by the FBI in performing the DNA testing because the methodology was standardized. (PCR V3:560-61). Dr. Acton testified that at the time of Appellant's trial, it was his belief that the FBI laboratory had not achieved accreditation, and he had never seen any evidence of their accreditation. (PCR V3:566). In regards to the DNA testing done on Appellant's shorts, Dr. Acton testified that the DNA testing was a test of exclusion; neither the victim nor Appellant could be excluded as possible contributors to the blood stain on the shorts. (PCR V3:572-74). At Appellant's trial, Dr. Acton generally agreed with Dr. Baechtel, with the exception of Dr. Baechtel's opinion that one could quantify whether a contributor to a mixed stain was a major or minor contributor based on the intensities of the alleles. (PCR V3:571-72).

At the postconviction hearing proffer, Dr. Acton acknowledged that even after reviewing the reports on the improprieties at the FBI laboratory provided to him by collateral counsel, he did not know if his trial testimony would be any different. (PCR V3:575). Dr. Acton did not have any specific information that the DNA testing performed by the FBI in Appellant's case was suspect in any manner. Upon further

questioning by the court and counsel, Dr. Acton admitted that, because he did not possess any specific information regarding improprieties at the FBI laboratory at the time of the testing in Appellant's case, he was unable to testify whether his trial opinions or testimony would be different. (PCR V3:575-83).

In its original order denying an evidentiary hearing on claim II, the trial court found that the report on the FBI lab was newly discovered evidence, but ruled that the newly discovered evidence would not have had any effect on the outcome of Appellant's trial. (PCR V5:890-92). Specifically, the court found that the report did not attack the credibility of the FBI analyst involved in Appellant's trial, Dr. Baechtel; there was sufficient other evidence proving Appellant's guilt; and Dr. Baechtel's report merely stated that Appellant could not be conclusively ruled out as the perpetrator. (PCR V5:890-92). After hearing collateral counsel's argument on his motion to reconsider and hearing the proffered testimony from Dr. Acton, the court again denied Appellant an evidentiary hearing on his newly discovered evidence claim. (PCR Supp. V1:60-62).

After the court heard the proffered testimony from Dr. Acton, collateral counsel called witnesses in support of his other postconviction claims. Robert Fraser, a very experienced

defense trial attorney,[3] testified that he represented Appellant in his 1997 trial and was responsible for the penalty phase portion of the trial. Mr. Fraser testified that he did not find that the prosecutor attempted to denigrate the defense during her closing argument, but merely attacked the facts that the defense presented. (PCR V4:610-11). Mr. Fraser testified that the prosecutor had the right in closing argument to argue that the testimony regarding Appellant's brain damage did not have any relationship to his violent and aggressive behavior.[4] Mr. Fraser testified that at the time of Appellant's penalty phase proceeding, this Court had not issued its opinion in Ruiz v. State, 743 So. 2d 1 (Fla. 1999), condemning the prosecutor's "Operation Desert Storm" closing argument. Defense trial counsel testified that had this opinion been issued at the time, he would have lodged an objection and moved for mistrial when the prosecutor made a similar argument in Appellant's case. (PCR V4:613).

[3] At the time of the postconviction hearing, Mr. Fraser had been a criminal defense attorney for over twenty-eight years and had been involved in approximately 15 death penalty cases, including 10 as the penalty phase attorney. (PCR V4:609-10).

[4] Contrary to collateral counsel's legal conclusion in his statement of facts that the prosecutor's argument denigrated the defense (Initial Brief at 9), defense trial counsel noted that the prosecutor had every right to make such an argument based on the testimony introduced. (PCR V4:612).

Nick Sinardi represented Appellant during the guilt phase of his trial. Mr. Sinardi utilized an investigative team from Brown Investigative Services to assist him in his investigation of Appellant's case. (PCR V4:617). Mr. Sinardi was aware that there were two reports, one from his investigator and one from the Tampa Police Department, which referred to a witness, Robert Thompson, having seen a white female walking away from the motel in the company of an older white gentleman, approximately 60 years of age.[5] (PCR V1:120; V4:622). Mr. Sinardi testified that it was assumed in the reports that the female was the victim in the instant case. Furthermore, the report from his investigator indicated that Mr. Thompson saw Appellant and the victim together later that evening. (PCR V4:622-23). After reviewing the reports and having a lengthy conversation with Mr. Thompson, Mr. Sinardi decided not to call him as a witness. (PCR V4:625-629; 652-53).

[5] Mr. Sinardi also briefly testified to the existence of another witness, Thomas Ambrose, who apparently came into contact with Appellant at the Motel 8. Ambrose described seeing either a Mexican or Hispanic male in the motel room with Appellant and the victim. (PCR V4:624). This witness did not come forward until the conclusion of Appellant's trial. (DAR V24:9-14; PCR V4:645-46; 653-55). Sinardi proffered Ambrose's testimony at a hearing on his motion for a new trial, but the trial judge denied the motion after hearing Ambrose's testimony and finding that he lacked credibility. (PCR V4:655-56, 687; DAR V24:36-127, V25:238-43).

Mr. Sinardi testified at length regarding his extensive investigation into attempting to link another suspect, Jonathan Lundin,[6] to the murder of Tina Marie Cribbs. Mr. Sinardi searched the hotel registrations for the Motel 8 and Tropicana Motel[7] and showed photographs of Lundin to Robert Thompson[8] and Thomas Ambrose and other witnesses in an attempt to place Lundin at the scene.[9] (PCR V4:646-47). The best evidence the defense had regarding Lundin was a statement from another inmate who was housed with Appellant and Lundin at the Hillsborough County Jail. According to a statement by Mitchell Monteverdi, at one point when Appellant left, Lundin told Monteverdi that "the bitch had to answer to me." (PCR V4:630-31). Mr. Sinardi deposed Monteverdi and soon thereafter, the State Attorney's

[6] Jonathan Lundin was incarcerated at the Hillsborough County Jail awaiting charges on a first degree murder case that occurred a year after Tina Cribbs' murder. Like the victim in the instant case, the victim in Lundin's case was stabbed. (PCR V4:635-37). Sinardi researched the possibility of introducing reverse Williams rule evidence, but did not find that there were enough similarities between the two murders. Despite Appellant's argument that counsel was ineffective for failing to present the similarities of these murders to the jury, Initial Brief of Appellant at 47, trial counsel testified that there simply were not any similarities between the murders other than the fact that both victims were women and both had been stabbed.

[7] Although the murder occurred at the Motel 8, the Tropicana Motel was right next door.

[8] Thompson stated that Lundin was not the older white man he witnessed accompanying the victim. (PCR V4:651-52).

[9] Sinardi was recalled and shown a report from his investigator that indicated that a motel clerk recognized the photograph of Lundin, but she could not remember when or where she had seen him. (PCR V4:769-70).

Office investigated Monteverdi and spoke to him privately regarding an alleged conspiracy at the jail to have Jonathan Lundin take the wrap for the Tina Marie Cribbs murder. (PCR V4:638-42; V5:823-37). Appellant's trial counsel never called Monteverdi as a witness because he concluded that Monteverdi was not credible and he was concerned that the State would be able to establish through numerous inmates that Appellant was trying to pin the murder on Lundin while they were housed in the county jail. (PCR V4:642-45; 654; 657-60).

Collateral counsel questioned Mr. Sinardi regarding his knowledge of reports detailing problems with the FBI's laboratory. At the time of Appellant's trial, Sinardi was aware of an investigation into the FBI lab which was not related to their DNA/serology section. (PCR V4:647-50). Subsequent to Appellant's trial, Gerald Lefcourt, president of the National Association of Criminal Defense Lawyers, issued statements alleging problems with the FBI laboratory's DNA section. Mr. Sinardi testified that had this information been available at the time of trial, he would have utilized it when cross-examining the State's expert, Dr. Baechtel, and would have advised his own expert, Dr. Acton, regarding the report. (PCR V4:649-50). Sinardi acknowledged that neither expert could conclusively identify the mixed stain found on Appellant's

shorts. The State was contending that the blood found in the mixed stain was the victim's blood mixed with Appellant's DNA, while the defense was contending that the mixed stain contained Appellant's blood mixed with the victim's DNA. Neither expert could identify whose blood was in the mixed stain so the defense's theory that Appellant and the victim had engaged in consensual sex was consistent with the DNA evidence. (PCR V4:663-65).

Mitchell Monteverdi testified at the evidentiary hearing that he had conversations with Jonathan Lundin while housed at the Hillsborough County Jail. According to Monteverdi, Lundin laughed at the fact that Appellant had been charged with the Tina Marie Cribbs murder because, according to Lundin, he knew for a fact that Appellant did not commit the murder because "the bitch had to answer to me." (PCR V4:692-93). Monteverdi testified that the day after he gave his deposition in this case, prosecutors returned to the jail and started talking to him about perjury and he got scared and felt like they were threatening him. They returned a few hours later to take a tape-recorded statement. (PCR V4:695-98). Monteverdi went along with what he thought the prosecutors wanted him to say, and in his second statement, he made changes to his deposition

testimony, but maintained that Lundin had stated that "the bitch had to answer to me." (PCR V4:697-703).

On cross-examination, Monteverdi could not recall exactly why he had filed a Motion for Reduction or Modification of Sentence in his own case expressing a desire to be a state witness in Appellant's case rather than a defense witness.[10] (PCR V4:704-08). He indicated that a friend of his was somehow related to the victim and his friend was "giving him flack" about testifying as a defense witness for Appellant. (PCR V4:706-07). Monteverdi also admitted that he was taking psychotropic medication at the time he filed his motion and does not really remember what was going through his mind at the time. (PCR V4:722).

Appellant testified at the evidentiary hearing regarding trial counsel's decision not to call Robert Thompson. According to Appellant, Nick Sinardi told him he was going to call Robert Thompson, but after the prosecutor spoke to Thompson during a recess, Thompson "went haywire" and changed his story.[11] (PCR

[10] A few weeks prior to giving his deposition in Appellant's case, Monteverdi filed a motion in his own pending case indicating that he was supposed to be a defense witness in Glen Rogers' murder trial, however, "upon lengthy reflection and consideration, I prefer to be a state's witness with information in support thereof." (PCR V4:724).

[11] Trial defense counsel's testimony contradicted Appellant's testimony on this point. Trial counsel testified that he had made the decision, prior to trial, not to call Thompson because

V4:733). Appellant also denied that there was a conspiracy at the jail to implicate Lundin, and denied that he asked other inmates to be witnesses for him. (PCR V4:735-39).

The State presented evidence from an investigator with the State Attorney's Office, Douglas Vieniek, regarding his investigation of a conspiracy at the jail involving an attempt to implicate Jonathan Lundin in the Tina Marie Cribbs murder case. (PCR V4:796). Mr. Vieniek testified that the day after prosecutors Karen Cox and Lyann Goudie took the deposition of Mitchell Monteverdi,[12] he accompanied the prosecutors back to the jail to interview Monteverdi. Vieniek testified that there were two reasons they went back to the jail to talk with Monteverdi; one was that a pleading had been discovered where Monteverdi indicated that he wanted to be a State witness rather than a defense witness, and two, Vieniek had been informed by a confidential informant at the jail regarding the conspiracy and now it was coming to light given Monteverdi's deposition testimony that Lundin was apparently taking responsibility for the murder. (PCR V4:796-98).

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he lacked credibility, but counsel had him present at the courthouse "in an abundance of caution." (PCR V4:625-27; 791).

[12] Monteverdi's deposition was taken on April 22, 1997, and the prosecutors returned to the jail on April 23, 1997, for the sworn statement. (PCR V4:795).

When Vieniek and the prosecutors returned to the jail on April 23, 1997, and spoke with Monteverdi they did not threaten or coerce him in any manner, and Monteverdi was never threatened with perjury if he did not change his testimony. (PCR V4:799-800). Mr. Vieniek explained that in his experience with the State Attorney's Office, when interviewing people, his office always explains that they want the truth and nothing else. If, however, the person tells a story that is not true, they would be subject to being charged with perjury. (PCR V4:800). During the April 23rd sworn statement, Monteverdi was the person who brought up perjury, and the prosecutors explained to him that the defense of recent recantation could be used as a defense to perjury. The prosecutors did not promise Monteverdi that they would not charge him with perjury. (PCR V4-5:800-01). During his April 23rd sworn statement, Monteverdi changed his story and told them about the conspiracy at the jail. (PCR V5:801-02).

Attorney Lyann Goudie testified that during her tenure with the State Attorney's office, she participated in the prosecution of Appellant for the first degree murder of Tina Marie Cribbs. (PCR V5:823-24). Goudie testified that she and prosecutor Karen Cox deposed Mitchell Monteverdi in the presence of Appellant's counsel, Nick Sinardi, on April 22, 1997. During this deposition, Monteverdi did not mention any alleged conspiracy at

the jail to implicate Jonathan Lundin with the murder. (PCR V5:825-26). After the deposition was taken, Goudie became aware of a pleading filed by Monteverdi in his case asking the court to reduce his sentence because he had information in the Glen Rogers' murder case and wanted to be a state witness rather than a defense witness.[13]

The information in Monteverdi's pleading prompted the prosecutors to return to the jail the next day to see what information Monteverdi had to support the State's case. When Goudie and investigator Vieniek first spoke with Monteverdi on April 23, 1997, he expressed concern with being charged with perjury if he changed or modified his deposition testimony. (PCR V5:849-50). The issue of perjury was first raised by Monteverdi, and Goudie informed him about the doctrine of recent recantation. (PCR V5:830-31). Goudie testified that she never threatened or coerced Monteverdi and, because he was not under subpoena, he could have refused to speak with them. (PCR V5:831-33). After Monteverdi informed Goudie and Vieniek about the conspiracy at the jail between Appellant and Lundin, Goudie returned to the State Attorney's Office and spoke with her

[13] The motion was served on the State Attorney's Office on April 14, 1997, but was directed to Assistant State Attorney Jay Pruner who was handling Monteverdi's case. Goudie testified that she did not become aware of the motion until after Monteverdi's deposition on April 22, 1997. (PCR V5:825-28).

supervisor, Karen Cox. The decision was made to return to the jail and take a sworn statement. (PCR V5:834). Monteverdi's sworn statement was the same as his earlier off-the-record discussion. (PCR V5:834-35).

On cross-examination, prosecutor Goudie testified that she was not concerned "one iota" with the fact that various inmate witnesses might testify that Jonathan Lundin had committed the murder because she felt it would "annihilate" Appellant's defense theory. (PCR V5:845). Because Goudie was the prosecutor assigned to the Jonathan Lundin murder case, she had tracked down Lundin's whereabouts on the date of Tina Marie Cribbs' murder and knew that Lundin could not have committed the murder because he was in Texas at the time. (PCR V5:845; 856-58). Goudie testified that both she and Karen Cox concluded that Monteverdi was a liar and they were not concerned with the prospect of him being a defense witness. (PCR V5:846-47).

SUMMARY OF THE ARGUMENT

The lower court properly denied Appellant's claim of ineffective assistance of counsel based on trial counsel's decision regarding the presentation of a defense theory that an alternate suspect committed the murder. Trial counsel made the strategic decision to forego presenting evidence from Mitchell Monteverdi, a felon housed at the Hillsborough County Jail, regarding statements made by fellow-inmate Jonathan Lundin. Defense counsel investigated the possibility that Lundin was involved and was unable to find any corroborating evidence that he was in the vicinity of the murder at the time. Counsel also declined to present Monteverdi as a defense witness because he lacked credibility and could open the door to testimony regarding a conspiracy at the jail to implicate Lundin in the murder. Additionally, Appellant has failed to establish any error based on the lower court's denial of his postconviction claim involving alleged prosecutorial misconduct.

The postconviction court properly denied Appellant's claim based on newly discovered evidence regarding alleged improprieties involving the FBI's laboratory. As the lower court noted when finding that the information would probably not produce an acquittal on retrial, the newly discovered evidence did not establish that the State's DNA expert was unreliable

because the alleged improprieties could not be linked to any DNA testing done in Appellant's case. Furthermore, the DNA evidence at trial did not conclusively identify Appellant as the perpetrator, but merely established that neither Appellant nor the victim could be excluded as a contributor from the mixed blood stain found on Appellant's shorts. Because of the other evidence establishing Appellant's guilt, there is no question that the newly discovered evidence of alleged improprieties at the FBI's laboratory would not likely produce an acquittal after retrial.

The lower court properly summarily denied Appellant's ineffective assistance of counsel claim based on trial counsel's failure to object to comments made by the prosecutor during her guilt phase closing argument. The court properly found that trial counsel was not deficient for failing to object to the prosecutor's remarks because her comments were not improper. Even assuming that Appellant could establish deficient performance, he is unable to show that he was prejudiced in any manner as a result of trial counsel's failure to object.

Likewise, the court properly denied Appellant's claim of ineffective assistance of penalty phase counsel based on counsel's failure to object to comments made by the prosecutor during her penalty phase closing argument. After conducting an

evidentiary hearing on this claim, the court found that Appellant failed to establish either deficient performance or prejudice as required under Strickland v. Washington, 466 U.S. 668 (1984). The majority of the prosecutor's comments complained of were not improper so trial counsel was not deficient for failing to object to the comments. Furthermore, Appellant raised most of these comments on direct appeal and this Court found that most of the comments did not constitute error, much less fundamental error. Accordingly, Appellant cannot establish that he was prejudiced based on counsel's failure to object.

Although the prosecutor erred at the 1997 trial by giving a version of her "Operation Desert Storm" argument that this Court condemned in Ruiz v. State, 743 So. 2d 1 (Fla. 1999), defense counsel was not deficient for failing to foresee the Ruiz decision. Furthermore, because this Court found on direct appeal that the prosecutor's "Operation Desert Storm" argument did not warrant a mistrial, Appellant is unable to establish prejudice.

Finally, because Appellant has failed to establish any error regarding the court's ruling on his allegations of ineffective assistance of counsel, he is not entitled to relief under a cumulative error analysis.

ARGUMENT

ISSUE I

THE LOWER COURT PROPERLY DENIED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON TRIAL COUNSEL'S FAILURE TO PRESENT A DEFENSE THEORY OF AN ALTERNATE SUSPECT AND IN DENYING APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO OBJECT TO INSTANCES OF ALLEGED PROSECUTORIAL MISCONDUCT.

In his first issue on appeal, Appellant argues that the postconviction court erred in denying his claims of ineffective assistance of counsel based on trial counsel's decision to forego presenting evidence of an alternate suspect and in failing to object to alleged prosecutorial misconduct. The State submits that the lower court properly denied these claims.

A. The Alternate Suspect Defense Theory

Appellant's first sub-issue involving a claim of ineffective assistance of trial counsel at the guilt phase revolves around his assertion that defense counsel was ineffective for failing to present evidence that an alternate suspect, Jonathan Lundin, committed the murder of Tina Marie Cribbs.[14] Specifically, Appellant asserts that counsel should have attempted to implicate Jonathan Lundin as the perpetrator of the murder and trial counsel could have presented the

[14] As this Court noted on direct appeal, Appellant's defense theory "attempted to establish that someone else was the perpetrator of Cribbs' murder." Rogers, 783 So. 2d at 986-87.

evidence of Lundin, Mitchell Monteverdi, or Thomas Ambrose to support the defense theory that someone else committed the murder. After hearing all of the evidence on this sub-claim, the lower court issued an order denying the claim.

In Davis v. State, 30 Fla. L. Weekly S709 (Fla. Oct. 20, 2005), this Court recently reiterated that, pursuant to the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), a claim of ineffective assistance of counsel, to be considered meritorious, must include two general components.

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Id. at 710 (quoting Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986)). Furthermore, as the United States Supreme Court noted in Strickland, there is a strong presumption that trial counsel's performance was not ineffective. Strickland, 466 U.S. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the

challenged action 'might be considered sound trial strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91 (1955)).

When reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer to the trial court's findings on factual issues, but must review the trial court's ultimate conclusions on the deficiency and prejudice prongs de novo. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the court denied the claim because Appellant failed to meet his burden of proof.

Appellant raises the names of three individuals, Jonathan Lundin, Mitchell Monteverdi, and Thomas Ambrose, in his initial brief in support of his argument that counsel was ineffective. Appellant argues that trial counsel was ineffective for failing to investigate and present a defense theory to the jury that Jonathan Lundin was a possible alternate suspect in the murder of Tina Marie Cribbs, and asserts that Monteverdi and Ambrose's testimony would have supported the alternate suspect defense theory. Appellant asserts that had counsel investigated and developed Lundin as a possible suspect, the outcome of the guilt phase would have been different.

In denying this aspect of Appellant's claim, the lower court found that Appellant failed to meet his burden of proof because he failed to present Lundin at the evidentiary hearing

and because Lundin was not a viable alternate suspect. (PCR V5:870-73). Appellant takes issue with the court's ruling that he failed to meet his burden because he failed to call Lundin as a witness at the evidentiary hearing. However, collateral counsel questioned trial counsel Sinardi regarding the prospect of presenting Lundin as a witness at trial. Sinardi testified that he could have attempted to call Lundin, but he could not force him to testify. (PCR V4:642). Although the court addressed this aspect of Appellant's claim in a conclusory fashion, the fact remains that the lower court correctly found that Appellant failed to meet his burden of proof on his claim.

Trial counsel Sinardi testified at length regarding his extensive investigation into Jonathan Lundin's prior crimes in an attempt to formulate a defense theory that Lundin committed the murder. Trial counsel researched Lundin's prior convictions, had ordered the police and autopsy reports in Lundin's murder case,[15] and searched hotel records, but counsel was unable to discover any evidence that showed Lundin was in the vicinity at the time of Tina Marie Cribbs' murder. In fact, the unrebutted testimony at the evidentiary hearing, relied on by the lower court, established that the prosecuting attorney

[15] Jonathan Lundin was convicted of murdering Janet Ragland in October, 1996, almost a full year after Appellant murdered Tina Marie Cribbs.

had researched Lundin's whereabouts at the time of the murder and found that he was in Texas. (PCR V5:845; 857-58).

Collateral counsel asserts that because the prosecutor lacked any "hard evidence" of Lundin's whereabouts, her unrebutted testimony should not be credited. Yet, collateral counsel relies on a newspaper clipping to argue that Lundin was "clearly" in the area at or near the time of the murder. Obviously, reliance on a newspaper article as evidentiary support is of dubious value. In the case at bar, however, the situation is even more unpersuasive. The beginning of the newspaper article states:

> In the days after her daughter's murder in 1995, Mary Dicke was approached by lots of people in Gibsonton who offered comfort and help.
>
> One of them, she said, was Jonathan "Rock" Lundin, a shrimper and a regular customer at her restaurant. Dicke would later recall that Lundin appeared outraged at the fatal stabbing of her daughter, 34-year-old Tina Marie Cribbs, last seen leaving a Gibsonton bar.

(PCR Supp V1:5). Contrary to collateral counsel's assertion, the article does not "clearly" place Lundin in the vicinity of the murder at or near the time of the murder. If actually accurate, the best that can be said is that Lundin spoke to the victim's mother "in the days" after her daughter's murder.

Collateral counsel further argues that trial counsel was ineffective for not presenting Lundin as a possible suspect

based on evidence that Lundin may have been near the Tampa 8 Inn around the time of the murder. In addition to his newspaper article, Appellant asserts that defense exhibit 14, a Criminal Report Affidavit from Lundin's arrest in 1996 for the murder of Janet Ragland, established that Lundin had resided in the area. Defense counsel Sinardi testified that he aware of the report as a result of his investigation into using reverse Williams rule[16] evidence of Lundin's murder, but he was unable to corroborate the information in the report regarding Lundin's residence. (PCR V4:771-75). Furthermore, trial counsel's investigator had shown a photograph of Lundin taken from the local newspaper to a motel clerk at the Tampa 8 Inn and she apparently recognized the person, but could not say when or where she had seen him. (PCR V4:671; 774-75). Nevertheless, defense counsel Sinardi testified that he believed Lundin had frequented the area, he just was unable to find any evidence to present to the jury to support his theory.

Collateral counsel did not call or present a single witness or piece of evidence at the evidentiary hearing that contradicts the prosecutor's testimony that Lundin was in Texas at the time of the murder. Appellant presented evidence from trial counsel's defense file that, at best, inferred Lundin's presence

[16] See Williams v. State, 110 So. 2d 654 (Fla. 1959).

in the vicinity around the time of the murder, but trial counsel had no concrete evidence to present to the trial judge in an attempt to implicate Lundin in the murder.[17] As the trial court properly found, Appellant failed to meet his burden.

Furthermore, given trial counsel's extensive investigation into this matter, there clearly has been no showing of deficient performance. Rather, counsel made a strategic decision not to present evidence that Lundin was an alternate suspect because it would have opened the door for the State to introduce evidence regarding the conspiracy at the jail to implicate Lundin. As trial counsel testified, and the prosecuting attorney corroborated, the introduction of such evidence would have annihilated the defense.

In order to establish an ineffective assistance of counsel claim, Appellant must first establish that counsel's performance was deficient. In this instance, counsel's decision to forego presenting evidence implicating Lundin was clearly a sound strategic decision that does not equate to a finding of ineffective assistance of counsel. See Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) ("Strategic decisions do not

[17] Collateral counsel faults trial counsel for an alleged misapprehension of the law regarding the corroboration of a reasonable doubt. Trial counsel Sinardi testified that he was unaware of any legal principle that required corroboration of a reasonable doubt, but felt it was his responsibility to corroborate a reverse Williams rule defense. (PCR V4:778-82).

constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.”). In this case, it is not even necessary to address the second prong of Strickland to determine whether Appellant has made a showing of prejudice because he has failed to establish the deficiency prong.[18] 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.”). Trial counsel thoroughly investigated the possibility of presenting a defense theory that Lundin committed the murder, but after investigating this theory, counsel made the strategic decision not to present this evidence. Appellant has failed to show any deficiency in this regard.

Even if this Court were to address the second prong of the Strickland analysis, the State submits that there is no reasonable probability that the outcome of the trial would have been different had this defense been raised. The evidence of

[18] Clearly, Appellant has failed to show that the outcome of the proceedings would have been different had he presented the defense theory that Lundin had committed the murder. Had trial counsel presented this theory, the State would have easily discredited it by introducing evidence of the conspiracy at the jail and introducing evidence that established Lundin’s presence in Texas at the time of the murder.

Appellant's guilt presented at his trial was overwhelming. Briefly, this evidence consisted of: (1) evidence placing him at the scene of the murder; (2) the discovery of the victim's body in Appellant's locked motel room after Appellant had instructed the motel office not to go into his room; (3) DNA evidence; (4) Appellant's fingerprints located in the victim's abandoned purse; (5) Appellant's possession of the victim's motor vehicle after the murder; and (6) flight from the police just prior to his apprehension in Kentucky. None of this evidence applied to Lundin and, in fact, it totally eliminated him as a viable alternate suspect for the defense. Consequently, it is clear from the trial record that defense counsel was not ineffective for failing to raise this defense. Because there can be no showing of prejudice under the Strickland standard, this Court must affirm the lower court's order denying postconviction relief.

B. Mitchell Monteverdi

In a related argument, Appellant argues that the testimony of inmate Mitchell Monteverdi would have supported the defense theory that Lundin committed the instant murder and trial counsel was ineffective for failing to call Monteverdi. In denying this aspect of the claim, the trial court properly found that Monteverdi lacked credibility and any attempt by defense to

establish that Lundin committed the murder would be "wholly incredible." (PCR V5:872-73). The State submits that the court properly denied this sub-issue based on the testimony presented at the evidentiary hearing.

On April 22, 1997, Mitchell Monteverdi gave a deposition where he testified that Jonathan Lundin told him that "the bitch had to answer to me." Monteverdi interpreted this statement as an admission by Lundin that he had killed Tina Marie Cribbs. The next day, the prosecutors involved in Appellant's case became aware of a motion Monteverdi filed in his pending case wherein he indicated that he had information in Appellant's case and wanted to be a State witness rather than a defense witness. After obtaining this motion, the prosecutor returned to the jail to inquire what information Monteverdi had that caused him to want to be a State witness. Monteverdi expressed a concern with being charged with perjury given the fact that he had just given his deposition the day before, but he subsequently acknowledged that there was a conspiracy at the Hillsborough County Jail to implicate Lundin in the murder.

At the evidentiary hearing, Monteverdi testified that the prosecutors talked to him about perjury and he got scared and felt like they were threatening him. They returned a few hours later to take a tape-recorded statement. Monteverdi went along

with what he thought the prosecutors wanted him to say and changed his deposition testimony to include information about the conspiracy.

Trial counsel Sinardi gave extensive testimony at the evidentiary hearing regarding his reasons for not calling Monteverdi as a witness during the guilt phase. (PCR V4:642-45; 654-60). Sinardi testified that he did not find Monteverdi credible in the least and was unsure what type of testimony he would give in front of the jury. Counsel had a sound basis for such a conclusion. A review of Monteverdi's statements clearly establishes that he lacks credibility. Furthermore, as trial counsel properly concluded, he had no idea what type of witness Monteverdi would be given the fact that he had indicated that he wanted to be a State's witness and had given sworn testimony indicating that there was a conspiracy at the jail involving Appellant's attempt to implicate Lundin. (PCR V2:272-78)

Collateral counsel faults trial counsel for not calling Monteverdi because Monteverdi never retreated from his statement that Lundin told him, "the bitch had to answer to me." Of course, Appellant ignores the fact that had trial counsel presented such evidence, the State could have presented a multitude of witnesses to testify regarding the conspiracy at the jail to pin the murder on Lundin. The fact that the State

never filed any formal charges regarding the conspiracy does not negate the fact that the State possessed sufficient evidence of the conspiracy to, as prosecutor Goudie stated, "annihilate" the defense if they attempted to utilize this theory. Depositions of other inmates and the sworn statement of Monteverdi indicated that numerous inmates were involved in the conspiracy or had been asked by Appellant to give false testimony. (PCR V2:266-88; 343; 352-56; 391-426). Given such a wealth of information that Appellant was conspiring to implicate Lundin in the murder, trial counsel made the strategic decision not to call Monteverdi.

In Rose v. State, 675 So. 2d 567, 570 (Fla. 1996), this Court rejected a defendant's ineffective assistance of counsel claim based on trial counsel's failure to call certain witnesses. Trial counsel testified at the evidentiary hearing that each of the witnesses had inherent problems and he felt he would not be able to control them. Id. This Court found that the defendant's claim simply constituted a disagreement with trial counsel over a choice of strategy. Counsel was aware of the pros and cons of calling the witnesses and made an informed strategic decision not to call them. Id. Furthermore, had counsel presented the witnesses, the State would have been able to impeach them. Accordingly, this Court found that there was

no deficient performance and there was no showing that the alleged errors undermined confidence in the outcome of the guilt phase proceedings. Rose, 675 So. 2d at 570; see also Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) ("Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected.").

Likewise, in the instant case, Appellant's complaint is simply a disagreement with trial counsel's informed strategic decision. Trial counsel thoroughly analyzed the decision whether to present Monteverdi and concluded that he would not call him because he lacked credibility, counsel was unsure what the witness would say on the stand, and his testimony would have opened the door for the State to present evidence regarding Appellant's conspiracy with other inmates to present false evidence. Obviously, as trial counsel acknowledged, this would have been highly detrimental to the defense. A review of Monteverdi's inconsistent statements reveals that trial counsel made an informed strategic decision. Because Appellant failed to meet his burden of establishing ineffective assistance of counsel, this Court should affirm the lower court's denial of postconviction relief.

C. Thomas Ambrose

Although Appellant has a section in his initial brief entitled "Thomas Ambrose," counsel does not make any argument regarding this witness in his brief. In denying this claim, the trial court stated:

> Defendant alleges ineffective assistance of counsel for failing to present witnesses that would have corroborated testimony given by Thomas Ambrose at the hearing on Defendant's Motion for New Trial. Specifically, Defendant contends that had defense counsel presented the testimony of Robert Thompson and Mitchell Monteverdi, the testimony of Thomas Ambrose would not have been considered incredible and inconsistent with the evidence produced at trial.
>
> In its Response, the State contends that defense counsel was not ineffective because the trial court made clear its reason for denying the Motion for New Trial based on Mr. Ambrose's total lack of credibility. The trial court, as the State points out, could not believe Mr. Ambrose's testimony, not only because of its inconsistency with the evidence produced at trial, but also due to the timing of the statement and that most of the information offered could have been gleaned from watching television news reports or reading the newspaper.
>
> As the testimony given by Lyann Goudie at the August 6, 2004 hearing suggests, Jonathan Lundin could not have been presented as an alternative suspect. Therefore, trial counsel was not ineffective for failing to present witnesses to bolster Mr. Ambrose's testimony.

(PCR V5:873-74).

Trial counsel discovered Thomas Ambrose at the conclusion of Appellant's trial and presented his testimony to the trial court at a hearing on his motion for a new trial. (DAR V24:36-127). After hearing his testimony, the trial judge found

Ambrose lacked credibility. (DAR V25:238-43). In denying the motion for mistrial, the trial judge stated, in part:

> . . . [T]he evidence – considering the credibility of the witness, not only would it not have produced a different result in this case or at a retrial, should that occur, in all likelihood I can't even imagine a defense attorney putting on that witness.
>
> I find that his testimony is inconsistent. His testimony is incredible. It was totally unworthy of belief. And I am entirely disregarding or discarding anything he had to say.

(DAR V25:238-43). On direct appeal, Appellant argued that the trial court erred in denying his motion for new trial based on the discovery of Thomas Ambrose, and this Court upheld the lower court's ruling. See Rogers v. State, 783 So. 2d 980, 1004 (Fla. 2001) (stating that competent substantial evidence supports the trial court's finding regarding Ambrose's lack of credibility).

Although Appellant does not raise any argument regarding Ambrose in the instant appeal and has therefore waived any error regarding this ruling, the argument presented to the postconviction court below was properly denied. As previously argued, trial counsel was not ineffective for failing to raise a defense that Lundin committed the murder. Trial counsel made an informed decision based on his extensive investigation of this defense theory. Appellant's argument to the postconviction court that had defense counsel presented the testimony of Robert Thompson and Mitchell Monteverdi at the guilt phase, the

testimony of Ambrose would not have been considered inconsistent with the evidence presented at trial is without merit. It is abundantly clear from the trial court's findings concerning the lack of credibility of Ambrose that there is no reasonable probability that the trial court would have granted defense counsel's motion for new trial even had Thompson and Monteverdi testified at trial. Thus, no prejudice has been shown under Strickland and Appellant is entitled to no relief from this Court.

D. Prosecutorial Misconduct

Appellant argues in his brief that trial counsel's failure to call Mitchell Monteverdi was the result of both ineffective assistance of counsel and prosecutorial misconduct. In denying this claim, the lower court stated:

> Defendant alleges ineffective assistance of counsel for failing to object to several instances of prosecutorial misconduct. Specifically, Defendant contends that counsel failed to object to:
>
> 1.) the prosecution conducting a warrantless search of certain prisoner's cells, including Defendant's, in order to investigate a rumor of a conspiracy to blame the murder on Mr. Jonathan Lundin;
>
> 2.) the prosecution taking a sworn statement from a defense witness without notifying defense counsel and assuring said counsel's presence;
>
> 3.) the prosecution implying that defense witness, Mr. Mitchell Monteverdi, would be charged with perjury unless he recanted his prior testimony regarding an alternate suspect, Jonathan Lundin;

4.) the prosecution's failure to provide counsel to Mr. Mitchell Monteverdi after he requested counsel during the second, unnoticed, deposition; and

5.) the prosecution's blatant attempt to conceal Mr. Mitchell Monteverdi as a potential witness by transferring him to Union Correctional Institution under one of his aliases.

In its Response and at the Huff Hearing, the State refutes this issue, generally, claiming that it is procedurally barred because prosecutorial misconduct must be raised, if at all, on direct appeal. The State cites Spencer v. State, 842 So. 2d 52, 60 (Fla. 2003) to support its position.

However, Defendant has raised prosecutorial misconduct as a claim of ineffective assistance of counsel, which is properly raised in a motion for post-conviction relief. Mannonlini v. State, 760 So. 2d 1014 (Fla. 4th DCA 2000). Therefore, the Court will address the claim on its merits.

1. Warrantless searches.

Defendant alleges that defense counsel was ineffective when he failed to object when the prosecution conducted a warrantless search of certain prisoner's cells, including Defendant's, in order to investigate a rumor of a conspiracy to blame the murder on Mr. Jonathan Lundin.

In its Response to this issue, the State contends that the issue was raised on direct appeal and denied by the Supreme Court. Therefore, not only was defense counsel not ineffective, but even if he were, there was no prejudice.

Having reviewed the record, the Court finds that this issue was raised on direct appeal and disposed of by the Supreme Court. Rogers v. State, 783 So. 2d 980, 990-992 (Fla. 2001). Defense counsel filed a motion to suppress the evidence that was found as a result of the search and also filed a motion to disqualify the Hillsborough County State Attorney's Office. The trial court granted the motion to suppress and denied the motion to disqualify. The Supreme Court did not find any error in these rulings, therefore, defense counsel could not have done

anything further with respect to the searches. As such, the Defendant is not entitled to any relief on this issue.

2. Unnoticed Deposition of Mitchell Monteverdi; Threat of perjury charges; Failure to provide counsel to Mitchell Monteverdi; Transfer of defense witness under alias.

Defendant alleges: a.) the prosecution took a sworn statement from a defense witness without notifying defense counsel and assuring said counsel's presence; b.) the prosecution threatened perjury charges in order to elicit Mr. Monteverdi's change of testimony; c.) the prosecution failed to provide counsel to Mr. Monteverdi after he expressed concern over his rights when challenged with possible charges of perjury; and d.) the prosecution arranged the transfer of Mr. Monteverdi to the custody of the Department of Corrections under one of his aliases, making it impossible to determine his whereabouts.

At the August 6, 2004 hearing, Ms. Lyann Goudie testified that the State Attorney's Office interviewed Mitchell Monteverdi on April 23, 1996 in order to investigate a possible conspiracy to defraud the court, specifically, to create an alternative suspect in the trial against Glen Rogers. Because the State Attorney's Office is charged with the power to investigate crimes by interviewing suspects, Mr. Monteverdi was subject to questioning by those present at the April 23, 1996 interview. Moreover, because this interview was an investigation in a new case, the attorney for Glen Rogers was not entitled to be present.

The remainder of the allegations in this portion of the claim are irrelevant based on Ms. Goudie's testimony that Jonathan Lundin was known by the prosecution to not be a viable alternative suspect. Any suggestion that Mr. Lundin could have been a suspect would have been discredited because he was in Texas at the time of Ms. Cribbs' abduction. (See August 6, 2004 Transcript, pp. 312, 324 attached). As such, there is no prejudice to the Defendant with respect to the remainder of the allegations in this portion of the claim.

(PCR V5:874-76).

On appeal, Appellant does not state how the lower court erred, but makes vague and unsupported allegations regarding prosecutorial misconduct. For instance, counsel states that the actions taken against Mitchell Monteverdi, "including the threats made to Mr. Monteverdi by Prosecutor Cox at the unnoticed deposition where defense counsel was not present was merely a pretext to ensure that the chilling effect would take hold." Initial Brief of Appellant at 50-51. Collateral counsel clearly misrepresents the evidence presented below. First, there was never any evidence presented regarding "threats" made by the prosecution to Monteverdi at the "unnoticed deposition." Prosecutor Goudie, the only prosecutor present at the unrecorded interview with Monteverdi, specifically testified that she never threatened Monteverdi in any manner whatsoever. Likewise, a review of Monteverdi's taped sworn statement clearly shows that there were no threats. The best argument Appellant can make regarding alleged "threats" is Monteverdi's own testimony, which contradicted prosecutor Goudie's testimony, indicating that he "felt like they were threatening me." (PCR V4:695).

Collateral counsel further states in his brief that the State never had a real interest in investigating the conspiracy at the jail, but rather conducted the search of inmates' cells in order to intimidate any possible witnesses for Appellant.

Appellant misinterprets prosecutor Goudie's testimony at the evidentiary hearing to support his argument. Prosecutor Goudie testified that she first learned of the conspiracy from the State Attorney's Office's investigator Doug Vieniek at a meeting with Vieniek and prosecutor Karen Cox. (PCR V5:838-40). Goudie testified that she was not concerned "one iota" with the prospect of the defense attempting to pin the murder on Lundin by presenting inmate witnesses because she knew Lundin was not in the area at the time of the murder and she felt that presenting such a defense would "annihilate" the defense's case because the witnesses would be lying. (PCR V5:845-46). Goudie testified that she had no concern with this type of testimony affecting Appellant's trial, but she was concerned with inmates sitting in the jail and conspiring to perpetrate a fraud on the court. (PCR V5:847-48).

The State submits that the lower court properly denied Appellant's five sub-issues regarding prosecutorial misconduct. As noted, Appellant raised five sub-issues under this claim: (1) the prosecution conducted a warrantless search of certain prisoner's cells, including Appellant's, in order to investigate a rumor of a conspiracy to blame the murder on Mr. Jonathan Lundin; (2) the prosecution took a sworn statement from Mitchell Monteverdi, a defense witness, without notifying defense trial

counsel and assuring said counsel's presence; (3) the prosecution implied that Monteverdi would be charged with perjury unless he recanted his prior testimony regarding an alternate suspect, Jonathan Lundin; (4) the prosecution failed to provide counsel to Monteverdi after he requested counsel during the second, unnoticed, sworn statement; and (5) the prosecution attempted to conceal Monteverdi as a potential witness by transferring him to Union Correctional Institution under one of his aliases.

As the lower court properly found, the issue regarding the search of the inmates' cell was dealt with on direct appeal and disposed of by this Court. See Rogers v. State, 783 So. 2d 980, 990-92 (Fla. 2001). Trial counsel filed a motion to suppress the evidence found during the search and also moved to disqualify the State Attorney's Office from the prosecution. As the postconviction court correctly found, "defense counsel could not have done anything further with respect to the searches." (PCR V5:875). As to the other four sub-claims dealing with Mitchell Monteverdi, the court found that the State had the power to investigate the separate crime of a possible conspiracy to defraud the court and therefore, the State was entitled to question Monteverdi without notifying Appellant's trial counsel. (PCR V5:876). The remaining sub-claims were disposed of based

on the court's finding that Appellant suffered no prejudice because Lundin was never a viable alternate suspect to the defense. Appellant has shown no error in this finding. Accordingly, this Court should affirm the lower court's denial of postconviction relief.

ISSUE II

THE POSTCONVICTION COURT PROPERLY CONCLUDED THAT APPELLANT'S CLAIM OF NEWLY DISCOVERED EVIDENCE REGARDING ALLEGED IMPROPRIETIES AT THE FBI'S LABORATORY WOULD NOT HAVE AFFECTED THE OUTCOME OF HIS TRIAL.

In Claim II of his postconviction motion, Appellant asserted that he was deprived of his right to a reliable adversarial testing due to newly discovered evidence regarding alleged improprieties at the FBI Laboratory's DNA section. The trial court initially ruled that Appellant was not entitled to an evidentiary hearing on this claim because the newly discovered evidence would probably not produce an acquittal on retrial. (PCR V5:890-92). Appellant moved to reconsider the claim, and after proffering testimony from an expert witness at the outset of the evidentiary hearing, the postconviction court again denied the claim.

The State submits that the lower court properly denied Appellant's claim because the evidence of the alleged improprieties at the FBI's lab would probably not produce an acquittal on retrial. In Jones v. State, 709 So. 2d 512, 521 (Fla. 1998), this Court stated:

> Two requirements must be met in order for a conviction to be set aside on the basis of newly discovered evidence. First, in order to be considered newly discovered, the evidence 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or

> his counsel could not have known [of it] by the use of due diligence.' Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-25 (Fla. 1994).
>
> Second the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Jones, 591 So. 2d at 911, 915. To reach this conclusion the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial.' Id. at 916.

Furthermore, as members of this Court have noted, the test of prejudice for newly discovered evidence is the most difficult standard for a defendant to meet. Trepal v. State, 846 So. 2d 405, 438 (Fla. 2003) (Pariente, J., concurring). Newly discovered evidence warrants a new trial only if the evidence would probably produce an acquittal. Id. In the instant case, the trial court followed the standard set forth in Jones and viewed the entirety of the evidence presented at the postconviction proceeding and compared it with the evidence presented at the trial and concluded that the evidence regarding the FBI lab would not have likely produced a different result.[19] To uphold the lower court's summary denial of a claim raised in a postconviction motion, the claim must be either facially

[19] The lower court also went one step beyond the allegations and found that, even without the DNA evidence, the outcome at a new trial would likely not have been different. (PCR Supp. V1:61). The newly discovered evidence would not have precluded the admission the DNA evidence, but would have only served to impeach the State's expert witness.

invalid or conclusively refuted by the record. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999). Further, where no evidentiary hearing is held below, this Court must accept the defendant's factual allegations to the extent they are not refuted by the record. Id.; Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989).

Appellant's allegations of newly discovered evidence involving the FBI's laboratory fails to satisfy the test set forth by this Court in Jones. The defense expert witness at Appellant's trial, Dr. Ronald Acton, had his testimony proffered at the evidentiary hearing. Dr. Acton recalled the State's expert from the FBI laboratory, Dr. Baechtel, and was aware that Dr. Baechtel had not performed any DNA testing on a mixed blood stain found on a pair of Appellant's shorts, but had only reviewed the technician's report and signed it. (PCR V3:560). Dr. Acton testified that he did not have any problems with the methodology utilized by the FBI in performing the DNA testing because the methodology was standardized. (PCR V3:560-61). Dr. Acton further testified that at the time of Appellant's trial, it was his belief that the FBI laboratory had not achieved accreditation, and he had never seen any evidence of their accreditation. (PCR V3:566).

In regards to the DNA testing done on the mixed blood stain found on Appellant's shorts, Dr. Acton testified that the DNA testing was a test of exclusion; neither the victim nor Appellant could be excluded as possible contributors to the blood stain on the shorts. (PCR V3:572-74). At Appellant's trial, Dr. Acton generally agreed with Dr. Baechtel, with the exception of Dr. Baechtel's opinion that one could quantify whether a contributor to a mixed stain was a major or minor contributor based on the intensities of the alleles. (PCR V3:571-72).

After reviewing the newly discovered evidence of reports on the improprieties at the FBI laboratory, Dr. Acton did not know if his trial testimony would be any different. (PCR V3:575). The newly discovered evidence did not have any specific information that the DNA testing performed by the FBI in Appellant's case was suspect in any manner. Upon further questioning by the court and counsel, Dr. Acton admitted that, because he did not possess any specific information regarding improprieties at the FBI laboratory at the time of the testing in Appellant's case, he was unable to testify whether his trial opinions or testimony would be different. (PCR V3:575-83).

As the lower court properly found when initially denying this claim, the newly discovered evidence does not specifically

address the work done by the State's expert from the FBI lab. Dr. Baechtel testified at trial that neither the victim nor Appellant could be excluded as a contributor to a stain found on Defendant's shorts. The lower court stated that "[i]f this opinion was the sole basis for the conviction, then the Court would be more inclined to believe the outcome of the trial was tainted. However, the State provided substantial, competent other evidence to sustain the conviction." (PCR V5:892). Accordingly, the court found that there is no evidence that the outcome of the trial probably would have been different had this newly discovered evidence been introduced.

The lower court properly concluded that the newly discovered evidence would not have likely produced an acquittal. The newly discovered evidence did not establish that the State's expert witness, Dr. Baechtel, was in any way unreliable or unprofessional. Dr. Baechtel's testimony did not conclusively identify Appellant as the perpetrator; it only established that neither the victim nor Appellant could be eliminated as a contributor to the mixed stain on a pair of Appellant's shorts. Obviously, this could have been consistent with consensual sexual intercourse between Appellant and the victim because Baechtel testified that numerous types of body fluid could provide DNA in this mixed stain. (DAR V16:1838-39). Trial

counsel Sinardi capitalized on just this point in defense of his client in closing arguments. (DAR V20:2425-27). Appellant's DNA expert, Dr. Acton, generally agreed with Dr. Baechtel's methodology and conclusions with the exception of who was or was not a major or minor contributor to the mixed stain. This again was pointed out by defense counsel during closing arguments. (DAR V20:2428). Even after reviewing the newly discovered evidence of reports on the improprieties at the FBI laboratory, Dr. Acton did not know if his trial testimony would be any different. (PCR V3:575). The overwhelming nature of all of the other evidence presented against Appellant compels the conclusion reached by the lower court that the newly discovered evidence is not of such a nature that it would probably produce an acquittal after retrial. Accordingly, this Court should affirm the lower court's order denying Appellant relief on his claim of newly discovered evidence.

ISSUE III

THE LOWER COURT DID NOT ERR IN SUMMARILY DENYING APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BASED ON COUNSEL'S FAILURE TO OBJECT TO COMMENTS MADE BY THE PROSECUTOR DURING HER CLOSING ARGUMENT.

Appellant next asserts that the lower court erred in summarily denying his ineffective assistance of counsel claim based on trial counsel's failure to raise an objection to comments made by the prosecutor during her guilt phase closing argument. In its order denying Appellant an evidentiary hearing on this claim, the lower court stated:

> Defendant alleges that he was deprived of his right to a reliable adversarial testing due to ineffective assistance of counsel at the guilt phase of his capital trial, in violation of Mr. Rogers' Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and his corresponding rights under the Florida Constitution. Defendant contends that trial counsel was ineffective in failing to object to improper prosecutorial comments during closing arguments in the guilt phase of his trial. Specifically, Defendant alleges that counsel was ineffective for failing to object during closing arguments when State Attorney, Karen Cox, improperly attacked defense counsel, denigrated a defense and improperly bolstered the credibility of her witnesses.
>
> In its Response, the State contends that the comments made by Ms. Cox were proper. Therefore, there was no need for defense counsel to object. Furthermore, the State contends that even if the comments were improper, Defendant has failed to show how the comments resulted in prejudice, as there was substantial evidence against him to sustain a conviction.
>
> The record reflects that Ms. Cox stated multiple times in her rebuttal closing argument that defense counsel's closing argument was a product of his

imagination. Specifically, Ms. Cox stated, "Mr. Sinardi has a very vivid imagination, but what we're to do here today is to look at facts, not Mr. Sinardi's imagined scenarios that are based on nothing that was testified to here in court; imagined scenarios that there's no basis in the evidence. In fact, there's direct evidence refuting that." Trial Transcript, volume XXII, p. 2451, 11. 12-18, attached).

Ms. Cox's statements concerning Mr. Sinardi's imagination, taken in context, are entirely proper as rebuttal to the argument made by defense counsel in his closing argument. (See Trial Transcript, volume XXII, attached). A close reading of Mr. Sinardi's closing argument demonstrates that his intent was to cast doubt on Defendant's involvement in the murder by proposing certain scenarios that could have transpired. The scenarios were not based on facts in evidence, but were extrapolations based on a fraction of the evidence. Ms. Cox properly represented to the jury that Mr. Sinardi's scenarios were not evidence, but products of his imagination that could be given weight or ignored. (See Trial Transcript, volume XXII, p. 2459, 11. 4-5 and pp. 2486-2487, attached). Therefore, Ms. Cox's statements were proper and defense counsel was not required to object. As such, Defendant's claim does not meet the first prong of Strickland and is not entitled to any relief on this part of claim III.

With respect to Ms. Cox's comments to bolster the credibility of State witnesses, the comments were proper as rebuttal to Mr. Sinardi's closing argument. Mr. Sinardi's closing argument sought to cast doubt on the reliability of Dr. Schultz's testimony and the investigation done by the Kentucky Police Department. It is well settled that the State may bolster the credibility of its witnesses that have been attacked by defense counsel during closing arguments. None of the comments made by Ms. Cox in rebuttal closing argument did anything more than rehabilitate the State's witnesses. (See Trial Transcript, volume XXII, pp. 2451-2487, attached). As such, defense counsel was not required to object to the comments. Therefore, Defendant has not met prong one of Strickland with respect to this part of claim III. No relief is warranted.

(PCR V5:892-94).

This Court has previously stated that "a defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient." Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000). "Where the motion lacks sufficient factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied." Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998) (citing Steinhorst v. State, 498 So. 2d 414 (Fla. 1986)). However, in cases where there has been no evidentiary hearing, this Court "must examine each claim to determine if it is legally sufficient, and, if so, determine whether or not the claim is refuted by the record." Atwater v. State, 788 So. 2d 223, 229 (Fla. 2001).

In the instant case, the record supports the lower court's finding that Appellant is not entitled to relief on this claim due to his failure to establish deficient performance based on trial counsel's failure to object to the prosecutor's closing argument. As previously noted, in order to establish an ineffective assistance of counsel claim, a defendant must establish two elements: first, that counsel's performance was

deficient; and second, that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). In the instant case, trial counsel was not deficient in failing to object to certain comments made by the prosecutor in her rebuttal closing argument.

Appellant first complains that trial counsel was deficient for failing to object to the prosecutor's argument that defense counsel had a "vivid imagination." As the trial court properly found, the prosecutor's comments, when taken in context, were entirely proper as rebuttal to defense counsel's defense in his closing argument. The lower court found that defense counsel attempted to create reasonable doubt by proposing certain scenarios that could have transpired. The scenarios were not based on facts introduced into evidence, but were extrapolations based on a fraction of the evidence. (PCR V5:893).

The law is well settled that a prosecutor's argument should be examined in the context in which it is made, particularly so when invited by the nature of the defense. Stancle v. State, 854 So. 2d 228, 229 (Fla. 4th DCA 2003) (and cases cited therein). Because defense counsel's closing argument was based on speculative theories based only on a fraction of the evidence, the prosecutor did not err by commenting on counsel's imagination. See Chandler v. State, 848 So. 2d 1031, 1044 (Fla.

2003) (prosecutor's characterization of defense counsel's argument by use of words such as "desperation, distortion, and half-truths," "charade," and "totally irrational" was not improper). Even assuming Appellant could establish deficient performance based on trial counsel's failure to object to the prosecutor's comments, Appellant has failed to show prejudice under Strickland. Appellant has not shown, given the quantum of evidence against him, that the outcome of the trial would have been different had there been an objection to the prosecutor's argument.

Appellant next argues that trial counsel was ineffective for failing to object to the prosecutor's argument concerning Dr. Schultz, a forensic pathologist who testified for the State at trial regarding the victim's injuries. During his closing argument, defense counsel argued that Dr. Schultz was young and inexperienced and urged the jury to compare his credibility to the defense expert, Dr. Feegel. (DAR V20:2438-43). In response, the State argued:

> Dr. Schultz is a young, eager, interested professional. Dr. Schultz is a man who clearly likes what he is doing and is good at what he's doing. He's a man who when questions are put to him, he goes and does further research. He didn't talk to other experts. What he said is he went on the Internet and

> looked at the most forensic literature as to onset of rigor mortis.[20]
> …
> Mr. Sinardi somehow tried to suggest that Dr. Schultz was here trying to please somebody like, oh, Dr. Schultz has to push it back for the State. Give me a break. This guy is in Michigan as a forensic pathologist up there. He has no bias and no desire to do anything but to tell the truth.

(DAR V20:2464-65).

The argument by the prosecutor was not improper because it was simply a comment on the demeanor of the witness while testifying, the witness' trial preparation, his knowledge, and his apparent lack of bias. These were clearly proper subjects for comment by either party and for consideration by the jury under the standard jury instructions regarding the credibility of witnesses. Florida courts have held that prosecutorial comments are not improper where, incident to evaluating a witness' credibility, jurors are told to ask themselves what motive the witness would have to deceive them. Johnson v. State, 801 So. 2d 141, 142-43 (Fla. 4th DCA 2001). In this

[20] During his cross-examination of Dr. Schultz, defense counsel impeached the witness with his deposition testimony wherein he opined that full rigor mortis begins about four to eight hours after death. (DAR V16:1941-42). At trial, he testified that after reading literature and doing further research, he believed full rigor begins between eight to twelve hours after death. (DAR V16:1942-44).

During his closing argument, defense counsel mistakenly argued that Dr. Schultz had testified that he had spoken to other experts and changed his opinion. (DAR V20:2440). Thus, the prosecutor corrected defense counsel's recollection of the testimony during her rebuttal closing argument.

case, the prosecutor was not personally vouching for the credibility of the witness but, just as defense counsel was doing, the prosecutor was pointing out factors the jury could utilize in making a credibility determination.

Likewise, Appellant's related argument that the prosecutor improperly bolstered the testimony of the Kentucky State Police Department is without merit. As the lower court properly found when addressing these related claims, "[i]t is well settled that the State may bolster the credibility of its witnesses that have been attacked by defense counsel during closing arguments. None of the comments made by Ms. Cox in rebuttal closing argument did anything more than rehabilitate the State's witnesses." (PCR V5:893-94). The prosecutor's comments that the Kentucky crime lab did a "fantastic" job and the witnesses were professional in every respect were not improper. Clearly, Appellant has failed to establish deficient performance based on trial counsel's failure to object to the prosecutor's innocuous comments in her rebuttal closing argument.

Even assuming that Appellant was able to establish deficient performance, the State submits that the record conclusively shows that Appellant is not entitled to relief based on his inability to establish prejudice under Strickland. See Mann v. State, 770 So. 2d 1158, 1164 (Fla. 2000) (upholding

trial court’s summary denial of ineffectiveness claim because defense counsel’s failure to object to prosecutor’s comments during closing argument did not demonstrate a deficiency that prejudiced the defendant). If trial counsel had objected to the comments, the trial judge would have overruled the objections because the comments were proper rebuttal arguments. Certainly, the outcome of the proceedings would not have been different had defense counsel objected to the comments. Accordingly, this Court should affirm the lower court’s summary denial of Appellant’s ineffective assistance of counsel claim.

ISSUE IV

THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON TRIAL COUNSEL'S FAILURE TO OBJECT TO COMMENTS MADE BY THE PROSECUTOR DURING HER CLOSING ARGUMENT IN THE PENALTY PHASE.

Appellant mistakenly states in his issue statement that the trial court denied this claim without conducting an evidentiary hearing. In Claim Four of his postconviction motion, Appellant raised two separate ineffective assistance of penalty phase counsel claims. Sub-claim (A) dealt with counsel's failure to object to comments made by the prosecutor during penalty phase closing arguments, and sub-claim (B) dealt with counsel's failure to object during the charge conference to the exclusion of a jury instruction. The lower court denied sub-claim B without an evidentiary hearing and Appellant does not raise an issue on appeal regarding this summary denial. (PCR V5:895). The trial court granted an evidentiary hearing on sub-claim A, and after hearing from penalty phase counsel, denied this aspect of Appellant's claim. (PCR V5:878-79).

Collateral counsel further confuses the issue by misquoting the lower court's order. On pages 71-73 of his initial brief, Appellant correctly states that the trial court "denied Mr. Rogers a hearing on all sub-issues in this claim with the exception of 'A. Improper prosecutorial comments during penalty

phase closing arguments,'" but counsel then block quotes from two separate orders. After the case management conference, the lower court denied an evidentiary hearing on sub-claim B, but granted an evidentiary hearing on sub-claim A:

> Defendant alleges that he was deprived of his right to a reliable adversarial testing due to ineffective assistance of counsel at the penalty phase of his capital trial, in violation of Mr. Rogers' Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and his corresponding rights under the Florida Constitution. Trial counsel was ineffective in failing to object to improper prosecutorial comments during closing arguments in the penalty phase of his trial and for failing to object during the Charge Conference when the Court did not include the instruction on extreme mental or emotional disturbance.
>
> **A. Improper prosecutorial comments during penalty phase closing arguments.**
>
> Defendant contends that defense counsel was ineffective in failing to object to certain improper comments made by prosecution during the penalty phase closing arguments. Specifically, Defendant contends that defense counsel failed to object to: 1.) the prosecution's comments regarding the victim's final moments which were designed solely to inflame the passion of the jury and were not based on facts in evidence; 2.) the prosecution's denigration of a statutory mitigator; 3.) the prosecution's denigration of non-statutory mitigators; and 4.) the prosecution's use of the "Operation Desert Storm" story.
>
> The State contends, generally, that the Supreme Court has addressed the issues raised in this ground and that the Court did not find any fundamental error with respect to the penalty phase closing argument by the prosecution. As such, Defendant is unable to demonstrate any prejudice as a result of defense counsel's failure to object to the prosecution's comments during the penalty phase closing argument. The State contends, further, that each of the allegedly improper prosecutorial comments were proper and therefore, defense counsel was not ineffective.

> In an abundance of caution, the Court believes that an evidentiary hearing is necessary to resolve the issues raised in part A of ground IV.
>
> **B. Charge Conference.**
>
> Defendant contends that defense counsel was ineffective for failing to object during the charge conference to the exclusion of an instruction that Defendant killed the victim while he was under the influence of extreme mental or emotional disturbance.
>
> The State contends in its Response that the issue of excluding the instruction was raised on direct appeal and the Supreme Court rejected Defendant's claim. As such, Defendant cannot demonstrate that the outcome of the penalty phase would have been any different had counsel objected. The Court agrees.
>
> In its opinion, the Supreme Court devoted several pages to the issue of the excluded instruction. Rogers v. State, 783 So. 2d 980, 994-997 (Fla. 2001). The Supreme Court stated that the trial court did not abuse its discretion in excluding the proposed instruction because the record did not demonstrate its necessity. Further, the trial court addressed the mitigators individually and determined the amount of weight given to each. Therefore, it is clear that even had defense counsel objected to the exclusion of the instruction, the outcome of the penalty phase would not have been different. As such, Defendant is not entitled to any relief on this ground.

(PCR V5:894-95). After conducting the evidentiary hearing, the lower court denied sub-claim A of the claim, stating in pertinent part:

> In order for a defendant to be successful in a claim of ineffective assistance of counsel for failure to object to allegedly improper comments during closing argument, the defendant must show that the comments that counsel failed to object to constitute fundamental error. Chandler v. State, 848 So. 2d 1031, 1045 (Fla. 2003). Here, the Supreme Court stated in its Opinion that "most of the arguments complained of do not constitute error, much less fundamental error." Rogers v. State, 783 So. 2d 980, 1002 (Fla. 2001). As such, Defendant is unable to

> demonstrate any prejudice as a result of counsel's failure to object to the allegedly improper comments.
>
> Furthermore, trial counsel for Defendant, Robert Fraser, Esq., stated at the June 18, 2004 hearing that he believed the prosecution's comments to be proper based on facts in the record. Also, Mr. Fraser stated that had the Supreme Court decision that condemned Assistant State Attorney, Karen Cox, for the use of the "Desert Storm" argument been rendered prior to its use in the instant case, he would have objected. (June 18, 2004 Transcript, pp. 76-80). Counsel cannot be held to anticipate future developments in the law. Meeks v. State, 382 So. 2d 673, 676 (Fla. 1980). As such, trial counsel was not deficient in his representation. Therefore, Defendant is not entitled to any relief on this issue.

(PCR V5:879).

The State submits that the lower court properly denied Appellant's claim of ineffective assistance of penalty phase counsel based on counsel's failure to object to comments made by the prosecutor in her penalty phase closing argument. When reviewing a postconviction court's order denying relief after conducting an evidentiary hearing, this Court defers to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the Strickland deficiency and prejudice prongs de novo. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the lower court properly analyzed Appellant's ineffectiveness claim and concluded that he failed to show deficient performance or prejudice.

Appellant first argues that defense counsel was ineffective for failing to object to comments made by the prosecutor

regarding the victim's final moments which were allegedly made solely to inflame the passion of the jury. Contrary to Appellant's assertion, the prosecutor's comments were based on the evidence produced at trial, namely, the victim was stabbed twice and the knife was twisted, she struggled with her attacker and had defensive wounds, the attack occurred in a small space of a hotel bathroom, the victim would have remained conscious for a short period of time, and her beeper was found next to her body. (DAR V23:2819-21).

The prosecutor's comments were clearly permissible as commenting on the evidence presented at trial and drawing reasonable inferences from that evidence that the murder was especially heinous, atrocious, or cruel. Whether the victim was aware of her impending death, whether she experienced prolonged suffering before death, whether the cause of death was painful or even torturous, whether she fought for her life, and whether she experienced feelings of fear, terror, and helplessness are entirely relevant issues in a penalty phase proceeding in support of the statutory aggravating factor of especially heinous, atrocious, or cruel. In fact, this Court relied on these facts when affirming the trial court's finding of HAC on direct appeal:

> Tina Marie Cribbs died as a result of two fatal stab wounds inflicted while she was conscious. One

> stab wound was in the buttock and the knife was driven in with such great force that the wound path was nine and one-half inches deep. While in her body, the knife was twisted ninety degrees before being pulled from its path. Tina Marie Cribbs was alive and conscious during the infliction of this fatal wound. The other stab wound was to her chest and was driven in with such force that the wound path was eight and one-half inches deep. While in her body, the knife was twisted ninety degrees before being pulled from its path. Tina Marie Cribbs was alive and conscious during the infliction of this fatal wound.
>
> At some point during the attack on Cribbs, she struggled for her life, evidenced by blunt impact injuries to her torso and a laceration to her left wrist indicative of a defensive wound. All this took place in the small confines of a motel bathroom with little if any chance of escape, where Cribbs would have been face to face with her killer and his weapon of choice, a knife with a blade at least nine and one-half inches long.
>
> Cribbs was conscious at the least long enough to realize her lifeblood was flowing down the bathtub drain and that she could not escape death.

Rogers v. State, 783 So. 2d 980, 994 (Fla. 2001).

At the evidentiary hearing, penalty phase counsel Robert Fraser testified that he did not see anything wrong with the State's argument concerning the victim's perceptions at the time of her death. (PCR V4:610-11). Mr. Fraser testified that he was aware of caselaw allowing the State to argue facts in support of the HAC aggravator that caused the jury to focus on the victim's perception of the circumstances. (PCR V4:610). Obviously, the caselaw supports trial counsel's reasoning for not objecting to the prosecutor's argument. This Court has stated that in determining whether HAC applies, the trial court

considers the circumstances of the murder from the "unique perspective of the victim." Banks v. State, 700 So. 2d 363, 367 (Fla. 1997). The victim's "fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." Preston v. State, 607 So. 2d 404, 410 (Fla. 1992). Because Appellant cannot show either deficient performance or prejudice as a result of trial counsel's actions, this Court should affirm the lower court's ruling denying this sub-claim.

Appellant next contends that the prosecutor denigrated a statutory mental mitigating factor by making the following comments:

> Mr. Rogers is a violent, aggressive person and brain damage has nothing to do with it. That's Glen Rogers.
> . . .
> Is there anything about the excuse of voluntarily use of alcohol that in any way mitigates the death of Tina Marie Cribbs? Oh, Mr. Rogers goes to a bar, spends his money to drink alcohol and then kills somebody and we're supposed to say, oh, well, that somehow takes away from the horror of that woman's death.

(DAR V23:2827-28). At the evidentiary hearing, trial counsel Fraser testified that the prosecutor was not denigrating any defense,[21] but was simply attacking the facts presented by the defense; something she was legally entitled to do. Counsel testified that he could not show that Appellant's alleged brain

[21] Appellant did not present a defense at trial of voluntary intoxication.

damage was responsible for the violent murder, so he could not stop the prosecutor from arguing the opposite proposition. (PCR V4:611-12).

After hearing the testimony and considering the record, the lower court found that Appellant could not establish prejudice because this issue was raised on direct appeal and this Court found that "most of the arguments complained of do not constitute error, much less fundamental error." Rogers v. State, 783 So. 2d 980, 1002 (Fla. 2001). In Chandler v. State, 848 So. 2d 1031, 1045 (Fla. 2003), this Court found that in order for a defendant to be successful in a claim of ineffective assistance of counsel for failure to object to allegedly improper comments during closing argument, the defendant must show that the comments that counsel failed to object to constitute fundamental error. Because this Court has previously found that the prosecutor's comments did not constitute error, much less fundamental error, Appellant is unable to establish prejudice.[22]

Likewise, Appellant has failed to establish prejudice based on his claim regarding the prosecutor's alleged denigration of non-statutory mitigation during closing argument. Again,

[22] The instant comments were raised on direct appeal in Appellant's Initial Brief at 64, Rogers v. State (Case No. 91,384).

Appellant raised these specific comments on direct appeal and this Court found that the comments were not erroneous, much less fundamental error. Initial Brief of Appellant at 64-65, Rogers v. State (Case No. 91,384). Accordingly, Appellant is unable to establish prejudice under Strickland. Rogers, 783 So. 2d at 1002; Chandler, 848 So. 2d at 1045.

Finally, Appellant asserts that trial counsel was ineffective for failing to object to the prosecutor's "Operation Desert Storm" argument. Trial counsel testified that had this Court's opinion in Ruiz v. State, 743 So. 2d 1 (Fla. 1999),[23] been issued prior to the comments made by the prosecutor in the instant case, he would have lodged an objection. The lower court denied this aspect of Appellant's claim based on his failure to establish prejudice, see Chandler, supra, and based on his failure to establish deficient performance. The lower court noted that trial counsel could not be deficient for failing to anticipate future developments in the law. Meeks v. State, 382 So. 2d 673, 676 (Fla. 1980).

Appellant argues in his brief that had trial counsel objected to this comment, the probability of reversal on appeal would have been great. Initial Brief of Appellant at 80.

[23] In Ruiz, this Court condemned prosecutor Cox's "Operation Desert Storm" argument and found that she presented "virtually the same" argument in the instant case. Rogers, 783 So. 2d at 1002 n.6.

Contrary to Appellant's assertion, this Court found that the improper comment did not warrant a mistrial and did not constitute fundamental error. Rogers, 783 So. 2d at 1002. Thus, even if counsel had objected, a mistrial would not have been warranted and therefore no prejudice can be shown.

Appellant also asserts that the trial court erred in concluding that trial counsel could not be deficient for failing to anticipate future developments in the law because he asserts that Ruiz was not new law. Obviously, because Ruiz had not been issued, counsel was not aware at the time of Appellant's penalty phase that this Court would condemn an argument similar to the one given in this case. Although there was obviously caselaw out at the time regarding prosecutorial misconduct, counsel cannot be faulted for failing to foresee this Court's decision in Ruiz.

Finally, trial counsel mitigated any prejudice from the improper "Operation Desert Storm" argument by utilizing his own improper argument extolling the love and loyalty of his 82-year-old, 85-pound mother who would battle bailiffs on his behalf, the moral courage taught in the Marine Corps thirty years ago, and the improper emotional appeal that the State wanted to "cook" Appellant. (PCR V23:2835, 2837, 2854). Trial counsel testified at the evidentiary hearing that he capitalized on some

of the prosecutor's argument and made the same types of arguments that she made. (PCR V4:615). Because Appellant cannot show any deficient performance or prejudice based on counsel's failure to object to the prosecutor's comments, this Court should affirm the lower court's order denying Appellant relief on this claim.

ISSUE V

APPELLANT HAS FAILED TO SHOW ANY INDIVIDUAL ERRORS, MUCH LESS, ANY CUMULATIVE ERROR.

Appellant claims in his final issue that the arguments contained in his brief, when considered cumulatively by this Court, should cause this Court to vacate his judgment and sentence and order a new trial. The State has shown, however, that none of Appellant's claims have merit. The lower court agreed and found that because Appellant had failed to establish any of his allegations of ineffective assistance of counsel, he was not entitled to relief under a cumulative error analysis. (PCR V5:881).

Because there is no individual error to consider, Appellant is not entitled to combine meritless issues together in an attempt to create a valid "cumulative error" claim. See Brown v. State, 846 So. 2d 1114, 1126 (Fla. 2003) (upholding lower court's denial of cumulative error claim when each of the individual claims of ineffective assistance of counsel had been denied); Mann v. Moore, 794 So. 2d 595 (Fla. 2001) (finding no cumulative effect to consider where all claims were either meritless or procedurally barred); Downs v. State, 740 So. 2d 506, 509 (Fla. 1999) (concluding that where allegations of individual error do not warrant relief, a cumulative error argument based thereon is without merit).

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the trial court's denial of Appellant's motion for postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Richard E. Kiley and James Viggiano, Jr., Capital Collateral Regional Counsel – Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this 27th day of December, 2005.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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