In the Supreme Court of Florida

ANDREW RICHARD LUKEHART,

Appellant,

v. CASE NO. SC09-961

STATE OF FLORIDA,

Appellee.
_____/

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, ANDREW RICHARD LUKEHART, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is the appeal of a trial court's denial of a 3.851 motion, following an evidentiary hearing, in a capital case. The facts of the crime, as recited in the Florida Supreme Court's direct appeal opinion, are:

> The victim in this case, five-month-old Gabrielle Hanshaw, was killed by Lukehart, who lived in Jacksonville with Gabrielle's mother, Misty Rhue, along with Rhue's other daughter, Ashley, and Rhue's father and uncle. On February 25, 1996, Lukehart and Rhue spent Sunday afternoon running errands in Rhue's car with the two children. When the four returned to their house on Epson Lane, Rhue took two-year-old Ashley, who had been ill, to her bedroom for a nap, and Lukehart cared for Gabrielle, the baby, in another room. At one point, Lukehart entered the bedroom and took a clean diaper for the baby. At approximately 5 p.m., Rhue heard her car starting in the driveway, looked out the window, and saw Lukehart driving away in her white Oldsmobile. Rhue searched the house for the baby and did not find her. Thirty minutes later, Lukehart called from a convenience store and told Rhue to call the 911 emergency number because someone in a blue Chevrolet Blazer had kidnapped the baby from the house. After Rhue called 911, Jacksonville Sheriff's Detectives Tim Reddish and Phil Kearney went to the Epson Lane house.
>
> Shortly thereafter, Lukehart appeared without shirt or shoes in the front yard of the residence of a Florida Highway Patrol trooper in rural Clay County. At about that same time, the car that Lukehart had been driving was discovered about a block away from the trooper's house. The car was off the road and had been abandoned with its engine running. Law enforcement officers from the Clay County Sheriff's Office and the Jacksonville Sheriff's Office interviewed Lukehart and searched in Clay County for the baby during the ensuing eighteen hours. At about noon on Monday, February 26, Lukehart told a lieutenant with the Clay County Sheriff's Office that he had dropped the baby on her head and then shook the baby and that the baby had died at Misty Rhue's residence. Lukehart said that when the baby died, he panicked, left Rhue's residence, and threw the baby in a pond near Normandy Boulevard in Jacksonville. Law enforcement officers searched that area and found the baby's body in a pond.

Lukehart v. State, 776 So.2d 906, 910 (Fla. 2000)

On March 7, 1996, Lukehart was indicted on one count of first-degree murder and one count of aggravated child abuse. The trial was held February 26 and February 27, 1997. During the trial, the State put into evidence the testimony of law enforcement officers who were involved in the search for the baby and who were with Lukehart during the evening of February 25 through the morning of February 26, 1996. The State also presented statements made by Lukehart. The State presented the testimony of the medical examiner, who testified that the baby's body revealed bruises on her head and arm that occurred close to the time of death and that prior to death the baby had received five blows to her head, two of which created fractures.

Lukehart chose to testify in his defense at trial. Before Lukehart testified, the trial court appropriately advised him that he had a right not to testify and that if he did testify, he would be subject to cross-examination. In his testimony, Lukehart said that, while he was changing the baby's diaper on the floor at Rhue's residence, the baby repeatedly pushed up on her elbows. He forcefully and repeatedly pushed her head and neck onto the floor "until the last time I did it she just stopped moving, she was just completely still." Lukehart testified to being six-feet one-inch tall and weighing 225 pounds. He stated that he used "quite a bit" of force to push the baby down. He testified that he tried mouth-to-mouth resuscitation, and when the baby did not revive, he panicked and grabbed the baby and drove to a rural area. He said that when he stopped and was in the process of getting out of the car, he accidentally hit the baby's head on the car door. Lukehart testified

that he threw the baby into the pond where her body was found. He admitted that he had not told law enforcement officers the truth in his earlier accounts of the incident and that, although he did not intend to kill the baby, he was responsible for her death. He said that he eventually told Lieutenant Jimm Redmond of the Clay County Sheriff's Office that he was responsible for the baby's death and that he had revealed the location of the baby's body because "I felt bad, I felt guilty."

The jury convicted Lukehart of first-degree murder and aggravated child abuse as charged. At the penalty phase, the State established that Lukehart had pleaded guilty to felony child abuse for injuring his former girlfriend's baby and that Lukehart was on probation for that prior felony conviction. By a vote of nine to three, the jury recommended death. In its sentencing order, the trial court found that the following three statutory aggravators had been established: (1) that the murder was committed during commission of the felony of aggravated child abuse; (2) that the victim was under twelve years of age; and (3) that appellant had a prior violent felony conviction and was on felony probation (two factors merged). The trial court also found and gave some weight to the statutory mitigators of Lukehart's age (twenty-two) and his substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The court found and gave some weight to the following nonstatutory mitigators: Lukehart's alcoholic and abusive father; Lukehart's drug and alcohol abuse; Lukehart's being sexually abused and suicidal as a child; and Lukehart's being

employed. Finding that aggravators outweighed mitigators, the court sentenced Lukehart to death for the first-degree murder conviction and to fifteen years' imprisonment for the aggravated child abuse conviction. *Lukehart*, 776 So.2d at 910-911.

On appeal, Lukehart raised twelve claims: (1) the trial court erred in refusing to suppress Lukehart's statements; (2) the trial court erred by limiting cross-examination; (3) Lukehart's convictions of first-degree murder and aggravated battery are invalid because of insufficient evidence of premeditation and the lack of a felony independent of the homicide; (4) the trial court erred in instructing the jury on justifiable or excusable homicide; (5) Lukehart's death sentence is disproportionate; (6) the trial court erred in finding that the murder in the course of a felony aggravator had been established; (7) the trial court erred in applying the new aggravator of a crime committed while on felony probation; (8) the trial court erred in finding both murder in the course of a felony and that the victim was under twelve as aggravators (improper doubling); (9) the victim-under-twelve aggravator and the standard jury instruction on the aggravator are unconstitutional; (10) the trial court erred in allowing a collateral crime (found to be a prior violent felony) to be a feature of the penalty phase; (11) the prosecutor's closing argument comments during the penalty phase were fundamental error; and (12) the trial court erred regarding the sentence for the noncapital conviction and the restitution orders. *Lukehart*, 776 So.2d at 911, n.1 (listing issues). The Florida Supreme Court affirmed the convictions of first-degree murder and aggravated child abuse and the

death sentence. *Lukehart*, 776 So.2d at 910. The Florida Supreme Court remanded for resentencing on the aggravated child abuse conviction and directed the trial court to complete a sentencing guidelines scoresheet.

Lukehart sought certiorari review claiming that he was in custody when he was handcuffed for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). On June 25, 2001, the United State Supreme Court denied certiorari *Lukehart v. Florida*, 533 U.S. 934, 121 S.Ct. 2561, 150 L.Ed.2d 726 (2001). So, Lukehart's conviction and sentence became final on the next day, June 26, 2001.

Lukehart filed a "shell" post-conviction motion in the trial court on September 27, 2001. The State moved to strike the shell motion as improper. The trial court struck the shell motion.

On June 20, 2002, Lukehart filed a fully plead 3.851 motion raising seventeen claims: (1) the trial court striking his shell motion and requiring that he file a proper, fully pled motion is a denial of due process, equal protection, access to courts and effective assistance of counsel; (2)Florida's death penalty statute violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); (3) numerous claim of ineffectiveness at both guilt and penalty phase; (4) trial counsel was ineffective for failing to object to jury instructions that shifted the burden to the defendant to prove that a life sentence was appropriate; (5)the victim than twelve aggravator is unconstitutional; (6) the trial court violated the mandates of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), by informing the jury that their sentencing recommendation

was advisory; (7) that rule of professional conduct prohibiting jury interviews is unconstitutional; (8) Florida's lethal injection is cruel and unusual punishment and violates the *ex post facto* clause; (9) that his execution would violate the dictates of *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); (10) his death sentence violates *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and its progeny; (11) his mental health expert was ineffective under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); (12) the prosecutor's comments violated his right to a fair trial; (13) Florida's statute prohibiting the sentence of death to be imposed on a mentally retarded defendant § 921.137, Florida Statutes (2001), violates substantive due process because the statute does not apply retroactively; (14) the imposition of the death penalty on a mentally retarded defendant violates equal protection and due process; (15) his death sentence is cruel and unusual punishment in violation of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); (16) the trial court failed to consider mitigating evidence in violation of the Eighth Amendment and *Campbell v. State*, 571 So.2d 415, 419 (Fla. 1990) and (17) cumulative error.

On August 26, 2002, the State filed a response asserting that the trial court should summarily deny sixteen of the seventeen claim but hold an evidentiary hearing on claim III. Claim III contained numerous claims of ineffectiveness assistance of trial counsel in both the guilt and penalty phase.

Judge William Arthur Wilkes, who presided at the trial and penalty phase, also presided at the postconviction proceedings. On October 11, 2004, the trial court conducted a *Huff* hearing. *Huff v. State*, 622 So.2d 982 (Fla. 1993). Following a *Huff* hearing, the trial court ruled that an evidentiary hearing was necessary on claim III only.

On May 9, 2007 and May 10, 2007, the trial court held an evidentiary hearing. At the evidentiary hearing, the Defendant called twelve witnesses: Dr. Barry M. Crown, Dr. Jack Daniel, Officer R. G. Davis, Mr. Michael L. Edwards, Ms. Amy Grass-Gilmore, Deputy J. Gardner, Ms. Brenda Page, Ms. Stephanie Repko, Ms. Melissa Smith, Ms. Bonnie Lukehart, Mr. Randall Lukehart, and the Defendant, Andrew Lukehart. The State did not call any witnesses.

Following the evidentiary hearing, both the defense and state filed pleadings. The defense filed an post-evidentiary hearing memorandum of law. The State filed a written proposed order. The trial court denied the motion for postconviction relief following the two day evidentiary hearing.

SUMMARY OF ARGUMENT

ISSUE I

Lukehart claims his attorney was ineffective for not relitigating his guilt of the underlying felony child abuse conviction used to establish the prior violent felony aggravator in this capital case. IB at 21. Counsel was not ineffective. Counsel cannot be ineffective for failing to do something that the law prohibits. Counsel at the penalty phase of a capital trial may not relitigating his client's guilt of the underlying felony. Counsel can attack the weight using the facts of the underlying crime but not its existence. Nor was there any prejudice. Lukehart's claim of actual innocence of the underlying conviction is not a compelling one. The jury would have found that Lukehart was guilty of the prior conviction and therefore, the prior violent felony aggravator. Thus, the trial court properly this claim of ineffectiveness following an evidentiary hearing.

ISSUE II

Lukehart asserts for the first time on appeal that counsel was ineffective for failing to file a motion requesting that the medication of Sinequan, Vistaril and Mellaril be stopped. IB at 34. This claim is not preserved. It was not raised in the 3.851 motion and Lukehart did not obtain a ruling from the trial court on the matter. Nor was the issue developed at the evidentiary hearing. Lukehart did not present a medical doctor at the evidentiary hearing to establish that the medications were not appropriate. This claim of ineffectiveness is sheer speculation. This Court has repeatedly

observed that claims of ineffectiveness may not be based on mere conjecture. This claim is not preserved and this Court should not entertain it for the first time on appeal.

ISSUE III

Lukehart contends that counsel was ineffective for not presenting Dr. Krop to testify as to Lukehart's intermittent explosive disorder at the guilt phase. IB at 45. There was no deficient performance. Dr. Krop would not have been allowed to testify at the guilt phase regarding this type of diminished capacity defense. Counsel cannot be ineffective for failing to present a defense that is prohibited by law. Moreover, there was no prejudice. Even if Dr. Krop had been allowed to testify in the guilt phase, the jury still would have convicted Lukehart of murder. The trial court properly denied this claim following an evidentiary hearing.

ISSUE IV

Lukehart contends that the trial court erred in striking his shell motion because it was filed before the effective date of rule 3.851 and therefore, the prior version of the rule governed his case. IB at 55. First, this issue is not preserved. Moreover, trial courts have the discretion to require litigants to abide by a new version of the rule, that will shortly be effective, when the new rule is designed to cure abuses that occurred under the prior verison of the rule. Additionally, shell motions, while a common practice, were not proper even under the old version of the rule. Nor is there any prejudice. Lukehart's post-conviction motion was not deemed untimely and he was allowed to amend his fully pled motion. Nor will

Lukehart's federal habeas petition be rendered untimely. Thus, the trial court properly required Lukehart file a fully pled post-conviction motion.

ISSUE V

Lukehart asserts trial counsel was ineffective for failing to include an argument that the officer violated a Baker Act policy in the motion to suppress Lukehart's confession. IB at 60. This claim fails for lack of proof. Although granted an evidentiary hearing on this claim, post-conviction counsel did not introduce the policy into evidence at the evidentiary hearing. There was no deficient performance. Counsel filed a motion to suppress. Moreover, there was no prejudice. The exclusionary rule does not apply to a violation of local policy. So, the motion to suppress would not have been granted on the basis of a violation of a local policy regarding the Baker Act. Thus, the trial court properly denied this claim of ineffectiveness for not making an additional argument in the motion to suppress that counsel filed.

ISSUE VI

Lukehart claims that counsel was ineffective for not objecting to the felony murder instruction regarding the intent required. IB at 69. There was no deficient performance. The jury instructions were proper statements of the law. Felony murder with aggravated child abuse as the underlying felony does not require an intent to kill, only an intent to commit aggravated child abuse. There was no basis for any objection. Nor was there any prejudice. Any objection would have been properly overruled. Thus, the trial court properly

determined that counsel was not ineffective for failing to object to the felony murder jury instructions.

ISSUE VII

Lukehart claims that counsel was ineffective for not objecting, on the basis of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), to the jury instructions informing the jury that their sentencing recommendation was advisory. IB at 75. This Court has repeatedly held that counsel is not ineffective for not making *Caldwell* objections. Thus, the trial court properly summarily denied this claim of ineffectiveness.

ISSUE VIII

Lukehart contends that counsel was ineffective for presenting an uncle, two aunts, and two cousins' testimony via deposition at the penalty phase rather than live. IB at 78. This claim is limited to Lukehart's cousin, Stephanie Repko's testimony. There was no deficient performance. There was no prejudice either. Repko's testimony at the evidentiary hearing was largely cumulative to her deposition testimony. Thus, the trial court properly denied this claim of ineffectiveness.

ISSUE IX

Lukehart asserts that trial counsel was ineffective for failing to object to the prosecutor's comments in guilt and penalty phase. IB at 88. There was no deficient performance. Most of the prosecutor's comments were proper and therefore, there was no basis for defense counsel to object. Thus, the trial court properly denied

this claim of ineffectiveness for failing to object to the prosecutor's comments.

ISSUE X

Lukehart asserts that the rule regulating the Florida Bar, rule 4-3.5(d)(4), which prohibits counsel from conducting juror interviews violates due process and equal protection. IB at 93. This issue is procedurally barred. Additionally, this Court has repeatedly rejected this claim. Thus, the trial court properly summarily denied this claim.

ISSUE XI

Lukehart asserts that Florida's lethal injection protocols are cruel and unusual punishment in violation of the Eighth Amendment. IB at 96. Both the United States Supreme Court and this Court have rejected Eighth Amendment challenges to lethal injection. Thus, the trial court properly summarily denied this claim.

ISSUE XII

Lukehart asserts that the number and types of errors when "considered as a whole" rendered his trial fundamentally unfair. IB at 98. This Court should not permit cumulative error claims. Furthermore, even if cumulative error analysis was proper, Lukehart may not add direct appeal issues and post-conviction issues cumulatively. Finally, there was no ineffectiveness and therefore, no cumulative error. Thus, the trial court properly denied this claim of cumulative error.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO ATTACK THE UNDERLYING FELONY CONVICTION USED AS THE PRIOR VIOLENT FELONY AGGRAVATOR? (Restated)

Lukehart claims his attorney was ineffective for not relitigating his guilt of the underlying felony child abuse conviction used to establish the prior violent felony aggravator in this capital case. IB at 21. Counsel was not ineffective. Counsel cannot be ineffective for failing to do something that the law prohibits. Counsel at the penalty phase of a capital trial may not relitigating his client's guilt of the underlying felony. Counsel can attack the weight using the facts of the underlying crime but not its existence. Nor was there any prejudice. Lukehart's claim of actual innocence of the underlying conviction is not a compelling one. The jury would have found that Lukehart was guilty of the prior conviction and therefore, the prior violent felony aggravator. Thus, the trial court properly this claim of ineffectiveness following an evidentiary hearing.

Standard of review[1]

The standard of review is *de novo*. *Morris v. State*, 931 So.2d 821, 828 (Fla. 2006)(explaining that "when reviewing a trial court's

[1] Because most of the remaining claims are ineffectiveness claims, the standard of review is the same for these issues. In the interest of brevity, the standard of review will not be repeated for each issue.

ruling after an evidentiary hearing on an ineffective assistance claim, this Court gives deference to the trial court's factual findings to the extent they are supported by competent, substantial evidence, but reviews *de novo* the trial court's determinations of deficiency and prejudice, which are mixed questions of fact and law.").

Ineffectiveness[2]

As this Court explained in *Ferrell v. State*, 918 So.2d 163, 169-170 (Fla. 2005):

> . . .to prevail on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive the defendant of a fair trial. In reviewing counsel's performance, the reviewing court must be highly deferential to counsel, and in assessing the performance, every effort must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

[2] Because most of the remaining claims are ineffectiveness claims, the legal standard is the same. In the interest of brevity, the legal standard for ineffectiveness will not be repeated for each issue.

Ferrell, 918 So.2d at 169-170 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

The Eleventh Circuit, in an *en banc* decision, discussed the performance prong of *Strickland*. *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000)(en banc). The *Chandler* Court noted that the cases in which habeas petitioners can properly prevail are few and far between. The standard for counsel's performance is reasonableness under prevailing professional norms. The purpose of ineffectiveness review is not to grade counsel's performance; rather, the purpose is to determine whether the adversarial process at trial, in fact, worked adequately. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. Counsel does not enjoy the benefit of unlimited time and resources. Every counsel is faced with a zero-sum calculation on time, resources, and defenses to pursue at trial. Thus, no absolute duty exists to investigate particular facts or a certain line of defense. And counsel need not always investigate before pursuing or not pursuing a line of defense. Investigation (even a nonexhaustive, preliminary investigation) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. For example, counsel's

reliance on particular lines of defense to the exclusion of others--whether or not he investigated those other defenses-- is a matter of strategy and is not ineffective unless the petitioner can prove the chosen course, in itself, was unreasonable. Because the reasonableness of counsel's acts (including what investigations are reasonable) depends critically upon information supplied by the petitioner or the petitioner's own statements or actions, evidence of a petitioner's statements and acts in dealing with counsel is highly relevant to ineffective assistance claims. Counsel is not required to present every non-frivolous defense; nor is counsel required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy. Considering the realities of the courtroom, more is not always better. Stacking defenses can hurt a case. Good advocacy requires winnowing out some arguments, witnesses, evidence, and so on, to stress others. No absolute duty exists to introduce mitigating or character evidence. The reasonableness of a counsel's performance is an objective inquiry. Because the standard is an objective one, that trial counsel admits his performance was deficient matters little. When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger. Even the very best lawyer could have a bad day. No one's conduct is above the reasonableness inquiry. Just as we know that an inexperienced lawyer can be competent, so we recognize that an experienced lawyer may, on occasion, act incompetently. However, experience is due some respect. No

absolute rules dictate what is reasonable performance for lawyers. The law must allow for bold and for innovative approaches by trial lawyers. And, the Sixth Amendment is not meant to improve the quality of legal representation, but simply to ensure that criminal defendants receive a fair trial. These principles guide the courts on the question of reasonableness, the touchstone of a lawyer's performance under the Constitution. *Chandler*, 218 F.3d at 1312-1319.

Trial counsel, Mr. Michael L. Edwards, testified at the evidentiary hearing regarding his experience; his trial preparation and strategy in this case. (E.H. May 10, 2007 at 73-149). He had worked as a public defender for six months and then worked at the State Attorney's Office as a prosecutor for three (3) years. (E.H. May 10, 2007 at 73-149). In the State Attorney's Office, he worked as a misdemeanor prosecutor for nine months and then as a felony prosecutor. (E.H. May 10, 2007 at 75). He prosecuted "murder cases, attempted murder cases and major crimes." He has tried over twenty cases in which the State was seeking the death penalty. (E.H. May 10, 2007 at 76). Of those twenty capital cases, he handled probably eight to ten cases prior to handling Lukehart's case. (E.H. May 10, 2007 at 75). He was successful in getting the State to waive the death penalty in all but four of these capital cases. He had tried two capital cases that went to a penalty phase prior to handling Mr. Lukehart's case. (E.H. May 10, 2007 at 76). He tried Mr. Lukehart's case without co-counsel because that was the policy at the time. (E.H. May 10, 2007 at 77). While he has no independent recollection of consulting with the prior attorney involved in the case, Assistant

Public Defender Mr. Buzzell, it was his policy to consult with the prior attorney.

Evidentiary hearing testimony

At the evidentiary hearing, Mr. Edwards testified that he discussed the prior conviction with Lukehart and was aware Lukehart had denied committing that crime. (E.H. May 10, 2007 at 115-116). He discussed the prior conviction with the attorney who handled the case. (E.H. May 10, 2007 at 121). That attorney informed Mr. Edwards that she had told Mr. Lukehart that he had a good chance of acquittal based upon Brenda Page's deposition testimony and her advice was not to enter a plea. (E.H. May 10, 2007 at 121). He obtained the PD's file in the prior conviction case. (E.H. May 10, 2007 at 114). He read the file including the psychological report and the lawyer's notes. The file also reflected that Lukehart admitted the charged offense to the mother of the infant and that he had harmed the infant on prior occasions. (E.H. May 10, 2007 at 117). Although trial counsel presented this attorney at the penalty phase, he did not ask her her opinion of Lukehart's chances of acquittal during her testimony. Counsel was concerned that if he presented the theory that it was actually Monica Plummer who harmed the infant to mitigate the aggravator, this admitted but uncharged child abuse would come out as well.

The trial court's ruling

> In subclaim twelve the Defendant alleges trial counsel was ineffective for not attacking his prior felony conviction. It

appears the Defendant is asserting that trial counsel should have retried his guilt of the underlying conviction used as an aggravator in the penalty phase of this trial. This is residual doubt as to the aggravator. Florida does not recognize residual doubt, much less residual doubt as to the aggravators. *Williamson v. State*, 961 So. 2d 229 (Fla. 2007)(noting that the "Court has held that residual or lingering doubt ... is not an appropriate matter to be raised in mitigation during the penalty phase proceedings of a capital case" citing *Rose v. State*, 675 So. 2d 567, 572 n. 5 (Fla. 1996)); *Reynolds v. State*, 934 So. 2d 1128, 1152 (Fla. 2006)(concluding that the trial court "appropriately excluded evidence offered to establish residual or lingering doubt from consideration when making its sentencing determination"). A capital defendant has no constitutional right to present lingering doubt evidence at the penalty phase. *Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654, 1667 (2007)(noting "we have never held that capital defendants have an Eighth Amendment right to present 'residual doubt' evidence at sentencing citing *Oregon v. Guzek*, 546 U.S. 517, 523-527 (2006)).[3] Counsel's performance cannot be found deficient for failing to do what is legally impermissible. *Melton v. State*, 949 So. 2d 994, 1006 (Fla. 2006)(rejecting a claim that counsel was ineffective for failing to chase down leads that would have acquitted him of the conviction used as a prior violent felony aggravator because "it is clear that this conviction is final and was properly invoked as an aggravator.").

Additionally, trial counsel fully investigated the issue. At the evidentiary hearing, Mr. Edwards testified that he discussed the prior conviction with the Defendant, and was aware the Defendant denied committing that crime. (E.H. Vol. I at 115-116.) Trial counsel discussed the prior conviction with the attorney who handled that case, and was informed she had told the Defendant he had a good chance of acquittal, and advised him not to enter a plea. (E.H. Vol. I at 121.) Trial counsel also obtained the Public Defender's file in the prior conviction case, and read the file including the psychological report and the lawyer's notes. (E.H. Vol. I at 114.) After reviewing the file regarding the prior conviction and discussing the case with the Public Defender who handled the case, trial counsel concluded that the Defendant's plea had been knowingly, voluntarily, and intelligently entered. (E.H. Vol. I at 122.) Trial counsel testified that there was no basis to set aside the plea, and he has an ethical obligation not to

[3] A defendant may not rechallenge the legal validity of a prior conviction used as an aggravator merely because it was used as an aggravator. *Daniels v. United States*, 532 U.S. 374, 382 (2001) (holding 'a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully)").

file frivolous motions. (E.H. Vol. I at 122-123.) The Defendant's twelfth subclaim for relief is denied.

Merits

There was no deficient performance. Post-conviction counsel asserts that trial counsel should have either filed a 3.850 motion attacking the prior conviction or relitigated Lukehart's guilt regarding the prior conviction for felony child abuse during the penalty phase of this case. Neither option was available to counsel as a matter of law.

Counsel is not authorize to file a post-conviction motions attacking the prior conviction. Cf. *State v. Kilgore*, 976 So.2d 1066, 1068 (Fla. 2007)(holding that CCRC could not represent defendant in challenging prior non-capital conviction used as aggravating circumstance in a capital case). While Lukehart was entitled to attack his prior conviction *pro se*, an attorney appointed to represent a defendant in a capital case does not have a duty to file 3.850 motions attacking a prior conviction that will be used as an aggravator. They are not authorized to do so. Being charged with a capital case does not create a right to counsel in the postconviction process of a non-capital case that will be used as an aggravator.

Furthermore, counsel is not permitted to relitigate a prior conviction during the penalty phase of a capital trial. *Melton v. State*, 949 So.2d 994, 1005 (Fla. 2006)(agreeing with the State that "Melton may not relitigate the Saylor murder conviction in these proceedings" in a case where the defendant was challenging in this

Court an underlying murder conviction used as an aggravator which had been affirmed by the First District in both the direct appeal and post-conviction and never vacated). None of the testimony presented at the evidentiary hearing regarding Lukehart's prior conviction would have been admissible in the penalty phase of this case. This is a residual doubt regarding a prior conviction used as an aggravator. And Florida law does not permit residual doubt, much less residual doubt as to an aggravator. *Williamson v. State*, 961 So.2d 229, 237 (Fla. 2007)(noting that this "Court has held that residual or lingering doubt ... is not an appropriate matter to be raised in mitigation during the penalty phase proceedings of a capital case."); See also *Oregon v. Guzek*, 546 U.S. 517, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006). Counsel cannot be ineffective for failing to present a defense that is precluded as a matter of law. Cf. *Evans v. State*, 946 So.2d 1, 11 (Fla. 2006)(explaining that trial counsel cannot be ineffective for failing to present a defense that does not exist). Counsel can attack the weight of the aggravator using the facts of the underlying crime but not its existence.

Postconviction counsel is really raising an ineffectiveness for not pursuing a *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) claim. However, as this Court has explained, a legitimate *Johnson* claim requires that the underlying conviction has been set aside. *Nixon v. State*, 932 So.2d 1009, 1023 (Fla. 2006)(rejecting a claim when the defendant asserted that the two prior felonies used to support the prior violent felony aggravator were invalid "because the prior violent felonies used in Nixon's case have

not been vacated and are still valid convictions" citing *Buenoano v. State*, 708 So.2d 941, 952 (Fla. 1998)); *Bundy v. State*, 538 So.2d 445, 447 (Fla. 1989)(concluding that *Johnson* provided no basis for relief because the validity of Bundy's Utah conviction of aggravated kidnapping, which was a basis for the finding of a prior violent felony, had not been challenged citing *Straight v. State*, 488 So.2d 530 (Fla. 1986)). This is equally true of an ineffectiveness claim. To raise a valid ineffectiveness claim for not pursuing a *Johnson* claim, the underlying conviction must have been vacated by a court. Lukehart's underlying felony child abuse conviction has never been vacated.

Nor is there any prejudice. Even if counsel were miraculously allowed to relitigate Lukehart's guilt of the underlying conviction used as the prior violent felony aggravator in direct contravention of Florida law, the jury would not have recommended life based on that testimony. The jury in this case would have still found that Lukehart committed the underlying felony. Lukehart has no reasonable explanation for why he pled guilty to the prior child abuse charge if he did not commit the offense. The mother of the first of Lukehart's two infant victims, who may well have also been abusive to Jullian, was not home at the time. It was Lukehart who was with the eight-month-old infant, Jillian French, when she suffered the injuries. The first victim, another infant, sustained a closed head injury resulting in seizures and visual deficits. *Lukehart*, 776 So.2d at 926. Moreover, this jury would not have been a very receptive audience to an actual innocence claim regarding the prior conviction.

The jury simply would have concluded that Lukehart has a propensity to severely injure infants. Lukehart would have to have a much better claim of innocence than the testimony of a friend that the mother was also abusive to the infant. The mother being abusive and neglectful of the child does not preclude Lukehart from also being abusive to the child. Brenda Page's testimony simply is not the caliber of testimony that Lukehart would need to present to convince this jury that he actually did not commit the prior offense. Lukehart's claim of actual innocence regarding the prior child abuse conviction is not a very compelling one. There was no prejudice.

Post-conviction's reliance on *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), is misplaced. The Court in *Rompilla* held that counsel was ineffective for failing to make reasonable efforts to review the court file on the defendant's prior conviction which contained mitigation. Here, counsel's testimony regarding his investigation of the prior conviction at the evidentiary hearing was clear. He did investigate the prior conviction both by obtaining the Public Defender's file regarding the felony child abuse conviction and speaking with the attorney who handled the case. Counsel investigated the prior conviction. There certainly was no violation of *Rompilla*.

Postconviction counsel's reliance on ABA standards is also misplaced. IB at 23. The United States Supreme Court has recently clarified that the ABA guidelines are just that - guidelines, not mandates. In *Bobby v. Van Hook*, 558 U. S. -, 130 S.Ct. 13, 2009 WL 3712013 (Nov. 9, 2009), the United States Supreme Court concluded that

counsel was not ineffective at penalty phase for failing to investigate and present mitigating evidence. The Court explained that the "prevailing professional norms" standard was "necessarily a general one" and there was "[n]o particular set of detailed rules for counsel's conduct. . ." Restatements of professional standards, can be useful as "guides" "but only to the extent they describe the professional norms prevailing when the representation took place." Regarding the Sixth Circuit's reliance on the ABA's Guidelines, the Court observed that they had improperly treated the guidelines "as inexorable commands with which all capital defense counsel must fully comply." But the Court explained, the ABA's Guidelines are "only guides to what reasonableness means, not its definition." The Court explained that, while states and private organizations are free to impose whatever specific rules they see fit, the Constitution "imposes one general requirement: that counsel make objectively reasonable choices." *Van Hook*, 558 U.S. -, -, 2009 WL 3712013 at * 3. Such guidelines "must not be so detailed that they would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Van Hook*, 130 S.Ct at 17, n.1.

Accordingly, the trial court properly denied this claim following an evidentiary hearing.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO FILE A MOTION TO CEASE LUKEHART'S MEDICATION AND A MOTION FOR CONTINUANCE? (Restated)

Lukehart asserts for the first time on appeal that counsel was ineffective for failing to file a motion requesting that the medication of Sinequan, Vistaril and Mellaril be stopped. IB at 34. This claim is not preserved. It was not raised in the 3.851 motion and Lukehart did not obtain a ruling from the trial court on the matter. Nor was the issue developed at the evidentiary hearing. Lukehart did not present a medical doctor at the evidentiary hearing to establish that the medications were not appropriate. This claim of ineffectiveness is sheer speculation. This Court has repeatedly observed that claims of ineffectiveness may not be based on mere conjecture. This claim is not preserved and this Court should not entertain it for the first time on appeal.

Evidentiary hearing

At the evidentiary hearing, counsel testified that he was aware that Lukehart was being medicated but did not know the particular drugs or the side effects of the drugs. Dr. Barry Crown testified that Lukehart was being given Sinequan, Vistaril, and Mellaril.

Preservation

This issue is not preserved. This Court does not permit claims to be raised on appeal that were not included in the post-conviction

motion filed below. *Hutchinson v. State*, 17 So.3d 696, 703, n.5 (Fla. 2009)(refusing to address a claim of ineffectiveness that was not included in the post-conviction motion and being raised for the first time in its current version on appeal citing *Connor v. State*, 979 So.2d 852, 866 (Fla. 2007)(because the confrontation issue was not raised in defendant's postconviction motion, the issue could not be heard for the first time on appeal of the postconviction motion); *Bates v. State*, 3 So.3d 1091, 1103, n. 6 (Fla. 2009)(refusing to address a claim of ineffectiveness relating to a *Brady* claim that was not included in the post-conviction motion and was being raised for the first time on appeal, where the *Brady* claim was made in the post-conviction motion but the related ineffectiveness claim was not); *Griffin v. State*, 866 So.2d 1, 11 n. 5 (Fla. 2003)(finding that postconviction claim raised for the first time on appeal was procedurally barred where the defendant raised a new basis for his claim of ineffectiveness for not filing a motion to disqualify citing *Doyle v. State*, 526 So.2d 909, 911 (Fla. 1988)).

Nor did Lukehart obtain a ruling on the matter. *Jones v. State*, 998 So.2d 573, 581 (Fla. 2008)(finding a claim not preserved because the party did not obtain a ruling from the judge citing *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008), *modified*, 986 So.2d 560 (Fla. 2008). There is no ruling for this Court to review.

Postconviction counsel’s reliance on Florida rule of civil procedure 1.190(b), is misplaced. It is rule 3.851(f)(4) that governs amendments to postconviction motions in capital cases. That rule prohibits amendments to the post-conviction motion 30 days before the

evidentiary hearing. The rule certainly does not permit unilateral amendments after the evidentiary hearing. Moreover, the rule governing amendments requires that good cause be shown for any amendment. The rule requires that any motion to amend set "forth the reason the claim was not raised earlier." Post-conviction counsel provides no reason, good or otherwise, to explain why this claim was not included in the post-conviction motion or the amended post-conviction motion.

This Court has condemned the practice of piecemeal supplementation of capital post-conviction motions. *Doorbal v. State*, 983 So.2d 464, 485 (Fla. 2008)(concluding that "Doorbal's amended motion contains the type of post-*Huff* hearing piecemeal supplementation that we condemned in *Vining*").[4] Postconviction counsel attempts to evade this caselaw by asserting that rule 3.851 does not apply because the original post-conviction motion, that was stricken by the trial court, was filed before the effective date of rule 3.851. IB at 34 n.5. However, this caselaw applies regardless of whether rule 3.850 or rule 3.851 applies to this case or not. *Vining* was a pre-3.851 rule case. The post-conviction motion at issue in *Vining* was filed in 1996. *Vining*, 827 So.2d at 207. Lukehart may not engage in this untimely, unilateral, piecemeal amending of his postconviction motion under either rule.

Moreover, the State does object to the expansion. IB at 36. The State does not consent, either expressly or by implication, to this

[4] *Vining v. State*, 827 So.2d 201, 212 (Fla. 2002).

claim being raised for the first time on appeal. This Court has expressed frustration on numerous occasions when the State objects to the presentation of evidence at capital evidentiary hearing. This Court has a stated preference for the evidence to be presented at the evidentiary hearing and then addressing legal arguments regarding that evidence's appropriateness later. So, the fact that the Assistant Attorney General does not object at the evidentiary hearing to certain questions has no significance. If this Court allows the State's silence to be interpreted as an implied consent to an amendments to the pleadings, the State will certainly start objecting to every question that could possibly open the door to that type of abuse.

Waiver

This claim of ineffectiveness is waived. Lukehart did not call the medical doctors who prescribed the Sinequan, Vistaril, and Mellaril at the evidentiary hearing. There was no testimony regarding the dosage given to Lukehart or any actual side effects that Lukehart may have experienced. The medical charts relating to these medications were not introduced. Dr. Crown only testified to possible side effects, not Lukehart's actual side effects.

Merits

Counsel cannot be ineffective for failing to file a motion to cease medication because of the side effects if there were no side effects in Lukehart's particular case. This claim of ineffectiveness is pure

speculation. *Hitchcock v. State*, 991 So.2d 337, 353 (Fla. 2008)(rejecting a claim of ineffectiveness based on speculation because "[s]uch speculation is insufficient to meet the second prong of *Strickland*."); *Derrick v. State*, 983 So.2d 443, 462 (Fla. 2008)(rejecting a claim of ineffectiveness and concluding that Derrick had failed to demonstrate prejudice because a showing of prejudice "must rely on more than mere speculation."). As this Court has repeatedly observed, claims of ineffective assistance of counsel "must be based on more than speculation and conjecture." *Connor v. State*, 979 So.2d 852, 863 (Fla. 2007); *Maharaj v. State*, 778 So.2d 944, 951 (Fla. 2000)(rejecting a claim of ineffectiveness where the arguments supporting the claim were "sheer speculation"). This claim of ineffectiveness should not entertained for the first time on appeal, or alternatively, should be denied as based on sheer speculation.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO PRESENT DR. KROP AT THE GUILT PHASE? (Restated)

Lukehart contends that counsel was ineffective for not presenting Dr. Krop to testify as to Lukehart's intermittent explosive disorder at the guilt phase. IB at 45. There was no deficient performance. Dr. Krop would not have been allowed to testify at the guilt phase regarding this type of diminished capacity defense. Counsel cannot be ineffective for failing to present a defense that is prohibited by law. Moreover, there was no prejudice. Even if Dr. Krop had been allowed to testify in the guilt phase, the jury still would have convicted Lukehart of murder. The trial court properly denied this claim following an evidentiary hearing.

Trial and penalty phase

Defense counsel presented Dr. Krop at the penalty phase, just not at the guilt phase. Dr. Krop, a clinical psychologist, testified in the penalty phase for the defense. Dr. Krop repeatedly described Lukehart as seriously disturbed. (T. Vol. 18 1473, 1449). Dr. Krop reviewed the police reports; the 911 tape; the victim's medical records; the investigator's activity summary; notes from Lukehart's anger management class; his school records; his medical records; his juvenile probation records; records from the Maine Department of Human Services; the 1990 Arrowstock Mental Health Clinic records; and the forty-two (42) depositions in this case. Dr. Krop also consulted

with Dr. Miller who had previously evaluated Lukehart. Dr. Krop also administered neuropsychological
testing designed to detect brain damage. Dr. Krop diagnosed Lukehart as suffering from intermittent explosive disorder; substance abuse; post-traumatic stress disorder and antisocial personality disorder with borderline features. (T. Vol. 18 1467-1470).

Evidentiary hearing

Defense counsel, Mr. Edwards, testified at the evidentiary hearing that, while he presented Dr. Krop at the penalty phase to testify as to Lukehart's intermittent explosive disorder, as well as post-traumatic stress disorder and antisocial personality disorder, he did not present this testimony at the guilt phase. (E.H. May 10, 2007 at 100-102). He explained that the prosecutor in this case had a policy not to depose mental health experts who testified in the penalty phase; she just read the expert's reports. However, if he had listed Dr. Krop as a guilt phase witness, the prosecutor would have deposed him. (E.H. May 10, 2007 at 101). Trial counsel testified that he was afraid this would open the door to Mr. Lukehart's conduct after killing the infant and that he had to walk on "egg shells" during his examination of Dr. Krop at the penalty phase. (E.H. May 10, 2007 at 108,109,133).

At the evidentiary hearing, Dr. Crown confirmed Dr. Krop's diagnosis of intermittent explosive disorder. (PCR 1091).

The trial court's ruling

> In the Defendant's sixth subclaim, he alleges trial counsel was ineffective for failing to have Dr. Krop testify at trial. Trial counsel testified at the evidentiary hearing that, while he presented Dr. Krop at the penalty phase to testify as to the Defendant's intermittent explosive disorder, post-traumatic stress disorder, and antisocial personality disorder, he did not present this testimony at the guilt phase. (E.H. Vol. I at 100-102.) He explained that the prosecutor in this case had a policy not to depose mental health experts who testified in the penalty phase; she just read the expert's reports. However, if trial counsel had listed Dr. Krop as a guilt phase witness, the prosecutor would have deposed him. (E.H. Vol. I at 101.) Trial counsel testified that he was afraid this would open the door to the Defendant's conduct after killing the infant, and that he had to walk on "egg shells" during his examination of Dr. Krop at the penalty phase. (E.H. Vol. I at 108, 109, 133.) This Court finds that because tactical decisions do not constitute ineffective assistance, counsel's performance was not deficient. *Songer v. State*, 419 So. 2d 1044 (Fla. 1982); *Gonzalez v. State*, 579 So. 2d 145, 146 (Fla. 3d DCA 1991)("Tactical decisions of counsel do not constitute ineffective assistance of counsel."). The Defendant's sixth subclaim is denied.

Merits

There was no deficient performance. Diminished capacity is not a recognized defense in Florida. Trial counsel simply would not be permitted to present Dr. Krop's testimony regarding Lukehart's intermittent explosive disorder during the guilt phase. Counsel cannot be ineffective for failing to present a defense that is not permitted to be presented to the jury. *Evans v. State*, 946 So.2d 1, 10-11 (Fla. 2006)(rejecting a claim that trial counsel was ineffective for failing to investigate, prepare, and present the defense of diminished capacity at the guilt phase because diminished capacity is not a legally recognized defense in Florida citing *Chestnut v. State*, 538 So.2d 820, 820 (Fla. 1989)). Here, as in *Evans*, counsel cannot be ineffective for failing to present a defense

that does not exist in Florida. See *Hodges v. State*, 885 So.2d 338, 352, n.8 (Fla. 2004)(explaining that "[t]his Court has held on numerous occasions that evidence of an abnormal mental condition not constituting legal insanity is inadmissible to negate specific intent."); *Spencer v. State*, 842 So.2d 52, 63 (Fla. 2003) (holding that evidence of defendant's disassociative state would not have been admissible during the guilt phase).

Lukehart's reliance on *State v. Hickson*, 630 So.2d 172 (Fla. 1993), which approved the admission of testimony of battered woman syndrome, is misplaced. IB at 52. This Court has explained that it has made "exceptions for conditions which are commonly understood and may be explained to the jury without the assistance of a mental health expert, such as medication, epilepsy, infancy, and senility." *Evans*, 946 So.2d at 11. But intermittent explosive disorder is not in that category. It is not commonly understood and it requires the assistance of a mental health expert to present.

Moreover, there was no prejudice. Even if Dr. Krop had been allowed to testify in the guilt phase, the jury still would have convicted Lukehart of murder. Lukehart testified at trial. He testified that while he was changing the baby's diaper, the baby repeatedly pushed up on her elbows. *Lukehart*, 776 So.2d at 911. He admitted he forcefully and repeatedly pushed her head and neck onto the floor "until the last time I did it she just stopped moving, she was just completely still." Lukehart testified to being six-feet one-inch tall and weighing 225 pounds. He stated that he used "quite a bit" of force to push the baby down. *Lukehart*, 776 So.2d at 911.

The trial court properly denied this claim following an evidentiary hearing.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY REQUIRED LUKEHART TO FILE A FULLY PLED POST-CONVICTION MOTION? (Restated)

Lukehart contends that the trial court erred in striking his shell motion because it was filed before the effective date of rule 3.851 and therefore, the prior version of the rule governed his case. IB at 55. First, this issue is not preserved. Moreover, trial courts have the discretion to require litigants to abide by a new version of the rule, that will shortly be effective, when the new rule is designed to cure abuses that occurred under the prior verison of the rule. Additionally, shell motions, while a common practice, were not proper even under the old version of the rule. Nor is there any prejudice. Lukehart's post-conviction motion was not deemed untimely and he was allowed to amend his fully pled motion. Nor will Lukehart's federal habeas petition be rendered untimely. Thus, the trial court properly required Lukehart file a fully pled post-conviction motion.

Preservation

The issue is not preserved. Lukehart did not argue in his 2002 motion that the rule did not apply to him. He did not assert that the prior version of the rule was the applicable rule. Rather, he asserted that the rule was a violation of due process, equal protection, and access to courts. "For an issue to be preserved for appeal, it must be presented to the lower court, and the specific legal argument or ground to be argued on appeal must be part of that

presentation." *Murray v. State*, 3 So.3d 1108, 1117 (Fla. 2009)(quoting *Doorbal v. State*, 983 So.2d 464, 492 (Fla. 2008)). Nor did he obtain a ruling on which version of the rule applied. *Jones v. State*, 998 So.2d 573, 581 (Fla. 2008)(finding a claim not preserved because the party did not obtain a ruling from the judge citing *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008), *modified*, 986 So.2d 560 (Fla. 2008). This issue is not preserved.

The trial court's ruling

> In claim one, the Defendant argues he was denied due process, equal protection, access to courts, and ineffective assistance of counsel as a result of this Court's striking his shell motion and requiring that he file a fully pled motion, pursuant to Florida Rule of Criminal Procedure 3.851. This Court required that the Defendant file his Rule 3.851 Motion on time, but granted leave to amend the Motion with any new claims based on new information contained in the public records. The Defendant asserts that being "forced" to plead piecemeal causes "disadvantages" without identifying any. Contrary to the Defendant's assertions, this Court's Order permitting amendments, based on the public records disclosures, completely cures any possible problems.
>
> The Defendant claims he was deprived of the opportunity to toll his federal habeas time limit. However, the Defendant does not need to toll his federal habeas time limit, as all that is needed is one day remaining of the federal one-year time limit, after state post conviction litigation is complete. Because the federal habeas statute limits the claims that can be raised in federal habeas proceedings to those that were raised on appeal in state court, the Defendant can start preparing his federal habeas petition now and will have until the Florida Supreme Court's final opinion is issued in this case.
>
> The Defendant also asserts that Florida Rule of Criminal Procedure 3.852, which governs capital post conviction public records production, is unconstitutional. The Defendant argues the public records statute and rule violate the access to court provision of the Florida Constitution. Article I, § 21, Fla. Const. The access to court provision is designed for civil litigants, while the corresponding criminal provision is the habeas corpus provision. Art. I, § 13, Fla. Const.[5] The

[5] The habeas corpus provision, § 13, provides:

Florida Supreme Court and the legislature may place reasonable limits on the constitutional right of habeas corpus. *Johnson v. State*, 536 So. 2d 1009, 1011 (Fla. 1988) (holding that the two-year limitation is a reasonable limitation on the state constitutional right of habeas corpus); Cf. *Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103, 1104 (Fla. 1996)(concluding that the legislature may place reasonable Limits on the state constitutional right to appeal). Likewise, the Florida Supreme Court and the legislature may place reasonable limits on the constitutional right of access to public records and meetings. Art. I, § 24, Fla. Const. Thus, the reasonable procedures in the statute and rule do not violate either constitutional provision. *Johnson v. State*, 536 So. 2d 1009 (Fla. 1989)(rejecting a claim that the time limitation was unconstitutional; explaining that the rule reduces piecemeal litigation and the assertion of stale claims while at the same time preserves the right to unlimited access to the courts where there is newly discovered evidence and affirming the denial of a rule 3.850 motion as untimely).

The Defendant asserts that he, unlike any other seeker of public records, is required to demonstrate that he has made his own search, that his requests are relevant, and that his requests are not broad or burdensome. However, the Defendant, unlike any other member of the public who seeks public records, is given an attorney to obtain them, a special central repository to store them, and is not charged for them. There can be no equal protection challenge to the public records rule or statute because the Defendant and the ordinary citizen seeking public records are not similarly situated. The Defendant has failed to establish the actions of trial counsel were unreasonable. The Defendant's claim one is denied.

Merits

The rule of criminal procedure governing collateral relief after death sentence has been imposed and affirmed on direct appeal, rule 3.851(a), provides:

> This rule shall apply to all motions and petitions for any type of postconviction or collateral relief brought by a prisoner in state custody who has been sentenced to death and whose conviction and death sentence have been affirmed on direct

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> The writ of habeas corpus shall be grantable of right, freely and without cost, It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

> appeal. It shall apply to all postconviction motions filed on or after October 1, 2001, by prisoners who are under sentence of death. Motions pending on that date are governed by the version of this rule in effect immediately prior to that date.

The rule also requires "detailed allegations" for all claims. Rule 3.851(e)(1)(d); Rule 3.851(e)(1)(E); see also *Gonzalez v. State*, 990 So.2d 1017, 1034 (Fla. 2008)(discussing the amendment to rule 3.851 which prohibits "shell motions" by expressly requiring "a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought."). This Court has noted that it does not condone or encourage the practice of filing shell postconviction motions. *Gonzalez*, 990 So.2d at 1034, n.9 (citing *Bryant v. State*, 901 So.2d 810 (Fla. 2005)). As this Court has observed, before the adoption of the current rule 3.851, "shell motions" caused delays in capital cases. *Bryant v. State*, 901 So.2d 810, 818 (Fla. 2005). In 1999, the Morris Committee had found the practice of filing shell motions "unacceptable because it engenders both confusion and delay." See Letter to Chief Justice Harding from the Supreme Court Committee on Postconviction Relief Report, dated September 30, 1999 p. 3-4.

A trial court has the discretion to require a litigant to abide by a new rule, that is not yet in effect, when that rule was designed to curb abuses and delays that existed under the prior version of the rule. And trial courts certainly have that discretion in cases where abiding by the new rule, that will shortly be effective, causes no harm to a defendant. *Gonzalez v. State*, 990 So.2d 1017, 1034 (Fla. 2008)(observing that Gonzalez failed to demonstrate any prejudice from the trial court striking the shell motion "because he was in fact

allowed to file an amended 3.851 motion and that motion was heard and determined by the trial court."). Furthermore, while it was common practice, shell motions were not proper under the prior version of the rule, just as they are not proper under rule 3.850 governing non-capital cases. *Oquendo v. State*, 2 So.3d 1001, 1005 (Fla. 4th DCA 2008)(explaining that this Court decision in *Spera v. State*, 971 So.2d 754, 761 (Fla. 2007), "did not intend to authorize shell motions" and noting that "while rule 3.850(c)(6) requires merely 'a brief statement of the facts (and other conditions) relied on in support of the motion,' a claim that fails to specify facts necessary to support the claim is insufficient" and "strongly" condemning "the practice of postconviction movants who file motions cataloguing long lists of claims unsupported by specific allegations.")

In *Gore v. State*, - So.3d -, 2009 WL 1792798, 12 (Fla. 2009), this Court rejected a claim that the trial court striking an initial 3.851 motion violates due process or equal protection rights and a claim that the trial court's refusal to grant him leave to amend his motion has jeopardized his federal remedies. The trial court here did not deny Lukehart an opportunity to file a fully pled motion. Nor did the trial court refuse to allow an amendment to that motion. Lukehart was allowed to amend his fully plead motion.

Lukehart asserts that it is "imperative" that this Court resolve this issue. IB at 59. It is not. Lukehart has approximately six days remaining to timely file his federal habeas petition.[6] Having a few

[6] Lukehart sought certiorari review of his direct appeal. On June 25, 2001, the United State Supreme Court denied certiorari *Lukehart v. Florida*, 533 U.S. 934, 121 S.Ct. 2561, 150 L.Ed.2d 726

days remaining after the mandate from this Court issues is not unusual or burdensome. Due to the exhaustion doctrine, which requires that Lukehart raise all claims presented in the federal petition in the state appellate court, the claims that Lukehart can present in federal court are limited to those that Lukehart already has written. Basically, all Lukehart has to do is redraft the direct appeal brief and the postconviction appeal brief into a federal habeas petition. And he can start doing so while this appeal is pending. Cf. *Johnson v. Florida Department Of Corrections*, 513 F.3d 1328, 1333 (11th Cir. 2008)(holding that a federal habeas petitioner is not entitled to equitable tolling merely because the state court granted an extension of time to file his state post-conviction petitions citing *Howell v. Crosby*, 415 F.3d 1250, 1251-52 (11th Cir. 2005); but cf. *Gore v. State*, - So.3d -, 2009 WL 1792798, 12 (Fla. 2009)(stating that "in our view this Court's order granting an extension of time in which to file an amended motion rendered Gore's motion timely for purposes of federal review."). Thus, the trial court properly required Lukehart to file a fully pled post-conviction motion.

(2001). So, Lukehart's conviction and sentence became final on the next day, June 26, 2001. Lukehart has 365 days of untolled time from that date to timely file in federal court. Lukehart filed a "shell" post-conviction motion in the trial court on September 27, 2001. The State moved to strike the shell motion as improper. The trial court struck the shell motion. However, on June 20, 2002, Lukehart filed a fully pled 3.851 motion. This motion tolls the federal habeas clock until the mandate from this appeal is issued by this Court.

ISSUE V

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO INCLUDE AN ADDITIONAL ARGUMENT IN THE MOTION TO SUPPRESS THE CONFESSION THAT COUNSEL FILED? (Restated)

Lukehart asserts trial counsel was ineffective for failing to include an argument that the officer violated a Baker Act policy in the motion to suppress Lukehart's confession. IB at 60. This claim fails for lack of proof. Although granted an evidentiary hearing on this claim, post-conviction counsel did not introduce the policy into evidence at the evidentiary hearing. There was no deficient performance. Counsel filed a motion to suppress. Moreover, there was no prejudice. The exclusionary rule does not apply to a violation of local policy. So, the motion to suppress would not have been granted on the basis of a violation of a local policy regarding the Baker Act. Thus, the trial court properly denied this claim of ineffectiveness for not making an additional argument in the motion to suppress that counsel filed.

Evidentiary hearing

Collateral counsel did not introduce the policy at the evidentiary hearing. This Court has no evidence whether the policy was a formal, written policy or merely a local custom. Without more details regarding the policy, this Court cannot determine the parameters of the policy and whether it applied to a situation where the person to be Baker acted was also the only witnesses to what the officers then believed to be a kidnapping. Lukehart did not establish a violation

of the policy because he did not establish the parameters of the policy. There is a failure of proof regarding this claim of ineffectiveness.

The trial court's ruling

> In subclaim nine the Defendant alleges trial counsel was ineffective for failing to include the policy regarding Baker Acts in the Motion to Suppress. Violation of a local policy is not a basis for suppression. Evidence is suppressed, under the exclusionary rule, because it violates the constitution, not because it violates a local policy. Courts often refuse to apply the exclusionary rule to a violation of a statute, much less a local policy. *Jenkins v. State*, 924 So. 2d 20, 29-33 (Fla. 2d DCA 2006)(discussing the exclusionary rule; explaining that there is no constitutional requirement that evidence obtained in violation of state law (as opposed to the constitution) must be subjected to the exclusionary rule and refusing to suppress evidence obtained in violation of the strip search statute), review granted, *Jenkins v. State*, 944 So. 2d 345 (Fla. 2006); *United States v. Thompson*, 936 F.2d 1249, 1251-1252 (11th Cir. 1991)(holding that exclusionary rule was not applicable as remedy for statutory violation); *People v. Hawkins*, 668 N.W. 2d 602, 609 (Mich. 2003) (holding that exclusionary rule was not applicable to evidence obtained in violation of statute and court rule). A Motion to Suppress based on a violation of a local policy would not have been granted. The Defendant has failed to establish the actions of trial counsel were anything but reasonable. The Defendant's ninth subclaim is denied.

Merits

There was no deficient performance. Counsel filed a motion to suppress Lukehart's confession based on a violation of *Miranda.* Indeed, that was the main issue in the direct appeal. *Lukehart*, 776 So.2d at 917-920. Counsel cannot be ineffective for failing to do something that he, in fact, did do. *Bates v. State*, 3 So.3d 1091, 1106, n. 20 (Fla. 2009)(observing that counsel cannot be held ineffective for what counsel actually did); *Stephens v. State*, 975 So.2d 405, 415

(Fla. 2007)(explaining that counsel cannot be deemed ineffective for failing to object when, in fact, he did object.). This Court does not entertain claims of ineffectiveness for failing to make additional argument in support of issues that were raised in the brief in the context of ineffective assistance of appellate counsel. *Peterka v. State*, 890 So.2d 219, 246 (Fla. 2004)(refusing to consider a claim of ineffective assistance of appellate counsel for inadequately briefing an issue where the issue was raised); *Rutherford v. Moore*, 774 So.2d 637, 645 (Fla. 2000)(holding "if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal."). Likewise, defense counsel should not be faulted for not making additional arguments in support of the motion to suppress. There was no deficient performance.

Nor was there any prejudice. Any motion to suppress that included an argument that a violation of the local policy regarding the Baker Act required exclusion would not have been granted. The exclusionary rule does not apply to violations of statutes unless the statute explicitly provides for the exclusion of the evidence as a remedy, much less to local policies.

This Court recently explained that the exclusionary rule does not apply to violations of state statutes unless the statute itself allows such exclusion. In *Jenkins v. State*, 978 So.2d 116 (Fla. 2008), the Florida Supreme Court held that the exclusionary rule was not a remedy for a violation of Florida's strip-search statute. An officer, as part

of an undercover drug buy, conducted a pat down of the seller Jenkins, finding money but no drugs. Jenkins was wearing baggy jeans and boxer shorts. The officer pulled the boxer shorts away from Jenkins' waist area and observed that inside Jenkins' butt crack was a sandwich bag. The officer removed the sandwich bag which contained 5.9 grams of rock cocaine. Jenkins was arrested and charged with possession of cocaine and possession of cocaine with intent to sell. Jenkins filed a motion to suppress arguing, in part, that the search was a strip-search in violation of Florida's strip-search statute, § 901.211, Florida Statutes (2002). The trial court denied the motion finding that a strip-search did not occur. The Second District has concluded that this was a strip-search but that the exclusionary rule did not apply to the statute.

On appeal, the Florida Supreme Court first determined that a strip-search did not occur. The Florida Supreme Court found that "nothing equivalent to a strip-search occurred," rather, the search was a "reach-in" search. *Jenkins*, 978 So.2d at 127.

The Florida Supreme Court then addressed whether the exclusionary rule applied to Florida's strip-search statute. *Jenkins*, 978 So.2d at 128-131. The Florida Supreme Court explained that whether the exclusionary rule applies to a violation of a statute is to be determined based upon legislative intent. Relying on the United States Supreme Court's decision in *United States v. Giordano*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), the Florida Supreme Court explained that whether evidence obtained in violation of a statute must be suppressed, when no constitutional violation has occurred,

does not turn on the exclusionary rule, but upon the provisions of the specific statute. *Jenkins*, 978 So.2d at 128. The exclusionary rule is an inappropriate sanction unless the statute expressly provides for that remedy. The *Jenkins* Court reasoned that Courts should look to the terms of the statute and the intentions of the legislature, rather than to invoke judge-made exceptions to judge-made rules, when faced with allegations of a statutory violation. This Court then examined the provision of the strip-search statute which stated that "[n]othing in this section shall be construed as limiting any statutory or common-law right of any person for purposes of any civil action or injunctive relief" but did not "expressly provide for exclusion of evidence as a remedy for a violation of the statute." *Jenkins*, 978 So.2d at 129-130. The *Jenkins* Court noted that the only reference to remedies in the statute were civil and injunctive in nature. *Jenkins*, 978 So.2d at 130. The *Jenkins* Court concluded that the exclusionary rule was not a remedy for a violation of the statute. This Court explained that the strip-search statute made explicit reference to civil and injunctive remedies. The Florida Supreme Court reasoned that because the Legislature referred to those particular remedies, "we must assume that the Legislature intended to exclude all other remedies" and concluded "it would be inappropriate for this Court to read a judicially created remedy into the statute." *Jenkins,* 978 So.2d at 130 n.14. The Florida Supreme Court concluded that because the statute does not expressly list the exclusionary rule as a remedy, that remedy was not available for violations of the statute regardless of the

exclusionary rule's deterrence value. *Jenkins*, 978 So.2d at 130. See also *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006)(holding that the exclusionary rule did not apply to a violation of the constitutionally required "knock-and-announce" rule, explaining that suppression of evidence, however, has always been "our last resort, not our first impulse" and noting the substantial social costs of the exclusionary rule including "setting the guilty free and the dangerous at large."). So, the motion to suppress would not have been granted in the basis of a violation of a local policy regarding the Baker Act. Thus, the trial court properly denied the claim of ineffectiveness for not making an additional argument in the motion to suppress.

ISSUE VI

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO OBJECT TO THE FELONY MURDER JURY INSTRUCTIONS? (Restated)

Lukehart claims that counsel was ineffective for not objecting to the felony murder instruction regarding the intent required. IB at 69. There was no deficient performance. The jury instructions were proper statements of the law. Felony murder with aggravated child abuse as the underlying felony does not require an intent to kill, only an intent to commit aggravated child abuse. There was no basis for any objection. Nor was there any prejudice. Any objection would have been properly overruled. Thus, the trial court properly determined that counsel was not ineffective for failing to object to the felony murder jury instructions.

The trial court's ruling

> In subclaim five, the Defendant alleges trial counsel was ineffective for failing to adequately litigate the guilt phase jury instructions. Specifically, the Defendant alleges trial counsel should have provided a stronger argument about the confusing terms in the standard instruction regarding the specific intentional requirement, objected to remarks made by the State during closings regarding "intentional," and reproposed his requested his instruction after the State made remarks about the intentional acts. The standard is reasonably effective counsel, not perfect or error-free counsel. *Coleman v. State*, 718 So. 2d 827, 829 (Fla. 4th DCA 1998). A review of the record does not establish that counsels performance was so deficient as to fall outside the wide range of professional assistance. The Defendant's fifth subclaim is denied.

Merits

There is no deficient performance. The jury instructions were proper statements of the law. Felony murder, with aggravated child

abuse as the underlying felony, does not require an intent to kill, only an intent to commit aggravated child abuse.

In *Brooks v. State*, 918 So.2d 181, 197-199 (Fla. 2005), this Court held that aggravated child abuse cannot serve as the underlying felony in a felony-murder charge when there is a single instantaneous act by the defendant which constitutes both the aggravated child abuse and the act causing the child's death. However, this Court explained that generally aggravated child abuse can serve as the underlying felony in a felony-murder charge when there are multiple blows. The *Brooks* Court distinguished and reaffirmed its prior holding in this case because in this case there were five blows. *Brooks*, 918 So.2d at 198 (rejected the analogy to *Mills* in *Lukehart* because the facts were distinguishable); *Dorsey v. State*, 942 So.2d 983, 984-985 (Fla. 5th DCA 2006)(explaining that the *Brooks* holding is limited to those unique cases in which there is a single instantaneous act by the defendant which constitutes both the aggravated child abuse and the act causing the child's death and noting that the *Brooks* Court found its prior decision of *Lukehart v. State*, 776 So.2d 906 (Fla. 2000) to be distinguishable because the medical examiner's testimony that the baby died of injuries caused by blunt trauma from five blows to her head.). Even under the current law, there is no basis for any objection.

But counsel was not required to foresee the *Brooks* opinion to be effective. Defense counsel cannot be ineffective for failing to anticipate changes in the law. *Hitchcock v. State*, 991 So.2d 337, 348 (Fla. 2008)(stating that "[t]his Court has consistently held that

trial counsel cannot be held ineffective for failing to anticipate changes in the law." citing *Cherry v. State*, 781 So.2d 1040, 1053 (Fla. 2000)). There was no deficient performance.

Nor was there any prejudice. Any objection would have been properly overruled. Thus, the trial court properly rejected this claim of ineffectiveness for failing to object to the felony murder jury instructions.

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED A CLAIM OF INEFFECTIVENESS FOR NOT OBJECTING TO THE JURY INSTRUCTIONS THAT INFORMED THE JURY THAT THEIR RECOMMENDATION WAS ADVISORY? (Restated)

Lukehart claims that counsel was ineffective for not objecting, on the basis of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), to the jury instructions informing the jury that their sentencing recommendation was advisory. IB at 75. This Court has repeatedly held that counsel is not ineffective for not making *Caldwell* objections. Thus, the trial court properly summarily denied this claim of ineffectiveness.

The trial court's ruling

> In claim six the Defendant asserts the trial court violated the mandates of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), by informing the jury that their sentencing recommendation was advisory. This claim is procedurally barred as *Caldwell* claims should be raised on direct appeal. *Owen v. State*, 773 So. 2d 510, 515, n. 11 (Fla. 2000)(finding *Caldwell* claim to be procedurally barred because the Court repeatedly has held that *Caldwell* errors cannot be raised on collateral review); *Teffeteller v. Dugger*, 734 So. 2d 1009, 1026 (Fla. 1999) (observing that "[t]his Court has repeatedly held that *Caldwell* claims can and should be raised on direct appeal, and are procedurally barred in post-conviction proceedings). The Florida Supreme Court "has repeatedly held that the Florida Standard Jury Instructions are in compliance with *Caldwell*." *Coday v. State*, 946 So. 2d 988, 1008 (Fla. 2006)(citing *Globe v. State*, 877 So. 2d 663, 674 (Fla. 2004) and *Thomas v. State*, 838 So. 2d 535, 542 (Fla. 2003)(reiterating that the Florida Standard Jury Instructions have been determined to be in compliance with the requirements of *Caldwell*)). Additionally, the Defendant argues trial counsel was ineffective for failing to object and request a curative instruction. The Defendant has failed to establish deficient performance on the part of trial counsel. The Defendant's claim six is denied.

Merits

This Court has repeatedly rejected claims that counsel was ineffective for not making baseless and meritless *Caldwell* objections. *Hitchcock v. State*, 991 So.2d 337, 361 (Fla. 2008)(concluding that counsel cannot be deemed ineffective for failing to make "a meritless" *Caldwell* objection); *Rose v. State*, 617 So.2d 291, 297 (Fla. 1993)(rejecting the claim that the sentencing jury was misled by instructions and argument that diluted their sense of responsibility pursuant to the rationale of *Caldwell* and that counsel was ineffective for failing to object because the jury instructions correctly informed the jury of its sentencing role); *Mendyk v. State*, 592 So.2d 1076, 1080-1081 (Fla. 1992)(rejecting a claim that counsel was ineffective for failing to object to an alleged *Caldwell* violation). The Eleventh Circuit also has rejected an ineffectiveness of counsel claim for failing to object to statements by the prosecutor and the trial court which described the jury's findings regarding sentencing as "advisory" in Florida. *Johnston v. Singletary*, 162 F.3d 630, 642-43 (11th Cir. 1998)(holding that the prosecutor and trial court did not mislead the jury as to its role in the sentencing process in a Florida case and counsel was not ineffective because there was no prejudice).

There is no deficient performance. This Court has repeatedly held that Florida's jury instructions informing the jury that their sentencing recommendation is advisory does not violate *Caldwell*.[7]

[7] "This Court has repeatedly determined that challenges to the standard jury instructions that refer to the jury as advisory and that refer to the jury's verdict as a recommendation violate *Caldwell v.*

Defense counsel is not required to make objections that are baseless under controlling precedent to be effective. The Sixth Amendment does not require that counsel request "curative" instructions regarding jury instructions that are perfectly proper under existing caselaw.

Nor was there any prejudice. Had counsel made a *Caldwell* objection to the jury instructions, the trial court would have overruled that objection and that ruling would have been affirmed on appeal. Thus, the trial court properly summarily denied this claim of ineffectiveness.

Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)" are without merit." *Dufour v. State*, 905 So.2d 42, 67 (Fla. 2005); *Card v. State*, 803 So.2d 613, n.14 (Fla. 2001)(rejecting as "without merit" a *Caldwell* challenge); *Combs v. State*, 525 So.2d 853, 855-56 (Fla. 1988) (rejecting a Caldwell challenge and holding that the standard jury instruction informing jurors that their recommendation was "advisory," together with similar comments by the prosecutor to that effect, did not improperly minimize jury's role and correctly stated Florida law); *Pope v. Wainwright*, 496 So.2d 798, 804-805 (Fla. 1986)(rejecting a *Caldwell* challenge because the jury's recommendation, although an integral part of Florida's capital sentencing scheme, is merely advisory). The Eleventh Circuit has also held that references to and descriptions of the jury's sentencing verdict as an "advisory" or as a "recommendation" and statements that the judge is the final sentencing authority are not *Caldwell* errors because those references and descriptions are accurate characterizations of the jury's and judge's sentencing roles under Florida law. *Davis v.* Singletary, 119 F.3d 1471, 1482 (11th Cir. 1997).

ISSUE VIII

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR PRESENTING MITIGATION WITNESSES BY DEPOSITION RATHER THAN BY LIVE TESTIMONY? (Restated)

Lukehart contends that counsel was ineffective for presenting an uncle, two aunts, and two cousins' testimony via deposition at the penalty phase rather than live. IB at 78. This claim is limited to Lukehart's cousin, Stephanie Repko's testimony. There was no deficient performance. There was no prejudice either. Repko's testimony at the evidentiary hearing was largely cumulative to her deposition testimony. Thus, the trial court properly denied this claim of ineffectiveness.

Penalty phase

At the penalty phase, defense counsel presented the live testimony of Lukehart's mother and father, Randall and Bonnie Lukehart. He also presented the live testimony of Lukehart's cousin, Melissa Smith, and Lukehart's brother-in-law.

Evidentiary hearing

At the evidentiary hearing, defense counsel Edwards testified that he begged two relatives who lived in Pennsylvania to testify but they refused because it was "inconvenient" to take time out of their schedules and lives. (Evid H at 127).

Lukehart's mother and father, Randall and Bonnie Lukehart and his Lukehart's cousin, Melissa Smith, testified again at the evidentiary

hearing. Lukehart's cousin, Melissa Smith, acknowledged that she had testified at the original penalty phase. (PCR at 218).

Stephanie Repko testified in person testimony at the evidentiary hearing. (PCR at 203-215). Ms. Repko noted that there were "probably maybe" ten family members at the deposition taken in the West Chester Pennsylvania courthouse. (PCR 204). She testified at the evidentiary hearing that lack of money was the reason that she did not testify live. (PCR 207). She testified that if she had been provided with a ticket as well as money for hotel and food she would have testified in person. (PCR 207). But she also testified that she gave full information in her deposition. (PCR 207). Her additional testimony was about Lukehart's relationship with her five-month-old child. (PCR 209). She testified that she never saw Lukehart abuse her child. Nor did she have any fear of leaving her child with Lukehart. (PCR 209). She testified as to a family history of clinical depression. (PCR 212).

Preservation

Post-conviction counsel did not present the live testimony of Scram, Vanentine or Uphold at the evidentiary hearing either. Without presenting the live testimony of these witnesses at the evidentiary hearing, Lukehart cannot possibly establish prejudice.

The trial court's ruling

> In subclaim eleven the Defendant alleges trial counsel was ineffective for failing to conduct a proper and thorough investigation. The Defendant alleges trial counsel should have presented more of the Defendant's background history including

> claims of abuse. Trial counsel presented both his father's physical abuse and his uncle's sexual abuse to the jury and the items were found to be nonstatutory mitigation. *Lukehart*, 776 So. 2d at 928 (Anstead, concurring) (observing that: "[as nonstatutory mitigation, the trial judge found: (1) Lukehart's father was an alcoholic who physically abused him; (2) Lukehart suffered from drug and alcohol abuse; (3) Lukehart was repeatedly sexually abused by his uncle; . . .). The Defendant has failed to establish the actions of trial counsel were unreasonable. The Defendant's eleventh subclaim is denied.

Merits

There is no deficient performance. Counsel presented the live testimony of numerous family members at penalty phase. Furthermore, counsel went to Pennsylvania and took the deposition of several additional family members including Stephanie Repko. Presenting the set testimony of a mitigating witness has the advantage of there being no surprises on cross-examination.

Moreover, there was no prejudice. Repko's testimony at the evidentiary hearing was largely cumulative to her deposition testimony. *Henyard v. State*, 883 So.2d 753, 761 (Fla. 2004)(finding no ineffectiveness where the evidentiary hearing testimony was cumulative of the testimony at the penalty phase). Thus, the trial court properly denied this claim of ineffectiveness for not presenting one witness live rather than via deposition.[8]

[8] This claim highlights the problem with this court's current 3.851 rule. This claim started out as a ineffectiveness for failing to investigate and has now morphed into a claim for failure to present live testimony on appeal. Claim III contained 14 subclaims of ineffectiveness. This was a subclaim of a subclaim. This Court should require that each claim of ineffectiveness be separately pled and contain no subclaims, much less subclaims of subclaims. The capital defense bar pleads claims in this purposefully confusing manner in the hope that such a subclaim will be accidently overlooked.

ISSUE IX

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO OBJECT TO THE PROSECUTOR'S COMMENTS? (Restated)

Lukehart asserts that trial counsel was ineffective for failing to object to the prosecutor's comments in guilt and penalty phase. IB at 88. There was no deficient performance. Most of the prosecutor's comments were proper and therefore, there was no basis for defense counsel to object. Thus, the trial court properly denied this claim of ineffectiveness for failing to object to the prosecutor's comments.

The trial court's ruling

> In subclaim seven the Defendant alleges trial counsel was ineffective for failing to object to improper argument and comments made by the State during closing arguments in the guilt phase. The Defendant argues comments made by the State tainted the jury and provided an improper influence. Wide latitude is afforded counsel during argument. See *Moore v. State*, 701 So. 2d 545, 550 (Fla. 1997); *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. See *Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999). A review of the comments cited by the Defendant as improper shows they were logical conclusions that could be drawn from the evidence presented at trial. Counsel can not be ineffective for failing to raise a meritless objection. See *Darling v. State*, 966 So. 2d 366, 383 (Fla. 2007). The Defendant's seventh subclaim is denied.

Merits

There was no deficient performance. Most of the prosecutor's comments were perfectly proper. As to the prosecutor's comment that Lukehart deserves to die, this was proper argument. IB at 89. Just as defense counsel may argue in closing in the penalty phase of a

capital trial that the defendant deserves to live, the prosecutor may argue that he deserves to die. Regarding the prosecutor's comment on the victim being an baby, this is a proper comment on the victim under twelve aggravator. IB at 90-91. There was no basis for any objection and therefore, counsel performance was not deficient.

Regarding the prosecutor referring to the mitigation as an excuse, there was no ineffectiveness. IB at 91-92. There was no deficient performance. This case was tried in 1997, three years before this Court's opinion in *Brooks v. State*, 762 So.2d 879, 904 (Fla. 2000)(holding that repeated characterization of mitigating circumstances as "flimsy," "phantom," and "excuses" was improper denigration). Defense counsel cannot be ineffective for failing to anticipate changes in the law. *Hitchcock v. State*, 991 So.2d 337, 348 (Fla. 2008)(stating that "[t]his Court has consistently held that trial counsel cannot be held ineffective for failing to anticipate changes in the law." citing *Cherry v. State*, 781 So.2d 1040, 1053 (Fla. 2000)).[9]

Moreover, there was no prejudice. In *Williamson v. State,* 994 So.2d 1000, 1015 (Fla. 2008), this Court held that there was no prejudice from defense counsel's failure to object to the prosecutor's brief mention of the word "excuses." Here, as in *Williamson*, the

[9] It certainly is not evident that a prosecutor may not refer to the mitigation as an excuse. *McElmurry v. State*, 60 P.3d 4, 31 (Okla. Crim. App. 2002)(holding the prosecutor referring to the mitigation as excuses and saying: "let's blame everybody else, but don't blame Harold and don't hold him accountable" was not error because both sides have the right to argue for or against an alleged aggravating circumstance).

aggravation overwhelmed this comment. Lukehart was still on probation from felony child abuse for the injuries he inflicted on eight-month-old Jillian French when he killed five-month-old Gabrielle Hanshaw. Thus, the trial court properly denied this claim of ineffectiveness for not objecting to the prosecutor's comments.

ISSUE X

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT THE RULE PROHIBITING JUROR INTERVIEWS IS UNCONSTITUTIONAL? (Restated)

Lukehart asserts that the rule regulating the Florida Bar, rule 4-3.5(d)(4), which prohibits counsel from conducting juror interviews violates due process and equal protection. IB at 93. This issue is procedurally barred. Additionally, this Court has repeatedly rejected this claim. Thus, the trial court properly summarily denied this claim.

Procedural bar

This claim is procedurally barred because it should have been raised in the direct appeal. *Reese v. State*, 14 So.3d 913, 919 (Fla. 2009)(finding a claim that Florida Rule of Criminal Procedure 3.575 and Rule Regulating the Florida Bar 4-3.5(d)(4) violate equal protection to be procedurally barred because it should have been raised in the direct appeal citing *Israel v. State*, 985 So.2d 510 (Fla. 2008) and *Rose v. State*, 774 So.2d 629, 637 n. 12 (Fla. 2000)). While Lukehart acknowledges that this Court has previously rejected this claim, he asserts he is presenting the claim "for future preservation." But claims regarding state post-conviction process are not proper in federal habeas. The Eleventh Circuit has repeatedly held defects in state collateral proceedings do not provide a basis for habeas relief. *Carroll v. Secretary*, DOC, 574 F.3d 1354, 1365 (11th Cir. 2009)(citing *Anderson v. Sec'y for Dep't of Corr.*, 462 F.3d 1319, 1330 (11th Cir. 2006); *Quince v. Crosby*, 360

F.3d 1259, 1262 (11th Cir. 2004) and *Spradley v. Dugger*, 825 F.2d 1566, 1568 (11th Cir. 1987)). Moreover, any claim regarding the rule would be procedurally barred in federal habeas as well because it was not raised in the direct appeal.

The trial court's ruling

> In claim seven the Defendant asserts that the Florida Rule of Professional Conduct which prohibits jury interviews is unconstitutional, and impeded his ability to fully explore possible jury misconduct and bias. This claim is procedurally barred as it should have been raised in the direct appeal. *Preston v. State*, 970 So. 2d 789, 796 (Fla. 2007)(finding a claim that equal protection was violated because his counsel could not interview his jurors was "both procedurally barred and without merit."); *Suggs v. State*, 923 So. 2d 419, 440 (Fla. 2005)(finding a claim that the defendant's constitutional right to litigate claims of juror misconduct was violated by Florida Rule of Professional Conduct 4-3.5(d)(4), which prohibits a lawyer from communicating with jurors was procedurally barred because he "could have and should have brought this claim on direct appeal" and "meritless" because the Court "has consistently rejected constitutional challenges to rule 4-3.5(d)(4)" citing *Power v. State*, 886 So. 2d 952, 957 (Fla. 2004) and *Johnson v. State*, 804 So. 2d 1218 (Fla. 2001)). The Defendant's claim seven is denied.

Merits

This Court has repeatedly rejected the claim that this rule is unconstitutional. *Floyd v. State*, 18 So.3d 432, 459 (Fla. 2009)(stating: "we have repeatedly rejected claims that rule 4-3.5(d)(4) is unconstitutional" citing *Israel v. State*, 985 So.2d 510, 522 (Fla. 2008); *Barnhill v. State*, 971 So.2d 106, 116-117 (Fla. 2007) and *Farina v. State*, 937 So.2d 612, 626 (Fla. 2006)). Thus, the trial court properly summarily denied this claim.

ISSUE XI

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CHALLENGE TO FLORIDA'S LETHAL INJECTION PROTOCOLS? (Restated) ?

Lukehart asserts that Florida's lethal injection protocols are cruel and unusual punishment in violation of the Eighth Amendment. IB at 96. Both the United States Supreme Court and this Court have rejected Eighth Amendment challenges to lethal injection. Thus, the trial court properly summarily denied this claim.

The trial court's ruling

> In claim eight the Defendant contends the execution of death sentence statute which authorizes lethal injection, Section 922.10, Florida Statutes (2001), is cruel and unusual punishment, and violates the ex post facto clause. The Florida Supreme Court has repeatedly rejected claims that lethal injection is unconstitutional. *Preston v. State*, 970 So. 2d 789 (Fla. 2007); *Diaz v. State*, 945 So. 2d 1136, 1144 (Fla. 2006) (rejecting a cruel and unusual punishment challenge to both the lethal injection statute and the protocol, and explaining that the Court considered the constitutionality of lethal injection in Florida after a full evidentiary hearing in *Sims v. State*, 754 So. 2d 657 (Fla. 2000) and then subsequently affirmed cases where the trial courts summarily denied the claims citing *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006)); *Rutherford v. State*, 926 So. 2d 1100, 1113 (Fla. 2006), *cert. denied*, 126 S.Ct. 1191 (2006); *Hill v. State*, 921 So. 2d 579, 583 (Fla. 2006), *cert. denied*, 126 S.Ct. 1441 (2006). Moreover, the Florida Supreme Court has rejected an ex post facto challenge to the statute. *Sims v. State*, 754 So. 2d 657 (Fla. 2000) (determining that retroactive application of the legislative change to lethal injection does not violate state or federal ex post facto clause), *cert. denied*, 528 U.S. 1183 (2000). The Defendant's claim eight is denied.

Merits

This Court has repeatedly rejected Eighth Amendment challenges to Florida's lethal injection protocols. *Davis v. State*, - So.3d -, -, n.3, 2009 WL 3644172 at n.3, 34 Fla. L. Weekly S605 (Fla. November

5, 2009)(citing a string of cases rejecting such claims including *Ventura v. State*, 2 So.3d 194, 200 (Fla.), *cert. denied*, - U.S. -, 129 S.Ct. 2839, 174 L.Ed.2d 562 (2009); *Power v. State*, 992 So.2d 218, 220-21 (Fla. 2008); *Sexton v. State*, 997 So.2d 1073, 1089 (Fla. 2008); *Schwab v. State*, 995 So.2d 922, 933 (Fla.), *cert. denied*, 128 S.Ct. 2996 (2008); *Woodel v. State*, 985 So.2d 524, 533-34 (Fla.), *cert. denied,* - U.S. -, 129 S.Ct. 607, 172 L.Ed.2d 465 (2008); *Lebron v. State*, 982 So.2d 649, 666 (Fla. 2008); *Schwab v. State*, 982 So.2d 1158, 1159-1160 (Fla. 2008); *Lightbourne v. McCollum*, 969 So.2d 326, 350-353 (Fla. 2007)).

Furthermore, so has the United States Supreme Court. In *Baze v. Rees*, - U.S. -, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), the United States Supreme Court rejected a challenge to Kentucky's lethal injection protocols. While *Baze* was a § 1983 challenge to Kentucky's lethal injection method of execution, the actual holding applies to Florida. Kentucky's lethal injection protocol involves a three-drug combination of 3 grams of thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride. *Baze*, 128 S.Ct. at 1528. The *Baze* Court rejected the "unnecessary risk" standard and instead held that a method of execution does not violate the Eighth Amendment unless it creates a "substantial risk of serious harm," or "a demonstrated risk of severe pain." The *Baze* Court explained that "simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual" under the Eighth Amendment. *Baze*, 128 S.Ct. at

1531. The Court rejected the contention that a method must include an assessment of consciousness, by the use of medical professionals or a BIS monitor. *Baze*,128 S. Ct. at 1534-1537. The *Baze* Court noted that a "State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard." *Baze*, 128 S.Ct. at 1537.[10]

Florida's protocols are substantially similar to Kentucky's and therefore, Florida's protocols were upheld as well. Indeed, Justice Ginsburg, in her dissenting opinion, relied on Florida's method as a model example. Specifically noting that Florida's protocols differed from Kentucky's because Florida's contained an assessment of consciousness, she explained:

> Recognizing the importance of a window between the first and second drugs, other States have adopted safeguards not contained in Kentucky's protocol. Florida pauses between injection of the first and second drugs so the warden can "determine, after consultation, that the inmate is indeed unconscious." The warden does so by touching the inmate's eyelashes, calling his name, and shaking him.

Baze, 2008 WL 1733259 at *47 (Ginsburg, J., dissenting with Souter, J., joining). She also noted that "the eyelash test" was the most common assessment used in the operating room to determine consciousness. *Baze*, at n.6 (Ginsburg, J., dissenting with Souter,

[10] The plurality opinion was written by Chief Justice Roberts with Justices Alito and Kennedy joining. Justice Thomas' concurring opinion, joined by Justice Scalia, would have adopted a standard that a method of execution violates the Eighth Amendment "only if it is deliberately designed to inflict pain" which is a lower standard. So, the plurality written by Chief Justice Roberts actually is the opinion of the Court.

J., joining). So, both the majority and the dissent in *Baze* approved of Florida's protocols.

There was an extensive evidentiary hearing in recent years regarding Florida's lethal injection protocols ordered by this Court. *Lightbourne v. McCollum*, 969 So.2d 326 (Fla. 2007), *cert. denied*, - U.S. -, 128 S.Ct. 2485, 171 L.Ed.2d 777 (2008)(rejecting a challenge to Florida's lethal injection protocols following an extensive evidentiary hearing). Since that extensive evidentiary hearing, this Court has held lethal injection claims are properly summarily denied even when a defendant wishes to present materials not presented during the evidentiary hearing in *Lightbourne*. *Tompkins v. State*, 994 So.2d 1072 (Fla. 2008), *cert. denied*, - U.S. -, 129 S.Ct. 1305, -L.Ed.2d - (2009).

Both the United States Supreme Court and the Florida Supreme Court have rejected constitutional challenges to lethal injection. In this Court's words, this claim is "foreclosed" by that controlling precedent. *Davis v. State*, - So.3d -, -, n.3, 2009 WL 3644172 at n.3 (Fla. November 5, 2009)(explaining that "the decisions in *Baze v. Rees*, - U.S. -, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), and *Tompkins v. State*, 994 So.2d 1072, 1081 (Fla.2008), *cert. denied*, - U.S. -, 129 S.Ct. 1305, - L.Ed.2d - (2009), foreclose relief on this issue."). Thus, the trial court properly summarily rejected this claim.

ISSUE XII

WHETHER THE TRIAL COURT PROPERLY FOUND NO CUMULATIVE ERROR OCCURRED? (Restated) ?

Lukehart asserts that the number and types of errors when "considered as a whole" rendered his trial fundamentally unfair. IB at 98. This Court should not permit cumulative error claims. Furthermore, even if cumulative error analysis was proper, Lukehart may not add direct appeal issues and post-conviction issues cumulatively. Finally, there was no ineffectiveness and therefore, no cumulative error. Thus, the trial court properly denied this claim of cumulative error.

The trial court's ruling

> In claim seventeen the Defendant asserts that cumulative error rendered his trial fundamentally unfair. This is actually a claim that the Florida Supreme Court conducted an inadequate harmless error analysis. Challenges to sufficiency of the Supreme Court's harmless error analysis on direct appeal are not cognizable in post conviction relief proceedings. *Sireci v. State*, 773 So. 2d 34 (Fla. 2000). Moreover, the Defendant may not mix and match direct appeal errors with post conviction errors in a cumulative error claim. A post conviction claim of cumulative error is limited to only claims of cumulative error regarding post conviction claims. Furthermore, because there is no merit to any of the numerous ineffectiveness claims or any of the other post conviction claims, any cumulative error claim necessarily fails. *Bell v. State*, 965 So. 2d 48, 75 (Fla. 2007)(noting "where individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail" citing *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003)); *Suggs v. State*, 923 So. 2d 419, 441 (Fla. 2005)("[A] claim of cumulative error will not be successful if a petitioner fails to prove any of the individual errors he alleges"). The Defendant's claim seventeen is denied.

Merits

As the Eleventh Circuit recently observed, the United States Supreme Court has never endorsed the concept of cumulative error. *Forrest v. Florida Dept. of Corrections*, 2009 WL 2568185, 5 (11th Cir. 2009)(unpublished)(noting that the absence of Supreme Court precedent applying the cumulative error doctrine to claims of ineffective assistance of counsel claims). The problem with cumulative error analysis is that it is "mix and match" law. A defendant raising a cumulative error claim cannot, by definition, meet the existing legal test for individual reversible error. Cumulative error is premised on the notion that while the errors individually do not warrant reversal, when considered together, the errors do warrant reversal. The problem with cumulative error analysis is that it is an open admission that none of the individual errors warrants reversal but somehow together the errors do warrant reversal. So, for example, a defendant who cannot meet the three prongs of *Brady* or the two prongs of *Strickland*, says, yes, but I met two prongs of *Brady* and one prong of *Strickland*, so I'm entitled to reversal. This undermines the actual legal tests of both *Brady* and *Strickland*. The whole is greater than the sum of the parts according to the doctrine of cumulative error. *Derden v. McNeel*, 978 F.2d 1453, 1456 (5th Cir. 1992)(en banc)(noting "[t]hat the constitutionality of a state criminal trial can be compromised by a series of events none of which individually violated a defendant's constitutional rights seems a difficult theoretical proposition). "Cumulative error" claims should not be entertained.

Even if cumulative error analysis is proper, direct appeal issues and post-conviction issues should not be considered cumulatively. But see *Hurst v. State*, 18 So.3d 975, 1015 (Fla. 2009)(noting that this Court "considers the cumulative effect of evidentiary errors and ineffective assistance claims together" citing *Suggs v. State*, 923 So.2d 419, 441 (Fla. 2005)). Finally, even if the post-conviction claims are considered cumulatively, there was no ineffectiveness and therefore, necessarily no cumulative error. *Victorino v. State*, - So.3d -, -, 2009 WL 4061285, 17 (Fla. November 25, 2009)(rejecting a cumulative error claim because where the individual claims are without merit, his cumulative error claim must fail citing *Griffin v. State*, 866 So.2d 1, 22 (Fla. 2003)); *Hurst v. State*, 18 So.3d 975, 1015 (Fla. 2009)(rejecting a claim of cumulative error where errors occurred but no prejudice ensued). Thus, the trial court properly denied the claim of cumulative error.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of postconviction relief following an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Michael P. Reiter 5313 Layton Drive, Venice, FL 34293 this 28th day of December, 2009.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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