IN THE SUPREME COURT OF FLORIDA

ERIC SIMMONS,

Appellant,

v. CASE NO. SC10-2035
L.T. No. 01-CF-2577

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

STEPHEN D. AKE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 14087
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
Stephen.Ake@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

The following factual history is taken from this Court's opinion from the direct appeal of Simmons' convictions and sentences, Simmons v. State, 934 So. 2d 1100 (Fla. 2006).

> The charges against appellant, Eric Simmons, resulted from the kidnapping, sexual battery, and stabbing and beating of [redacted], who was found dead in a wooded area in Sorrento, Florida. Simmons was tried and found guilty of kidnapping, sexual battery using force likely to cause serious injury, and first-degree murder. The jury unanimously recommended death as the penalty for the murder. The trial court sentenced Simmons to death on the charge of first-degree murder and life in prison for each of the kidnapping and sexual battery charges respectively.
>
> Prosecution Evidence
>
> The evidence presented at trial indicated that on December 3, 2001, at approximately 11:30 a.m., John Conley, a Lake County Sheriff's Office (LCSO) deputy, discovered the body of [redacted] in a large wooded area commonly used for illegal dumping. The body was located some 270 feet from the main road. Crime scene technician Theodore Cushing took pictures of the body, performed a sketch of the area, and found five tire tracks near the body. The crime scene technicians took plaster cast impressions of the three tracks with the most detail for comparison purposes. Mr. Cushing noticed that the tire tracks indicated that a car made a three-point turn close to the body. All-terrain vehicle tracks were present closer to the body, but they appeared older and deteriorated.
>
> The medical examiner, Dr. Sam Gulino, observed the victim and the surroundings at the scene on December 3, 2001, with the victim lying on her left side with her right arm over her face. Dr. Gulino estimated the time of death was twenty-four to forty-eight hours before the body was discovered.
>
> Dr. Gulino performed an autopsy, which revealed numerous injuries. [redacted] suffered some ten

lacerations on her head, as well as numerous other lacerations and scrapes on her scalp and face. There was a very large fracture on the right side of her head, and her skull was broken into multiple small pieces that fell apart when the scalp was opened. Dr. Gulino opined that this injury and the injuries to her brain resulted in shock and ultimately [redacted]'s death. There was another fracture that extended along the base of the skull, resulting from a high-energy impact; bleeding around the brain; and bruises in the brain tissue where the fractured pieces of skull had cut the brain. There were numerous stab wounds on the neck, a long cut across the front and right portions of the neck, and other bruises and cuts. There was little bleeding from these injuries, indicating that the victim was already dead or in shock at the time of the injuries. The victim also suffered a stab wound in the right lower part of her abdomen that extended into her abdominal cavity and probably occurred after she received the head injury. There were also injuries to her anus with bruising on the right buttock extending into the anus, and the wall of the rectum was lacerated. These injuries were inflicted before death. Dr. Gulino opined that these injuries would be painful and not the result of consensual anal intercourse. The victim suffered numerous defensive wounds on her forearms and hands. There was also a t-shaped laceration on the scalp and an injury at the base of her right index finger that was patterned, as if a specific type of object, like threads on a pipe, had caused it. Dr. Gulino opined that the attack did not occur at the exact spot where [redacted] was found because of the lack of blood and disruption to the area, but stated that the position of [redacted]'s body was consistent with an attack occurring in that area.

On December 4, 2001, Robert Bedgood, a crime scene technician, collected evidence from [redacted]'s body during the autopsy. Dr. Jerry Hogsette testified that, based on the temperature in the area of [redacted]'s body and the development of the insect larvae taken from [redacted]'s body, [redacted] had been killed between midnight on December 1, 2001, and early Sunday morning, December 2, 2001.

After identifying the body as [redacted]'s, crime scene technicians went to the trailer where [redacted]

lived and the laundromat where she worked to conduct Luminol testing. They found [redacted]'s purse at the laundromat and located a birthday list containing the names of Simmons' relatives. There was no evidence of violence in either place.

Andrew Montz testified that late on the night of December 1, 2001, he was at the Circle K convenience store at the intersection of State Road 44 and County Road 437 in Lake County. Mr. Montz saw a white four-door car heading northbound on 437, stopping at the traffic light very slowly, when a woman opened the passenger door and screamed, "Somebody help me. Somebody please help me." The driver pulled the woman back into the car and ran the red light quickly. Mr. Montz stated that the woman was wearing a white T-shirt or pajama-type top. He was not able to see the driver and described the car as a Chevy Corsica/Ford Taurus-type car with a dent on the passenger side, black and silver trim on the door panel, and a flag hanging from the window. After viewing a videotape of a white 1991 Ford Taurus owned by Simmons a year later, Mr. Montz identified it as being the car he saw on December 1. Mr. Montz initially told lead Detective Stewart Perdue that the car had spoked rims, but after viewing spoked rims at an auto parts store, he concluded that the rims on the car he saw were not spoked.

Sherri Renfro testified that she was at the same Circle K as Montz between 11:30 and 11:40 p.m. with her sister-in-law's boyfriend, Shane Lolito. She also saw a white car slowly approach the red light, the passenger door open, and a woman yell for help while looking directly at Ms. Renfro. Ms. Renfro yelled at the driver to stop, but he did not, and Ms. Renfro got into her van and chased after the car. She traveled in excess of the speed limit, but was unable to get close to the car and eventually lost track of it. Ms. Renfro thought that the car was a Chevy Corsica, but admitted that she "[did not] really know [her] cars too well." She recalled that the car had a patriotic bumper sticker in the rear window and a flag hanging from the back passenger window. She testified that there was a large spotlight on the side of the Circle K building that illuminated the surrounding area well. Ms. Renfro subsequently identified Simmons' white Ford

Taurus as the car she saw at the intersection, and she recognized the interior, the bumper sticker, and the flag on the car. Ms. Renfro identified [redacted] as the woman in the car when shown a photograph of her.

Jose Rodriguez testified that he knew [redacted] from the laundromat, he often saw Simmons and [redacted] together drinking, and he was familiar with Simmons' car. Mr. Rodriguez saw Simmons with [redacted] at the laundromat on the night of December 1, 2001. When he arrived at the laundromat, he knocked on the glass window to get Simmons' attention and asked him to come outside. While Simmons was exiting, Mr. Rodriguez got [redacted]'s attention and asked if she was okay; she replied that she was. Mr. Rodriguez spoke with Simmons for a few minutes and then talked to his own girlfriend on the pay phone outside. When he finished, Simmons and [redacted] were still inside the closed laundromat.

Mr. Rodriguez was arrested the next day on unrelated charges, and on December 5, 2001, police officers showed Mr. Rodriguez a photopack with about thirty-five pictures in it, but he was unable to identify any as [redacted]'s boyfriend. However, Mr. Rodriguez picked the picture that looked most like Simmons and he drew additional characteristics similar to those of Simmons. On December 7, Mr. Rodriguez positively identified a photograph of Simmons as [redacted]'s boyfriend.

Detective Perdue testified that he and other police officers went to Simmons' parents' home after confirming that Simmons owned a white 1991 Ford Taurus. Detective Perdue and Detective Kenneth Adams approached Simmons and asked him to walk to a group of trees so they could talk. There were some fifteen other police officers at the scene as well as a helicopter flying overhead. Simmons acknowledged that he knew [redacted] was dead, and the detectives asked if Simmons would come to the sheriff's office to talk. Simmons consented, and the detectives transported him to the sheriff's office in the back of a police cruiser. The detectives handcuffed Simmons for their protection pursuant to their standard practice, and Simmons did not object. Detectives Perdue and Adams removed the handcuffs upon arrival at the office, and interviewed Simmons in a room equipped with audio and

video capabilities, although the videotape was allowed to run out after two hours.

Simmons waived his *Miranda* rights and stated that he was friends with [redacted] and had tried to help her improve her living conditions. Simmons explained to Detective Perdue that on December 1, 2001, he and [redacted] had been watching the Florida-Tennessee football game at his apartment in Mount Dora. The reception was bad, so [redacted] asked him to take her to the laundromat or her trailer so she could watch the game. He took her to the laundromat and then drove home because [redacted] and he were supposed to go to work together early the next morning for his father's landscaping business. He stated that he had engaged in sexual intercourse with [redacted] on one occasion approximately two weeks before the interview, even though Simmons' semen was found in [redacted]'s vaginal washings during her autopsy. During a break in the interview, the detectives learned that blood had been found in Simmons' car. After the detectives informed Simmons of this, he stated, "Well, I guess if you found blood in my car, I must have did it."

Terrell Kingery, a crime lab analyst with the Florida Department of Law Enforcement (FDLE), examined the plaster tire casts from the scene of the crime and compared them to the tires on Simmons' car. The rear tires, which were different brands, were consistent with the three plaster casts. The dimension and general condition of the rear tires were consistent with two of the three casts.

Crime scene technician Ronald Shirley testified that when he performed a presumptive test for blood on a stain on the passenger door of Simmons' car, he obtained a positive result. Luminol testing was positive for blood on the area around the passenger seat cushion, the carpet below the passenger seat in the front and back, and especially the area of the passenger seat where one sits. Mr. Shirley noted that there were containers of partially consumed cleaning materials in the car. Technicians also cut the fabric off the seat cover and noted a large stain on the cushion itself.

Brian Sloan, a forensic DNA analyst, performed a mitochondrial DNA (mtDNA) sequence on the cushion stain and testified that, in his professional opinion,

the stain on the cushion was blood. He testified that mtDNA is inherited maternally, and the mitochondrial genome is 16,500 pairs long. Most of these pairs are very similar between individuals, but approximately 610 bases are highly variable between individuals, and these variable bases can be used to differentiate between people. mtDNA testing differs from the Short Tandem Repeat (STR) technique for DNA profiling because the STR technique is specific to the DNA in the nucleus, or chromosomal DNA. Mr. Sloan testified that mtDNA is the better technique to use on degraded samples because the plasmid circular DNA in mitochondria have thousands of copies in a single cell.

Mr. Sloan compared the mtDNA extracted from the seat cushion to that of Lee Daubanschmide, [redacted]'s mother; determined that each had an anomaly in the same place; and concluded that the two DNA sequences were consistent. After noting the consistency, Mr. Sloan entered the sequence into the FBI database of 4,839 contributors to check for matches, and concluded that the sequence had never been seen in that group. Mr. Sloan also stated that mtDNA is present in several types of human biological fluid or material, such as bones, hair, saliva, semen, diarrhea, sweat, and menstruation. He noted that he did not run statistical calculations to determine the ninety-five percent confidence interval as had Dr. Rick Staub, the director of the lab. Dr. Staub had obtained an upper confidence limit of one in 1600 individuals, but was unable to testify at trial.

Shawn Johnson, a crime laboratory analyst with the FDLE, testified that he performed a presumptive chemical test on the cushion stain, which was positive for blood. He then took three different cuttings from three different areas, combined them into one sample, but did not get any DNA results. Mr. Johnson testified that the lack of DNA results indicated that there was degradation of the DNA. Mr. Johnson swabbed the front passenger door jamb of Simmons' car and obtained a DNA profile that matched [redacted]'s. Mr. Johnson also matched [redacted]'s DNA to other stains on the car trim.

Defense Evidence

The defense called a number of witnesses during its case. Stuart James, a defense witness who is an expert in blood stain pattern analysis, examined blood spatter in photographs of the doorjamb of Simmons' car and concluded that it was a limited amount of staining but that it was consistent with the size range found in beatings, stabbings, and sometimes gunshots.

Dr. Neal Haskell, a forensic entomologist, testified that he could not determine the time of [redacted]'s death from the insect specimens collected by the LCSO. He also could not determine whether Dr. Hogsette's opinion regarding the time of death was correct, but he opined that some of Dr. Hogsette's conclusions were faulty and that Dr. Hogsette was not qualified as a forensic entomologist.

Dr. Terry Melton, an expert in mtDNA analysis, testified that the State's lab results regarding the match with the mtDNA were correct, but its statistical analysis that the mtDNA sequence had never been seen in the FBI database was incorrect. Dr. Melton stated that the State's lab did a search of the DNA bases only on a portion of the DNA they obtained. In Dr. Melton's lab, they compare all 783 of the DNA bases to the known DNA bases. When Dr. Melton ran the data in the database according to her lab's methods, she found a common type sequence in 105 of the 4839 people in the database.

Dr. Wilber Frank, a veterinarian and local resident, testified that he encountered a white four-door car driving very slowly at the intersection of State Road 44 and Seminole Springs Road at about 11 a.m. on December 2, 2001, near the area where the victim's body was found. The driver appeared to be an older white male.

At the conclusion of the trial's guilt phase, the jury found Simmons guilty of kidnapping, sexual battery using force likely to cause serious injury, and murder in the first degree, all as charged in the indictment.

Simmons v. State, 934 So. 2d 1100, 1105-09 (Fla. 2006) (footnotes omitted). Based on this evidence, the jury convicted

Simmons of kidnapping, sexual battery, and first-degree murder. The jury unanimously recommended the death penalty and the trial court sentenced Simmons to death for the murder of [redacted].

In sentencing Simmons to death, the trial judge found three aggravating factors: (1) Simmons was previously convicted of a felony involving the threat of violence to a person; (2) the crime for which Simmons was to be sentenced was committed during the commission of, or attempt to commit, sexual battery, kidnapping, or both; and (3) the crime for which Simmons was to be sentenced was especially heinous, atrocious, or cruel (HAC). As this Court noted:

> The court rejected the defense's proposed statutory mitigating circumstance of Simmons' age of twenty-seven because there was no evidence that he functioned at a level below his age in anything but reading. The court also rejected all other statutory mitigating factors, but found a number of nonstatutory mitigating factors: (1) Simmons manifested appropriate courtroom behavior (some weight); (2) Simmons was kind to the victim (some weight); (3) Simmons loves and cares for animals (minimal weight); (4) Simmons was active in his church and a mentor to boys who belonged to the church's Royal Rangers (some weight); (5) Simmons had a good family background and came from a closely knit, caring family (some weight); (6) Simmons was employed (some weight); (7) Simmons has a learning disability (some weight); and (8) Simmons is immature (some weight). The trial court rejected three other proposed mitigating circumstances as either not proven or not mitigating in nature, and imposed the death penalty for the murder.

Simmons, 934 So. 2d at 1110.

On direct appeal to this Court, Simmons raised eleven issues for review: (1) the guilty verdicts on the charges of kidnapping, sexual battery, and murder were not supported by the evidence; (2) the trial court did not have jurisdiction and venue was not proper in Lake County; (3) the trial court erred in denying Simmons' motion to suppress his statement to law enforcement officers and evidence obtained from the search of his vehicle; (4) the trial court erred in allowing the State's expert on mtDNA to testify before the jury; (5) the prosecuting attorney made improper remarks regarding the mtDNA evidence; (6) the trial court erred in excluding the testimony of a defense expert in eyewitness identification; (7) the trial court erred in allowing the State's entomology expert to testify as an expert in the life cycle of flies; (8) the trial court erred in denying Simmons' motion to exclude an in-court identification of Simmons' vehicle; (9) the prosecutor engaged in misconduct that rose to the level of preventing a fair trial; (10) Florida's death penalty statute is unconstitutional; and (11) the trial court erred in imposing aggravators to arrive at the death sentence. On May 11, 2006, this Court affirmed Appellant's convictions and sentences, Simmons v. State, 934 So. 2d 1100 (Fla. 2006), and thereafter, Simmons petitioned the United

States Supreme Court for a writ of certiorari. On February 20, 2007, the United States Supreme Court denied Simmons' petition. Simmons v. Florida, 549 U.S. 1209 (2007).

On January 29, 2008, Simmons filed a postconviction motion raising six issues. The trial court conducted an evidentiary hearing on all of Simmons' claims with the exception of his constitutional challenge to Florida's lethal injection procedures. At the evidentiary hearing, Appellant presented testimony from 43 witnesses. In addition to the attorneys that represented Simmons at trial,[1] collateral counsel presented voluminous testimony from a multitude of witnesses relating to FDLE's forensic work in the instant case. Expert witnesses, lay witnesses, and law enforcement officers also testified in support of Simmons' postconviction claims.[2] After hearing all of the evidence and argument from counsel, the trial judge issued a detailed 88-page order denying Simmons' postconviction motion. This appeal follows.

---

[1] Initially, Simmons was represented by the Public Defender's Office. Attorneys William Stone and James Baxley of the Public Defender's Office testified at the postconviction evidentiary hearing. Ultimately, however, Simmons was represented at trial by private attorneys Janice Orr and Jeffrey Pfister; both of whom also testified at the evidentiary hearing.

[2] Appellee will summarize the relevant witnesses' testimony in the argument section when addressing each issue on appeal.

SUMMARY OF THE ARGUMENT

Issue I: The postconviction court properly denied Simmons' claim that his trial counsel was ineffective for failing to move to suppress his confession based on the alleged coercive nature of law enforcement during his interrogation. After an approximate four-hour interview with detectives, the officers took a break and learned that blood had been found in Simmons' car. When detectives confronted Simmons with this fact, he concluded the interview by stating, "Well, I guess if you found blood in my car, I must have did it." Collateral counsel claimed that Simmons' statement was a false confession that was the result of a coercive interrogation and that trial counsel was ineffective for failing to move to suppress the statement on those grounds. The postconviction court properly concluded that Simmons failed to establish both deficient performance and prejudice as there was never any evidence that Simmons "confessed" as a result of the detectives' interrogation methods. In fact, the evidence indicated that trial counsel, after consulting with Simmons, made the strategic decision to argue to the jury that the "confession," was really a sarcastic, flippant remark by Simmons. Furthermore, the court noted that Simmons could not establish prejudice because, even had trial

counsel moved to suppress the statement on these grounds, the motion would not have been successful.

Issue II: The postconviction court properly denied Appellant's claim of ineffective assistance of guilt phase counsel. Trial counsel was not deficient for making the strategic decision to stipulate to the semen evidence given that it was clearly admissible and relevant. Likewise, trial counsel was not deficient for failing to consult an expert on false confessions as the expert's testimony would not have been admissible at trial. Trial counsel was also of the opinion, after speaking with her client, that his statement to law enforcement was not a confession, but was a sarcastic statement and counsel made the strategic decision to present this argument to the jury. Contrary to Appellant's assertion, trial counsel was not ineffective for failing to discover and present evidence at trial regarding FDLE analyst John Fitzpatrick resigning from FDLE after a finding that he falsified information on an unrelated proficiency test. The lower court properly noted that trial counsel *was* aware of this information, and had trial counsel attempted to present any evidence regarding this collateral matter, the trial court would have excluded it. As to Simmons' claim that counsel was ineffective for failing to present testimony from certain witnesses during the guilt phase,

the court properly denied this claim because trial counsel had a sound strategic reason for not calling Simmons' father, and the other witnesses, Shirley Harness and Carrie Petty, were unavailable and could not be located by trial counsel.

Issue III: The postconviction court properly denied Simmons' claim that the State withheld material exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), and presented, or failed to correct, false testimony in violation of Giglio v. United States, 405 U.S. 150 (1972). The lower court's finding that the State did not suppress material exculpatory evidence is supported by competent, substantial evidence. Trial counsel was aware that FDLE analyst John Fitzpatrick had worked on forensic evidence in this case and had left FDLE after he allegedly cheated on a proficiency test. Likewise, the court properly found that the State did not knowingly present false testimony at trial that was material. Eyewitness Sherri Renfro testified at trial that she was not at risk of going to jail based on her probationary status, and collateral counsel asserts that this was false. The court properly found that the State did not know this testimony was false, and even assuming that it was false, it was not material. Additionally, Simmons' Giglio claim regarding witness Jose Rodriguez is without merit as his denial of receiving any

preferential treatment from law enforcement was not false. Mr. Rodriguez testified during trial that law enforcement assisted him by calling his bail bondsman for him during an interview with officers.

Issue IV: Contrary to Appellant's assertions, trial counsel was not ineffective for failing to investigate or present mitigating evidence at the penalty phase. Trial counsel was severely limited in their ability to investigate and present mitigating evidence in this case because Simmons and his family did not want to cooperate and air their "dirty laundry" to the jury. Nevertheless, trial counsel presented lay witnesses at the penalty phase in support of their theory that Simmons was a warm and caring person who came from a wonderful family. Trial counsel also retained a mental health expert who conducted a thorough mental health examination of Simmons and presented her testimony at the Spencer hearing in support of nonstatutory mitigation. As the lower court properly concluded, Simmons failed to establish deficient performance and prejudice based on trial counsel's investigation and presentation of mitigating evidence.

Issue V: As there are no individual errors, Appellant cannot combine meritless claims in an attempt to create a valid cumulative error claim.

ARGUMENT

ISSUE I

THE LOWER COURT PROPERLY DENIED SIMMONS' CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL BASED ON COUNSEL'S FAILURE TO CHALLENGE THE ADMISSIBILITY OF HIS CONFESSION ON THE GROUNDS THAT IT WAS INVOLUNTARY.

In his first issue, Simmons asserts that the postconviction court erred in denying his ineffective assistance of trial counsel claim based on counsel's failure to move to suppress Simmons' statement to detectives because it was involuntary. Appellant acknowledges that trial counsel moved to suppress his statements to law enforcement officers prior to trial (DAR V4:568), but now makes the hindsight claim that trial counsel should have also argued that his confession was involuntary based on his intellectual functioning and the alleged coercive nature of the interrogation.[3] The postconviction court denied

[3] After law enforcement made contact with Simmons at his parents' residence, he voluntarily accompanied them to the sheriff's office where he was questioned for approximately four hours. The first two hours of his interview were videotaped, but officers failed to replace the tape with a new tape and the remaining interview was not videotaped. After a break in the interview, the detectives learned that blood had been found in his car, and when confronted with this information, Simmons concluded the interview by stating, "Well, I guess if you found blood in my car, I must have did it." Simmons, 934 So. 2d at 1107-08. Although the defense argued at trial that this was not a "confession," but was rather a flippant and sarcastic statement, "the jury, as the trier of fact, was entitled to draw an inference that Simmons was acknowledging guilt from his statement that he 'must have did it.'" Id. at 1111 (noting that

this claim based on a finding that Appellant failed to establish deficient performance or prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984). (PCR V9:1702-12).

When reviewing the trial court's ruling on Simmons' ineffective assistance of counsel claim, this Court must defer to the court's findings on factual issues, but reviews the court's ultimate conclusions on the deficiency and prejudice prongs *de novo*. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, contrary to collateral counsel's assertions, the lower court properly identified the applicable law in analyzing Appellant's claims, correctly applied this law to the facts as presented in the trial and postconviction proceedings, and concluded that Appellant was not entitled to postconviction relief. In the order denying relief, the court began its analysis by addressing the various legal standards to be applied to Appellant's postconviction claims and properly noted that, in regard to his ineffective assistance of counsel claims, the court was required to apply the standards set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), and that Appellant had the burden of establishing that trial counsel's performance was deficient and

---

this was not just a circumstantial evidence case -- there was direct evidence of physical evidence and eyewitness testimony, as well as Simmons' statement, to support his convictions).

that he was prejudiced as a result, i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (PCR V9:1698-1701). The court further noted the unusual position Simmons placed him in by insisting on hiring Janice Orr, an unqualified capital attorney, as his private trial counsel.

> In considering the issue of ineffective assistance of counsel, this Court believes it is important to note the history of the Defendant's representation by Ms. Janice Orr and Mr. Jeffrey Pfister. Originally, Defendant was represented by the Public Defender's Office and by two attorneys associated with that office, Mr. William Stone and Mr. James Baxley. Defendant and his family were dissatisfied with counsel and decided to retain Ms. Orr as trial counsel. This Court - on its own initiative - raised the issue of whether Ms. Orr was qualified pursuant to Florida Rule of Criminal Procedure 3.112 and conducted two hearings on the issue. (See generally Transcripts of October 21 and 25, 2002, Hearings). During those hearings, the Defendant was present and privy to the discussions. This Court questioned the Defendant and explicitly informed him that Ms. Orr did not possess the required qualifications to represent him in this case. The Defendant insisted that he wanted Ms. Orr and informed the Court that, regardless of her lack of qualifications, he wanted her as his attorney. In an order dated October 25, 2002, this Court denied the Defendant's request to substitute Ms. Orr for the Public Defender's Office.
>
> The Defendant and his family refused to give up and ultimately retained Ms. Orr. They accomplished this by also retaining Mr. Jeffery Pfister, an experienced attorney, to represent the Defendant along with Ms. Orr. This Court notes that Mr. Pfister was qualified pursuant to rule 3.112. Mr. Pfister

> testified at the 3.851 evidentiary hearing that Ms. Orr approached him and informed him that the Defendant and his family wanted her to represent the Defendant. She asked Mr. Pfister to file a Notice of Appearance so she could handle Defendant's case. Mr. Pfister testified that in hindsight he was very much just a figurehead. Mr. Pfister stated that it seemed to him that Ms. Orr was the Defendant's attorney and that he was only there because he had to be there. According to Mr. Pfister, the Defendant and his family were loyal to and listened to Ms. Orr despite this Court's warnings that she was not qualified. (Evidentiary Hearing at 756-812).
>
> On July 3, 2003, in its continuing concern regarding qualified counsel, this Court again examined Defendant regarding his choice of counsel. Defendant stated under oath that he was satisfied with the division of labor between the attorneys representing him and that they had done everything he had asked them to do.
>
> Despite its best efforts, this Court is now faced with allegations by the Defendant that trial counsel was ineffective. This Court believes it is disingenuous for Defendant to raise claims of ineffective assistance of counsel after having been explicitly informed by the Court that Ms. Orr was unqualified under the rule to represent him. Undoubtedly, had this Court refused to allow Ms. Orr to be the Defendant's primary counsel, the argument would now be that the Court interfered with the Defendant's right to an attorney of his choice. Thus, this Court was "damned if you do, damned if you don't." It is clear from the evidence before the Court and, in particular, Mr. Pfister's testimony, that the Defendant and, in particular, his family were intent on Ms. Orr's representation and, with their full and complete support, she assumed primary responsibility for the defense and its decisions. **This notwithstanding, the Court now considers his ineffective claims under the required standards.**

(PCR V9:1700-01) (emphasis added). Simmons argues that the court's order indicates that the judge was biased and did not

fairly adjudicate his claims. To the contrary, the court properly noted the catch-22 position that he was placed in regarding the ineffectiveness claims based on Simmons' insistence to hire an attorney who failed to meet the qualifications set forth in Florida Rule of Criminal Procedure 3.112. See generally Williams v. State, 932 So. 2d 1233 (Fla. 1st DCA 2006) (rejecting defendant's argument that his first degree murder conviction should be vacated after the trial judge allowed the defendant to knowingly be represented by an unqualified capital attorney). Here, the trial judge properly indicated that he would analyze Simmons' claims under the applicable standards set forth in Strickland. See Fla. R. Crim. P. 3.112 Comm. Comments (noting that the standards are not "intended to establish any independent legal rights" and ineffective assistance of counsel claims should be controlled by Strickland).

After identifying the proper legal standards, the trial court made numerous factual findings that are clearly supported by the record. In denying Simmons' claim, the court stated:

> At the evidentiary hearing, the Defendant called defense expert Professor Richard Leo to testify. Professor Leo testified that the detectives utilized classic interrogation techniques when questioning the Defendant by confronting him with alleged evidence of his guilt, calling him a liar, and accusing him of murder, etc. (Evidentiary Hearing at 501-02).

Professor Leo opined that some of these tactics were psychologically coercive. (Evidentiary Hearing at 502). He acknowledged, however, that not everything the Defendant said was suspect, but he was concerned with the reliability of the statement at the end of the interview: “Well, if you found blood in my car, I guess I must have did it.” (Evidentiary Hearing at 553-54). Professor Leo testified that he believed Defendant’s confession was a “compliant false confession”. (Evidentiary Hearing at 516). Noting Defendant’s low I.Q., low intellectual functioning, and communicative difficulties, Professor Leo stated individuals with such difficulties were: (1) more vulnerable to pressure and likely to confess; (2) more likely to look to authority figures for cues on how to behave; (3) likely to be acquiescent and submissive; (4) more likely to avoid conflict; and (5) not able to understand the long-term consequences of their actions. (Evidentiary Hearing at 517-19). **While he concluded the methods used by the police were psychologically coercive, he admitted that ultimately he did not know whether Defendant’s statement was a false confession.** (Evidentiary Hearing at 537).

Lake County Detectives Kenneth Adams and Stewart Perdue also testified. Both detectives agreed that the interrogation took place over approximately a four-hour period. Detective Perdue testified that the first two (2) hours of the interrogation were recorded. The second two hours were not. Detective Adams testified that he perceived the Defendant’s statement to be a partial admission. Detective Perdue testified that he did not believe the Defendant was being sarcastic when he made the remark. (Evidentiary Hearing at 1386-97).

Ms. Janice Orr also testified. Ms. Orr testified that she did not believe Defendant’s statement was a confession but that it was, in fact, a sarcastic statement. (Evidentiary Hearing at 1564-66). In her opinion, the Defendant made the remark to end the interview. (Evidentiary Hearing at 1566). She opined that she did not consult a false-confession expert, but, in hindsight, she believed she should have. (Evidentiary Hearing at 1564). Ms. Orr also stated that, in hindsight, she should have moved to suppress the statements because they were not knowingly, intelligently and voluntarily made by the Defendant.

She also stated that she did not consult a mental health expert because she believed the Defendant was competent to aid her in his defense. (Evidentiary Hearing at 1567-68).

As an initial matter, this Court notes that Ms. Orr's testimony regarding what she would have done in hindsight is irrelevant. As stated above, the Florida Supreme Court has repeatedly noted that the test when assessing the actions of trial counsel is not how, in hindsight, present counsel would have proceeded. Bradley v. State, 33 So. 3d 664, 671 (Fla. 2010) (citation omitted); Reaves v. State, 942 So. 2d 874, 878 (Fla. 2006) (citation omitted); Cherry, 659 So. 2d at 1073. In its review, this Court is mindful that, "a fair assessment of attorney performance requires that every effort 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." Strickland, 466 U.S. at 689. As a result, this Court will not consider Ms. Orr's statements that, in hindsight, she would have done some things differently. Instead, this Court will evaluate her and Mr. Pflster's conduct from their perspective at the time.

This Court finds that the Defendant has failed to prove that Ms. Orr was ineffective for failing to file a motion to suppress his statement because it was involuntary and the result of police coercion. In beginning its analysis, it is noted that Detective Perdue read the Defendant his Miranda rights. The Defendant stated he understood his rights and was freely and voluntarily waiving those rights. The Defendant signed the written Miranda waiver form. (See Trial Transcript at 2968, 3028-29).

At the heart of Defendant's argument is his assertion that the "confession" was the result of coercive police techniques on an intellectually challenged man. He argues:

> Mr. Simmons shouldered four hours of offensive accusations from two law enforcement officers in a tiny room, and he repeatedly made denials until he finally he [sic] became exasperated and gave the police exactly what they demanded to hear: a confession. Mr. Simmons, even with his

> communicative and intellectual limitations, came to realize that the only way he could possibly terminate the oppressive interrogation was to admit guilt notwithstanding his innocence.

(Written Closing Argument at 145) (emphasis in original). In analyzing the Defendant's arguments, this Court notes that the Defendant, in effect, adopts two different positions. First, in the above statement, the Defendant admits that the statement was, in fact, a confession, i.e., what Professor Leo would call a "compliant false confession". At other times, the Defendant adopts the position argued by Ms. Orr at trial, that the statement was not a confession, but an "off-the-record, sarcastic and flippant statement." (Written Closing Arguments at 144). Ultimately, this ambiguity as to the nature of the Defendant's statement is fatal to Defendant's argument.

Significantly, there is no testimony from the Defendant that he felt coerced by the detectives into making the statement. Likewise, there is no statement by either Mr. Pfister or Ms. Orr that the Defendant had at any time informed them that he felt coerced into making the statement. The Defendant offered no testimony as to whether it was a false confession, a true confession or a sarcastic, ("let's get this over with") flippant remark. **Consequently, this Court concludes that it is mere speculation that Defendant made the statement as a response to police coercion.**

Because there is no statement by the Defendant to the contrary, this Court believes that this issue amounts to little more than different approaches to trial strategy. Although no evidence was ever offered, one could presume that Ms. Orr discussed with the Defendant whether it was a sarcastic remark. Ms. Orr was clear that she did not consider the Defendant's statement a confession, false or otherwise. Without such an explanation or other basis, it is not unreasonable for Ms. Orr to have concluded the statement was, in fact, a flippant, sarcastic remark. This Court notes that whether "a strategy is successful or unsuccessful is not the standard by which counsels' performance must be measured." Gibson v. State, 835 So. 2d 1159, 1162 (Fla. 2d DCA 2002) (Silberman, J. concurring) (citing Sireci V. State,

469 So. 2d 119, 120 (Fla. 1985)). Moreover, as noted above, there is a presumption of reasonableness as to counsel's trial strategy. Downs v. State, 453 So. 2d 1102, 1108 (Fla. 1984). Absent any evidence that Defendant informed counsel that he felt he was coerced into making the statement or that he informed her that he was just being flippant, this Court must conclude that Ms. Orr's decision was a matter of trial strategy.

The Court also finds that the statement was made voluntarily. In determining whether a confession was obtained voluntarily, this Court must analyze the evidence under a "totality of circumstances" test. Nelson v. State, 850 So. 2d 514, 521 (Fla. 2003) ("At the trial court level it is proper to apply a 'totality of the circumstances' analysis when determining if a confession was obtained voluntarily.") (quoting Frazier v. Cupp, 394 U.S. 731, 739 (1969)); Thompson v. State, 548 So. 2d 198, 203-04 (Fla. 1989)). This Court will first look at the issues surrounding Defendant's waiver of his rights.

Defendant asserts that he could not have understood the written Miranda form. He also argues that the failure to present mental health testimony during the motion to suppress hearing was error because it would have informed the Court that he lacked the intellectual capacity to waive the Miranda warnings. This Court has examined the testimony presented by Dr. Henry Dee, Ms. Heidi Hanlon-Guerra, and Dr. Frank B. Wood. Significantly, none of these mental health experts testified that Defendant was incapable of understanding his rights whether spoken or written. Dr. Henry Dee testified that the Defendant never learned to read past the fourth-grade level, was not a "fluent reader" and that he was functionally illiterate. (Evidentiary Hearing at 75, 81, and 88). Dr. Dee, however, did not testify that Defendant did not or could not understand his rights. Ms. Hanlon-Guerra offered no testimony regarding the Defendant's ability to understand his rights. Dr. Wood testified that he performed a PET scan on the Defendant and that the Defendant suffered from unilateral hypometabolism of the thalamus - a conclusion disputed by the State's expert, Dr. Larry Holder. Dr. Wood testified that he concluded that the Defendant suffered from cognitive

impairments and was impaired in interpreting stimuli from the outside world. Dr. Wood, however, did not testify that as a result of the impairments, the Defendant was incapable of understanding his rights.

Ms. Orr testified that she saw no need to raise this issue because she had concluded that the Defendant was capable of assisting her in his defense. Mr. Pfister offered no such concerns during trial or after and did not testify about his perceptions that the Defendant could not understand his rights. Likewise, the other attorneys involved in the Defendant's representation did not express any opinion that Defendant was incapable of understanding his Miranda rights. There is only argument and no evidence that the Defendant could not understand the Miranda warnings he was given. Thus, this Court concludes that the Defendant failed to establish that he was incapable of understanding his Miranda rights.

This Court will look next at the interrogation itself. In looking at the totality of the circumstances surrounding the interrogation, this Court notes that the interrogation took place over a four-hour period. This is not an extremely lengthy period of time and lends itself to the conclusion that the interrogation was not coercive. See. e.g., Nelson, 850 So. 2d 514 (Fla. 2003) (multi-day interrogation not coercive even though defendant was tired); Walker v. State, 707 So. 2d 300, 311 (Fla. 1997) (six-hour police interrogation was not coercive as to render a confession involuntary - suspect was provided with drinks upon request and allowed to use the bathroom when he wished). Significantly, during the interrogation of the Defendant, the officers stopped the interview and brought in food for themselves and for the Defendant. (See Trial Transcript at 3077). Detective Perdue also testified that they took breaks and allowed Defendant to use the rest room. (See Trial Transcript at 2982). These factors further support the conclusion that the interrogation was not coercive.

This Court also finds that the Defendant failed to establish that there was a causal nexus between what Defendant alleged were coercive tactics and the Defendant's confession, if, indeed, it was a confession and not a sarcastic response. Both the Florida and the Federal courts have long held that

such a nexus must exist: "There must be a causal nexus between the improper police conduct and the confession." Nelson v. State, 688 So. 2d 971, 974 (Fla. 4th DCA 1997) (citing United States v. Kelley, 953 F.2d 562, 565 (9th Cir.1992)); State v. Walter, 970 So. 2d 848 (Fla. 2d DCA 2007); see also, Colorado v. Connelly, 479 U.S. 157, 164 (1986) ("[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law"). As the Florida Supreme Court has noted: "The constitution does not bar the use by investigating officers of any statement that could be construed as a threat or promise, but only those which constitute outrageous behavior and which in fact induce a confession." Nelson, 688 So. 2d at 975 (citing United States v. Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988) and United States v. Bamett, 814 F. Supp. 1449, 1456 (D. Alaska 1992)). **Without this nexus, a motion to suppress could not have been successful. Therefore, Defendant cannot demonstrate that trial counsel was deficient or that the Defendant was prejudiced.**

A careful reading of the trial transcript, which includes the police interview with the Defendant, demonstrates that there was a marked change in the police approach to the Defendant during the interview. This conclusion is supported by Detective Perdue's testimony. Detective Perdue testified that the second half of the interview was not as confrontational as the first half. Detective Perdue stated that he took a more "fatherly" approach to the Defendant because the confrontational approach was not producing any results. (See Trial Transcript at 2990). Perdue testified that at about 8:30 p.m., he took a break from the interrogation and went downstairs to see if they had searched Defendant's car. By that time other officers had performed a presumptive test for blood on the Defendant's car and determined that it was positive for blood. Perdue went back upstairs and informed Defendant that they had just found blood in his car. Detective Perdue testified that the Defendant did not immediately reply. Finally, the Defendant looked up at the detective and stated, "Well, if you found blood in my car, I guess I must have did it." (See Trial Transcript a[t] 2992). **There is simply no**

evidence that the alleged coercive tactics continued after the first two hours. Even more significant, there was a break in the interview just prior to the Defendant making his statement. Thus, this Court finds there was no causal nexus between the alleged coercive activities and the Defendant's statement.

As discussed earlier, Defendant did not testify during the trial or at the evidentiary hearing. Thus, this Court does not have any statement from the Defendant characterizing the remark as a confession or a sarcastic, flippant remark. Also, the Defendant did not testify that the remark was made as a result of the police interrogation and the techniques they utilized. In Beltran v. State, 700 So. 2d 132 (Fla. 4th DCA 1997), the court stated:

> The appellant did not take the stand and declare such, nor was there evidence offered to show its falsity. We agree with the state that without appellant claiming that his confession was false, the proffered testimony was irrelevant and inapplicable to the evidence in the case.

Id. at 133. **Similarly, this Court is left without any statement by the Defendant that the confession was false and the result of police coercive techniques. Coupled with the lack of a nexus between the alleged coercive tactics and Defendant's statement, this Court finds that the absence of Defendant's testimony regarding his statement is fatal to his claim.**

This Court also finds Professor Leo's testimony unpersuasive. Professor Leo testified that although it could be true and he was not positive, he believed the Defendant's confession was a "compliant false confession". Professor Leo defined a "compliant false confession" as one where someone "knowingly confesses falsely because they want to put an end to any intolerably stressful or coercive interrogation." (Evidentiary Hearing at 516). As noted above, this Court has reviewed the transcript of the interview with the Defendant and notes that the tone changed significantly during the first two hours from a confrontational tone to one markedly less confrontational. This is confirmed by Detective Perdue's testimony that the second half of the interview was not as confrontational as the first

> half. He stated that he took a more "fatherly" approach to the Defendant because the confrontational approach was not producing any results. (See Trial Transcript at 2990). Dr. Leo's failure to acknowledge these facts leads this Court to reject his conclusions.
>
> Moreover, this Court finds that the Defendant does not fit the model presented by Professor Leo. Professor Leo stated individuals like the Defendant were: (1) more vulnerable to pressure and likely to confess; (2) more likely to look to authority figures for cues on how to behave; (3) likely to be acquiescent and submissive; (4) more likely to avoid conflict; and (5) not able to understand the long-term consequences of their actions. The record of the police interview demonstrates that: the Defendant was not vulnerable to the police pressure; the Defendant did not look to officers for cues on how to behave; the Defendant was not acquiescent and submissive; and the Defendant did not avoid conflict with the officers. The Defendant repeatedly denied having killed the victim. (Trial Transcript at 3038, 3039, 3047, 3049, 3050, 3051, 3052, 3053, 3055, 3058, 3059). Defendant was defiant at times with the Detectives as evidenced by his statements to the Detectives: "Let it happen" and "You better get out of my face". (Trial Transcript at 3033, 3056). Professor Leo fails to address these comments or the change in the tone of the interrogation and, thus, this Court finds that his conclusion that the Defendant's confession is a "compliant false confession" is not substantiated by the record.

(PCR V9:1703-12) (emphasis added).

At the evidentiary hearing, collateral counsel presented the testimony of Professor Richard Leo, who testified that the detectives utilized "classic interrogation techniques" when questioning Simmons by confronting him with alleged evidence of his guilt, calling him a liar, accusing him of murder, using

inducements to try and motivate him, etc.[4] (PCR V22:501-02). In Professor Leo's opinion, some of the detectives' interrogation techniques were psychologically coercive. (PCR V22:502). Professor Leo acknowledged that not everything Simmons told the detectives was suspect, but rather, he was only concerned with the reliability of Simmons' single incriminating statement at the end of the interview: "If you found blood in my car, I must have did it." (PCR V22:553-54). Although the professor opined that the interrogation methods were psychologically coercive, he admitted that he did not know whether Simmons' confession was false. (PCR V22:537).

[4] Collateral counsel makes the meritless assertion that "the State never challenged the admissibility of Professor Leo's testimony" and therefore waived any argument regarding the admissibility of his testimony. Initial Brief of Appellant at 27-28. In his postconviction motion, collateral counsel never identified any expert witness on false confessions, and after the State argued that the claim was insufficiently pled and should be summarily denied, Appellant improperly filed a "reply" to his postconviction motion and "supplemented" his claim and identified Professor Leo for the first time. (PCR V1:2-9; V2:301-08, 368-72). At the case management conference, the trial court questioned the admissibility of Dr. Leo's testimony and the State argued that his testimony would not have been admissible at Simmons' trial. (PCR V19:6080-90). Nevertheless, the trial judge allowed Appellant the opportunity to present the witness's testimony at the evidentiary hearing, but the court specifically informed collateral counsel that "you're going to have to convince me that [such testimony] would be admissible." (PCR V19:6089). After hearing the witness's testimony, the postconviction court properly found that trial counsel was not deficient for failing to attempt to present such an expert at trial because his testimony would not have been admissible.

In addition to Professor Leo, collateral counsel also presented testimony from the two detectives involved in Simmons' interrogation: Detectives Kenneth Adams and Butch Perdue. At Simmons' trial, the detectives explained that the initial portion of the interrogation was confrontational, but after Simmons' repeated denials, the detectives realized their interrogation techniques "weren't getting us anywhere," and they changed their methods to a more friendly and fatherly approach. (DAR V24:2983, 2990; V26:3320-23). At the evidentiary hearing, Detective Perdue acknowledged that he should not have threatened Simmons with capital punishment during the interrogation. (PCR V27:1453-56). Detective Perdue also opined that Simmons was not being sarcastic when he concluded the interrogation by making the incriminating statement after being informed that blood was found in his car. (PCR V27:1480). Likewise, Detective Adams testified that he thought Simmons' statement, "if you found blood in my car, I must have did it," was an admission. (PCR V26:1387-88).

Janice Orr, Simmons' trial counsel, testified that it was her opinion that Simmons was in custody when the detectives interviewed him, and she pursued her motion to suppress on Fourth Amendment grounds. See Simmons, 934 So. 2d at 1113-15 (affirming the trial court's ruling denying the motion to

suppress and finding that Simmons' interview with detectives was voluntary and that a reasonable person in his position would have felt free to terminate the encounter with police). Ms. Orr was convinced that Simmons' incriminating statement at the end of the interview was simply a sarcastic statement made by Simmons to stop the interview. (PCR V27:1564-66). Ms. Orr indicated that, in hindsight, after consulting with her client, she should have consulted a false confession expert and moved to suppress Simmons' statement because she did not think it was a confession. (PCR V27:1563-69). Ms. Orr, however, did not consider moving to suppress Simmons' statement based on his intellectual functioning because she found Simmons competent to assist her. (PCR V27:1568-69). On cross-examination, Ms. Orr testified that she insisted the jury see the videotape of Simmons' interview because, during the two hour tape, he consistently maintained his innocence despite the confrontational nature of the detectives' questioning. (PCR V28:1643-44). Ms. Orr further stated that she cross-examined the detectives concerning the alleged sarcastic nature of Simmons' incriminating statement. (PCR V28:1665).

As the postconviction court properly found, Appellant failed to establish that trial counsel performed deficiently by failing to move to suppress Simmons' statement based on the

alleged coercive nature of the interrogation, and further failed to establish that Simmons suffered prejudice as a result of counsel's performance. The record clearly supports the court's findings that "there is no testimony from the Defendant that he felt coerced by the detectives into making the statement" and "it is mere speculation that Defendant made the statement as a response to police coercion." (PCR V9:1706). The court noted that it was reasonable to conclude that trial counsel Orr discussed with Simmons whether his statement was "sarcastic," given that "Ms. Orr was clear that she did not consider the Defendant's statement a confession, false or otherwise."[5] Thus, as the court concluded, absent any indication that Simmons' statement was the result of coercion, it was not an unreasonable trial strategy for counsel to argue to the jury that Simmons' statement was not a confession. See generally Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) ("Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.").

[5] Trial counsel Orr vaguely testified that she spoke with Simmons about his statement and, apparently, it was her opinion that his statement was not a confession, but was a sarcastic comment. (PCR V27:1564-66).

In addition to finding that trial counsel acted reasonably in making a strategic decision and therefore was not constitutionally deficient, the court also noted that Simmons could not establish prejudice as required by Strickland because he failed to establish any nexus between the alleged coercive tactics and his subsequent confession. (PCR V9:1708-12). In reviewing the totality of the circumstances surrounding the interrogation, the court noted that it took place over a four-hour period, and the detectives stopped the interview on multiple occasions for a food break and for restroom breaks. The court found that the initial portion of the interrogation which was videotaped, was more confrontational, but found that there was a "marked change" in the detectives' approach during the second half of the interview and the detectives took a more "fatherly" approach with Simmons. Throughout the entire interview, Simmons maintained that he did not commit the murder. After detectives took a break from the interview and went downstairs and discovered that blood had been found inside of Simmons' vehicle, they returned and informed Simmons of this development. At this time, Simmons stated, "Well, I guess if you found blood in my car, I must have did it."

The court properly concluded that the record did not support collateral counsel's allegations that Simmons confessed

because of coercive conduct by law enforcement. The court found that there was no evidence that any alleged coercive conduct occurred after the first half of the interview. After the change in approach by the detectives, and after a break in the questioning, Simmons made the brief statement at issue in response to being informed that blood had been found in his car. As the court correctly found, there simply was no nexus between the alleged coercive tactics and Simmons' inculpatory statement. Clearly, his statement was not made as a result of any coercive tactics, but rather, was made in response to being informed that incriminating evidence was found in his vehicle. See Colorado v. Connelly, 479 U.S. 157, 164 (1986) ("Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.").

Collateral counsel relies on Brewer v. State, 386 So. 2d 232 (Fla. 1980), to support his argument that trial counsel was ineffective for failing to move to suppress Simmons' statement, but the Brewer case is distinguishable from the instant facts. In Brewer, the trial court suppressed the defendant's oral confession finding that it was not voluntary given the threats

and promises made by law enforcement officers,[6] but allowed the State to introduce the defendant's subsequent written confession given shortly after appearing before a judge for his first appearance. Id. at 235. This Court found that the trial court erred in suppressing the written confession because the intervening facts were not "sufficient to break the stream of events and insulate the written confession from the coercive influences that produced the earlier statement." Id. at 236.

In addressing the admissibility of the defendant's subsequent written confession, this Court stated:

> In order for a confession or an incriminating statement of a defendant to be admissible in evidence, it must be shown that the confession or statement was voluntarily made. Coffee v. State, 25 Fla. 501, 6 So. 493 (1889). The due process clause of the Fourteenth Amendment to the United States Constitution prohibits the states from using the coerced confession of an accused against him. Brown v. Mississippi, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936). . . .
>
> Under that standard, when a question arises as to the voluntariness of a confession, the inquiry is whether the confession was "free and voluntary; that is (it) must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ." Bram v. United States, 168 U.S. 532, 542-43, 18 S. Ct. 183, 187, 42 L. Ed. 568 (1897). For a confession to be admissible as voluntary, it is required

[6] This Court stated that the detectives "raised the spectre of the electric chair, suggested that they had the power to effect leniency, and suggested to the appellant that he would not be given a fair trial." Brewer, 386 So. 2d at 235.

> that at the time of the making the confession the mind of the defendant be free to act uninfluenced by either hope or fear. The confession should be excluded if the attending circumstances, or the declarations of those present at the making of the confession, are calculated to delude the prisoner as to his true position, or to exert improper and undue influence over his mind.
>
> Frazier v. State, 107 So. 2d 16, 21 (Fla. 1958); Harrison v. State, 152 Fla. 86, 12 So. 2d 307 (Fla. 1943).

Brewer, 386 So. 2d at 235-36.

Although the detectives in the instant case discussed lethal injection, the detectives did not suggest that they had the power to affect leniency or that Simmons would not be given a fair trial. Furthermore, as a review of the totality of the interrogation demonstrates, the detectives' confrontational approach in the first half of the interrogation did not induce Simmons to make any incriminating statements. It was not until a break in the questioning and after being informed of blood being found in his car that Simmons immediately made the single, brief inculpatory statement. Because this statement was clearly not connected to any alleged coercive conduct by the detectives, the trial court would not have suppressed Simmons' statement had trial counsel raised this argument. See Blake v. State, 972 So. 2d 839 (Fla. 2007) (finding that there must be a casual connection between the police conduct and the confession in

order to render it involuntary); Walker v. State, 707 So. 2d 300 (Fla. 1997) (rejecting defendant's claim that his confession was involuntary where the detectives informed him that he was facing the death penalty and informed him that the detectives would inform the prosecutor that he cooperated); see also Kormondy v. State, 983 So. 2d 418, 430 (Fla. 2007) (noting that in order to establish prejudice as a result of trial counsel's withdrawal of a motion to suppress, the defendant must demonstrate that the motion to suppress would have been successful).

Additionally, Simmons cannot establish prejudice based on trial counsel's failure to move to suppress his statement because, even had the statement been suppressed, it would not have affected the outcome of his case in any manner. As this Court noted on direct appeal, there was other direct evidence in this case, including physical evidence and eyewitness testimony linking Simmons to the victim at the time of the murder. Simmons was the last person seen with the victim prior to her death. Shortly before the murder, independent eyewitnesses observed the victim attempting to escape Simmons' moving vehicle at an intersection. There was blood spatter linked to the victim in Simmons' car, as well as a large degraded blood stain on the passenger seat. Tire tracks near the victim's body matched the rear tires on Simmons' car, which were of different

tire models. Additionally, Simmons' semen was found in the victim's vaginal washings, indicating that he had been with her recently. See Simmons, 934 So. 2d at 1111-12. Based on this evidence, there is no question that even if Simmons' single, non-detailed "confession" had not been admitted, it would not have affected the jury's verdict given the overwhelming evidence of his guilt.[7] Accordingly, this Court should affirm the postconviction court's finding that Simmons failed to carry his burden under Strickland of establishing both deficient performance and prejudice.

[7] It should further be noted again that trial counsel argued to the jury that Simmons' statement was not a confession, but was a sarcastic, flippant remark. (DAR V31:4284-85).

ISSUE II

THE POSTCONVICTION COURT PROPERLY DENIED APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE AT THE GUILT PHASE.

Appellant raised a number of sub-claims in his postconviction motion regarding alleged ineffective assistance of counsel during the guilt phase. After conducting an evidentiary hearing on Simmons' claim, the court issued a detailed order denying his claims. On appeal, collateral counsel reasserts the same arguments rejected by the lower court. As will be seen, these sub-claims are meritless and this Court should affirm the lower court's order denying relief.

A. Stipulating to semen being found in the victim's vaginal washings

At Simmons' trial, defense counsel stipulated that forensic testing indicated that semen found in the victim's vaginal washings belonged to Simmons. (DAR V23:2660-96). Simmons asserts that trial counsel was ineffective for making this stipulation without presenting evidence that the sexual encounter was consensual, and further argues that the evidence was not relevant, and as support for this proposition, he relies on trial counsel's opinion that it was not relevant.

First, as was stipulated to by the State and trial counsel at the time of trial, the semen evidence was not relevant to the

sexual battery allegation because that charge involved anal penetration. However, the semen evidence was clearly admissible to the State's murder charge because it was relevant to show that Simmons gave false statements to law enforcement officers regarding the last time he had sexual intercourse with the victim – allegedly over two weeks before her murder. Because the trial court had found that this evidence was admissible, trial counsel testified that she made the strategic decision to stipulate to this evidence because it was the least harmful way for the evidence to come in. (PCR V27:1575). Based on trial counsel's strategic decision, the postconviction court properly rejected the instant claim. See PCR V9:1716-17, citing Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) ("Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.").

Collateral counsel further argues that trial counsel should have presented "credible" evidence from Simmons' neighbors, [redacted] and Edward Johnson, that they overheard Simmons and [redacted] engaging in consensual sex on Saturday,

December 1, 2001 at Simmons' residence.[8] At the postconviction hearing, the two neighbors testified that they did not observe any sexual interaction between Simmons and the victim, but based on sounds they overheard, they believed Simmons was engaging in consensual sex with the victim on Saturday afternoon. (PCR V20:105-07, 111-12, 120, 124). Conveniently absent from collateral counsel's brief, however, is any mention of the fact that Simmons informed his trial counsel that he did ***not*** have sex with the victim on that date and trial counsel did not want to put on testimony that would be inconsistent with Simmons' testimony if she decided to call him.[9] (PCR V28:1616-18). As the trial court found:

> **Ms. Orr's decision not to call the Johnsons to testify was also a strategic decision. She testified that the Defendant had told her that he had not had sex with the victim the day she was murdered. Thus, his version of events was in direct conflict with the Johnsons' version.** Moreover, Ms. Orr noted that the Johnsons had not seen the Defendant and the victim having sex and only concluded they were having sex because of the

[8] The State presented evidence that Simmons committed the murder sometime between midnight on December 1, 2001, and early Sunday morning, December 2, 2001. Simmons, 934 So. 2d at 1106.

[9] In addition to ignoring this fact, collateral counsel attempts to mislead this Court by stating "trial counsel failed to provide a readily-available, logical and lawful reason why Mr. Simmons' semen was found inside the victim: they had consensual sex the day of the murder!" Initial Brief of Appellant at 35. The evidence is unrefuted that collateral counsel's client denied having sex with the victim on this day, yet collateral counsel urges this Court to find otherwise.

> sounds they heard coming from Defendant's patio. Again, this Court notes that the Defendant chose not to testify at trial or at the evidentiary hearing. Thus, this Court has only Ms. Orr's testimony that Defendant told her that he did not have sex with the Defendant just prior to her death. This Court again finds it curious for the Defendant to now assert that Ms. Orr was deficient for believing him at trial. This Court finds that Ms. Orr was not deficient for failing to call the Johnsons to testify.

(PCR V9:1717) (emphasis added). The lower court properly rejected Simmons' claim that trial counsel was deficient for failing to call Deborah and Edward Johnson given Simmons' statements which were directly contradictory to their speculative testimony. See Lamarca v. State, 931 So. 2d 838, 849 (Fla. 2006) (stating that it was a reasonable trial strategy for counsel not to call persons who were not credible and would not have made good defense witnesses).

Although the trial court properly found that trial counsel was not deficient for stipulating to the semen evidence or for failing to call the Johnsons, the State would further submit that there can be no showing of prejudice because the State would have succeeded in introducing the semen evidence even had trial counsel challenged its admissibility. There was no legal evidentiary basis to exclude this evidence as it was relevant to

the murder charge.[10] See generally Lara v. State, 528 So. 2d 984, 984 (Fla. 3d DCA 1988) ("Finally, we are unpersuaded that counsel's agreement to certain aspects of the stipulation amounts to ineffective assistance of counsel. The facts of the case as contained in the stipulation are basically accurate and complete"). Furthermore, had trial counsel presented the testimony of the Johnsons regarding what they allegedly overheard, it would have prejudiced Simmons' defense because it would have shown that Simmons lied to law enforcement officers regarding his relationship with the victim and his prior sexual contact with her. Thus, because the record clearly supports the postconviction court's denial of this sub-claim, this Court should affirm the lower court's ruling.

B. Failure to present the testimony of an expert in the area of false confessions during the guilt phase

In his next sub-claim, Simmons asserts that trial counsel was ineffective for failing to call an expert on false confessions during the guilt phase to opine that Simmons' statement to detectives that "I guess if you found blood in my

[10] As will be discussed in more detail in Issue III, infra, the fact that FDLE analyst John Fitzpatrick was initially involved in the forensic work on this case has no relevance to the instant issue. Trial counsel Orr reluctantly conceded that she was aware of Fitzpatrick's involvement in this case, and there is no evidence that the DNA findings performed by a different FDLE analyst were unreliable. (PCR V28:1652-61).

car, I must have did it," was a "false" confession. As discussed in Issue I, supra, Professor Leo testified that detectives utilized psychologically coercive techniques in questioning Simmons, but the witness admitted that he did not know whether Simmons' confession was "false." Furthermore, trial counsel Orr testified that it was her belief, after speaking with Simmons, that the comment was a sarcastic, flippant statement. In denying this sub-claim, the postconviction court stated:

> This Court has previously addressed the issue of hiring an expert in false confessions under issue I. This Court will briefly summarize its findings. First, there is no evidence before this Court that Defendant informed Ms. Orr or any other counsel that he confessed due to the tactics of the officers. Second, this Court finds that there is evidence that the Defendant knowingly, voluntarily and intelligently waived his right to counsel. Third, Professor Leo's conclusion that Defendant's confession was a "compliant, false confession" is not supported by the facts of this case. Fourth, there was no nexus between the Defendant's statement and the tactics used by the police during the interview. Fifth, the Defendant has not testified that admission was false.
>
> . . .
>
> This Court would further note that, had trial counsel attempted to call an expert in false confessions during the guilt phase, this Court would have excluded such testimony. This Court is well aware that the Florida Supreme Court has questioned (without resolving the issue) whether this testimony is ever admissible. See Derrick v. State, 983 So. 2d 443, 451 n.7 (Fla. 2008) (citing Beltran, 700 So. 2d at 133 (questioning whether expert testimony regarding the voluntariness of a confession is ever admissible)).

(PCR V9:1713-14).

The State submits that the postconviction court properly denied Simmons' sub-claim. Had trial counsel attempted to call Dr. Leo as a witness in the guilt phase, the trial court would have excluded such testimony (as was similarly done by the trial court with Dr. Brigham's expert opinion regarding eyewitness identification). See generally Derrick, supra; Beltran v. State, 700 So. 2d 132, 133 (Fla. 4th DCA 1997) (trial court did not abuse its discretion in excluding expert testimony regarding alleged falsity of confession . . . "We question whether such testimony, which amounts to no more than an expert's assessment that the confession is involuntary, is ever admissible"); Bullard v. State, 650 So. 2d 631 (Fla. 1995) (court did not err in denying request to appoint expert on false confession); Johnson v. State, 438 So. 2d 774, 777 (Fla. 1983) ("Expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions."); Nelson v. State, 43 So. 3d 20, 30-31 (Fla. 2010) (noting that trial counsel was not ineffective for failing to call expert witness because his testimony would not have been admissible at guilt phase).

Even assuming that Dr. Leo's testimony would have been admissible in the guilt phase, collateral counsel failed to establish that trial counsel performed deficiently by failing to consult and call this witness, or that Simmons was prejudiced as a result. Trial counsel Orr testified at the evidentiary hearing that she should have consulted with an expert such as Dr. Leo. However, as the postconviction court properly noted, Janice Orr's eagerness to "fall on her sword" and endorse the notion that she was deficient is of little consequence, particularly when her assessment has been made with the benefit of hindsight. (PCR V9:1704-05). See also Routly v. State, 590 So. 2d 397, 401 n.4 (Fla. 1991); Kelley v. State, 569 So. 2d 754 (Fla. 1990). Dr. Leo testified that the law enforcement officers utilized coercive methods of interrogation, but he did not opine that the incriminating statement was false. In fact, as Dr. Leo conceded, Simmons' statement was "ambiguous" and he "ultimately [doesn't] know whether this was a false confession or not." (Tr.530, 537). Thus, given Dr. Leo's equivocal testimony, Simmons is unable to establish deficient performance pursuant to Strickland. Furthermore, as noted in the discussion of Issue I, supra, Simmons is unable to establish prejudice under Strickland given the fact that trial counsel argued to the jury that Simmons' incriminating statement was flippant and

sarcastic, and even if his statement had been suppressed, it would not have changed the outcome of his case given the other overwhelming evidence of guilt. Thus, because Simmons has failed to establish deficient performance and prejudice, this Court should affirm the lower court's denial of the instant sub-claim.

C. Trial counsel's alleged failure to investigate, discover, and expose FDLE analyst John Fitzpatrick's involvement in the collection and testing of forensic evidence

Simmons asserts that trial counsel was ineffective for failing to investigate, discover and inform the jury that FDLE analyst John Fitzpatrick was initially involved in the DNA collection and testing in this case.[11] Simmons asserts that the forensic evidence was "unreliable" at trial because of John Fitzpatrick's involvement in his case.[12] Despite eliciting substantial testimony at the evidentiary hearing surrounding

[11] Soon after his involvement in Simmons' case, Fitzpatrick resigned from FDLE after an investigation determined that he had falsified information on a proficiency exam.

[12] Collateral counsel does not expound on his vague assertion that the forensic evidence was "unreliable," but the postconviction court's analysis of the forensic evidence at PCR V9:1720-27 clearly shows that this allegation is meritless. As the court recognized, Simmons' own DNA expert, Dr. Edward Blake, utilized the blood sample from FDLE to obtain the victim's DNA and reported that he had no problems obtaining the victim's DNA profile from the sample. (DAR V30:4090-91). Obviously, trial counsel was not ineffective for challenging the reliability of the victim's blood sample when her own expert utilized it for his testing.

John Fitzpatrick's proficiency test and subsequent investigation, collateral counsel failed to establish that trial counsel was ineffective for failing to "investigate, discover and expose" to the jury Fitzpatrick's involvement. As the postconviction court properly found in its detailed analysis of this claim, Simmons failed to establish either deficient performance or prejudice. (PCR V9:1719-27).

The court began its analysis by noting that trial counsel was, in fact, aware of the problems with Fitzpatrick prior to trial, although counsel could not recall the specifics at the evidentiary hearing. Trial counsel Janice Orr acknowledged that she had an Excel spreadsheet in her files, prepared by her investigator, which indicated Fitzpatrick handled evidence in this case, including the victim's blood, and had been "fired" by FDLE. (PCR V28:1652-61). Furthermore, prior trial counsel was also aware of Fitzpatrick's involvement and Ms. Orr had a copy of prior counsel's files.[13] Thus, contrary to Simmons'

[13] Assistant Public Defender William Stone was aware of John Fitzpatrick's involvement in this case as evidenced by his email exchanges with the prosecutor and his court filings seeking records from FDLE. The prosecutor also testified that he orally informed Mr. Stone of Fitzpatrick's involvement in this case. (PCR V27:1492-93). Subsequent trial counsel, Janice Orr, copied all of the records from the Public Defender's Office and also had knowledge of Fitzpatrick's involvement in the forensic testing. (PCR V28:1661).

allegations, trial counsel was aware of this information and was not deficient for failing to discover this information.

The postconviction court further rejected Simmons' ineffective assistance of counsel claim based on a finding that he could not establish any prejudice. The court noted that, even had trial counsel attempted to introduce evidence of FDLE's investigation into Fitzpatrick, it would not have been admissible at Simmons' trial. Despite presenting voluminous testimony regarding Fitzpatrick at the evidentiary hearing, Simmons failed to produce *any* evidence connecting Fitzpatrick's behavior in failing his proficiency exam to any forensic work performed in this case. As the record clearly establishes, after learning of Fitzpatrick's resignation, the forensic evidence was retested "from scratch" by another FDLE analyst, Shawn Johnson. There was no testimony at the evidentiary hearing that Fitzpatrick was responsible for purposefully tainting the victim's blood and causing it to have a foul odor when subsequently examined by Shawn Johnson. In fact, the testimony at the evidentiary hearing indicated that Fitzpatrick opened the vacuumed-packed tube of the victim's blood in December, 2001, and Shawn Johnson then examined the blood over two and a half months later. The testimony at the hearing indicated that, once the tube was opened, air and oxygen would

likely cause bacteria to degrade the blood sample. (PCR V23:652). As the court noted, there was simply no evidence presented that Fitzpatrick tampered with or contaminated any evidence in Simmons' case.[14] Additionally, the court found that even if trial counsel had been allowed to present evidence of Fitzpatrick's resignation from FDLE at Simmons' trial, it would not have changed any of the witnesses' testimony or opinions regarding the forensic testing done in this case. Because the record supports the lower court's findings that Simmons failed to carry his burden of showing deficient performance and prejudice, this Court should affirm the court's ruling regarding this sub-claim.

D. Failure to call Simmons' father, Terry Simmons

In his next sub-issue, Simmons asserts that the court erred in denying his claim that trial counsel was ineffective for failing to call his father, Terry Simmons, at the guilt phase to testify that: (1) Simmons did not run from the police and did not have a consciousness of guilt; (2) the victim had loose

[14] At the postconviction hearing, collateral counsel presented testimony from an expert in DNA analysis, Candy Zuleger, who testified to concerns she had over FDLE's forensic work in this case. However, as the court concluded, Ms. Zuleger's "complaints with Mr. Fitzpatrick were primarily procedural and concerned with his methodology," and she did not opine that there was any evidence of tampering with the evidence. (PCR V9:1725-26).

bowels on Thanksgiving when at his home; and (3) the victim's blood in Simmons' car may have come from scratches she obtained while helping Simmons unload thorny bougainvillea bush debris. The postconviction court rejected this claim because Simmons' two trial attorneys, Janice Orr and Jeffrey Pfister, both testified that they made the strategic decision not to call Terry Simmons because he had a manslaughter felony conviction and they did not want the jury to think that murder "runs in the family," but instead had a stipulation read to the jury regarding Simmons' whereabouts with his father on December 2, 2001. (PCR V9:1729-31; V23:777-81; V27:1591-92).

As this Court has previously noted, a trial attorney is not deficient for making a strategic decision regarding the decision of whether to call a witness for the defense. See Fennie v. State, 855 So. 2d 597 (Fla. 2003) (noting tactical decisions regarding whether or not a particular witness is presented are subject to collateral attack only in rare circumstances when the decision is so irresponsible as to constitute ineffective assistance of counsel); Lamarca v. State, 931 So. 2d 838, 848-49 (Fla. 2006) (affirming lower court's denial of ineffective assistance of counsel claim for failing to call defense witnesses based on strategic decision). In addition to failing to establish deficient performance based on trial counsel's

sound strategic decision, the court further found that Simmons failed to establish prejudice because Terry Simmons' testimony regarding his son's alleged lack of consciousness of guilt and the scratches allegedly obtained by the victim were based solely on speculation. The court noted that there could be no showing of prejudice regarding the other potential testimony relating to the victim's loose bowels at Thanksgiving because this testimony would be cumulative to testimony given to the jury by Simmons' mother. (DAR V30:4149-50).

E. Alleged mismanagement of DNA defense expert, Dr. Edward Blake

Simmons next alleges that trial counsel was ineffective in her handling of the defense DNA expert, Dr. Edward Blake. Collateral counsel faults trial counsel for calling this witness because, on cross-examination, he "bolstered" the State's case by agreeing that the victim's mother was a good source for a mtDNA profile of the victim. As the postconviction court correctly noted, Simmons cannot establish either deficient performance or prejudice because the expert simply acknowledged a known fact regarding mtDNA that is not disputed in the scientific community. (PCR V9:1731-34).

Likewise, the postconviction court properly rejected Simmons' claim that trial counsel was ineffective during her questioning of this expert. Simmons faults trial counsel for

questioning the expert regarding two samples, Q-114 and Q-116, that he did not test because counsel had not sent him those two samples. As the court noted, the expert received numerous items for testing, and assuming *arguendo* that trial counsel became confused regarding these two items of evidence, the mistake did not reach the level of deficiency required by Strickland entitling Simmons to relief.

F. Alleged mismanagement of bloodstain pattern expert Stuart James

Simmons asserts that the court erred in denying his claim that trial counsel was ineffective for calling bloodstain pattern analysis expert Stuart James because trial counsel was unsuccessful in making points with this witness. Collateral counsel does not allege any specific deficiencies on the part of trial counsel, but rather makes a hindsight claim based on the alleged failures of trial counsel to elicit favorable testimony from the witness.

At the evidentiary hearing, Janice Orr testified that she had met with her expert numerous times and had talked with him on the phone, but on the day of his trial testimony, he had flown into town and she did not have time to meet with him. Ms. Orr testified that James' testimony at trial was very different from their prior conversations regarding the bloodstain

evidence, and she speculated that the witness may have confused Simmons' case with another case he was working on. (PCR V28:1611-12, 1648-49). Mr. James had indicated to Ms. Orr prior to trial that the victim could not have been killed in Simmons' car without there being substantial bloodstains inside the car, but at trial, he testified that the "fairly limited" bloodstains on the car doorjam did not exclude the possibility of a beating or stabbing occurring in the car. (PCR V28:1611-15).

Obviously, as the postconviction court properly found when denying this claim, trial counsel is not deficient in preparing her expert witness when the witness gave answers which were unanticipated and not consistent with their prior conversations. (PCR V9:1734-38). In addition to failing to demonstrate deficient performance, the court further noted that Simmons was unable to establish prejudice as a result of Stuart James' testimony. The witness's testimony was offered to explain to the jury the lack of bloodstain evidence inside Simmons' car, and although his testimony was not expressed with an aura of certainty, it still permitted trial counsel to argue reasonable doubt via the lack of substantial bloodstain evidence. (DAR V31:4275).

G. Failure to call Shirley Harness and Carrie Petty and failure to thoroughly question Jerry Linton

In his final sub-claim, Simmons asserts that trial counsel was ineffective at the guilt phase for failing to call witnesses Shirley Harness and Carrie Petty and for failing to thoroughly question Simmons' cousin, Jerry Linton. Collateral counsel asserts that Shirley Harness and Carrie Petty would have supplied exculpatory evidence that would have changed the result of the trial. Additionally, Simmons alleges that trial counsel was ineffective for failing to elicit exculpatory evidence from Jerry Linton when he testified at trial.

Simmons first claims that trial counsel was ineffective for failing to call Shirley Harness because she would have testified to exculpatory evidence. At the evidentiary hearing, Shirley Harness testified that the victim, [redacted], was "very pushy" and always "got into everybody's business." (PCR V21:368-69). Ms. Harness explained that Ms. [redacted] would watch the laundromat where she worked with binoculars from her nearby trailer and would call the police if she saw any suspicious activity. (PCR V21:374). Ms. Harness testified that the Rodriguez brothers (Jose and Juan) dealt drugs at the laundromat and threatened Ms. [redacted]. (PCR V21:378). When questioned by the State, Ms. Harness testified that she never

heard Ms. [redacted] call the police on Jose Rodriguez, and never heard Jose Rodriguez threaten Ms. [redacted]. (PCR V21:394).

Ms. Harness admitted that during the time of the murder and the trial, she was a street person living "on the run." (PCR V21:366, 385). Simmons' trial counsel, Janice Orr, testified that she and her full-time investigator searched for Ms. Harness prior to trial, but they were never able to locate her. (PCR V28:1619-21, 1648).

Obviously, as the postconviction court appropriately found, this claim is without merit because Simmons failed to establish that the Shirley Harness was available at the time of trial. (PCR V9:1738-40). The law is well established that trial counsel cannot be ineffective for failing to call an unavailable witness. See White v. State, 964 So. 2d 1278, 1286 (Fla. 2007) ("A defendant cannot establish ineffective assistance of counsel based on counsel's failure to call a witness who is unavailable."); Evans v. State, 995 So. 2d 933, 943 (Fla. 2008) ("Because it is clear from the record that counsel made reasonable attempts to locate Lynch but was unable to find him, Evans cannot establish that counsel was ineffective for failing to call him at trial."). The court noted that "collateral counsel never pursued any line of questioning regarding the efforts made by trial counsel and her investigator to locate"

this witness and "did not provide any evidence that another investigator or witness locator would have been successful." (PCR V9:1740).

Similarly, the court found that Simmons failed to establish that his trial counsel was deficient for failing to call Carrie Petty because she was also unavailable. Ms. Petty testified that she worked at Robin's Restaurant which was near the laundromat where the victim worked. She testified that she observed the victim with John Yohman on four or five occasions and they appeared very friendly together.[15] About a month or two after the murder, the restaurant closed. (PCR V22:571-89). Trial counsel Janice Orr testified that her full-time investigator also tried to locate Carrie Petty, but was unable to find her. Ms. Orr explained that her investigator contacted a law enforcement officer for assistance in locating these witnesses, but they did not have any information on either of these two witnesses. (PCR V28:1621). Because Shirley Harness and Carrie Petty were unavailable, the postconviction court

[15] John Yohman testified that he recognized a photograph of the victim, but he did not know her name and had never socialized with her. Shortly after her murder, Yohman gave a statement to detectives regarding seeing the victim at the laundromat late in the evening on December 1, 2001, with a white car parked in front of the laundromat. (PCR V22:557-69). As previously noted, other eyewitnesses observed the victim trying to jump out of Simmons' white car at an intersection around midnight.

properly found that trial counsel was not deficient for failing to call these witnesses.

Simmons further alleges that trial counsel was ineffective for failing to elicit testimony from Simmons' cousin, Jerry Linton, regarding his meeting the victim at Simmons' apartment sometime around late October or early November, 2001. (PCR V23:690). At the evidentiary hearing, collateral counsel proffered testimony from Mr. Linton that when he saw the victim limping at Simmons' apartment, he asked her about her injury and she responded that her ex-husband or ex-boyfriend had pushed her off a horse and punched or kicked her. (Tr.695-96). The proffered testimony regarding how the victim had received her injuries was the result of the lower court sustaining the State's hearsay objection to this testimony. Mr. Linton testified that he did not know when the victim sustained her injury and also did not know when she left Marion County and moved to Lake County. Thus, collateral counsel's speculation that this testimony, if admissible, would have suggested that "some abusive ex-boyfriend was lurking across town, he had beaten her up to the point that she limped, and she was on the run from him" is without merit.

As the postconviction court noted when denying this claim, Simmons' allegation that trial counsel was ineffective for

failing to question Linton regarding his conversation with the victim is without merit because Linton's testimony was inadmissible hearsay and would not have been admitted at trial. (PCR V9:1740-42). Trial counsel cannot be deemed ineffective for failing to attempt to elicit inadmissible hearsay testimony. See generally Owen v. State, 986 So. 2d 534, 543 (Fla. 2008) (noting that allegations that counsel was ineffective for not pursuing a meritless argument are legally insufficient to state a claim for postconviction relief); Nelson v. State, 43 So. 3d 20, 30-31 (Fla. 2010) (noting that trial counsel was not ineffective for failing to call expert witness because his testimony would not have been admissible at guilt phase). As the record clearly supports the postconviction court's denial of Simmons' ineffective assistance of guilt phase counsel claims, this Court should affirm the court's denial of relief.

ISSUE III

THE POSTCONVICTION COURT PROPERLY DENIED SIMMONS' BRADY AND GIGLIO CLAIMS.

In his third issue, Simmons asserts that the State withheld material exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), and presented, or failed to correct, false testimony in violation of Giglio v. United States, 405 U.S. 150 (1972). After conducting an evidentiary hearing on Simmons' claims, the postconviction court issued a detailed order denying these allegations. (PCR V9:1747-61). The State submits that a review of the record clearly supports the lower court's findings that the State did not suppress exculpatory or impeaching evidence that was material, nor did the State present, or fail to correct, false testimony.

As this Court has noted, both Brady and Giglio claims present mixed questions of law and fact. Sochor v. State, 883 So. 2d 766, 785 (Fla. 2004). As to findings of fact, this Court defers to the lower court's findings if they are supported by competent, substantial evidence. Hurst v. State, 18 So. 3d 975, 988 (Fla. 2009). This Court reviews the trial court's application of the law to the facts *de novo*. Id. at 988. The State submits that the postconviction court properly applied the applicable law to Simmons' claims and the court's numerous

factual findings are supported by competent, substantial evidence. See generally Taylor v. State, 62 So. 3d 1101, 1114 (Fla. 2011) (noting that "[q]uestions of whether evidence is exculpatory or impeaching and whether the State suppressed evidence are questions of fact, and the trial court's determination of such questions will not be disturbed if they are supported by competent, substantial evidence").

A. Alleged Brady violation

In addressing Simmons' allegation that the State withheld favorable evidence from defense counsel, the lower court set forth the proper legal standards to review the claim:

> To the extent the Defendant presents a Brady claim, he must show "(1) that favorable evidence-either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced." Riechmann v. State, 966 So. 2d 298, 307 (Fla. 2007) (citing Strickler v. Greene, 527 U.S. 263, 281-82 (1999)). To establish prejudice, this Court must ask whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Smith v. State, 931 So. 2d 790, 796 (Fla. 2006) (quoting Strickler, 527 U.S. at 290). In Guzman v. State, 868 So. 2d 498 (Fla. 2003), the Florida Supreme Court clarified the Brady standard for materiality:
>
> > Under Brady, the undisclosed evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A criminal defendant alleging a

> Brady violation bears the burden to show prejudice, i.e., to show a reasonable probability that the undisclosed evidence would have produced a different verdict.

Id. at 506. (Citations and quotations omitted).

(PCR V9:1747-48).

Simmons claims that the State violated Brady by failing to disclose to defense counsel alleged exculpatory or impeaching information regarding FDLE's investigation and findings that analyst John Fitzpatrick's falsified records on a proficiency examination. At the evidentiary hearing, collateral counsel called numerous witnesses and presented voluminous amounts of documentary evidence regarding John Fitzpatrick's initial involvement in this case and FDLE's investigation of Fitzpatrick's alleged cheating on his proficiency examination which ultimately culminated in Fitzpatrick resigning from FDLE after FDLE concluded that he had falsified results on the test. The court correctly noted that "the heart of Defendant's argument is his assertion that the State withheld information regarding Mr. Fitzpatrick's termination with FDLE." (PCR V9:1749).

The court rejected Simmons' Brady claim based, among other reasons, on a factual finding that the information regarding Fitzpatrick was not withheld or suppressed by the State. Although there were documents from FDLE that were not turned

over to Simmons' trial counsel, the postconviction court found that the State had nevertheless notified trial counsel that John Fitzpatrick had been involved in this case and was subsequently investigated by FDLE and resigned.[16] In addition to informing prior trial counsel William Stone of this information, the record also established that Simmons' trial counsel Janice Orr was aware of the fact that analyst Fitzpatrick had analyzed evidence in this case and was "fired" from FDLE. As the postconviction court properly noted:

> Thus, it is apparent counsel knew that Mr. Fitzpatrick had handled the evidence and that there had been problems with Mr. Fitzpatrick that ultimately led to his leaving FDLE. **This Court concludes that this is fatal to the Defendant's claim.** Florida courts have held that a Brady claim cannot stand if the defendant knew of the evidence that was allegedly withheld or had possession of it. Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000); see also, Lynch v. State, 2 So. 3d 47, 83 (Fla. 2008) (citations omitted); Walton v. State, 847 So. 2d 438,453 (Fla. 2003) (quoting Occhicone); Maharai v. State, 778 So. 2d 944, 954 (Fla. 2000).

[16] Prior to trial, defense counsel filed a motion to compel to obtain documents from FDLE regarding their forensic work in order for the defense to provide this information to their expert. (DAR V1:83-85). The trial court entered an order requiring FDLE to release, among numerous other items, "a complete copy of the personnel file of any and all analysts that performed work in the above referenced case, including, but not limited to Shawn M. Johnson." (DAR V1:117-19).

(PCR V9:1750). Because defense trial counsel was aware of the substance of this information, or could have obtained it with reasonable diligence, this Court should affirm the postconviction court's denial of this claim. See generally Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993) (explaining that there is no Brady violation where the information is equally accessible to the defense and the prosecution, or where the defense had the information); Downs v. State, 740 So. 2d 506 (Fla. 1999) (stating that trial court did not err in denying Brady claim where the record established that trial counsel was aware of the substance of the evidence, despite not having all the relevant documentation).

In addition to the factual finding that the State did not suppress the information regarding John Fitzpatrick, the postconviction court also found that the evidence was not material and there was no reasonable probability that the Fitzpatrick evidence would have provided a different verdict at trial if presented to the jury. Although Fitzpatrick initially handled and tested some of the forensic evidence in this case, the testimony from the evidentiary hearing establishes that once FDLE learned of Fitzpatrick's proficiency test issues, another FDLE analyst, Shawn Johnson, re-worked the evidence "from scratch" and treated the evidence as if it had just come into

the lab. Despite presenting extensive evidence surrounding FDLE analyst Fitzpatrick's proficiency test issues, Simmons failed to establish how *any* of this evidence would have been admissible at trial or beneficial to his defense.

At the evidentiary hearing, collateral counsel presented testimony from DNA expert Candy Zuleger. Ms. Zuleger examined all of the forensic evidence submitted to FDLE and also reviewed FDLE's handling of Fitzpatrick's proficiency test. Ms. Zuleger testified that she was confused by FDLE analysts Fitzpatrick's and Johnson's different labeling of the forensic evidence in this case and this caused her to doubt the scientific validity of the testing, i.e., the ability of others to reproduce the results. However, she acknowledged that when Shawn Johnson took over the case, he may not have been confused by Fitzpatrick's initial labeling of the evidence.[17] (PCR V23:155-92).

Despite the differing methods of labeling between the two FDLE analysts, both Shawn Johnson and John Fitzpatrick came up with consistent results on all of the forensic testing,[18] and

[17] Shawn Johnson testified that he thought Fitzpatrick's labeling was somewhat confusing, but he re-labeled all the evidence as he inventoried it after receiving instructions to work the case from scratch. (PCR V26:1267-68).

[18] As noted by the lower court, the only difference in results concerned Simmons' DNA in the victim's vaginal washings. As Cathy Zuleger explained, Shawn Johnson's test results of the

collateral counsel failed to cast any doubt on the reliability of these results. (PCR V26:1344-46). Furthermore, in addition to noting that the two analysts had consistent results on all the evidence, the postconviction court further noted that the defense's own DNA expert, Dr. Blake, confirmed some of these results. (PCR V9:1751). Because the record clearly supports the lower court's finding that Simmons "failed to cast any doubt on the reliability of these results," this Court should affirm the court's ruling denying Simmons relief on his claim of a Brady violation.

B. Alleged Giglio violations

In order for a defendant to prevail on a Giglio claim, a defendant must establish: (1) that false testimony was presented, (2) that the prosecutor knew the testimony was false, or failed to correct what he subsequently learned was false testimony, and (3) that the falsehood was material. Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001). If the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. Tompkins v. State, 994 So. 2d 1072, 1091 (Fla.

---

victim's vaginal washing matched Simmons' DNA at 8 loci, whereas Fitzpatrick's results matched Simmons' DNA at all 13 loci. (PCR V21:260-61). Thus, by relying on Shawn Johnson's DNA testing, the State utilized statistics that were more favorable to Simmons.

2008). The State must then "prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt." Id. Under the harmless error test, the State must prove "'there is no reasonable possibility that the error contributed to the conviction.'" Guzman v. State, 941 So. 2d 1045, 1050 (Fla. 2006) (quoting State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986)).

Simmons claims that the State violated Giglio by presenting false testimony from eyewitness Sherri Renfro. Ms. Renfro testified at Simmons' trial to her observations while at a convenience store on the night of December 1, 2001. Ms. Renfro testified to observing the victim screaming for help and attempting to exit Simmons' passenger door while the car was still moving.[19] Ms. Renfro proceeded to chase Simmons' vehicle, but ultimately lost it while traveling at a high rate of speed. (DAR V26:3250-64). During her testimony, Ms. Renfro acknowledged that she was currently on probation, but denied that she was "in trouble with her probation officer" or "at risk of going to jail." (DAR V26:3251).

[19] A separate customer at the convenience store, Andrew Montz, presented similar eyewitness testimony regarding his observations of the victim screaming for help and attempting to flee from Simmons' car.

Simmons asserts that the State knowingly presented, or failed to correct, Ms. Renfro's "false" testimony that she was not as risk of going to jail. In rejecting this claim, the postconviction court stated:

> At the evidentiary hearing, Ms. Renfro testified she was placed on probation in April 2003. She testified that at the time of the trial, she was fearful of violating her probation because she did not have a stable residence. At the time, she was pregnant and had no job. Ms. Renfro denied ever moving without telling her probation officer. Defendant's counsel questioned her regarding a May 13, 2003 report of her probation officer, in which the probation officer stated she informed Ms. Renfro that she was currently in violation of her probation and directed her to report for transfer papers to change her probation to Lake County. Ms. Renfro testified that she remembered doing the transfer but not that she was in violation. She testified that at that time, she was not in fear of being sent to jail because she had been honest with her probation officer.
>
> Ms. Renfro remembered that on June 3, 2003, she requested help from the State Attorney's Office to get into a women's shelter. She asked for help because the shelter was full. She denied using the State Attorney's Office to attempt to avoid being violated. Ms. Renfro testified that she called because she was not having any luck anywhere else and thought the State Attorney's Office could help her with names of places she could go or they might know someone she could call.
>
> Ms. Renfro testified that she could not recall whether her probation officer informed her that a detective called looking for her to serve a subpoena in this case. At that time, she did not know that she was an important witness in this case. Ms. Renfro testified that she had conversations with Mr. Gross concerning the case but could not remember how many. She remembered calling Mr. Gross on June 9, 2003, and telling him that she had found a place to live in Paisley. Ms. Renfro testified that the nature of the

message for Mr. Gross was to tell him she had left the shelter in Ocala. She first denied asking Mr. Gross to call her probation officer and let her know where she was living because she called the probation officer herself. She later stated that she did not recall asking him.

Ms. Renfro testified that she did not remember a May 16, 2003 conversation with her probation officer in which she talked with her about having her financial requirements reduced to a lien. She testified that she could not recall Mr. Gross telling her that he was going to do whatever he could for her after she had testified or saying he was going to write a letter to the judge to help her out with her financial situation. Ms. Renfro stated that, in order to prevent her being violated, she discussed with her probation officer in Ocoee the possibility of having her costs of supervision waived. Ms. Renfro testified that she violated her probation several months after the Simmons' trial.

On cross-examination, Ms. Renfro testified that she asked about places to go because she was really homeless and approximately four to five months' pregnant. When she called the State Attorney's Office she did not talk to Mr. Gross but did talk to a woman in the office. She stated that she remembered Mr. Gross frequently telling her that he needed to know where she was going to be. She stated that the reason why she called the State Attorney's Office was because she had moved or to let Mi. Gross know where she was living. Ms. Renfro testified that after the trial she was violated because she was arrested for possession of drugs. (Evidentiary Hearing at 720-755).

This Court finds that Defendant has failed to prove that Mr. Gross knew Ms. Renfro's testimony was false, i.e., that she was at risk of going to jail, or that Ms. Renfro's statement was material. As an initial matter, this Court notes that Ms. Renfro's testimony at the evidentiary hearing was inconsistent regarding whether she was afraid she might be violated. Thus, this Court will assume for the sake of argument that Ms. Renfro deliberately lied under oath.

In support of his contention that the State Attorney knew about the lie and fostered this testimony, the Defendant cites to a letter from Mr.

> Gross dated September 25, 2003 - six days after the Defendant's trial ended - in which Mr. Gross wrote to Judge Boylston on behalf of Ms. Renfro explaining that she has been unable to pay fines and costs by September 22, 2003. The letter stated that Ms. Renfro had been unable to find work due to being pregnant. **Because the letter was written after the trial had ended, the Defendant has totally failed to demonstrate that Mr. Gross knew anything about the possible violation at the time the question was asked at trial.**
>
> **Moreover, the Defendant's allegations as to the materiality of the statement are nothing more than conclusory allegations**. He states:
>
> > had the truth been heard regarding the true motives for her testimony against Simmons, Simmons would have been acquitted. This false testimony definitely affected the jury's deliberations. There is a reasonable likelihood that the false testimony would have affected the judgment of the jury.
>
> (Written Closing Argument at 208-09). The Defendant does not explain - much less show in the record - what Ms. Renfro's true motives for her testimony were or why this would have led to him being acquitted. **The Defendant's assertion that had the "truth been heard regarding the true motives for her testimony against Simmons" the outcome would have been different, totally ignores the fact that she had told the same "truth" to law enforcement months before the trial. Defendant also ignores Mr. Andrew Montz's testimony which corroborated Ms. Renfro's. Thus, this Court concludes that the Defendant has failed to establish that Mr. Gross knew of any false statement or that any false statement was material.**

(PCR V9:1754-56) (emphasis added).

The State submits that competent, substantial evidence supports the lower court's factual finding that the State did not knowingly present, or fail to correct, false testimony from Ms. Renfro. Even assuming that Simmons could establish that Ms.

Renfro's testimony was false and that the State knew it was false, the record supports the court's conclusion that it was not material as there was no reasonable likelihood that the false testimony would have affected the jury's verdict.

Once again, Appellant repeats the same conclusory allegations regarding materiality in his brief to this Court in support of his assertion that "had the truth been revealed regarding the true motives of her testimony against Simmons, Simmons would possibly have been acquitted." Initial Brief at 74. Here, the jury was aware that Ms. Renfro was on probation at the time of her testimony and, as the court noted, Simmons' argument ignores the fact that Ms. Renfro's statements were consistent from the moment she spoke with law enforcement officers at the time of her observations on the night of the murder until trial. See DAR Supp. V1:86-96. Furthermore, her testimony was cumulative to another eyewitness, Andrew Montz, who observed the exact same incident. Thus, even if Simmons could have established that the testimony regarding her risk of going to jail for violating her probationary status was false, there is no reasonable likelihood that the false testimony could have affected the jury's verdict.

In his next Giglio sub-claim, Simmons asserts that the State presented false testimony from Jose Rodriguez when he

denied having received any preferential treatment from the police or the State Attorney's Office. Simmons asserts that this testimony was false because Detective John Herrell "assisted" Jose Rodriguez by contacting his bail bondsman during an interview on December 4, 2001. Obviously, defense counsel was aware of fact that the detective called the bail bondsman as Jose Rodriguez's taped statement with Detective Herrell was turned over during discovery. (DAR V1:42). Furthermore, as the lower court correctly noted when denying this claim, Jose Rodriguez informed the jury during his testimony that "the police had made a phone call to his bondsman to try to help him get out of jail" and "that the police had not given him any money or posted bond for him." (PCR V9:1757, citing DAR V23:2794-95). Thus, the postconviction court found that Jose Rodriguez did not give false testimony under oath. As this factual finding is clearly supported by the record, this Court should affirm the court's denial of Simmons' Giglio claim.

ISSUE IV

THE POSTCONVICTION COURT PROPERLY DENIED SIMMONS' CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

In his fourth issue, Simmons argues that his trial counsel was ineffective for failing to investigate and present mitigating evidence at his penalty phase proceedings. Collateral counsel fails to acknowledge the evidence and the lower court's factual findings refuting his allegations and further ignores in its entirety the lower court's order denying his claim. The State submits that the lower court properly concluded that Appellant was not entitled to relief on his ineffective assistance of counsel claim based on his failure to establish both deficient performance and prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984).

In order for a defendant to prevail on a claim of ineffective assistance of counsel claim pursuant to the United States Supreme Court's decision in Strickland, a defendant must establish two general components.

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

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). When addressing the prejudice prong of a claim directed at penalty phase counsel's performance, the defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000). Furthermore, as the Strickland Court noted, there is a strong presumption that counsel's performance was not ineffective. Id. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

When reviewing a trial court's ruling on an ineffectiveness claim, this Court defers to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prongs *de novo*. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the lower court properly identified the applicable law in analyzing Appellant's claim, correctly applied this law to the

facts as presented in the trial and postconviction proceedings, and concluded that Appellant was not entitled to postconviction relief.

At the penalty phase of Simmons' trial, trial counsel presented evidence from Simmons' younger sister regarding his Christian upbringing, his closeness to his parents, and she related that Simmons had "the biggest heart of anyone I know." (DAR V33:4625-31). Trial counsel also presented evidence from a corrections officer from the Lake County Jail regarding Simmons' behavior during his incarceration prior to trial. The officer testified that Simmons had only one disciplinary report for a fight with another inmate which was not surprising given his lengthy seventeen months of incarceration in a higher security area of the jail. (DAR V32:4593-98). After presenting mitigation evidence from these two witnesses, defense counsel Jeffrey Pfister stated on the record that trial counsel possessed Defendant's school records and mental health records, but chose not to present any evidence regarding these areas at that time. (DAR V33:4633).

Subsequently, at the Spencer hearing, trial counsel presented evidence from their retained mental health expert, Dr. Elizabeth McMahon. (DAR V33:4718-28). Dr. McMahon, a psychologist with extensive experience in capital cases,

testified that she conducted neuropsychological testing and interviewed Simmons during three examinations with him. (DAR V33:4719). In conducting her evaluation, Dr. McMahon also reviewed discovery material in Simmons' case, reviewed his school records, and spoke with his mother. Dr. McMahon testified that her testing and evaluation revealed that Simmons did not have the characteristics that are typical in this type of violent homicide. (DAR V33:4723). She found that Simmons had a low level of maturity, a moderate to severe learning disability, and that he generally withdrew from conflict. (DAR V33:4723-26).

In his postconviction motion, Simmons claimed that his trial counsel was ineffective during the penalty phase based on counsel's failure to present: (1) Simmons' drug and alcohol abuse in support of statutory mitigating factors and as an independent nonstatutory mitigating circumstance; (2) mental health testimony in support of statutory and nonstatutory mitigation; and (3) other mitigating evidence based on his childhood and upbringing.

At the evidentiary hearing, evidence was presented from Simmons' initial attorneys regarding their investigation into mitigating evidence. Shortly after Simmons' arrest in December, 2001, Assistant Public Defender William Stone was assigned as

lead counsel to Simmons' case and Assistant Public Defender James Baxley assisted him on the case and was primarily responsible for the penalty phase. Assistant Public Defenders Stone and Baxley represented Simmons for almost one year before Janice Orr and Jeffrey Pfister were appointed. (PCR V29:1916-18). Mr. Stone retained Dr. McMahon early in their representation and she first met with Simmons on March 19, 2002. (DAR V33:4719). Trial counsel obtained a medical waiver release from Simmons so they could obtain his medical records, and assisted Simmons in completing a detailed forensic assessment form over numerous visits. (PCR V29:1894-1903, 1916-21). Simmons informed his attorneys that he had never been abused or neglected as a child, drank alcohol, and had used marijuana occasionally with friends. (PCR V29:1906-09).

Janice Orr testified that she and Jeffrey Pfister were appointed on December 6, 2002. (DAR V3:488). Ms. Orr testified that Mr. Pfister would handle the penalty phase and she would be guilt phase counsel and would handle the majority of the work. (PCR V27:1557). Shortly after her appointment, she and her assistant went to the Public Defender's Office and photocopied their entire file over a three day period. (PCR V27:1561-62). Ms. Orr testified that Simmons and his family did not get along with Jeffrey Pfister because Mr. Pfister wanted Simmons to

consider a plea deal. (PCR V28:1634). Ms. Orr further recalled that she spoke with Dr. Elizabeth McMahon, but the doctor informed Ms. Orr that she did not have much to offer in this case and encouraged her to do a good job on the guilt phase. (PCR V27:1571).

Jeffrey Pfister testified that he was approached by Janice Orr and asked if he could also represent Simmons because Ms. Orr did not meet the qualifications to represent a capital defendant. Mr. Pfister was aware that Simmons and his family had hired Ms. Orr and that their loyalty was clearly with Ms. Orr. (PCR V23:756-57). In hindsight, he testified that he was just a figurehead and a "fifth wheel," as Simmons and his family only listened to Ms. Orr. (PCR V23:756-58, 765-66). Mr. Pfister obtained and reviewed the mitigating information compiled by the Public Defender's Office. (PCR V23:767).

Regarding the presentation of mitigating evidence, Mr. Pfister testified that it was his opinion that Dr. McMahon should have been called before the jury at the penalty phase rather than at the Spencer hearing, but Simmons and Ms. Orr made the tactical choice not to follow his advice. (PCR V23:758-62, 792). Simmons and his family did not want Dr. McMahon to testify about his low intelligence, and Simmons did not want any other embarrassing "bad stuff" or his family's "dirty laundry"

presented to the jury. (PCR V23:762, 765-67, 782, 793-95). Mr. Pfister testified at length that Simmons' family believed he was innocent and they did not envision the case proceeding to a penalty phase, and as such, it was difficult to get Simmons and his family members to talk about mitigating evidence. (PCR V23:761-83). Mr. Pfister acknowledged that Simmons' alcohol problem was "talked about." (PCR V23:782).

Simmons first argues that trial counsel was ineffective for failing to present evidence regarding his drug and alcohol use in support of statutory and nonstatutory mitigation. At the evidentiary hearing, collateral counsel introduced evidence from psychologist Dr. Henry Dee that he learned from school and DOC records that Simmons began using marijuana at a young age and began drinking alcohol in his mid-teens. (PCR V19:89-90). Dr. Dee opined that Simmons suffered from brain damage and was therefore more sensitive to the use of drugs and alcohol. (PCR V19:90). Given Simmons' brain damage and mental health issues, Dr. Dee testified that both statutory mental mitigating factors were present.[20] (PCR V19:93-95). Heidi Hanlon-Guerra, an addictions counselor, testified that Simmons told her he began smoking marijuana regularly at age 17, used LSD and mushrooms "a

[20] Dr. Dee acknowledged that Simmons was not under the influence of drugs or alcohol at the time of the murder. (PCR V19:97).

few times," and as an adult, he would drink about a 12-pack of beer everyday.[21] (PCR V21:336-37).

As previously noted, Simmons was initially represented by the Public Defender's Office and attorney James Baxley testified that he visited with Simmons a few times after his incarceration and Baxley instructed and assisted Simmons with filling out the Public Defender's Office's forensic assessment forms. (PCR V29:1894-1909). Simmons indicated to his attorneys that he had utilized marijuana "occasionally with friends" and had used alcohol. (PCR V29:1908-09). Baxley wrote on the forensic form that he filled out that Simmons drinks "a lot," that he drinks beer "like a fish, all the time." On the same form, he also indicated that Simmons did not consider himself an alcoholic and had never suffered any adverse effects. Simmons told the defense mental health expert, Dr. McMahon, that he first began using marijuana at age 17-18, and that was the time period of his most frequent usage. (PCR V29:1941). After the jury's verdict in the guilt phase, Dr. McMahon met with Janice Orr and Jeffrey Pfister and informed them that she would not be beneficial at the penalty phase, and the decision was made to present her testimony at the Spencer hearing. (PCR V29:1935-

[21] Simmons' friend, Steve Ellis, also testified that Simmons drank a large amount of beer on a daily basis. (PCR V23:700).

37). Unlike Simmons' postconviction experts, Dr. McMahon never opined that the statutory mental mitigating factors were applicable.

Simmons' assertion that trial counsel was ineffective for failing to investigate and present evidence of his drug and alcohol use at the penalty phase is without merit. As the postconviction record demonstrates, trial counsel investigated and was aware of this information. Simmons informed his attorneys of his "occasional" use of marijuana and told them of his alcohol use. Trial counsel considered presenting their mental health expert, Dr. McMahon, who was also aware of this information, but Simmons and trial counsel made the decision not to present this evidence to the jury.

In denying Simmons' claim, the trial court noted the substantial evidence showing that Simmons and his family made a knowing, strategic decision to limit the amount and type of mitigation evidence presented in this case. The lower court noted that, based on this evidence, "[t]his Court is convinced that the Defendant and his family made the ultimate decisions about the evidence to offer. . . . and this Court is now presented with post-conviction issues raised by a Defendant who repeatedly chose to ignore the advice of his qualified lead-counsel and chose – with his family's support – to limit

mitigation evidence because it would cast him and/or his family in a negative light." (PCR V9:1769-72). With regard to the specific allegation regarding counsel's failure to present evidence of Simmons' drug and alcohol usage, the court found that trial counsel was not deficient because counsel was aware of this information and Simmons made the choice not to present this evidence because he did not want any negative evidence presented that would make him look bad.[22] (PCR V9:1773).

As the lower court properly noted, this Court has long recognized that a defendant "possesses great control over the objectives and content" of the mitigation evidence and has the right to choose what evidence, if any , the defense will present to the jury during the penalty phase. (PCR V9:1772-73). See Hojan v. State, 3 So. 3d 1204, 1211 (Fla. 2009) ("Competent defendants who are represented by counsel maintain the right to make choices in respect to their attorneys' handling of their cases. This includes the right to either waive presentation of mitigation evidence or to choose what mitigation evidence is

[22] Obviously, trial counsel did not seek to have a substance abuse expert, like Heidi Hanlon-Guerra, appointed at the time of trial, but the fact that collateral counsel secured a different expert years after the penalty phase proceeding does not establish that trial counsel was deficient. See generally Asay v. State, 769 So. 2d 974, 986 (Fla. 2000) (stating that trial counsel's reasonable investigation is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable expert in postconviction).

introduced by counsel.") (citation omitted); Boyd v. State, 910 So. 2d 167 (Fla. 2005); Farr v. State, 656 So. 2d 448 (Fla. 1995). Here, trial counsel was aware of Simmons' drug and alcohol usage, but Simmons made the decision not to present this type of evidence. Because there is competent, substantial evidence supporting the court's finding in this regard, this Court should affirm the lower court's ruling.

Although not required to address Strickland's prejudice prong given Simmons' inability to establish deficient performance, the lower court nevertheless found that Simmons could not establish prejudice based on the failure to present this evidence to the jury. (PCR V9:1773). In this case, even had the jury heard that Simmons used marijuana when he was a teenager and often drank beer, it would not have affected their recommendation or the lower court's sentence of death. Simmons was not under the influence of either alcohol or drugs at the time of the murder. Because the nonstatutory mitigation evidence of drug and alcohol use would not have resulted in a life sentence given the substantial aggravation present in this case, this Court should affirm the lower court's denial of this sub-claim.

Simmons next claimed in his postconviction motion that penalty phase counsel was ineffective for failing to obtain a

"full and complete neuropsychological work up" on Simmons and for failing to present mental health testimony to the jury at the penalty phase.[23] As previously noted, collateral counsel presented the testimony of Dr. Henry Dee, a neuropsychologist, who examined Simmons and opined that he suffered from brain damage. Dr. Dee opined that both statutory mental mitigators were applicable in this case. Dr. Dee recommended to collateral counsel that Simmons obtain a PET scan to assess the adequacy of his brain functioning. (PCR V19:76). Dr. Frank Wood, a professor of neurology, administered a PET scan on Simmons and testified as to his interpretation of the results. (PCR V28-29:1759-1819). According to Dr. Wood, the results of the PET scan, standing alone, would be sufficient for a finding of the statutory mental mitigator that Simmons suffered an extreme mental disturbance at the time of the murder based on his impaired brain condition. (PCR V28:1791). The PET scan was insufficient, standing alone, to corroborate the other statutory mental mitigator, but after consulting with Dr. Dee, Dr. Wood opined that Simmons' capacity to understand the criminality of

[23] In his brief to this Court, Simmons ignores the specific claims he made below and the court's rulings on these claims, and instead, presents an overview of the mitigation evidence presented during the postconviction proceedings and argues that trial counsel was ineffective for presenting this evidence.

his conduct or conform his conduct to the requirements of the law was substantially impaired. (PCR V28:1792-93).

In contrast to Simmons' postconviction mental health experts, trial counsel's mental health expert, neuropsychologist Dr. McMahon, did not feel that a PET scan was a wise diagnostic tool to utilize in this case for strategic reasons. (PCR V29:1937-38). Dr. McMahon was confident that Simmons' records and testing established that he had a learning disability, but she was concerned that the PET scan may come back showing no impairment and that would make it difficult for a jury to reconcile the two sets of conflicting data. (PCR V29:1950-51).

Dr. Larry Holder, an expert in PET scan technology, testified for the State at the postconviction evidentiary hearing that he examined the entire PET scan performed on Simmons at the lab, and it did not show any clinically significant abnormal condition in Simmons' brain. (PCR V30:2103-04). Dr. Holder did not agree with Dr. Wood's conclusions or his protocol in conducting the test. After conducting his own review of Simmons' brain activity, Dr. Holder did not find any abnormalities. (PCR V30:2103-25).

Collateral counsel failed to meet his burden of proof in establishing that trial counsel was deficient for failing to seek a PET scan test or for making the strategic decision to

present their mental health expert at the Spencer hearing rather than before the jury. Trial counsel obtained the services of a respected, experienced neuropsychologist and provided her with all the relevant background material in their possession. Trial counsel Pfister testified that he personally would have preferred to present Dr. McMahon before the jury at the penalty phase, but Simmons decided, based on discussions with his other attorneys, that he wanted to present Dr. McMahon at the Spencer hearing.

Trial counsel acknowledged that the strategy at the penalty phase was to assert that Simmons was a "warm and caring person" that came from a wonderful family and that trial counsel would not argue that he committed this murder based on some mental or emotional problems. (DAR V8:1407). The instant facts are similar to Hannon v. State, 941 So. 2d 1109 (Fla. 2006), wherein this Court rejected an ineffective assistance of penalty phase counsel claim when the strategy was to present the defendant as a good person incapable of committing the crime. In Hannon, like the instant case, trial counsel conferred with the defendant and his family regarding this strategy and the defendant agreed with it. Because trial counsel made this strategic choice after conducting a reasonable investigation of the mitigating evidence, and made this choice at Simmons'

direction, his ineffective assistance of counsel claim must fail.

Furthermore, collateral counsel's assertion that trial counsel should have sought a PET scan test is without merit. Based on her examination of Simmons, Dr. McMahon did not feel it was in Appellant's best interest to order a PET scan test because she was confident they could establish his learning disability without the use of the PET scan and she was concerned about the ramifications of the PET scan coming back normal (which, according to the State's expert, it did). Trial counsel acted reasonably by relying on Dr. McMahon's results and by not seeking an additional expert. See Bowles v. State, 979 So. 2d 182 (Fla. 2008) (finding counsel did not perform deficiently by relying on Dr. McMahon and not seeking out another mental health expert). Based on this evidence, the postconviction court properly found that Simmons failed to establish any deficient performance. (PCR V9:1769-75).

Even if Simmons were able to establish that trial counsel's performance fell below the norms for professional conduct regarding this claim, he failed to establish that there was a reasonable probability that he would have received a life sentence had this mental health evidence been presented to the jury. The PET scan evidence from Dr. Wood was clearly rebutted

from the State's expert, Dr. Holder. As Dr. McMahon opined, if trial counsel had chosen to pursue this strategy of presenting PET scan evidence before the jury, it could have negated her testimony because the results arguably did not support her findings.

Likewise, although collateral counsel has obtained more favorable mental health expert testimony from Dr. Dee during the postconviction process, this does not undermine this Court's confidence in Dr. McMahon's expert opinion. See Asay, supra. As trial counsel acknowledged in their sentencing memorandum, the penalty phase strategy was to maintain Simmons' innocence and trial counsel asserted that Simmons did not have the mental make-up to have committed this murder. Trial counsel conceded that Simmons does not suffer from any psychological problems or maladies and acknowledged that Dr. McMahon concurred with this assessment. (DAR V8:1407). In support of this strategy, trial counsel and Simmons chose to present the expert mental health opinion of Dr. McMahon at the Spencer hearing, rather than before the jury. There can be no showing of prejudice when the trial court was aware of the slight mental mitigation present in this case. See White v. State, 964 So. 2d 1278 (Fla. 2007) (finding that trial counsel was not ineffective for making the strategic decision to present testimony at Spencer hearing

rather than in front of the jury). Accordingly, this Court should affirm the lower court's denial of this aspect of Simmons' ineffective assistance of penalty phase counsel claim.

Finally, Simmons claims that trial counsel was ineffective for failing to present evidence regarding a choking incident he suffered as a young child which allegedly exasperated his learning and cognitive difficulties. Collateral counsel alleges that this incident led to numerous other mitigating factors in Simmons life, including that he was ostracized by his peers when he was placed in SLD classes at school, he has a low IQ, learning disabilities, brain damage, ADHD, and borderline personality disorder. As previously noted, trial counsel's stated strategy for the penalty phase proceedings was to stress Simmons' good character, loving family life, and lack of mental problems that would cause someone to commit the heinous murder of [redacted]. Contrary to collateral counsel's allegations, trial counsel investigated the mitigating evidence, but nevertheless made the strategic decision to pursue a different strategy after consulting with Simmons and his family. Trial counsel weighed the possibility of presenting this evidence before the jury and, after consulting with Simmons, the decision was made not to present certain evidence before the

jury because the jury may have viewed the evidence in a negative light. (PCR V23:788-94).

The record clearly establishes that the Public Defender's Office began investigating the mitigation case immediately by obtaining Simmons' school and medical records and two forensic assessment forms. Simmons informed trial counsel on his assessment forms that he "grew up in a Christian family with lots of love," that he got "along great with my family," and when he was bad, he "got disciplined in the right way (whippings and grounding)." Simmons stated that there were never any allegations of abuse or neglect in his family and that he was not aware of any violence towards any family members. The information on the forensic assessment forms was provided to subsequent counsel Orr and Pfister.[24] Pfister also spoke with Simmons' mother, father and sister and was aware of Simmons' father's conviction for murder when Simmons was a child. Dr. McMahon informed trial counsel that Simmons was not retarded, but he had a low IQ in the upper 70s, low 80s range, which Pfister agreed with based on his personal experience with his

[24] Additionally, as previously noted, trial counsel stated on the record at trial that they possessed Simmons' school and mental health records, but were making the strategic decision not to present that information before the jury. (DAR V33:4633). Pfister explained that the records showed disciplinary problems and the jury may have viewed this information negatively. (PCR V23:788-94).

learning-disabled daughter. (PCR V23:761-64). Accordingly, collateral counsel's allegations that trial counsel failed to investigate and discover this information is factually refuted by the record. See State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000) (stating that trial counsel has duty to conduct a *reasonable* investigation of a defendant's background for possible mitigating evidence).

Although this Court is not required to even address the prejudice prong of Strickland where, as here, Simmons has failed to establish deficient performance, the State nevertheless submits that Simmons is unable to establish prejudice as a result of trial counsel's investigation and presentation of the mitigating evidence in this case. The mitigation evidence presented at the postconviction evidentiary hearing was not of such a nature as to have affected the outcome of his penalty phase proceedings. The jury in this case unanimously found the existence of three aggravating factors: (1) the defendant had previously been convicted of a prior violent felony; (2) the murder was committed while the defendant was committing a kidnapping and sexual battery; and (3) the murder was especially heinous, atrocious or cruel (HAC). These aggravating factors greatly outweighed the mitigation evidence established at trial, and at the evidentiary hearing. Because trial counsel's alleged

deficiencies in investigating and presenting the mitigating evidence would not have resulted in a life sentence given the substantial aggravation in this case, this Court should affirm the lower court's denial of Simmons' claim of ineffective assistance of penalty phase counsel.

ISSUE V

CUMULATIVE ERROR CLAIM

Appellant raises a cumulative error claim and states in his brief, in its entirety, that "[d]ue to the errors that occurred individually and cumulatively in the lower court, this Court should grant relief from this unconstitutional conviction and death sentence, and/or remand for further postconviction proceedings." Initial Brief of Appellant at 100. The State submits that the lower court properly denied this claim based on the finding that Simmons had "failed to establish that trial counsel was deficient in any manner," and that his Brady and Giglio claims were without merit. (PCR V9:1775). As the lower court properly noted, a defendant cannot combine meritless issues together in an attempt to create a valid "cumulative error" claim. See Brown v. State, 846 So. 2d 1114, 1126 (Fla. 2003) (upholding lower court's denial of cumulative error claim when each of the individual claims of ineffective assistance of counsel had been denied); Mann v. Moore, 794 So. 2d 595 (Fla. 2001) (finding no cumulative effect to consider where all claims were either meritless or procedurally barred); Downs v. State, 740 So. 2d 506, 509 (Fla. 1999) (concluding that where allegations of individual error do not warrant relief, a cumulative error argument based thereon is without merit).

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by UPS delivery to David D. Hendry, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this 10th day of October, 2011.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

_____

STEPHEN D. AKE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 14087
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
Stephen.Ake@myfloridalegal.com

COUNSEL FOR APPELLEE