IN THE SUPREME COURT OF FLORIDA

BRANDY JENNINGS,

Petitioner,

CASE NO. SC11-1031

v.

KENNETH S. TUCKER,
Secretary, Florida
Department of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, Kenneth S. Tucker, Secretary, Florida Department of Corrections, by and through the undersigned counsel, and hereby responds to the Petition for Writ of Habeas Corpus filed herein, pursuant to this Court's Order of December 29, 2011. Respondent respectfully submits that the petition should be denied as meritless.

FACTS AND PROCEDURAL HISTORY

Petitioner Brandy Jennings was charged by indictment on December 20, 1995 with committing: (I) the first degree murder of Dorothy Siddle, (II) the first degree murder of Vickie Smith, (III) the first degree murder of Jason Wiggins, and (IV) robbery

(V1/20-21).[1] The crimes were alleged to have occurred on November 15, 1995. The matter proceeded to trial on October 28, 1996, before the Honorable William J. Blackwell. Jennings was convicted of all charges following a jury trial conducted in Pinellas County pursuant to an order granting a change of venue (V1/132-37, V4/619-20).

After penalty phase proceedings, the jury recommended Jennings be sentenced to death by a vote of 10-2 for each murder (V4/622-24). The court followed the recommendations and sentenced Jennings to death, citing three aggravating circumstances: (1) that the murders were committed during a robbery, (2) that they were committed to avoid arrest, and (3) that they were cold, calculated, and premeditated (CCP) (V5/784-86). The court found one statutory mitigator, that Jennings had no significant history of prior criminal activity (some weight); rejected two statutory mitigators, that (1) Jennings was an accomplice in a capital felony committed by another and (2) his participation was relatively minor and that Jennings acted under extreme duress or under the substantial domination of another person; and found eight non-statutory mitigators: (1) that Jennings had a deprived childhood (some weight), (2) that accomplice Graves was not sentenced to death (some weight), (3)

[1] Citations are to the record in Jennings' direct appeal, Jennings v. State, Florida Supreme Court Case No. 89,550.

that Jennings cooperated with police (substantial weight), (4) that he had a good employment history (little weight), (5) that he had a loving relationship with his mother (little weight), (6) that he had positive personality traits enabling the formation of strong, caring relationships (some weight), (7) that he had the capacity to care for and be mutually loved by children (some weight), and (8) that he exhibited exemplary courtroom behavior (little weight)(V5/786-90).

This Court affirmed Jennings' convictions and sentences. Jennings v. State, 718 So. 2d 144 (Fla. 1998). The facts of the case were described as follows:

> Dorothy Siddle, Vicki Smith, and Jason Wiggins, all of whom worked at the Cracker Barrel Restaurant in Naples, were killed during an early morning robbery of the restaurant on November 15, 1995. Upon arriving on the scene, police found the bodies of all three victims lying in pools of blood on the freezer floor with their throats slashed. Victim Siddle's hands were bound behind her back with electrical tape; Smith and Wiggins both had electrical tape around their respective left wrists, but the tape appeared to have come loose from their right wrists.
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> Police also found bloody shoe prints leading from the freezer, through the kitchen, and into the office, blood spots in and around the kitchen sink, and an opened office safe surrounded by plastic containers and cash. Outside, leading away from the back of the restaurant, police found scattered bills and coins, shoe tracks, a Buck knife, [FN2] a Buck knife case, a pair of blood-stained gloves, and a Daisy air pistol. [FN3]
>
> [FN2] According to testimony at trial, a "Buck knife" is a particular brand of very sharp,

sturdy knife that has an approximately four and one-half inch black plastic handle, into which folds the blade of the knife.

[FN3] According to testimony at trial, a Daisy air pistol is like a pellet gun, but looks almost identical to a Colt .45 semi-automatic pistol.

Jennings (age twenty-six) and Jason Graves (age eighteen), both of whom had previously worked at the Cracker Barrel and knew the victims, were apprehended and jailed approximately three weeks later in Las Vegas, Nevada, where Jennings ultimately made lengthy statements to Florida law enforcement personnel. In a taped interview, Jennings blamed the murders on Graves, but admitted his (Jennings') involvement in planning and, after several aborted attempts, actually perpetrating the robbery with Graves. Jennings acknowledged wearing gloves during the robbery and using his Buck knife in taping the victims' hands, but claimed that, after doing so, he must have set the Buck knife down somewhere and did not remember seeing it again. Jennings further stated that he saw the dead bodies in the freezer and that his foot slipped in some blood, but that he did not remember falling, getting blood on his clothes or hands, or washing his hands in the kitchen sink. Jennings also stated that the Daisy air pistol belonged to Graves, and directed police to a canal where he and Graves had thrown other evidence of the crime.

In an untaped interview the next day, during which he was confronted with inconsistencies in his story and the evidence against him, Jennings stated, "I think I could have been the killer. In my mind I think I could have killed them, but in my heart I don't think I could have."

At trial, the taped interview was played for the jury, and one of the officers testified regarding Jennings' untaped statements made the next day. The items ultimately recovered from the canal were also entered into evidence. [FN4]

[FN4] The evidence from the canal consisted of:

> clothes, gloves, socks, and shoes that Jennings said were worn during the crime; a homemade razor/scraper-blade knife and sheath that Jennings said belonged to Graves; packaging from a Daisy pellet gun and CO2 cartridges; unused CO2 cartridges and pellets; money bags (one marked "Cracker Barrel"), bank envelopes, money bands, Cracker Barrel deposit slips, and some cash and coins; personal checks, travelers' checks, and money orders made out to Cracker Barrel; a clear plastic garbage bag; and rocks to weigh down the bundle of evidence.

The medical examiner, who performed autopsies on the victims, testified that they died from "sharp force injuries" to the neck caused by "a sharp-bladed instrument with a very strong blade," like the Buck knife found at the crime scene. A forensic serologist testified that traces of blood were found on the Buck knife, the Buck knife case, the area around the sink, and one of the gloves recovered from the crime scene, but in an amount insufficient for further analysis. An impressions expert testified that Jennings' tennis shoes recovered from the canal matched the bloody shoe prints inside the restaurant as well as some of the shoe prints from the outside tracks leading away from the restaurant.

The State also presented testimony concerning previous statements made by Jennings regarding robbery and witness elimination in general. Specifically, Angela Chainey, who had been a friend of Jennings', testified that about two years before the crimes Jennings said that if he ever needed any money he could always rob someplace or somebody. Chainey further testified that when she responded, "That's stupid. You could get caught," Jennings replied, while making a motion across his throat, "Not if you don't leave any witnesses." On cross-examination, Chainey further testified that Jennings had "made statements similar to that several times."

The State also presented testimony concerning previous statements made by Jennings regarding his dislike of victim Siddle. Specifically, Bob Evans, one of the managers at Cracker Barrel, testified that Jennings

> perceived Siddle to be holding him back at work and that, just after Jennings quit, he said about Siddle, "I hate her. I even hate the sound of her voice." Donna Howell, who also worked at Cracker Barrel, similarly testified that she was aware of Jennings' animosity and dislike of Siddle, and that Jennings had once said about Siddle, "I can't stand the bitch. I can't stand the sound of her voice."

Jennings, 718 So. 2d at 145-147.

In his appeal, Jennings was represented by an experienced capital appeals litigator, Assistant Public Defender Robert F. Moeller. Mr. Moeller filed a 65-page brief, raising seven issues:

> ISSUE I: THE COURT BELOW SHOULD HAVE SUPPRESSED APPELLANT'S STATEMENTS TO LAW ENFORCEMENT AUTHORITIES AND ALL EVIDENCE DERIVED THEREFROM, AS THE STATEMENTS WERE OBTAINED IN VIOLATION OF APPELLANT'S RIGHT TO COUNSEL.
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> ISSUE II: THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE AT PENALTY PHASE TWO MASKS SEIZED FROM APPELLANT'S TRUCK AFTER HE WAS ARRESTED IN LAS VEGAS, AS THESE ITEMS WERE IRRELEVANT AND PREJUDICIAL.
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> ISSUE III: APPELLANT'S PENALTY TRIAL WAS TAINTED WHEN THE PROSECUTOR ENGAGED IN IMPROPER AND PREJUDICIAL CROSS-EXAMINATION OF DEFENSE WITNESS MARY HAMLER, WHICH WAS OUTSIDE THE SCOPE OF DIRECT AND DID NOT RELATE TO ANY LEGITIMATE SENTENCING ISSUE.
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> ISSUE IV: THE STATE FAILED TO PROVE THAT THE INSTANT HOMICIDES WERE COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY, AND THIS AGGRAVATING CIRCUMSTANCE SHOULD NOT HAVE BEEN SUBMITTED TO APPELLANT'S JURY OR FOUND BY THE TRIAL COURT TO EXIST.
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> ISSUE V: THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS NOT PROVEN, AND THE COURT BELOW ERRED IN SUBMITTING THIS FACTOR TO THE JURY FOR

ITS CONSIDERATION, AND IN USING IT IN SUPPORT OF APPELLANT'S SENTENCES OF DEATH.

ISSUE VI: APPELLANT SHOULD NOT HAVE BEEN SENTENCED TO DEATH WHERE HIS EQUALLY CULPABLE CODEFENDANT RECEIVED LIFE SENTENCES FOR HIS PART IN THE CRACKER BARREL MURDERS.

ISSUE VII: THE COURT BELOW ERRED IN SENTENCING APPELLANT TO 15 YEARS IN PRISON FOR THE NON-CAPITAL OFFENSE OF ROBBERY WHERE THE SENTENCING GUIDELINES SCORESHEET PREPARED IN THIS CASE ERRONEOUSLY INCLUDED VICTIM INJURY POINTS FOR THE CAPITAL FELONIES FOR WHICH APPELLANT WAS ALSO BEING SENTENCED.

Jennings' convictions and sentences were affirmed on September 10, 1998. Jennings, 718 So. 2d at 145-147. Jennings' motion for rehearing was denied January 25, 1999 and the mandate issued on February 24, 1999. Jennings sought certiorari review in the United States Supreme Court, asserting that his right to due process was violated when the State took inconsistent positions in the prosecutions of Jennings and his co-defendant, Jason Graves. Review was denied on June 24, 1999. Jennings v. Florida, 527 U.S. 1042 (1999).

Jennings timely filed his Motion to Vacate on March 20, 2000, and amended it several times. An evidentiary hearing was held in April, 2010, and concluded in August, 2010. The motion was denied on January 31, 2011. His appeal from the denial of the motion is currently pending in this Court. Jennings v. State, Case No. SC11-1016.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Jennings alleges that extraordinary relief is warranted because he was denied the effective assistance of counsel in his direct appeal. The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the Strickland v. Washington, 466 U.S. 668 (1984), standard for claims of trial counsel ineffectiveness. See Valle v. Moore, 837 So. 2d 905 (Fla. 2002); Rutherford v. Moore, 774 So. 2d 637, 645 (Fla. 2000). Such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it compromised the appellate process to such a degree that it undermined confidence in the correctness of the result. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case.

Jennings asserts that Mr. Moeller should have raised several issues which were not presented to this Court on direct appeal. As will be seen, none of the omitted issues Jennings identifies would have been found meritorious. Therefore, counsel was not ineffective for failing to present these claims. Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066,

1068 (Fla. 1994) (failure to raise meritless issues is not ineffective assistance of appellate counsel).

The petition implies that reasonable appellate attorneys will raise an issue for every adverse ruling obtained at trial. See Petition, p. 12, "Despite trial counsel having preserved the issue, appellate counsel failed to raise this issue on direct appeal" and p. 19, "Despite the timely objection and adverse ruling, appellate counsel failed to raise this issue on direct appeal." The United States Supreme Court recognized that "since time beyond memory" experienced advocates "have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). The failure of appellate counsel to brief an issue which is without merit is not a deficient performance which falls measurably outside the range of professionally acceptable performance. See Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986). Habeas relief is not warranted on Jennings' meritless claims.

CLAIM I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT ADDITIONAL ISSUES PRESERVED BY DEFENSE OBJECTION AT TRIAL.

Jennings' first argument asserts that his appellate counsel rendered constitutionally deficient performance by failing to present two meritorious issues for consideration. However, the record refutes any possibility that relief would have been granted on the claims, even if they had been raised. Therefore, neither deficient performance nor prejudice has been demonstrated.

A. Witness Testimony

The first issue Jennings submits should have been presented challenges the testimony given by three of the state witnesses at trial. While Jennings now asserts these claims would have been meritorious, he has not cited any cases to support that contention. A review of the record confirms that the testimony now disputed was properly admitted. As no trial error has been shown, appellate counsel cannot be deemed to have been ineffective for failing to offer this issue on appeal.

Officer Robert Browning testified that blood found in the kitchen appeared to be shoe tracks going in a certain direction (V8/275-77). The defense objected to a question about the

direction of travel, asserting that it required scene reconstruction that could only be offered by an expert (V8/276). The trial court ruled that the witness was only being asked about his observations, and overruled the objection (V8/277). This ruling was proper. Browning offered a physical description based on his observations which did not require any special knowledge or expertise. It is within the common understanding of the typical juror to recognize a potential shoe track and the direction of travel. Accordingly, the trial court properly overruled the objection to this evidence, and appellate counsel could reasonably determine that no viable appellate issue was available.

Similarly, no error occurred when the trial court permitted David Grimes to testify that a print at the scene "matched" one of Jennings' tennis shoes (V10/670-83). The record reflects that Grimes was accepted as an expert witness in the field of footwear and shoe print examination without objection (V10/665). He testified that he compared State Exhibits 61 and 62, a pair of Reebok tennis shoes, with an impression left on a rubber mat at the Cracker Barrel, State Exhibit 17 (V10/666). Grimes also prepared an exhibit, State Exhibit 158, with photographs of the left Reebok shoe, an impression of the shoe, the impression on the mat, and an overlay of the shoe impression with the mat

impression (V10/667). Grimes was asked if the shoe "could have" made the impression on the mat (V10/667), and he used his diagram to demonstrate the four areas of examination that he uses in making a comparison: the size of design, the design itself, general wear of the shoe, and any cuts that might be visible (V10/668-69). He concluded that the size of the design and the design itself "correspond," but that there were no individual characteristics, such as cuts, for that type of identifier (V10/670-71).

Grimes then testified that he compared a shoe cast impression taken from the field east of the Cracker Barrel with an impression of a left boot from a pair of black boots recovered from a canal along with the tennis shoes (V10/671-72). Grimes noted that these impressions reflected distinctive cuts in the sole of the boot, which are also seen in the cast taken from the scene (V10/673-74). As Grimes was explaining the composite exhibit used for that comparison, the defense lodged its first objection, citing Grimes' leaning toward the jury and encroaching into the jury box; the judge advised the witness to avoid entering the jury box space (V10/675). Grimes then opined that the four areas of consideration, including visible cuts, "did match and correspond to this" (V10/676). The defense objected at that point, asserting that Grimes' response was

becoming a narrative (V10/67678). During the course of that objection, the defense claimed that Grimes' use of the word "corresponds" was an improper characterization of his opinion, and that Grimes could only say whether certain tests were consistent or inconsistent (V10/676-77). According to defense counsel, by using terms such as match or correspond, the witness was invading the province of the jury, because these were conclusions that could only be made by a jury (V10/677). The State responded that the defense had not offered a legal objection, but had only taken issue with a witness' choice of words and the trial judge agreed it was a matter of semantics and that "correspond" and "consistent with" were sort of synonyms (V10/677). The defense then clarified that the objection was to the narrative nature of the response, and the court denied the objection, noting that the question had asked the witness to explain his conclusion (V10/678).

Grimes continued to contrast the boot impressions, pointing out the unique cut characteristics (V10/678-79). Grimes concluded by offering that, "in my opinion, the left boot made the impression that you see here in this case" (V10/679). The defense objected and moved to strike the testimony as calling for a legal conclusion, but the objection was overruled (V10/679).

Grimes then addressed a shoe print which was left in blood on the tile floor inside the Cracker Barrel, which he compared with the Reebok tennis shoes (V10/679). In comparing the impressions, Grimes noted the print from the scene was a small, partial impression (V10/680). When the impression from the shoe was laid over the impression from the scene, there was "correspondence" with the impression design and the design size, and Grimes concluded that the tennis shoe "could have" made the bloody impression on the tile floor (V10/681). There was no objection to this testimony.

The last comparison Grimes made was between the Reebok tennis shoes and an impression taken out in the field (V10/681). Grimes explained that he was not able to determine the size of the impression from the field, because there was no measuring device shown in the picture of the impression (V10/683). However, once he enlarged the photo to be the same size as the known impression from the shoe, he was unable to exclude the shoe from having made the print at the scene (V10/683). He noted the impressions do "match," and "[t]here is a correspondence between them" (V10/683). Grimes observed that part of the lettering on the shoe was shown in the impression itself, and you could see it in the soil (V10/683-84). There was again no objection to this testimony.

Thus, the only defense objection available for appellate review challenged the testimony Grimes offered as to the boot from the canal having made one of the impressions taken from the field outside the Cracker Barrel. That objection was properly overruled because the testimony was not an improper narrative and did not invade the province of the jury; experts are entitled to offer a conclusion within the bounds of reasonable scientific certainty. This Court has noted forensic evidence of a "match" with a defendant in a number of cases without ever suggesting that such testimony is improper. See Rigterink v. State, 66 So. 3d 866, 874 (Fla. 2011) (fingerprint match); Troy v. State, 57 So. 3d 828, 832 (Fla. 2011) (fingerprint match); Terry v. State, 668 So. 2d 954 (Fla. 1996) (ballistic match and DNA match). Jennings has not offered any argument to the contrary.

No impropriety has been shown in Corporal Joe Barber's testimony that an air pistol used in the robbery "looked like" a real gun (V8/361-63). The record reflects that there was no objection to testimony about the similarity between the air pistol found at Cracker Barrel and a real gun (V8/354-55, 361-62). After the Daisy pistol had been admitted into evidence, the State offered a real firearm as a demonstrative exhibit to support the testimony that the air pistol was similar to an

actual firearm, and the defense objected that the evidence was cumulative (V8/362-63). The court properly overruled the objection, as letting the jurors observe the air gun/real gun comparison is not the same as having a witness testify they are very similar. Jennings does not present a colorable argument of error in this ruling, and no basis for deficient performance or prejudice exists.

Jennings now asserts that all three of these witnesses provided expert opinions but did not use standard terminology or protocols, and the evidence lacked the necessary scientific basis (Petition, p. 15). None of the objections lodged below cited a lack of customary terms or objective procedures. The fact that trial counsel objected on one ground to this evidence would not permit appellate counsel to challenge the testimony on a ground not asserted. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Jennings does not assert that fundamental error occurred, and the record does not reflect that any error at all occurred. Browning and Barber did not even testify as experts and Grimes' expert opinion only offered testimony of a complete "match" from the scene with the boots worn by the co-defendant. Grimes properly limited testimony on the tennis shoes by noting only that they "could have" been the source of other impressions found at the scene.

Even if any possible error could be found, it would be harmless beyond any reasonable doubt on the facts of this case. While Jennings has identified potential errors that were preserved for appellate review, he has made no showing of any prejudice. He does not provide case law to support his claim of error, and does not offer any basis to conclude there could be a reasonable probability of a different result had these claims been offered on appeal. Jennings provided an extensive statement admitting his participation in the robbery, led police to the discovery of a bundle of evidence from the restaurant which had been dumped in a canal, had motive and opportunity, had previously made statements of his disdain for one of the victims, and was seen after the robbery, enjoying the proceeds with exotic dancers before leaving the state; the guilty verdicts would easily have been obtained even in the absence of the testimony as now challenged. Appellate counsel could reasonably determine that the admission of this testimony was not improper and would not compel the granting of a new trial, and counsel cannot be deemed ineffective for failing to raise the issue as offered in the habeas petition.

B. Alleged State Misconduct

Jennings also alleges that a mistrial was required when the State Attorney investigator provided a cough drop to a juror in a humanitarian attempt to quell a coughing spell (V8/342-47). Once again no cases are cited to support any claim of error on the facts presented.

The record reflects that during witness testimony defense counsel approached the bench to make a record about a member of the State Attorney's Office having walked over to the jury box to hand something to one of the jurors (V8/341). Counsel was concerned with any affect that may have had on the jury, and the judge sent the jury out in order to conduct an inquiry (V8/342). The court had also observed Mr. Bowling walking from the State Attorney's table and handing something to a juror, and asked Mr. Bowling for an explanation (V8/342). Mr. Bowling responded that he had handed over a cough drop; he had indicated to the bailiff that he wanted to give the cough drop to the bailiff so that the bailiff could give it to a juror who was having a coughing spell, and the bailiff "just told me to place it over there, which I did" (V8/342). The bailiff confirmed that she was going to wait for the right time, "but she just kept coughing and he, you know, wanted to give it to her and she was coughing, so I did say, 'Fine'" (V8/343).

The court emphasized the importance of avoiding any appearance of impropriety, admonished Mr. Bowling not to do anything like that again, and reminded everyone that only the bailiff should see to the comfort of the jury (V8/343). The judge asked defense counsel if he proposed a curative instruction, and counsel responded that he felt obligated to request a mistrial, as the jury might be prejudiced against his client "based on Mr. Bowling's good-faith actions" which could not be cured with an instruction (V8/344). The State responded that the extreme action of a mistrial was not necessary as the court could caution the jury against being influenced by the act (V8/344). The judge agreed and after again warning all parties to refrain from attending to the jury, he had the jury returned and advised them that the provision of the cough drop may have been a kind gesture, but it was highly inappropriate as no one from counsel tables should ever have that kind of contact with a juror (V8/346-47). The jury was reminded that if they needed anything, they should only seek assistance from the bailiff, and they were cautioned not to be influenced in any way by the gesture (V8/346-47).

No viable appellate argument could be raised based on this incident. The denial of a motion for mistrial is reviewed for an abuse of discretion, which will only be found where the ruling

is arbitrary, fanciful or unreasonable. Green v. State, 907 So. 2d 489, 496 (Fla. 2005). This Court has upheld the denial of a mistrial due to comments or interaction with a jury on facts more egregious than those presented in this case. In Smith v. State, 7 So. 3d 473, 495 (Fla. 2009), a mistrial was denied after the defendant's mother spoke directly to prospective jury pool members. In affirming the ruling, this Court noted that her comments did not disclose evidence or facts not presented at trial and did not even constitute an opinion about the defendant's guilt or innocence. See also Hutchinson v. State, 882 So. 2d 943, 956 (Fla. 2004) (comment by restaurant patron to hang the defendant; Street v. State, 636 So. 2d 1297, 1301 (Fla. 1994) (person in hallway muttered "guilty" to jury; Larzelere v. State, 676 So. 2d 394, 403-404 (Fla. 1996) (woman threatened to blow up juror's car; Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990) (spectator told prospective juror that she thought defendant was guilty).

The facts of this case do not suggest the jury would be prejudiced against the defense or for the State simply because a cough drop was provided to a juror who was suffering from a documented coughing spell. The presentation of this entire issue would not have compelled a new trial for Jennings, or any other relief. No prejudicially deficient performance by appellate

counsel can be discerned, and Jennings' petition must be denied.

C. Admission of Photographs

Jennings also submits that an appellate issue should have been raised challenging the admission of photographs. He cites to four times at trial where the defense objected to the admission of pictures as allegedly prejudicial, non-probative, and gruesome. Once again, a review of the record demonstrates that no reasonable appellate argument was available on this issue, and habeas must be denied.

Jennings first identifies an objection to State Exhibits 138A and 138B, two photos depicting Jennings and Graves enjoying the company of exotic dancer Danielle Martel (V9/509-513; SV1/179-82). Jennings does not counter the trial court's ruling that these pictures were relevant to corroborate Martel's testimony, to demonstrate that Jennings was not acting afraid of Graves, and to show the affluent lifestyle the co-defendants were living shortly after the robbery (V9/513). Two pictures were admitted, one of Jennings and one of Graves (V9/510-11). The photos are not gruesome or inflammatory and Jennings offers no legal basis for exclusion. Moreover, he has not identified any prejudice to the defense from the admission of these exhibits.

A trial court's ruling on the admissibility of photographic

evidence is reviewed under an abuse of discretion standard. Dennis v. State, 817 So. 2d 741 (Fla. 2002); Mansfield v. State, 758 So. 2d 636, 648 (Fla. 2000). No abuse of discretion can be found on the facts of the instant case.

Jennings also challenges the admission of crime scene and autopsy photos. Once again, no error is shown. This Court has long recognized that the test of admissibility of photographs is relevancy, and not necessity. Brooks v. State, 787 So. 2d 765, 781 (Fla. 2001). In Henderson v. State, 463 So. 2d 196 (Fla. 1985), the defendant argued that the trial court erred by allowing into evidence gruesome photographs which he claimed were irrelevant and repetitive. This Court found that the photographs, which were of the victim's partially decomposed body, were relevant:

> Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.

463 So. 2d at 200. This Court further held that it is not to be presumed that gruesome photographs so inflamed the jury that they will find the accused guilty in the absence of evidence of guilt, but it is presumed that jurors are guided by logic and thus, pictures of the murder victims do not alone prove the guilt of the accused. Id. A review of the record reflects that

the disputed photos were relevant and properly admitted in this case.

Jennings initially disputes the admission of crime scene photos during the testimony of Officer Browning, citing to pages 232-37 of the record (Petition, p. 19). The exhibits admitted at the referenced pages, Exhibits 87P, 88P, 89P, and 90P, were aerial photographs of the Cracker Barrel restaurant and the surrounding neighborhood, which were admitted without any defense objection (V8/235-36). The petition does not specifically identify any objectionable photograph, either by exhibit number or page citation, during Browning's testimony. If offered as an argument on appeal, the petition would be insufficient to even identify the particular court ruling or rulings at issue. Accordingly, Jennings has failed to offer any cognizable claim with regard to photographs admitted during Browning's testimony, and this Court should decline to consider the allegations in the petition as support for Jennings' claim of ineffective assistance of appellate counsel.

Moreover, a review of Officer Browning's testimony in its entirety offers no basis for an appellate argument with regard to the admission of photographs. The defense objections to pictures alleged to be inflammatory and unfairly prejudicial were properly overruled (V8/269-71, 300-04, 307-08, 311-13, 315). In this case, the pictures corroborated Browning's

testimony about the condition of the bodies upon discovery, and assisted in reconstructing the crime scene. The position of the bodies at the time of the attack is reflected, and the distribution of blood demonstrates that one victim had been lying as she was found when killed, and another victim was standing up at the time of his murder (V8/271, 302-03).

Another picture of a victim in the freezer was admitted during the testimony of Deputy John Horth, one of the first officers on the scene. Horth and Deputy Siciliano opened the door to the freezer and discovered the bodies of the victims inside (V9/581). During Horth's testimony, the State admitted Exhibits 91P, 92P, and 94P (V9/583-92). There was no objection to Exhibit 91 (V9/586). The defense objected to Exhibit 92 as cumulative, asserting that there was already a picture showing the same scene (V9/586-87). The defense objected to Exhibit 94 as too gruesome, with the relevance outweighed by the danger of unfair prejudice (V9/591). The State again observed that the pictures assisted with reconstructing the crime scene, and that the blood evidence supported the conclusion that one victim had been standing up to the point in time of being killed (V9/590). The court noted the relevance of the blood as illustrated and cited the case of Pope v. State, 679 So. 2d 710 (Fla. 1996), in overruling the objections and admitting the photos (V9/587, 592).

Jennings has failed to establish that any reversible error occurred in the admission of the crime scene photos. There were only a total of twelve pictures which depict the victims in the freezer, which is not excessive, particularly in light of the fact that there were three victims. The photos were not unnecessarily inflammatory, in that the victims' bodies were not in a state of decomposition and there is no indication that the bodies have been marred by predatory animals, as in Czubak v. State, 570 So. 2d 925 (Fla. 1990), cited in the petition. In Czubak, this Court noted that the gruesome nature of the photos was a result of circumstances "above and beyond the killing," which cannot be said as to the exhibits in the case at bar.

This Court has approved the admission of relevant photos under similar circumstances. Davis v. State, 859 So. 2d 465, 477 (Fla. 2003); Burns v. State, 609 So. 2d 600 (Fla. 1992); Marshall v. State, 604 So. 2d 799 (Fla. 1992); Nixon v. State, 572 So. 2d 1336 (Fla. 1990). In Gore v. State, 475 So. 2d 1205 (Fla.), cert. denied, 475 U.S. 1031 (1985), this Court disagreed with Gore's contention that the trial court reversibly erred in allowing into evidence two prejudicial photographs, one depicting the victim in the trunk of Gore's mother's car and the other showing the hands of the victim behind her back. This Court held that the photographs placed the victim in the car, showed the condition of the body when first discovered by

police, showed the considerable pain inflicted by Gore binding the victim, met the test of relevancy, and were not so shocking in nature as to defeat their relevancy. Id. at 1208.

Jennings also challenges the admission of three autopsy photos during the testimony of the associate medical examiner, Dr. Manfred Borges, over defense objection (V8/383-88). Dr. Borges testified that the exhibits would assist him in explaining his testimony as to the wounds suffered by the victims (V8/383). Notably, the photos demonstrate that the injuries to Dorothy Siddle were more severe than the wounds to the other victims, which is significant since other evidence revealed that Jennings had a particular hostility toward Siddle (V9/537-39).

This Court has previously upheld the admission of pictures when relevant to explain a medical examiner's testimony, or to show the manner of death and/or the location of the wounds. See Brooks, 787 So. 2d at 781; Floyd v. State, 808 So. 2d 175, 184 (Fla. 2002); Mansfield, 758 So. 2d at 648; Pope, 679 So. 2d at 714; Larkins v. State, 655 So. 2d 95, 98 (Fla. 1995). The photos admitted against Jennings meet this test, and no abuse of discretion has been demonstrated in the rulings to admit these exhibits.

As no meritorious argument challenging the admission of the photographic evidence could be offered, counsel cannot be deemed

ineffective for failing to raise this issue on appeal. The habeas petition must be denied.

CLAIM II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ISSUES NOT PRESERVED BY ANY DEFENSE OBJECTION.

Jennings also contends that his appellate attorney performed deficiently by failing to raise an issue pertaining to the trial judge's characterization of the case as "infamous" in opening remarks to the jury (V7/26). Although there was no objection to the comment, Jennings now asserts that the comment constituted fundamental error, and no objection was necessary.

In this case, a change of venue was granted due to pervasive media coverage of the murders (V1/132-37). The record reflects that at the beginning of voir dire, the trial judge was asking the prospective jurors who may have heard what about the case from the media (V7/20-21). One prospective juror was trying to recall if he knew the case, and the judge offered, "This case is particularly referred to by a lot of people as the infamous Cracker Barrel case," which was sufficient to remind the prospective juror that he had heard about it (V7/26). This reference to how some people referred to the case did not provide any basis for an appellate issue.

Yet again, Jennings fails to cite any cases to support his conclusory claim of error, he only offers a vague complaint about the court's comment. Describing as "infamous" a case where three innocent victims were confined to a restaurant freezer before having their throats ruthlessly cut from side to side, and where a change of venue was granted due to the extensive publicity that followed, was not improper, let alone fundamental error. The court's introductory remark was not a comment on the evidence, the credibility of any witness, or Jennings' guilt or innocence; it was not even a characterization from the judge but only a recitation of how other people had characterized the case. It did not reveal any particular prejudicial information and was an accurate description of the case.

This Court has rejected relief even where the challenged comment was more egregious and objected to by the defense. See Huff v. State, 495 So. 2d 145, 148 (Fla. 1986) (motion for mistrial properly denied after trial court remarked that defendant's testimony was vague); Jones v. State, 652 So.2d 346, 352 (Fla. 1995) (prosecutor's reference to "assassination" of victim not so prejudicial as to warrant a mistrial). As no meritorious argument challenging the judge's reference to this case as "infamous" in opening remarks to the jury pool could be offered, counsel cannot be deemed ineffective for failing to

raise this issue on appeal. The habeas petition must be denied.

CLAIM III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE CONSTITUTIONALITY OF FLORIDA'S RULE ON JUROR INTERVIEWS.

Jennings also contends that his appellate attorney performed deficiently by failing to raise an issue challenging the constitutionality of Florida's rule on juror interviews, Florida Rule of Professional Responsibility 4-3.5(d)(4). This Court has previously rejected this exact claim as a basis for granting habeas relief due to ineffective assistance of appellate counsel. Wyatt v. State, 36 Fla. L. Weekly S683 (Fla. Nov. 23, 2011); Floyd v. State, 18 So. 3d 432, 459 (Fla. 2009). Appellate counsel cannot be deemed to have performed deficiently or prejudicially for failing to raise this issue, as this Court has repeatedly rejected the substantive merits of the juror interview claim. Isreal v. State, 985 So. 2d 510, 522 (Fla. 2008); Kormondy v. State, 983 So. 2d 418, 440 (Fla. 2007); Barnhill v. State, 971 So. 2d 106, 116-17 (Fla. 2007); Johnson v. State, 804 So. 2d 1218, 1225 (Fla. 2001). The failure to present a claim which has been resoundingly rejected can hardly be deemed deficient performance.

The facts of this case offer no basis to recede from the

established precedent rejecting this claim. Jennings asserts that juror interviews in this case were necessary to determine the impact of the court's comment that the case was "infamous" as well as the impact of the State Attorney investigator providing a juror with a cough drop. However, the time to determine any potential impact for these record events would have been at trial. Defense counsel did not object to the court's comment and did not request any inquiry about the cough drop incident. Because counsel could have sought jury input previously, due process is not violated by the reasonable limitations on any post-trial juror interviews under the applicable rule.

Once again, Jennings makes no meaningful attempt to show prejudice under Strickland. He does not identify a single case where relief has been granted on the substantive argument he now claims counsel should have made. As no meritorious claim could be offered, habeas relief must be denied as to this issue as well.

CONCLUSION

Respondent respectfully requests that this Honorable Court DENY the instant petition for writ of habeas corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished by U.S. mail to Paul Kalil, Assistant Capital Collateral Regional Counsel - South, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, Florida, 33301, this 30th day of March, 2012.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(*l*).

Respectfully submitted,

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