Filing # 9078346 Electronically Filed 01/13/2014 12:27:41 PM

IN THE SUPREME COURT OF FLORIDA

ROBERT LUNDBERG,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC13-66

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENT

PAMELA JO BONDI
ATTORNEY GENERAL

CELIA A. TERENZIO
SENIOR ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 656879

JEANINE GERMANOWICZ
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0019607

Office of the Attorney General
1515 N. Flagler Drive, Ste. 900
West Palm Beach, FL 33401
Primary E-Mail:
CrimAppWPB@myfloridalegal.com
(561)837-5000
(561)837-5108

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE #

TABLE OF CITATIONS

CASES **PAGE#**

OTHER AUTHORITIES

Statutes

Rules

Other Authorities

PRELIMINARY STATEMENT

Respondent, the State of Florida, the appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Lundberg, the Petitioner in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

"IB" will designate Petitioner's Initial Brief on Jurisdiction. That symbol is followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Petitioner's statements of the case and facts for purposes of this appeal, insofar as they are not argumentative, and subject to any minor additions, corrections, and/or clarifications here and in the argument that follows.

SUMMARY OF ARGUMENT

I. Petitioner's trial counsel did not provide ineffective assistance in not moving to suppress Petitioner's taped conversation with his girlfriend/ex-wife, as argued in Issue 14. At the time of this conversation, Petitioner had already waived his right to remain silent and made incriminating statements on

tape to the police officer who was questioning him. The officer had already handcuffed Petitioner and told Petitioner that he was being arrested and charged with two felonies and told Petitioner that he would not be let out of the interview room to speak to his girlfriend and told Petitioner that he would not be released from handcuffs while speaking with her. Petitioner did not have an expectation of privacy in the small interview room nor did the police deliberately foster such an expectation of privacy. Therefore, counsel was not ineffective. Consequently, neither the trial court nor the Fourth District erred in denying relief on this claim.

II. The fact that the child told various people about Petitioner's misconduct was admissible under the Child Hearsay Rule. And, counsel made it clear that his decision not to object to testimony that could be construed as bolstering the victim's testimony was part of his trial strategy to show that no one in the victim's family believed her and the only reason that charges were brought was because a counselor was required by law to report the allegations. Counsel's strategy was at least partially successful; the jury found Petitioner guilty only of attempted capital sexual battery. Counsel was not ineffective in connection with Issues 4, 5, 6, 7, 9, and 12. Therefore, neither the trial court nor the Fourth District erred in denying relief on these claims.

III. There was evidence to show that the charged acts took place after the effective date of the amended statute. The trial court did not err in summarily denying issues 18 and 22 and the Fourth District did not err in affirming.

IV. The trial court did not err in summarily denying issues 8, 11, 15, 16, 19, and 21 and the Fourth District did not err in affirming the trial court. The claims were insufficient as a matter of law and fact and/or they were refuted by the record.

V. The trial court did not err in summarily denying the claim that counsel was ineffective for failing to object to the instruction on attempted capital sexual battery as argued in Issue 2, and the Fourth District did not err in affirming. There was evidence that could support both a completed battery and an attempt.

None of the issues merit any relief. This Court must uphold the Fourth District's opinion affirming the denial of Petitioner's Florida Rule of Criminal Procedure 3.850 motion below.

ARGUMENT

AN OVERVIEW OF THE STANDARD OF REVIEW GENERALLY APPLICABLE TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Before examining each of the individual grounds of ineffective assistance of counsel raised in Petitioner's Florida Rule of Criminal Procedure 3.850 motion, on appeal in the Fourth District, and in this Court, it is necessary to have a clear

understanding as to the standard of review against which these claims are measured. Such operative standards are set forth in the governing case of Strickland v. Washington, 104 S.Ct. 2052 (1984). Strickland establishes a two-prong analysis, *both* facets of which must be affirmatively established, before a defendant can prevail upon a claim of ineffective representation.

The first component requires a showing that the defense counsel's performance was deficient and fell below an objective standard of reasonableness considering all the circumstances. In applying this method of review, the Court cautions that judicial scrutiny must be "highly deferential," avoiding the "distorting effects of hindsight" and, as such, must indulge in a strong presumption that the defense counsel's conduct falls within the wide range of reasonable professional assistance. Moreover, strategic decisions made by the defense counsel, after a thorough review of the law and facts, are virtually unassailable and immune from such retrospective analysis. Id. at 2064-2066.

> "[S]trategic 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." The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Moreover, this Court has held, "That there may have been more that trial counsel could have done or that new counsel in reviewing the record with hindsight would handle the case differently, does not mean that trial counsel's performance during the guilt phase was deficient."

Everett v. State, 54 So. 3d 464, 478 (Fla. 2010) (citations omitted) (quoting Anderson v. State, 18 So. 3d 501, 509 (Fla. 2009); Strickland, 466 U.S. at 689; State v. Coney, 845 So. 2d 120 (Fla. 2003)).

The second factor considers the actual prejudice attributable to the defense counsel and how such conduct directly impacted upon the overall result obtained. It is not sufficient to show that the defense counsel's errors in judgment had "some conceivable effect on the outcome" but rather it must be proven with reasonable probability that "but for the defense counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Hutchinson v. State, 17 So. 3d 696, 700 (Fla. 2009) (quoting Strickland, 466 U.S. at 694). Thus, the integrity of the entire proceeding must have been compromised by the defense counsel's deficiencies.

It is not necessary, and is often unwarranted, to scrutinize claims of ineffectiveness under both prongs of the Strickland analysis. The Court has made it clear that the defendant's failure to make a sufficient showing as to one component will vitiate the claim. Strickland, 104 S.Ct. at 2069. The purpose of such review is not intended 'to grade counsel's performance" and

the Court emphasizes that where the record demonstrates a lack of prejudice the analysis may cease.

"Because both prongs of the Strickland test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo." Johnston v. State, 63 So. 3d 730, 737 (Fla. 2011). See also, Kelley v. State, 569 So. 2d 754, 761 (Fla. 1990). Given this standard of review, the State submits that the record supports the trial court's findings of fact and, further, submits that the trial court did not err in denying any of the claims raised in Petitioner's Rule 3.850 motion which are re-argued in his Initial Brief to this Court. Therefore, the appellate court did not err in affirming the trial court's denial of post conviction relief.

ISSUE I: THE TRIAL COURT DID NOT ERR IN DENYING ISSUE 14 AND THE APPELLATE COURT DID NOT ERR IN AFFIRMING; COUNSEL WAS NOT INEFFECTIVE FOR NOT MOVING TO SUPPRESS PETITIONER'S VIDEOTAPED CONVERSATION WITH HIS GIRLFRIEND; THE POLICE DID NOT CREATE A FALSE BELIEF THAT PETITIONER'S CONVERSATION WAS PRIVATE. (RESTATED)

Contrary to Petitioner's assertions, Petitioner's trial counsel did not provide ineffective assistance in not moving to suppress Petitioner's taped conversation with his girlfriend/ex-wife, as argued in Issue 14 of Petitioner's Florida Rule of

Criminal Procedure 3.850 motion below.[1] There was no reason to suppress the tape on grounds that the police deliberately fostered an expectation of privacy in the petitioner. That is, as the trial court and the Fourth District found, the police did not deliberately foster an expectation of privacy in the petitioner.

The following facts must be noted. Prior to Petitioner's conversation with his girlfriend, Petitioner had already made incriminating statements. Detective Dennis had told Petitioner that her interview with him was over for all practical purposes, that she was arresting him for two felonies, and that he would be going to the jail to be processed. (R2 381-384) It was at this point that Petitioner himself asked to see his girlfriend before he went to the jail. (R2 381) Dennis told Petitioner he was being handcuffed. (R2 381) Dennis told Petitioner that he could not leave the interview room to speak to his girlfriend and she told him that she could not remove his handcuffs while

---

[1]Petitioner's interview with Detective Dennis is contained at R2 292-384 and R3 385-94 and his conversation with girlfriend (or ex-wife) Xiomara Figueroa is contained at R3 386-90. Any record references in this point on appeal are to this portion of the record and particularly to R2 381-R3 390.

he was speaking to his girlfriend. (R2 381) In addition, although Detective Dennis had previously urged Petitioner to talk to Dennis and confess, Dennis did not urge Petitioner to talk to Figueroa and confess. Dennis had no need to since Petitioner had already confessed to Dennis. As the trial court found, Petitioner's girlfriend was not placed in the interview room "to induce a confession, but was there solely at the Defendant's request." (R4 679)

The fact of the matter is that Dennis simply, **at Petitioner's own request**, permitted Petitioner an opportunity to tell his girlfriend that he was being arrested. Certainly, Petitioner did not present any testimony or affidavit from Detective Dennis or any other police officer suggesting that Dennis' actions were deliberately intended to foster a false expectation of privacy in the petitioner in order to elicit incriminating statements. In fact, the record shows that Dennis agreed that there was a hidden video camera in the interview room but she explained that it was kept running and monitored only for purposes of officer safety. (R3 507)

Although Detective Dennis offered Petitioner and his girlfriend "privacy" by leaving the two together alone in the interview room, this did not render the conversation inadmissible. "A citizen's right to privacy ... is determined by a two prong test: 1) whether the citizen had a subjective

expectation of privacy; and 2) whether that expectation was one that society recognizes as reasonable." Williams v. State, 982 So. 2d 1190, 1194 (Fla. 4th DCA 2008) (citing State v. Smith, 641 So. 2d 849, 851 (Fla. 1994)). However, a defendant does not normally have a reasonable expectation of privacy in a police interview room. See Bedoya v. State, 779 So. 2d 574 (Fla. 5th DCA 2001); State v. Calhoun, 479 So. 2d 241 (Fla. 4th DCA 1985); Boyer v. State, 736 So. 2d 64 (Fla. 4th DCA 1999); Johnson v. State, 730 So. 2d 368 (Fla. 5th DCA 1999). Similarly, voluntary jailhouse conversations are not entitled to the same degree of privacy afforded some other communications. Lanza v. New York, 370 U.S. 139, 82 S. Ct. 1218, 8 L. Ed. 2d 384 (1962). Thus, the courts have generally permitted the use of such evidence where it was electronically recorded, at least in the absence of any factor diminishing the trustworthiness of the conversation such as coercion or trick. Allen v. State, 636 So. 2d 494 (Fla. 1994)(no expectation of privacy in jail). In Larzelere v. State, 676 So. 2d 394 (Fla. 1996), this Court found that the State did not act wrongfully in placing the defendant and her co-conspirator together in a holding cell and recording the ensuing conversation where the police did not foster an illusion of privacy.

Instructively, in Boyer v. State, 736 So. 2d 64 (Fla. 4th DCA 1999), the Fourth District held that a defendant had no

subjective expectations of privacy in jailhouse conversations. Boyer voluntarily agreed to speak to police but he did not confess during this interview. After the interview, he asked to speak to his sister-in-law. The officer permitted the sister-in-law to enter the interview room, saying that he would get out of the room so Boyer could speak with her. The defendant made incriminating statements to her which were recorded. The Fourth District found that the defendant had no subjective or reasonable expectation of privacy because Boyer did not ask for privacy and the police did nothing to foster a sense of privacy in the conversation. Id., at 67.

In the instant case, the Fourth District acknowledged Boyer and stated:

> Although the detective used the word "privacy" when leaving the room, we find this hard to distinguish from Boyer where the officer told the defendant that he would get out of the room so the defendant could talk to his sister-in-law. That, too, could foster a notion in a defendant that people would not be listening to his conversation. Yet, in Boyer we held that the statement should not be suppressed. Here, the defendant had already made admissions to the detective and had specifically asked to see his girlfriend. He had not asked for privacy, even though the officer did vacate the room. And all he apparently wanted to do was to tell his girlfriend how sorry he was for the situation and explain what he had told the detective. **The officer's statement that she wanted to give them privacy more likely conveyed to the defendant that he could tell his girlfriend about his arrest out of the public eye—to save embarrassment to them both. This conduct is not the type of deliberate fostering of an expectation of privacy in order to avoid the defendant's assertion of his constitutional rights**

which led the trial court to suppress the recorded conversation in Calhoun and Cox.

Lundberg v. State, 37 Fla. L. Weekly D2684, 2012 WL 5870104, *5 (Fla. 4th DCA 2012)(Lundberg II)(Emphasis added). In the totality of the circumstances, this analysis is correct especially where Petitioner had voluntarily come to the station; where Petitioner had already voluntarily waived his rights; where Petitioner had already made incriminating statements to the police; and where the detective testified that the hidden videotape was used for officer safety purposes, and not to elicit incriminating statements. Under the circumstances, there was no error in concluding that the police did not deliberately foster an expectation of privacy.

Even though the Fourth District, in State v. Calhoun, 479 So. 2d 241 (Fla. 4th DCA 1985), found, based on the totality of the circumstances therein, that suppression was warranted where the police **deliberately** fostered an expectation of privacy on the defendant's part in order to garner incriminating statements made by the defendant, that case is distinguishable both in degree and on a number of points. In that case, the defendant was not informed he was a suspect on the instant charges and was informed of his Miranda rights only in connection with another, unrelated, pending charge. The defendant asked to speak to his brother **before making a statement to police.** The defendant's

conversation with his brother was monitored by police. After speaking with his brother, **the defendant expressly invoked his right to remain silent and asked for counsel (the fact used by the Fourth District to distinguish Calhoun from other cases involving surreptitious tape recording).** The defendant's brother was brought back, admittedly for strategic "investigative purposes," and the police again monitored their conversation. Under the circumstances, this Court found suppression to be warranted.

The totality of the circumstances in Calhoun were much more compelling than they were here. In the case at bar, when Petitioner voluntarily met and spoke with Detective Dennis, he was not in custody. Petitioner waived his right to remain silent and his right to counsel. Petitioner then made incriminating statements to Detective Dennis **before** speaking with his girlfriend and repeating the same or similar incriminating statements. Most importantly, Petitioner did not make it clear he desired or expected privacy as the defendant in Calhoun did; he at no time invoked his right to remain silent nor his right to counsel nor asked to speak to his girlfriend **confidentially.** Finally, the videotape was not made for strategic investigative purposes but for purposes of officer safety. Thus, although Petitioner may or may not have had a subjective expectation of

privacy, it was clear he did not have an objectively reasonable expectation of privacy. Calhoun must be distinguished.

State v. Munn, 56 S.W. 3d 486 (Tenn. 2001), another case cited by Petitioner, is also distinguishable. Apart from the fact that it is a Tennessee case that is in no way binding on this Court, it is clear in Munn that the police there deliberately initiated and invited the incriminating conversations between Munn and his mother (and, later, between Munn and his father), by asking Munn if he and his mother wanted to talk by themselves. After the police suggested it, Munn indicated that he did, in fact, want to talk to his mother by himself. Significantly, the police then **turned off the tape recorder in the room at Munn's own request** (and then immediately rushed off to the private room where the conversation was being monitored and recorded, in order to listen in as Munn talked to his mother). Clearly, Munn expressly indicated a desire to be private to which the police seemingly acceded.

Here, in contrast, Petitioner was the one who requested to be allowed to talk to his girlfriend; the detective did not suggest it to Petitioner. Moreover, Petitioner had **already** waived his right to remain silent and **confessed to the police** at the time of his conversation with his girlfriend as contrasted with Munn who had not yet confessed to anything. Also, Petitioner did not do anything indicating that he desired, **much less requested,**

privacy to talk to his girlfriend, as opposed to Munn who **specifically asked the police to turn off the tape recorder.** Finally, the police in Munn admitted they were monitoring Petitioner's conversation with his mother in real time, making it appear that such recording was done solely for evidence gathering purposes rather than security purposes. Cf., United States v. Hearst, 563 F.2d 1331, 1344 (9th Cir. 1977)(tape recording in prison for purposes of prison security is permissible); State v. Wilkins, 125 Idaho 215, 868 P.2d 1231, 1232 (1994)(tape recording in police interrogation room for purposes of surveillance is permissible where there was a necessity for same).

As for People v. A.W., 982 P.2d 842 (Colo. 1999), also cited by Petitioner, in this case, the detective who interviewed the juvenile defendant in a room with a two-way mirror, told the defendant's father, who was also present, not to worry because "nothing [was] behind there [the two-way mirror]." The juvenile's father then repeatedly asked the detective if he could speak with his son in private. When the detective eventually agreed to this request, he explicitly stated that he would be right outside and that he would not be listening to the conversation between the juvenile and his father. However, the juvenile and his father were surreptitiously video-recorded. A.W. is clearly distinguishable because it is a Colorado case

not binding on this Court and because the officer therein explicitly promised there was nothing behind the two-way mirror and explicitly assured he would not listen to the conversation between defendant and his father.

Finally, Cox v. State, 26 So. 3d 666 (Fla. 4th DCA 2010), a case cited by Petitioner in the appellate court, is also distinguishable. In that case, the defendant had already invoked his right to counsel, the officer had expressly **lied** to Cox in assuring Cox he was not being recorded, and Cox's co-defendant had been convinced to become an agent of the police with promises of a more lenient sentence. There was no such police conduct herein.

As the trial court herein noted, even if the defendant had not voluntarily relinquished his right to remain silent, that fact alone would not necessarily lead to a conclusion that he had a reasonable expectation of privacy. (R4 679) In Larzelere, 676 So. 2d at 394, the defendant invoked her right to remain silent and right to counsel. Nonetheless, the Supreme Court held that the police's recording of her jailhouse conversation with her co-conspirator was not improper because the police had not fostered a reasonable expectation of privacy.

Again, as the trial court could, and did properly find, Petitioner herein did not have an expectation of privacy in the police interview room nor did the police deliberately foster

such an expectation of privacy in the case at bar. (R4 679-80) Because the record showed that the police did not deliberately foster an expectation of privacy in Petitioner, there was no strong ground for a motion to suppress based on this argument. Therefore, defense counsel was not ineffective for not moving to suppress the videotape on this basis. See Melendez v. State, 612 So. 2d 1366, 1369 (Fla. 1992)(counsel cannot be deemed ineffective for failing to raise meritless argument); Teffeteller v. Dugger, 734 So. 2d 1009, 1023 (Fla. 1999)("Trial counsel cannot be deemed ineffective for failing to raise meritless claims or claims that has no reasonable probability of affecting the outcome of the proceeding.").

The Fourth District properly stated:

> While we acknowledge that this is a close case factually, and each case turns on its specific facts, for that very reason we cannot conclude that counsel made a serious error such that he was not functioning as counsel within the Sixth Amendment. As he stated at the evidentiary hearing, "I think it's well founded in the case law that you don't have a reasonable expectation of privacy under those conditions.... You're in an interrogation room, you're in handcuffs...." Counsel did try to get the statements suppressed under Wong Sun, but both the trial court and this court rejected that approach. And while this issue was at least arguable, meaning that he could have filed a motion to suppress in good faith and made an argument based upon Calhoun, that does not mean that he was ineffective under the Strickland standard for failing to do so.

Lundberg II, 2012 WL 5870104 at *6.

Petitioner also claims the Fourth District erred in affirming this claim without an evidentiary hearing. In fact, this issue came up at the evidentiary hearing and testimony was taken pertaining to it at the evidentiary hearing and the parties discussed the parts of the trial and interview transcripts pertaining to this issue and this issue was argued at length. (R7 43-97) The trial court simply did not hear any testimony or argument that came out at the evidentiary hearing that would cause the trial court to change its earlier ruling that this issue was meritless. Petitioner did not proffer below, and did not specify on appeal, what additional information he would have elicited at a new evidentiary hearing that he did not already elicit. Because there was no need to have a further hearing on this matter, the Fourth District did not err in affirming without further ado.

Moreover, contrary to Petitioner's contentions, there is indeed a difference between letting people talk out of the public eye **to spare them embarrassment** and deliberately fostering an expectation of privacy **for the purpose of eliciting incriminating statements.**

Nor, as Petitioner claims, did the Fourth District act as a "fact finder." The court merely stated that, under the circumstances, the detective's statement was simply "more likely" to convey to the defendant that she was trying to save

him some social embarrassment. Lundberg II, 2012 WL 5870104, at *5. This was not a finding of fact.

To the extent that Petitioner claims that the Fourth District applied the wrong standard and did not consider prejudice, this is incorrect. As previously noted, the Fourth District stated: "While we acknowledge that this is a close case factually, and each case turns on its specific facts, for that very reason we cannot conclude that counsel made a serious error such that he was not functioning as counsel …" Lundberg II, 2012 WL 5870104, at *6. The court noted that counsel stated that at the evidentiary hearing, "I think it's well founded in the case law that you don't have a reasonable expectation of privacy under those conditions.... You're in an interrogation room, you're in handcuffs...." Id. The court explained that the issue was at least arguable, meaning that counsel could have filed a motion to suppress in good faith, but the court concluded that did not mean that counsel was ineffective for not so arguing. Id.

When assessing a lawyer's performance, "Courts must indulge the strong presumption that counsel's performance was reasonable and that counsel made all significant decisions in the exercise of reasonable professional judgment." Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000)(en banc), cert. denied, 531 U.S. 1204 (2001). The court's role in reviewing ineffective assistance of counsel claims is not to "grade a lawyer's

performance; instead, [the court] determine[s] only whether a lawyer's performance was within "the wide range of professionally competent assistance." Van Poyck v. Florida Dept. of Corrections, 290 F.3d 1318, 1322 (11th Cir.), cert. denied, 537 U.S. 812 (2002), quoting, Strickland v. Washington, 466 U.S. 668, 690. Review of counsel's conduct is to be highly deferential. Spaziano v. Singletary, 36 F.3d 1028, 1039 (11th Cir. 1994), and second-guessing of an attorney's performance is not permitted. White v. Singletary, 972 F.2d 1218, 1220 (11th Cir. 1992)("Courts should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight."); Atkins v. Singletary, 965 F.2d 952, 958 (11th Cir. 1992). The law does not require counsel to raise every available nonfrivolous defense. See Knowles v. Mirzayance, 129 S.Ct. 1411, 1420-22, 173 L.Ed.2d 251 (2009) (stating that the U.S. Supreme Court has never required defense counsel to pursue every claim or defense, regardless of its merit, viability, or realistic chance for success). In sum, the Fourth District addressed and correctly analyzed both the performance and prejudice prongs.

The Fourth District did not err in affirming the denial of post conviction relief on this issue. This Court must affirm.

ISSUE II: THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S ISSUES CONCERNING THE BOLSTERING OF THE VICTIM'S CREDIBILITY AND THE APPELLATE COURT DID NOT ERR IN AFFIRMING (ISSUES 4, 5, 6, 7, 9 AND 12). (RESTATED)

Petitioner asserts that his counsel was ineffective for not objecting to extensive evidence bolstering the victim's credibility. However, it is clear that counsel did so as a matter of trial strategy.

Review of counsel's 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." Heath v. State, 3 So. 3d 1017, 1027 (Fla. 2009) (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)). As a general rule, counsel cannot be deemed ineffective for making tactical decisions regarding evidentiary matters mid-trial.

> "Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, 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."

Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) (citations omitted). The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Everett v. State, 54 So. 3d 464, 478 (Fla. 2010) (citations omitted) (quoting

Anderson v. State, 18 So. 3d 501, 509 (Fla. 2009); Strickland, 466 U.S. at 689; State v. Coney, 845 So. 2d 120 (Fla. 2003)). Moreover, "[t]hat there may have been more that trial counsel could have done or that new counsel in reviewing the record with hindsight would handle the case differently, does not mean that trial counsel's performance during the guilt phase was deficient." Id.

It is clear from the trial transcripts in general and from counsel's testimony at the evidentiary hearing[2] in particular that counsel had made a strategic decision to argue that the victim's accusations were the product of manipulation by the victim's Aunt [redacted] who hated the defendant and/or that the victim so lacked credibility that none of her family members believed anything had happened. (See trial transcripts, generally and at R3 447-581; see also evidentiary hearing transcript at SR1 68-71) Counsel had also made a strategic decision to attack the victim's credibility on the issue of

[2] The judge had the benefit of the trial transcript. Moreover, any expressly designated pages of the trial transcripts are contained at Exhibit 18 of the State's reply to Petitioner's motion below. (R3 447-581) As for the evidentiary hearing, that transcript is contained at SR1.

whether there was actual penetration as the victim told the police or whether there was merely a touching as she supposedly told her family. (SR1 69) Under the circumstances, counsel's decision was reasonable under the norms of professional conduct.

First, it must be recalled that testimony that the child told various people about Petitioner's misconduct was admissible under the Child Hearsay Rule, Section 90.803(23), Florida Statutes. This sort of testimony would not constitute improper bolstering. To the extent that counsel decided not to object to various additional comments that could be construed as improperly bolstering the victim's testimony, counsel explained at the hearing that this was part of his trial strategy to show that no one in the victim's family believed her and the only reason that charges were brought was because a counselor was required by law to report the allegations. For example, it was elicited from the victim's father and mother that they repeatedly asked the victim if she was telling the truth, took no action on the victim's accusations, and did not even talk to Petitioner about them. (R3 472-73, 493-94, 497-98) Similarly, it was revealed that Aunt [redacted], the victim's trusted aunt, asked the victim: "are you sure you're not lying, you don't want attention? Is everything okay with mom and dad?" (R3 484)

Although counsel's strategy resulted in the admission of what might be considered to be inadmissible prior consistent

statements or other bolstering statements, it is clear that counsel desired to elicit this information for the purposes of showing that the victim's own mother and father as well as her Aunt [redacted] felt her accusations lacked credibility. Again, this was to the defendant's advantage.

Finally, it was revealed that the victim's mother and father so questioned the victim's statements that Petitioner had sexually abused her that they took her to a counselor who opined that there was no reason not to believe her and that, if they did not report the allegations, he would. (R3 496) Although the counselor's statement may have been objectionable, it had to be balanced against the fact that it revealed the extent of the victim's parents' disbelief in the victim's allegations. As the prosecutor below noted, "[w]hat better evidence of reasonable doubt could defense counsel have hoped for, than evidence that the victim's own family members' first response was to question truthfulness of the victim." Similarly, what better evidence of the parents' disbelief in the allegations was there than the fact that they would not have reported the allegations made by their own daughter to police if not told by this professional that there was no choice in the matter. This opinion evidence as to the victim's veracity, **or lack thereof**, so helpful to the defense, would never have been admitted if counsel had

interposed the objection Petitioner now urges. Counsel was not ineffective as to issues 4, 5, 6, and 7.

As for counsel's lack of objection to Detective Dennis' testimony regarding the detective's interview with the victim, raised in issues 9 and 12, these issues too were properly rejected as a ground for post conviction relief. It must be recalled that counsel had elicited from the victim that, prior to speaking with Detective Dennis, the victim stated that the defendant had touched her but after speaking with Detective Dennis, the victim stated that the defendant had actually put his finger inside her. (R3 480-81) Counsel pointedly asked the victim if Detective Dennis had **suggested** to the victim that Petitioner had penetrated the victim. (R3 480)

Moreover, defense counsel had argued in opening statement that Detective Dennis had rushed to judgment and had arrested the defendant without interviewing anyone except the victim; the police had not even interviewed the victim's Aunt [redacted]. (R3 463, 464) Counsel did so despite the fact that Detective Dennis was constrained, by the trial court's order excluding Petitioner's confession to the police, from revealing that she conducted no further interviews because Petitioner himself admitted to touching the victim inappropriately.

Under the circumstances, as the State argued in its Reply to Petitioner's Rule 3.850 motion below (R2 276), the facts and

circumstances of the interview and of the victim's reactions thereto were relevant and admissible as a fair reply to counteract defense counsel's suggestion of improper tampering with the witness. There was no ineffectiveness in not objecting, especially since to do so might open the door to a prejudicial explanation as to why the detective had conducted no further interviews: the defendant had confessed and had admitted touching the victim.

Similarly, to the extent that Petitioner complains that Detective Dennis improperly bolstered the credibility of the victim, it must be noted that the statements of which Petitioner complains were made during the detective's interview with the Petitioner which was played for the jury. In the interview, the detective is embellishing on, and fabricating, statements allegedly made by the victim as part of her interview tactics. (R3 511-12; 549-550) These claims as to what the victim said were admitted fabrications by Detective Dennis. As such, it is clear that the supposed bolstering by Detective Dennis was not, in fact, actual bolstering. That is, the detective could not be considered to be vouching for the credibility of the victim where the detective was admittedly lying about what the victim supposedly said. Counsel could not be considered ineffective for not objecting to this faked "bolstering" which was admitted only

to show the impact it had on the defendant during the interview and which the jury would have understood as such.

In sum, as the trial court found: "it is clear from the record and the Defendant's motion that strategic decisions were made and that alternative courses of conduct were considered and rejected." (SR1 5, 8, 10, 11) "The issue as to her veracity or capacity for truthfulness was essentially two sides of the same coin: the family questioning her truthfulness versus bolstering the victim's statements and testimony." (SR1 8) Trial counsel's strategy was reasonable, especially since, as previously argued in Point I on appeal, Petitioner's taped admissions to his girlfriend were not suppressible. Ultimately, counsel's strategy to attack the victim's credibility, based in part on the lack of objection to potentially objectionable testimony, did succeed, at least to a certain extent. The jury found Petitioner guilty only of attempted capital sexual battery even though much of the evidence showed that Petitioner actually penetrated the victim.

Petitioner claims that the Fourth District improperly deferred to the trial court's finding that counsel's strategy was not "completely unreasonable." (IB 31) This is incorrect. First, the Fourth District expressly based their conclusion upon their own review of the trial transcript. Lundberg II, 2012 WL at *7. Second, the Fourth District in mentioning "deference" was obviously referring to their earlier quote from Strickland, to

wit: "Judicial scrutiny of counsel's performance must be highly deferential." Id. They were not deferring to the trial court's finding but rather to the deference required in judicial scrutiny of counsel's performance.

Nor did the Fourth District use the wrong prejudice standard. To the contrary, the Fourth District immediately followed the statement of which Petitioner complains (IB 32), by quoting the "reasonable probability" standard of Strickland, thereby showing that the court knew full well what the standard was and that the court believed that it had not been met.

> Moreover, having reviewed the trial transcript, we cannot say that had all of the evidence bolstering the victim's credibility been excluded, the result would have been any different or that the jury would have had a reasonable doubt respecting guilt, thus failing the second prong of Strickland.
>
> > To establish the second prong under Strickland, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [466 U.S.] at 694, 104 S.Ct. 2052, 80 L.Ed.2d 674.

Lundberg II, 2012 WL 5870104, at *7, quoting Morris v. State, 931 So. 2d 821, 828 (Fla. 2006).

The appellate court then went on to explain:

> In this case, the victim's testimony was clear and precise. She was able to recount the events with complete detail and firmly rejected the defendant's version of the events. The defendant admitted to his

> girlfriend in the taped conversation that he might have touched the child when he was drunk. Even when he testified, his explanation was that he might have accidentally touched her, although his version of the incidents was markedly different than the child's version. In his testimony, he was much less certain with respect to his description. He also admitted that he might have accidentally touched the victim as he was carrying her to bed. His attempt to explain away his statements to his girlfriend at the jail were weak and ineffective. Further, many of the victim's statements to her parents and relatives likely were admissible as a child hearsay statement. See § 90.803(23), Fla. Stat. Thus, not all of the evidence presented by the parents and relatives was inadmissible. We cannot say that the bolstering of the victim's testimony caused Strickland prejudice.

Lundberg II, 2012 WL 5870104, at *7.

Again, counsel was not ineffective in connection with Issues 4, 5, 6, 7, 9, and 12. The Fourth District did not err in affirming the trial court. This Court must uphold that decision.

ISSUE III: THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING THE ISSUES RELATING TO THE HURRICANE (18 AND 22), AND THE APPELLATE COURT DID NOT ERR IN AFFIRMING. (RESTATED)

As the State and the trial court were at some pains to detail below, there was evidence to show that the charged acts took place after the effective date of the amended statute. (R2 285-87; R4 685-91) Admittedly, the trial court took judicial notice of the National Oceanographic and Atmospheric Administration (NOAA) records with respect to Hurricanes Floyd and Irene, and evidently did so pursuant to Section 90.202, Florida Statutes, which authorizes the court to take judicial notice of "facts that are not subject to dispute because they are capable of

accurate and ready determination by resort to sources whose accuracy cannot be questioned." (R4 691) The State submits that this was not improper and this Court should affirm.

Additionally, because the variance did not surprise nor hamper Petitioner in the preparation of his defense, because the crime remained within the applicable statute of limitations, because the crime was committed before the return date of the indictment, because the crime was a crime under both the old and new version of the statutes, and because the change in the statute, if anything, **increased** the State's burden of proof, Petitioner cannot demonstrate prejudice as he would not have been acquitted or discharged altogether. Tingley v. State, 549 So. 2d 649, 651 (Fla. 1989).

For all these reasons, the Fourth District did not err in affirming the denial of Petitioner's Florida Rule of Criminal Procedure 3.850 motion below. This Court should uphold that affirmance.

ISSUE IV: THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING ISSUES 8, 11, 15, 16, 19, AND 21 AND THE APPELLATE COURT DID NOT ERR IN AFFIRMING. (RESTATED)

The trial court did not err in summarily denying Issues 8, 11, 15, 16, 19, and 21. Either they were insufficient as a matter of law and fact or they were refuted by the record. Consequently, the Fourth District properly affirmed the trial

court's denial of relief on these grounds and this Court must uphold that affirmance.

A. Issue 8: The prosecutor asserted below that "counsel's ability to get a detective with the Port St. Lucie Police Department, with only three years experience investigating person crimes to admit that during that short career she has dealt which such child victims who don't tell the truth and blow things out of proportion was masterful legal work" which was exploited by defense counsel in his closing argument. (R2 275; R3 504, 579) The detective's statement was helpful to the defense given that the defense theory of the case was that the victim had lied and/or that the victim's Aunt [redacted] had influenced the child and the more times the incident was discussed by the victim, the bigger it was blown out of proportion. Thus, as the State urged, counsel was not deficient, and further, as the trial court found, even if counsel was deficient, Petitioner could demonstrate no prejudice from the alleged deficiency. (R4 673)

B. Issue 11: Although there was a brief reference to the detective's running Petitioner's file and seeing that Petitioner had things like "alcohol," and that Petitioner had an attorney, there was no actual reference to any **criminal** act. As the State asserted below, this was not actually evidence of prior bad acts or crimes. Moreover, it would already have been clear to the

jury from Petitioner's taped conversation with his girlfriend that Petitioner suffered from issues with alcohol. (R3 549) And, the reference to an attorney could be considered relevant because it resolved whether Petitioner was invoking his right to counsel prior to being interviewed by Detective Dennis and, therefore, bore on whether the statement was freely and voluntarily given. (R3 518) Under the circumstances, the comments were so minor in nature that Petitioner cannot demonstrate either deficient representation or actual prejudice.

C. Issue 15: As for Petitioner's claim that counsel was ineffective for failing to argue at the time of the trial that the police did not properly advise him of his right to have counsel present during questioning, this too is meritless. First, Petitioner was not under arrest but freely agreed to go to the police department to talk to Detective Dennis. (R3 469, 575) This was a non-custodial interview for which Miranda warnings were not even required. Second, as the trial court properly recognized, the warnings given were sufficient to properly advise Petitioner of his rights, Canete v. State, 921 So. 2d 687 (Fla. 4th DCA 2006); Williams v. State, 998 So. 2d 650, 651 (Fla. 4th DCA 2008), especially in light of the recently issued opinions in State v. Powell, 66 So. 3d 905 (Fla. 2011), and Rigiterink v. State, 66 So. 3d 866 (Fla. 2011), which now demonstrate that Petitioner does not have greater protections on

this ground under the Florida constitution than under the U.S. constitution. Third, trial counsel cannot be considered to have provided deficient representation in not raising this issue at the time of trial where the trial was held in 2003 but the first of the cases on this issue, Roberts v. State, 874 So. 2d 1225 (Fla. 4th DCA 2004), did not even issue until 2004. See, e.g., Anthony v. State, 980 So. 2d 610, 612-13 (Fla. 4th DCA 2008)(given the deep division on this issue still extant, counsel could not be considered ineffective for not being the first attorney to raise it).

D. Issue 16: Respecting Petitioner's allegations in the initial brief that the videotape was not properly authenticated when put in evidence at the suppression hearing and that the State did not establish a chain of custody, (IB 41), to the extent these are not framed as claims of ineffective assistance of counsel, those would seem to be issues for a direct appeal. Smith v. State, 445 So. 2d 323, 325 (Fla. 1983)("Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack."). Moreover, as the State pointed out below, the videotape and audiotape were running concurrently and Detective Dennis authenticated the audiotape and videotapes by identifying them as the audio and video recordings of her conversation with the defendant and of the defendant's conversation with his

girlfriend and stating that she had reviewed the recordings prior to Court, and that they accurately reflected the actual conversations. (R3 507-510) Pursuant to Section 90.901, Florida Statutes, the test for authentication under the Florida Evidence code is whether the evidence is "sufficient to support a finding that the matter is what its proponent claims." The trial judge must evaluate whether the evidence is sufficient in each instance on its own merits, "there being no specific list of requirements for such a determination." Justus v. State, 438 So. 2d 358, 365 (Fla. 1983); Allen v. State, 492 So. 2d 802, 803 (Fla. 1st DCA 1986).

Further respecting these allegations as well as respecting Petitioner's allegations that his counsel did not investigate apparent tampering with the tape, the State pointed out in its reply to the Rule 3.850 motion below that defense counsel himself reviewed the tapes and acknowledged that they were redacted, as had evidently been previously agreed between the parties, with the exception being that the State had started the redaction of exhibit B on page 49 instead of page 51. (R2 283; R3 513-14) The State then made it clear that the redaction was started earlier to avoid any "inappropriate things the defendant did;" a comparison of the actual statement and redacted statements show that references to the defendant's probation, prior record, and prior offenses were redacted. (R3 514; R2 292-

388; R3 515-563) The State also noted that it was going to be very obvious that the tape had been edited and there was going to be some spots where it was blank and there was a loud noise and the judge accordingly instructed the jury to disregard the editing. (R5 883-884)

To the extent that Detective Dennis asserted that Petitioner had admitted to penetrating the victim, Petitioner unwarrantedly assumed that this, in combination with "flashes/splices," meant that the tape had been unwarrantedly tampered with rather than that the tape had been redacted pursuant to prior agreement and that Detective Dennis had simply made an error of recollection. Notably, counsel did review the tapes and did not notice any tampering beyond the agreed upon redactions nor is same evident from a comparison of the redacted and unredacted tape transcripts. Moreover, the fact that one transcript was of the redacted tape and one transcript was of the unredacted tape would explain the discrepancy between an 80 page transcript and a 104 page transcript. And, even more notably, Petitioner, who was present during the taped conversations, has not pointed to a single statement occurring, or not occurring, during the tapes that conceivably could have been "tampered with," other than the error in Detective Dennis' recollection.

In sum, there was no ineffectiveness. This claim is simply meritless.

E. Issue 19: Regarding the claim that counsel was ineffective for failing to investigate and present expert testimony regarding parental alienation syndrome, this claim is also clearly without merit. First, neither the victim's aunt nor the defendant is a "parent" and the syndrome self-evidently applies to "parents." Ellis v. Ellis, 952 So. 2d 982, 992 (Miss. 2006)(syndrome is defined as a systematic programmed alienation of a child from one parent brought upon by the other parent). Defendant has provided no citation to scientific authorities to suggest otherwise. Second, it has been criticized as lacking an adequate scientific basis for admissibility. Jennifer Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, 26 Children's Legal Rts. J 1 (2006). Third, Petitioner failed to name an expert who could have appeared and failed to detail their testimony. Bryant v. State, 901 So. 2d 810 (Fla. 2005). As to this pleading deficiency, the trial court properly recognized that there was no need to provide an opportunity to amend the claim where Petitioner could not overcome the first two reasons: that the theory lacked scientific credibility and self-evidently did not apply to non-parents, especially when the parents are still alive and in the picture. This is all the more true when Petitioner is not even related to the victim.

F. Issue 21: While this claim was less than clear, it appeared that Petitioner was contending that the State's playing of a certain portion of the recorded statement occurring on page 563, lines 15-23, which is mostly inaudible but appears to be a reference to the end of the interview and Petitioner's question as to whether he would be able to get bond (the answer was probably) was in contravention of the trial court's ruling on suppression. As the State pointed out, Petitioner has not shown by this brief reference to bond that anything prejudicial occurred.

As for the transition from being uncuffed to being cuffed, the trial court had already informed the jury that the tape had been redacted and that they were not to think anything of it or take it into consideration. (R5 884) Moreover, the State was entitled to show both the tape of Petitioner's initial, uncuffed, conversation with the detective and the tape of Petitioner's later, cuffed, conversation with his girlfriend. The fact that Petitioner had been handcuffed in the interim could not be helped. Finally, there was no need for the jury to assume Petitioner had stated something incriminating in the gap in the tape where Petitioner had already made sufficient incriminating statements prior to the gap to justify his being cuffed. The sudden transition was not unduly prejudicial under the circumstances.

ISSUE V: NEITHER THE TRIAL COURT NOR APPELLATE COURT ERRED IN DENYING RELIEF ON ISSUE 2, THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE INSTRUCTION ON ATTEMPTED CAPITAL SEXUAL BATTERY; THERE WAS EVIDENCE THAT COULD BE CONSTRUED AS CONSTITUTING AN ATTEMPT AS WELL AS EVIDENCE THAT COULD BE CONSTRUED AS CONSTITUTING THE COMPLETED OFFENSE. (RESTATED).

The trial court did not err in summarily denying the claim that counsel was ineffective for failing to object to the instruction on attempted capital sexual battery as argued in Issue 2. The record conclusively refuted Petitioner's claim and supported a summary denial without an evidentiary hearing. Therefore, the appellate court did not err in affirming the trial court without further ado.

Notably, the issue of whether or not there was penetration, as opposed to a mere touching, was hotly contested by the defense during trial. And, there was evidence that could support both a completed battery and an attempt. For example, during his cross examination, counsel had elicited from the victim that prior to speaking with Detective Dennis, she stated that the defendant had touched her but after speaking with Detective Dennis, she stated that the victim had actually put his finger inside her. (R3 480-81) Similarly, during cross-examination of Aunt [redacted], defense counsel elicited from her that the victim never stated that the defendant put his finger in her vagina. (R3 491, 492) During cross of the victim's father, counsel elicited from the father that the victim stated Petitioner

touched her and he did not recall her stating that Petitioner put his finger inside her vagina. (R5 854) Finally, during cross-examination of the detective, counsel questioned the detective about the victim's statements regarding touching versus penetration. (R3 567-571) Despite Petitioner's efforts to suggest that the evidence **could only be interpreted** as showing the completed act, that is, an actual penetration, it is clear that the evidence **could also be interpreted** to show only an attempt, that is, a touch. Thus, there was evidence which could be interpreted to support both the attempt and the completed act. This is supported by the fact that one of the ways in which counsel sought to discredit the victim was to suggest that she had changed her story from a touching to an actual penetration after talking to the detective.

Given this strategy, it is hardly surprising that counsel would not object to giving an instruction on an attempt in addition to an instruction on the completed act. As the trial transcript refuted Petitioner's allegations on this point, there was simply no need to hold an evidentiary hearing.

The State submits that Badger v. State, 933 So. 2d 729 (Fla. 4th DCA 2006), is distinguishable because it is clear in that case that the evidence showed **only** a completed crime, as contrasted to here where there was also evidence to support an attempt. Based on this distinction, there is no need to remand

for an evidentiary hearing on the issue of whether counsel was acting as a matter of trial strategy in failing to object to the attempt instruction.

Moreover, the State submits that, as a matter of common sense, there was no reason to object. As the judge below noted, the Petitioner was facing a mandatory life sentence if convicted as charged of capital sexual battery, and giving the attempt instruction would allow the jury to "pardon" the defendant and find him guilty of a lesser crime with a maximum sentence of only thirty years. (R4 668) See Sanders v. State, 946 So. 2d 953, 958 (Fla. 2006)(Florida recognizes the inherent power of a jury to pardon despite direct evidence of the greater crime). See also s. 794.011(2)(a), Fla. Stat.; s. 775.082(1) and (3)(b), Fla. Stat. "Despite their suspect pedigree, jury pardons have become a recognized part of the system; so much so that, in direct appeals, [t]he failure to instruct on the next immediate lesser included offense (one step removed) constitutes error that is per see reversible.'" Reddick v. State, 394 So. 2d 417, 418 (Fla. 1981). The State submits that it was equally as reasonable to not object as it would have been to object. As the judge noted, Petitioner cannot show that counsel's failure to object adversely affected him.

Further, even if counsel had objected, it is clear the State could, and would, have requested the instruction, the request

would have been granted based on the evidence, and the objection would have been fruitless. (R4 668) Counsel cannot be considered ineffective for failing to make a meritless objection. Melendez, 612 So. 2d at 1369. Therefore, Badger is, again, distinguishable.

In sum, neither the trial court nor the appellate court erred in denying relief on this ground.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court UPHOLD the decision of the Fourth District to affirm the trial court's denial of post conviction relief.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL on January 13, 2014: Gary Lee Caldwell, Assistant Public Defender, Office of the Public Defender, Fifteenth Judicial Circuit, 421 Third Street, West Palm Beach, FL 33401 at gcaldwel@pd15.state.fl.us, cgload@pd15.state.fl.us, and appeals@pd15.state.fl.us.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Celia A. Terenzio
SENIOR ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 656879

/s/ Jeanine Germanowicz
By: JEANINE GERMANOWICZ
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0019607
Attorney for Respondent, State of Fla.
Office of the Attorney General
1515 N. Flagler Drive, Ste. 900
West Palm Beach, FL 33401
Primary E-Mail:
CrimAppWPB@myfloridalegal.com
(561)837-5000
(561)837-5108