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In the Supreme Court of Florida

WILLIE JAMES HODGES,

Appellant,

v. CASE NO. SC14-878

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, WILLIE JAMES HODGES, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is the postconviction appeal of the denial of a postconviction motion in a capital case.

The facts of the murders and the details of the trial are recounted in the Florida Supreme Court's direct appeal opinion. *Hodges v. State*, 55 So.3d 515, 519-526 (Fla. 2010). On the morning of December 19, 2001, Hodges entered Patricia Belanger's home, fatally stabbed and bludgeoned her, and then fled through a window. *Id*. at 519. The Florida Supreme Court affirmed the conviction for first-degree murder and the death sentence. *Id*.

Hodges filed a petition for writ of certiorari in the United States Supreme Court raising a claim that the Sixth Amendment right to a jury trial provision requires a jury determination of mental retardation. On October 3, 2011, the United States Supreme Court denied the petition for writ of certiorari. *Hodges v. Florida*, - U.S. -, 132 S.Ct. 164, 181 L.Ed.2d 77 (2011).

Hodges then filed a 3.851 motion for post-conviction relief in the trial court. On June 25 & 26, 2013, the trial court conducted an evidentiary hearing. At the close of the evidentiary hearing, both parties gave short closing arguments. Both parties submitted written closing arguments as well. (Vol. IV 459-547; 552-577; 583-587). The trial court denied the motion for postconviction relief. (Vol. V 639-683).

On appeal from the trial court's denial of his successive motion, Hodges raises six issues in this Court.

SUMMARY OF ARGUMENT

ISSUE I

Hodges asserts that his trial counsels, Jerry Allred and Martin Lester, were ineffective for not consulting a DNA expert and for not cross-examining the State's DNA experts regarding their use of the exclusion principle rather than the inclusion principle in their statistical calculations. He also asserts that his trial counsel was ineffective in not challenging the scientific validity of the bite mark testimony. Counsel did challenge the DNA evidence and therefore, counsel was not ineffective. Moreover, counsel was not ineffective for failing to challenge the bite mark evidence because bite mark evidence was admissible at the time of the trial under Florida law. And there was no prejudice from failing to challenge the bite mark evidence because the DNA established Hodges guilt of this crime. Thus, the trial court properly denied these two claims of ineffectiveness.

ISSUE II

Hodges asserts that his trial attorneys were ineffective for misadvising him not to testify in his own behalf. Hodges asserts that counsel misunderstood the scope of possible cross-examination. As the trial court found, Hodges' testimony that his attorneys' misadvised him regarding the possible scope of cross-examination was incredible. The trial court properly denied this claim of ineffectiveness.

ISSUE III

Hodges asserts that his guilt phase counsel Allred was ineffective for presenting McCaskill as a defense witness. McCaskill, although he identified another person in a photo line-up as the man he saw near the crime scene, tentatively identified Hodges at trial as the man. Hodges claims that his trial attorneys were ineffective for failing to have a third party present when they interviewed Mr. McCaskill regarding his statement that a person fitting Hodges' description trespassed the morning of the murder putting Hodges in the area of the murder. As the trial court found, because the witnesses' testimony was a surprise, there was no deficient performance. Furthermore, as the trial court found, there was no prejudice because the jury was aware that McCaskill had previously identified another man. Moreover, the DNA evidence would remain the same even if the witness had testified as expected that he did not think Hodges was the man. Thus, the trial court properly denied the claim of ineffectiveness.

ISSUE IV

Hodges asserts that his trial attorneys were ineffective for failing to procure the phone records of Debra Silver to establish that her mother did not have a telephone at the time to rebut her testimony that Hodges confessed to her over the telephone. IB at 84. This claim of ineffectiveness is pure speculation as the phone records are no longer available. Thus, the trial court properly denied this claim of ineffectiveness.

ISSUE V

Hodges asserts that his guilt phase counsel Allred was ineffective for failing to cross-examine Williams and Taylor regarding their identification of the jacket and shoes. As the trial court concluded, there was no deficient performance and there was no prejudice. Counsel was attempting to establish that Hodges' jacket had been stolen, so any questions regarding the ownerships of the jacket or shoes would have been out of keeping with that theme. Nor was there any prejudice. Based on the personal photograph in the jacket, the jury would have concluded the jacket was Hodges' jacket, regardless of any such questions. The trial court properly denied this claim of ineffectiveness.

ISSUE VI

Hodges asserts that his guilt phase counsel Allred was ineffective in his cross-examination of the State's crime scene technician Janice Johnson regarding her testimony that the perpetrator entered the house bare-handed to then covered his hands once inside the house. As the trial court concluded, there was no deficient performance and no prejudice. Counsel made his points via closing argument instead of via cross-examination. And there was no prejudice. It is the DNA evidence and the fingerprints on the photographs that were the critical damning pieces of evidence. Thus, the trial court properly denied this claim of ineffectiveness.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILING TO PRESENT DEFENSE DNA AND BITE MARK EXPERTS?

Hodges asserts that his trial counsels, Jerry Allred and Martin Lester, were ineffective for not consulting a DNA expert and for not cross-examining the State's DNA experts regarding their use of the exclusion principle rather than the inclusion principle in their statistical calculations. IB at 48. He also asserts that his trial counsel was ineffective in not challenging the scientific validity of the bite mark testimony. Counsel did challenge the DNA evidence and therefore, counsel was not ineffective. Moreover, counsel was not ineffective for failing to challenge the bite mark evidence because bite mark evidence was admissible at the time of the trial under Florida law. And there was no prejudice from failing to challenge the bite mark evidence because the DNA established Hodges guilt of this crime. Thus, the trial court properly denied these two claims of ineffectiveness.

Standard of review

The standard of review for a claim of ineffective assistance of counsel is *de novo*. This Court reviews a postconviction court's rulings on the performance and prejudice prongs of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *de novo*. *Johnson v. State*, 104 So.3d 1010, 1022 (Fla. 2012).

Ineffective assistance of counsel

To establish ineffective assistance of counsel, a defendant must establish both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must satisfy both the performance and prejudice prongs to show ineffectiveness.

There is a strong presumption that trial counsel's performance was not ineffective. *Pagan v. State*, 29 So.3d 938, 949 (Fla. 2009). "A fair assessment of an attorney'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." *Pagan*, 29 So.3d at 949 (quoting *Strickland*, 466 U.S. at 689). Judicial scrutiny of counsel's performance must be highly deferential. "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." *Pagan*, 29 So.3d at 949 (quoting *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000)). An attorney can almost always be second-guessed for not doing more but that is not the standard. *Id.*

The strong presumption that counsel's performance was reasonable is even stronger when trial counsel is "particularly experienced." *Reed v. Sec'y, Fla. Dep't. of Corr.*, 593 F.3d 1217, 1244 (11th Cir. 2010)(citing *Chandler v. United States*, 218 F.3d 1305, 1316 & n.18 (11th Cir. 2000)(en banc)). Jerry Allred testified at the evidentiary hearing regarding his training and experience. He

worked for both the State Attorney's Office and the Public Defender's Office. He was a prosecutor for over 18 years. He then went into private practice. He handled approximately six capital cases while in private practice.

DNA experts

Hodges first asserts his trial counsel was ineffective in his handling of the DNA evidence.

Trial

Dr. Martin Tracey, a professor of genetics at Florida International University, testified as to the population statistics at trial. (T. Vol. X 1807-1843). While Dr. Tracey testified regarding exclusions, (T. Vol. IX 1824, 1825, 1826, 1829), he also testified as to inclusions. (T Vol. IX 1830-1831). Dr. Tracey testified that "the frequency of the profile found on the other sock, which matched Hodges on all thirteen available markers, is one in 990 quadrillion." *Hodges v. State*, 55 So.3d 515, 521 (Fla. 2010).

The trial court's ruling

The trial court rejected claims I, II, and III of the motion. (T. Vol. V 647-659). The trial court recounted the DNA experts testimony at trial. (T. Vol. V 649-654). The trial court recounted the defense expert's Mr. Noppinger's testimony at the evidentiary hearing regarding the DNA evidence. (T. Vol. V 648-649,654). The trial court observed that "most importantly" Mr. Noppinger

acknowledged that both inclusion and exclusion are accurate. (T. Vol. V 654). The trial court also noted that defense counsel cross-examined two of the State's experts, both Johnson and Dr. Tracey, on the DNA numbers. (T. Vol. V 655-657). The trial court found no deficient performance because challenging the DNA evidence would be inconsistent with the defense that the sock with Hodges' blood on them had been stolen. (T. Vol. V 658). The trial court also found no deficient performance because counsel "did not leave the DNA evidence wholly unchallenged." (T. Vol. V 658). The trial court concluded that there was no deficient performance and no prejudice. (T. Vol. V 659).

Merits

In *Murray v. State*, 692 So.2d 157 (Fla. 1997)(*Murray I*), the Florida Supreme Court held that the lab technician who performed the DNA tests was not qualified to testify as to the population frequency statistics. The Florida Supreme Court explained that there is a second step in DNA testimony regarding whether the DNA "matches" the defendant which is population frequency statistics. *Murray*, 692 So.2d at 161-62. The Florida Supreme Court found that the State's expert was "simply not qualified to report the population frequency statistics at issue here because the expert had no knowledge about the database upon which his calculations were based." *Murray*, 692 So.2d at 164. The Florida Supreme Court observed that the DNA expert must, at the very least, demonstrate a sufficient knowledge of the database used to generate the figures. Because the State "failed to offer a proper expert

witness" or to demonstrate the reliability of the DNA calculations utilized, the Florida Supreme Court then reversed the conviction for a new trial. *see also Butler v. State*, 842 So.2d 817, 827-28 (Fla. 2003)(explaining that DNA testing requires a two-step process, one biochemical and the other statistical and that the first step uses principles of molecular biology and chemistry to determine that two DNA samples look alike and the second step uses statistics to estimate the frequency of the profile in the population but finding the DNA expert to be qualified to testify regarding the statistics even though she did not participate in the creation of the database); *Banks v. State*, 46 So.3d 989, 997 (Fla. 2010)(finding a claim that a population geneticists was not called to testify as to the population frequency statistics, as required by *Murray*, was not properly preserved).

Under *Murray I*, the State was required to present an expert in population frequency statistics to testify as to the DNA statistics. The State was required to present an expert, such as Dr. Tracey, a professor in genetics from Florida International University. Controlling Florida Supreme Court precedent required a population geneticists testify.

Hodges relies on protocols developed by the FBI's Technical Working Group on DNA Analysis Methods (TWGDAM), but it is not clear that there was any violation of these protocols. The protocols basically require that any testimony that the DNA is a "match" be quantified. The protocols state that the jury should not just hear that the DNA matches the defendant's DNA. Rather, the jury should be provided figures regarding how close a match there is between

the two DNA results. But that is exactly what Dr. Tracey did in his testimony. He testified that the match was "one in 990 quadrillion." The State complied with the protocols. There was no deficient performance from not cross-examining the State's expert regarding inclusion versus exclusion because the critical figure one in 990 quadrillion complied with the protocols.

Moreover, counsel cannot be deemed ineffective for failing to do something that counsel, in fact, did. *Bates v. State*, 3 So.3d 1091, 1106, n.20 (Fla. 2009)(observing that counsel cannot be held ineffective for what counsel actually did); *Stephens v. State*, 975 So.2d 405, 415 (Fla. 2007)(explaining that counsel cannot be deemed ineffective for failing to object when, in fact, he did object). As the trial court noted, defense counsel cross-examined two of the State's experts, both Johnson and Dr. Tracey, on the DNA numbers. (T. Vol. V 655-657).

Furthermore, Hodges basically admitted that the blood on the sock was his but came to be on the sock when he cut his hand fixing his car. As *Strickland* itself teaches, reasonableness of counsel's conduct depends on the information supplied by the defendant. *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. Counsel is not required to challenge a fact when his client admits to that fact. There was no deficient performance.

Alternatively, there was no prejudice. As the State argued at the close of the evidentiary hearing, there is no prejudice from the failure to challenge the DNA if the DNA results remain intact. The DNA results that Hodges is the perpetrator at one 990 quadrillion remains intact. The defense expert presented at the

evidentiary hearing, Dr. Noppinger, admitted that both the one in 990 quadrillion figure showing that Hodges was the perpetrator of this murder and the one in 214 figure showing Hodges was the perpetrator of the *Williams* rule murder were valid.

In *Crain v. State*, 78 So.3d 1025, 1034-38 (Fla. 2011), the Florida Supreme Court rejected a claim of ineffectiveness for entering stipulation regarding the DNA rather than presenting an independent DNA expert. The Florida Supreme Court concluded that trial counsel made a reasonable strategic decision to enter the stipulation. *Id*. at 1036. At the evidentiary hearing the defense expert was unable to testify that the source of the DNA evidence in this case was derived from anything other than blood or that cross-contamination actually occurred. *Id*. at 1037-38. The Florida Supreme Court concluded that there was no prejudice because the testimony at the evidentiary hearing did "not disclose any definitive evidence of invalid or even questionable DNA test results." *Id*. at 1038.

In *Reed v. State*, 875 So.2d 415, 423-425 (Fla. 2004), the Florida Supreme Court rejected a claim of ineffectiveness for failing to retain a serology expert and failing to challenge the State's blood-type evidence. At trial, the State presented a forensic serologist that testified that the semen from the victim was consistent with the defendant's type. At the evidentiary hearing, Reed presented an expert who criticized the state's experts testimony and believed that Reed could have been excluded but who admitted the correctness of the state's expert finding that Reed fell within the fifty-six to fifty-seven percent of the male

population that could have had intercourse with the victim. The Florida Supreme Court reasoned that "trial counsel's consultation with an independent serologist would not have changed the statistical numbers in any way" and therefore, there was no ineffectiveness.

As in *Crain* and *Reed*, because the underlying science remains valid, there is no prejudice. Hodges would have still been convicted in light of the DNA evidence regardless of whether counsel attacked the DNA evidence in the manner postconviction counsel suggests. The jury would have still heard testimony that Hodges' blood from the cut on his hand was a DNA match of the blood on the sock at "one in 990 quadrillion" odds. There was no prejudice. And this same analysis applies to the other claims of ineffectiveness regarding prejudice as well. The trial court properly denied this claim of ineffectiveness.

BITE MARK EVIDENCE

Hodges next asserts that his trial attorneys were ineffective for failing to challenge the admissibility of bite mark evidence based on *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

The trial court's ruling

The trial court denied claim VIII of the motion. (T. Vol. V 676-679). The trial court noted, as guilty phase counsel Allred testified at the evidentiary hearing, bite mark evidence was admissible in Florida courts at the time of this trial. (T. Vol. V 677). The trial court noted that counsel objected at trial when

the State's bite mark expert Dr. Levine testified that Hodges' mouth "probably made this mark." (T. Vol. V 677-678). The trial court concluded that counsel's performance was not deficient because bite mark evidence was generally admissible at the time. (T. Vol. V 678). The trial court also noted that counsel was of the opinion that the jury did not "attach a great deal of significance" to the bite mark evidence, and therefore did not want to "pick a battle in a losing war." (T. Vol. V 678). Counsel also noted that he did not want argue about guilt in a manner that would undermine the penalty phase and so they would have the jury's ear during the penalty phase. (T. Vol. V 678-79). The trial court observed that the State did not rely heavily on the bite mark evidence in closing; rather, the State relied heavily on the DNA evidence in closing. (T. Vol. V 679). The trial court concluded that there was no deficient performance and no prejudice. (T. Vol. V 679).

Merits

There was no deficient performance. The controlling Florida Supreme Court case at the time of trial in 2008 was that bite mark evidence was admissible. *Mitchell v. State*, 527 So.2d 179, 181 (Fla. 1988)(stating that the "Court has previously approved the admissibility of expert bite mark testimony"); *Bundy v. State*, 455 So.2d 330, 348 (Fla. 1984)(finding that the "science of odontology, which is based on the discovery that the characteristics of individual human dentition are highly unique, is generally recognized by scientists in the relevant fields and therefore is an

acceptable foundation for the admissibility of expert opinions into evidence" after a hearing). As trial counsel testified at the evidentiary hearing, the well-established law was that bite mark evidence was admissible in a capital trial. Counsel is not required to anticipate changes in the law, much less bring those changes about to be effective. *Walton v. State*, 847 So.2d 438, 445 (Fla. 2003)(stating that the court "has consistently held that trial and appellate counsel cannot be held ineffective for failing to anticipate changes in the law" citing *Nelms v. State*, 596 So.2d 441, 442 (Fla. 1992) and *Stevens v. State*, 552 So.2d 1082, 1085 (Fla. 1989)).

Nor was there any prejudice from failing to challenge the admissibility of the bite mark evidence. The bite mark evidence was not the centerpiece of the State's evidence against Hodges; the DNA evidence was. The Florida Supreme Court's direct appeal opinion in recounting the evidence against Hodges included only one sentence regarding the bite mark evidence and that one sentence merely observed that Hodges could not be excluded from making the bite mark. *Hodges*, 55 So.3d at 522 (stating: "Dr. Phil J. Levine, a forensic dentist, opined that the bite mark on Jansen's thigh was made by a human and that based on dental impressions, he could not exclude Hodges' teeth from being the teeth that made the bite mark."). Regardless of the bite mark evidence, the state had more powerful scientific evidence of Hodges' guilt in the form of indisputably reliable DNA. Hodges committed this murder at one in 990 quadrillion. There was no prejudice.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR ADVISING THE DEFENDANT NOT TO TESTIFY?

Hodges asserts that his trial attorneys were ineffective for misadvising him not to testify in his own behalf. IB at 66. Hodges asserts that counsel misunderstood the scope of possible cross-examination. As the trial court found, Hodges' testimony that his attorneys' misadvised him regarding the possible scope of cross-examination was incredible. The trial court properly denied this claim of ineffectiveness.

Trial

During opening arguments, guilt-phase counsel Allred told the jury that he anticipated that Hodges would testify. (T. Vol. VI 670-671). But counsel also referred to the possibility that Hodges would not testify. (T. Vol. VI 671). He told the jury "you must not hold it against anyone if they choose not to testify." (T. Vol. VI 671). Allred also discussed the "flip side" of the defendant taking the stand with the jury. (T. Vol. VI 672).

During the trial, the trial court inquired as to whether Allred had made a decision regarding Hodges testifying. (T. Vol. X 1899). Allred responded that at this point, "I believe he is not going to testify." (T. Vol. X 1899-1900). The trial court then addressed Hodges personally and conducted an extensive colloquy. (T. Vol. X 1900-1906). The trial court informed him of his right to testify and his right to personally make that decision regardless of counsel's advise as well as giving him examples of the advise

supporting the decision not to testify and the advise supporting the decision to testify. (T. Vol. X 1900-1906). Hodges, however, refused to directly answer the trial court's question regarding whether he wanted to testify stating: "I want to testify or I don't" (T. Vol. X 1903).

Evidentiary Hearing Testimony

Hodges testified at the evidentiary hearing that he wanted to testify but that his attorneys advised him not to do so because they mistakenly believed and told him that the Alabama homicide could be used to impeach him.

The trial court's ruling

The trial court denied claim X of the motion. (Vol. V 659-666). The trial court concluded that there was no misadvise. (Vol. V 665). The trial found that the defendant's testimony at the evidentiary hearing regarding the advice he was given about possible impeachment with his prior record to be incredible. (Vol. V 665). The trial court found the defendant was "properly advised regarding the impeachment evidence he faced" and after a "lengthy discussion," he made "the decision not to testify." (Vol. V 665). The trial court also found no *Strickland* prejudice. (Vol. V 665). The trial court noted that Hodges' proposed testimony would not have accounted for how the sock ended up on the path tracked by the dog or the DNA evidence from the victim in this case, Ms. Belanger. (Vol. V 665). Nor, as the trial court observed, would Hodges'

proposed testimony negate the confessions made to Silvers and Breedlove. (Vol. V 665-666).

Merits

There was no deficient performance. Counsel did not misadvise the defendant. Counsel Allred testified at that he would have explained to Hodges that, because the trial court had excluded the evidence of the Alabama case, he would not be cross-examined regarding that case. As the trial court found, Allred properly advised Hodges and Hodges' testimony to the contrary was incredible. Hodges was not misadvised - he was playing games. His nonsensical response to the trial court that: "I want to testify or I don't" during the colloquy at trial establishes this game. (T. Vol. X 1903). This postconviction claim is merely a continuation of that same game. This Court defers to a postconviction court's credibility findings because the postconviction court has a "superior vantage point in assessing the credibility of witnesses and in making findings of fact." *Moore v. State*, 132 So.3d 718, 727 (Fla. 2013)(citing *Porter v. State*, 788 So.2d 917, 923 (Fla. 2001)).

Moreover, "no defendant in any court in the United States has been able to prove *Strickland* prejudice on the basis of his counsel advising him not to testify in his own defense at trial." *United States v. Wines*, 691 F.3d 599, 606 (5th Cir. 2012)(rejecting a claim of ineffectiveness for advising his client not to testify). That is because such advise is the epitome of trial strategy. *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995)(en

banc)(observing which “witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess.”); *United States v. Terry*, 366 F.3d 312, 317 (4th Cir. 2004)(observing that the decision whether to call a defense witness is a strategic decision which courts afford enormous deference citing *United States v. Kozinski*, 16 F.3d 795, 813 (7th Cir. 1994)).

Hodges had two prior convictions. It is a matter of significant debate among the defense bar whether a defendant with a criminal record should testify. Some defense lawyers advise every one of their clients with a criminal record not to testify regardless of any other consideration and think that any defendant with a criminal record who testifies is merely convicting himself. Other defense lawyers believe that it is imperative that the defendant testify in his own behalf. “Even the best criminal defense attorneys would not defend a particular client in the same way” or give them the same advise regarding the wisdom of testifying in their own behalf. *Strickland*, 466 U.S. at 689-690, 104 S.Ct. at 2065-66. It is not appropriate to grant relief based on *Strickland* when dealing with such contentious debates. *Basham v. United States*, 2013 WL 2446104, 60 (D.S.C. 2013)(rejecting a claim of ineffectiveness for conceding guilt to most of the counts in a capital case and noting that there are “different schools of thought, each of which has its vocal adherents in the criminal defense bar” regarding the wisdom of conceding guilt but such decisions “are quintessentially the type of strategy decisions that are best left to skilled trial counsel.”). Courts should not join

or adopt a particular school of thought on such subjects because doing so can itself be a violation of the Sixth Amendment right to counsel. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 (stating that any "set of rules" for counsel's conduct "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions."). And while counsel's representation may be regarded as reasonable even when it "deviated from best practices or most common custom," it is certainly reasonable when it falls within a standard school of thought. *Harrington v. Richter*, - U.S. -, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011). There was no deficient performance in advising Hodges not to testify.

There was no prejudice either. The jury would not have acquitted Hodges if he had testified in his defense. He simply does not have compelling version of events. Hodges testimony at the evidentiary hearing had numerous holes in it. Additionally, his testimony does not account for the DNA evidence. Hodges claimed to have cut his hand working on a car but that version of events does not account for how the sock with his DNA ended up on the path the perpetrator took leaving the victim's house. The victim's daughter saw a man running from the house who jumped the fence. A dog shortly afterward tracked the perpetrator by jumping over the fence. The white socks where found on that path. As the Florida Supreme Court observed, DNA testing of the recovered socks indicated that "at least one of the socks was almost certainly worn by Hodges." *Hodges v. State*, 55 So.3d 515, 541 (Fla. 2010). "The mitochondrial DNA profile developed from a hair found on Belanger's body and one of

the hairs found on the jacket matched Hodges' known mitochondrial DNA profile, and the partial YSTR DNA profile developed from an anal swab of the victim matched Hodges' known DNA profile on all six available markers." *Hodges*, 55 So.3d at 541. While Hodges proposed testimony would have accounted (lamely) for his fingerprints on the photographs and the photographs themselves being in the jacket, it would not have accounted for this DNA evidence. Hodges would have been convicted regardless of his testimony.

In *Jones v. Sec'y, Dep't. of Corr.*, 487 Fed.Appx. 563, 565, 2012 WL 3641549, 1 (11th Cir. 2012), the Eleventh Circuit held that counsel was not ineffective in advising his client not to testify. One of the victims of the robbery stated that the perpetrator had "no noticeable tattoos." Jones argued that his counsel was ineffective for not having him testify to show the jury his "full-sleeved" tattoos in support of the defense of mistaken identification. The court rejected the claim reasoning that "no competent counsel" would have advised him not to take the stand because the State would have challenged Jones' credibility on cross-examination and the jury would have learned that he had five prior felony convictions. *Id*. at *3. The Court also found no prejudice from not taking the stand, because Jones could not show a reasonable probability of a different result if he had testified in light of the evidence of his guilt that the State presented. *Id*. Jones also raised a claim of ineffectiveness for failing to correctly advise him about the scope of cross-examination. Jones claimed that he did not testify based on his attorney's incorrect

advice that, if he took the stand, the prosecutor could ask him about the nature and facts of his five prior felony convictions when under Florida law, the facts are not admissible unless he opened the door to that line of questioning. The Court rejected this claim finding no prejudice in light of the evidence of his guilt that the State presented.

Here, as in *Jones*, even assuming the advise was incorrect and that that misadvice automatically amounts to deficient performance, there was no prejudice.

Opposing counsel's reliance on *Ferrer v. State*, 2 So.3d 1111, 1112 (Fla. 4th DCA 2009) and *Tyler v. State*, 793 So.2d 137, 141 (Fla. 2d DCA 2001), is misplaced. *Ferrer* was merely a remand for an evidentiary hearing. The Fourth District merely concluded that such a claim was legally sufficient to warrant an evidentiary hearing be held. Hodges had an evidentiary hearing. *Ferrer* does not stand for the proposition that misadvice regarding the possible scope of cross-examination regarding the details of the prior conviction is necessarily deficient performance as opposing counsel would have it.

Tyler involved a claim of ineffectiveness regarding misadvise to a defendant to the effect that if he testified in his trial the jury would learn the nature of his past crimes, even charges of which he had been acquitted. *Tyler* does contain statements to the effect that where "counsel incorrectly informs a defendant regarding the use of prior convictions as impeachment, specifically, that upon testifying the jury will hear the specific nature of the prior convictions, and the defendant shows that

because of the misinformation he did not testify, he has satisfied the deficient performance prong of an ineffective assistance of counsel claim" and "[i]f Tyler's counsel provided misinformation regarding the use of prior convictions or threatened him with withdrawal as alleged, Tyler has satisfied the performance prong." *Tyler*, 793 So.2d at 141 (citing *Everhart v. State*, 773 So.2d 78, 79 (Fla. 2d DCA 2000)); *Tyler*, 793 So.2d at 142. But *Tyler* was also merely a remand for an evidentiary hearing. These statements, therefore, are dicta. *Id*. at 142.

There was no ineffectiveness from advising Hodges not to testify. The trial court properly denied this claim of ineffectiveness.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR PRESENTING McCASKILL AS A DEFENSE WITNESS? (Restated)

Hodges asserts that his guilt phase counsel Allred was ineffective for presenting McCaskill as a defense witness. McCaskill, although he identified another person in a photo line-up as the man he saw near the crime scene, tentatively identified Hodges at trial as the man. Hodges claims that his trial attorneys were ineffective for failing to have a third party present when they interviewed Mr. McCaskill regarding his statement that a person fitting Hodges' description trespassed the morning of the murder putting Hodges in the area of the murder. As the trial court found, because the witnesses' testimony was a surprise, there was no deficient performance. Furthermore, as the trial court found, there was no prejudice because the jury was aware that McCaskill had previously identified another man. Moreover, the DNA evidence would remain the same even if the witness had testified as expected that he did not think Hodges was the man. Thus, the trial court properly denied the claim of ineffectiveness.

The trial court's ruling

The trial court denied claim VII of the motion. (T. Vol. V 670-676). The trial court found that it was not deficient performance to present McCaskill as a defense witness because counsel expected McCaskill to testify that Hodges was not the man. (T. Vol. V 674-675). The trial court found the decision to be a reasonable strategic decision based on the information available to counsel at

the time he made the decision to present the witness. (T. Vol. V 675). The trial court also found that there was no prejudice because it was clear from Mrs. McCaskill's testimony that her husband could not identify Hodges in the photo line-up. (T. Vol. V 675). The trial court did not think that having a third witness to that incident would have "made a difference at trial." (T. Vol. V 675).

Merits

There was no deficient performance from presenting McCaskill as a witness. "Representation will not be labeled ineffective because unknown to counsel a witness decides to change his testimony on the stand." *Mountjoy v. State*, 750 S.W.2d 471, 474 (Mo. App. Ct. 1988)(citing *Armbruster v. State*, 686 S.W.2d 519, 520 (Mo. App. Ct. 1985)).

There was also no deficient performance from agreeing to the stipulation. A stipulation that a witness thinks that the defendant resembles the person who was in the area at the time of the murder but is "not sure" simply does not hurt the defendant. Mr. McCaskill did not positively identify Hodges. The Florida Supreme Court has rejected claims of ineffectiveness where counsel agreed to stipulate to facts that were much more damning than this equivocal stipulation. *Simmons v. State*, 105 So.3d 475, 491-92 (Fla. 2012)(rejecting a claim of ineffectiveness for stipulating to the fact that vaginal washings from the victim contained the defendant's semen where the stipulation included the statement that the DNA was not relevant to the charge of sexual battery and where

counsel testified she believed a stipulation would be less damaging than live testimony). So, there was no deficient performance.

Nor was there any prejudice. Regardless of any possible impeachment of Mr. McCaskill regarding his inability to identify Hodges from a photopak, the DNA establishes that Hodges was the murderer. Hodges' DNA was a one in 990 quadrillion match of the DNA on the sock. There was no prejudice. So, the trial court properly denied this claim of ineffectiveness.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO PROCURE THE PHONE RECORD TO IMPEACH SILVER'S TESTIMONY THAT HODGES CONFESSED TO HER ON THE PHONE? (Restated)

Hodges asserts that his trial attorneys were ineffective for failing to procure the phone records of Debra Silver to establish that her mother did not have a telephone at the time to rebut her testimony that Hodges confessed to her over the telephone. IB at 84. This claim of ineffectiveness is pure speculation as the phone records are no longer available. Thus, the trial court properly denied this claim of ineffectiveness.

The trial court's ruling

The trial court rejected claim VI of the motion. (T. Vol. V 668-670). The phone records from AT&T from May of 2003 were not available at the time of the evidentiary hearing in 2013 (T. Vol. V 669). The trial court concluded their was no deficient performance or prejudice. (T. Vol. V 669-670).

Failure of proof

There is no proof to support this claim of ineffectiveness. The phone records from AT&T from May of 2003 were no longer available. A claim of ineffectiveness cannot be premised on sheer speculation. *Wyatt v. State*, 78 So.3d 512, 533 (Fla. 2011)(stating that counsel cannot be considered ineffective for failing to raise an argument that relies on pure speculation); *Fla. Dep't. of Corr., v. Fana*, - Fed.Appx. -, 2014 WL 6900504, *5 (11th Cir. 2014)(reversing the

district court's grant of habeas relief and rejecting its conclusion that the alleged error resulted in a different outcome as “pure speculation.”)

Merits

There was no deficient performance. Assuming the records had existed and established that her mother did not have a working phone in May of 2003, this line of impeachment of Silver would not have been fruitful. She could have merely stated that she must have been mistaken about the month the conversation occurred or whose phone she was on at the time of the conversation. Impeachment regarding minor details, that jurors understand the average person is unlikely to be able to recall in minute detail, is rarely fruitful. Moreover, Hodges made incriminating statements to Breedlove, as well as Silver. There was no deficient performance.

Alternatively, there was no prejudice. The DNA evidence establishes his guilt independently and at a much higher confidence level than her testimony. Thus, the trial court properly denied this claim of ineffectiveness.

ISSUE V

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO CROSS-EXAMINING TWO WITNESS REGARDING THEIR IDENTIFICATION OF THE JACKET AND THE SHOES? (Restated)

Hodges asserts that his guilt phase counsel Allred was ineffective for failing to cross-examine Williams and Taylor regarding their identification of the jacket and shoes. IB at 87. As the trial court concluded, there was no deficient performance and there was no prejudice. Counsel was attempting to establish that Hodges' jacket had been stolen, so any questions regarding the ownerships of the jacket or shoes would have been out of keeping with that theme. Nor was there any prejudice. Based on the personal photograph in the jacket, the jury would have concluded the jacket was Hodges' jacket, regardless of any such questions. The trial court properly denied this claim of ineffectiveness.

The trial court's ruling

The trial court rejected claim V of the motion. (T. Vol. V 666-668). The trial court concluded their was no deficient performance or prejudice. (T. Vol. V 667). The trial court observed that the jury would be aware that there is more than one "Member's Only" jacket and more than one pair of Timberland boots. (T. Vol. V 667). Neither witness identified either the jacket or the boots as "particularly as Hodges." (T. Vol. V 667). It was counsel intent to establish the items had been stolen, so such impeachment was unnecessary. (T. Vol. V 667-668). The failure to cross-examine the

witnesses on these matters resulted in no prejudice. (T. Vol. V 668).

Merits

There was no deficient performance. Counsel does not have to cross-examine to witness to establish the obvious to be effective. *Cf. Reed v. State*, 875 So.2d 415, 423 (Fla. 2004)(finding no ineffectiveness for not presenting an expert to establish that hairs are easily shed because the fact that hairs shed and are easily transferred is within the average person's realm of knowledge). It is within the common understanding of the average juror that there are numerous jackets of a particular type. Jurors know that there is more than one “Member’s Only” jacket. Jurors also know that Timberland makes more than one pair of boots. Neither witness identified either the jacket or the shoes as definitively belonging to Hodges, based on a unique characteristic, such as a label in the jacket or unique stain or tear on the boots. Because neither testified that there were any unique characteristics to these items, cross-examination on this point was not necessary.

But, more importantly, counsel would have looked silly cross examining a witness in a vain attempt to establish that the jacket was not Hodges’ jacket. Hodges’ personal photographs with his fingerprints were found inside the jacket. The jacket was Hodges’ and there was no point in denying that fact or cross-examining anyone on the matter. Indeed, counsel was attempting to establish

that the jacket was Hodges but had been stolen. Any such cross-examination would have been out of keeping with that theme.

Alternatively, there was no prejudice. Even if defense counsel had cross-examined both witnesses and established that the jacket and shoes were just a particular brand, Hodges would still have been convicted based on the DNA evidence. Furthermore, based on the personal photograph in the jacket, the jury would have concluded the jacket was Hodges' jacket, regardless of any such questions. While Debra Taylor was an important state witness regarding the events of that morning, this particular portion of her testimony was not important. There was no prejudice. The trial court properly denied this claim of ineffectiveness.

ISSUE VI

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILURE TO EFFECTIVELY CROSS-EXAMINE THE STATE'S CRIME SCENE TECHNICIAN JANICE JOHNSON? (Restated)

Hodges asserts that his guilt phase counsel Allred was ineffective in his cross-examination of the State's crime scene technician Janice Johnson regarding her testimony that the perpetrator entered the house bare-handed to then covered his hands once inside the house. IB at 90. As the trial court concluded, there was no deficient performance and no prejudice. Counsel made his points via closing argument instead of via cross-examination. And there was no prejudice. It is the DNA evidence and the fingerprints on the photographs that were the critical damning pieces of evidence. Thus, the trial court properly denied this claim of ineffectiveness.

The trial court's ruling

The trial court rejected claim IX of the motion. (T. Vol. V 679-682). The trial court found no deficient performance and no prejudice. (T. Vol. V 682). The trial court found that Allred performed a "lengthy, through and effective" cross-examination of Johnson. (T. Vol. V 681). The trial court found counsel's tactic of painting her as a hired gun in closing argument was a reasonable tactic. (T. Vol. V 681).

Merits

There was no deficient performance. The trial court found that Allred performed a “lengthy, through and effective” cross-examination of Johnson. (T. Vol. V 681). Counsel made his points via closing argument instead of via cross-examination. It is not ineffective to have the “last word” with an expert by making your points in closing rather than cross.

Regarding the lack of Hodges’ fingerprints inside the house, there is no point in impeaching the crime scene tech on this point because the State could have easily rehabilitated her by merely asking a series of questions about whether fingerprints are always left by a person. The State could have easily established that even if Hodges did not wear gloves at any point, his fingerprints would not necessarily be found inside the house. There was no point quibbling about this. *United States v. Trevino*, 60 F.3d 333, 339 (7th Cir. 1995)(rejecting a claim of ineffectiveness for failing to adequately cross-examine the government's fingerprint expert because rather than “quibbling” with the expert regarding his methodology, counsel established that the expert had not found any of defendant’s fingerprints on various items, including the gun, the ammunition, and the packages of cocaine).

Nor was there any prejudice. It is the DNA evidence and the fingerprints on the photographs that were the critical damning pieces of evidence. Whether the perpetrator wore gloves or not at some point during the murder is pretty much irrelevant. Thus, the trial court properly denied this claim of ineffectiveness.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of the postconviction motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by email via the e-portal to Robert A. Norgard of Norgard & Norgard, P.O. Box 811, Bartow, FL 33831 this 29th day of December, 2014.

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CERTIFICATE OF FONT AND TYPE SIZE

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