IN THE SUPREME COURT OF FLORIDA

**BRODERICK W. MONLYN**,

Appellant,

v.

CASE NO. SC02-1729

STATE OF FLORIDA,

Appellee.

_______________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR MADISON COUNTY, FLORIDA

# ANSWER BRIEF

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## TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS . . . . . . . . . . . . . . . . . . . . . . i

TABLE OF CITATIONS . . . . . . . . . . . . . . . . . . . . . ii

PRELIMINARY STATEMENT . . . . . . . . . . . . . . . . . . . . 1

STATEMENT OF THE CASE AND FACTS . . . . . . . . . . . . . . . 2

SUMMARY OF ARGUMENT . . . . . . . . . . . . . . . . . . . . . 8

ARGUMENT . . . . . . . . . . . . . . . . . . . . . . . . . . 11

ISSUE I

DID THE TRIAL COURT PROPERLY DENY THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS FOLLOWING AN EVIDENTIARY HEARING? (Restated) . . . . . . . . . . . . . . . . . . . . . . . . . . 11

ISSUE II

WHETHER THE TRIAL COURT'S FAILURE TO RULE ON TWO CLAIMS IN THE POST-CONVICTION MOTION IS PRESERVED? (Restated) . . 38

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . 45

CERTIFICATE OF SERVICE . . . . . . . . . . . . . . . . . . . 45

CERTIFICATE OF FONT AND TYPE SIZE . . . . . . . . . . . . . . 45

TABLE OF CITATIONS

CASES PAGE(S)

Brown v. Commonwealth,
482 S.E.2d 75 (Va. App. 1997); . . . . . . . . . . . . . . . . 24

Carratelli v. State,
832 So. 2d 850 (Fla. 4th DCA 2002) . . . . . . . . . . . . . 40

Daniels v. Lee,
316 F.3d 477 (4th Cir. 2003) . . . . . . . . . . . . . . . . . 34

Davis v. State,
2003 WL 22722316 (Fla. Nov. 20, 2003) . . . . . . . . . . . 33

Downs v. State,
740 So. 2d 506 (Fla. 1999) . . . . . . . . . . . . . . . . . 37

Foster v. State,
810 So. 2d 910 (Fla 2002) . . . . . . . . . . . . . . . . . 25

Gallego v. United States,
174 F.3d 1196 (11th Cir. 1999) . . . . . . . . . . . . . 35,36

Gonzalez v. State,
829 So. 2d 323 (Fla. 2d DCA 2002) . . . . . . . . . . . . . 41

Griffin v. State,
2003 WL 22207901 (Fla. Sept. 25, 2003) . . . . . . . . . 37,42

Harris v. State,
394 S.W.2d 13 (Ark. 1965) . . . . . . . . . . . . . . . . . 17

Herrington v. State,
643 So. 2d 1078 (Fla. 1994) . . . . . . . . . . . . . . 41,42

Holladay v. Haley,
209 F.3d 1243 (11th Cir. 2000) . . . . . . . . . . . . . . . 11

Jackson v. State,
648 So. 2d 85 (Fla.1994) . . . . . . . . . . . . . . . . . . 43

Johnson v. State,
343 So. 2d 110 (Fla. 2d DCA 1977) . . . . . . . . . . . . . . 16

Larzelere v. State,
676 So. 2d 394 (Fla.), cert. denied, 519 U.S. 1043, 117 S. Ct.
615, 136 L. Ed. 2d 539 (1996) . . . . . . . . . . . . . . . 43

Lawrence v. State,

831 So. 2d 121 (Fla. 2002) . . . . . . . . . . . . . . . . . . 33

McGriff v. Department of Corrections,
338 F.3d 1231 (11th Cir. 2003) . . . . . . . . . . . . . . . . 32

McQueen v. Scroggy,
99 F.3d 1302 (6th Cir. 1996) . . . . . . . . . . . . . . . . . 32

Monlyn v. Florida,
524 U.S. 957, 118 S. Ct. 2378, 141 L. Ed. 2d 745 (1998) . 4

Monlyn v. State,
705 So. 2d 1 (Fla. 1997) . . . . . . . . . . . 2,3,4,14,42,43

Morrison v. State,
842 So.2d 1071 (Fla. 4th DCA 2003) . . . . . . . . . . . . . 40

Oisorio v. State,
676 So. 2d 1363 (Fla. 1996) . . . . . . . . . . . . . . . . . 31

Ottesen v. State,
28 Fla. L. Weekly D2198, 2003 WL 22149151 (Fla. 2d DCA Sept. 19, 2003) . . . . . . . . . . . . . . . . . . . . . . . . . . 40

People v. D'Arton,
289 A.D.2d 711, 734 N.Y.S.2d 309 (N.Y App. 2001) . . . . . 17

People v. Quinn,
176 P.2d 404 (Cal. App 1947) . . . . . . . . . . . . . . . . 25

Perry v. State,
801 So. 2d 78 (Fla. 2001) . . . . . . . . . . . . . . . 25,26

Randolph v. State,
562 So. 2d 331 (Fla. 1990) . . . . . . . . . . . . . . . . . 29

Reese v. State,
694 So. 2d 678 (Fla.1997) . . . . . . . . . . . . . . . . . . 43

Rentschler v. State,
838 So. 2d 1212 (Fla. 2d DCA 2003) . . . . . . . . . . . . . 41

Richardson v. State,
437 So. 2d 1091 (Fla. 1983) . . . . . . . . . . . . . . . . . 39

Roberts v. State,
840 So. 2d 962 (Fla. 2002) . . . . . . . . . . . . . . . . . . 32

Rogers v. State,
783 So. 2d 980 (Fla. 2001) . . . . . . . . . . . . . . . . . . 44

Rogers v. State,
783 So. 2d 980 (Fla. 2001) . . . . . . . . . . . . . . . . . 44

Rose v. State,
787 So. 2d 786 (Fla. 2001), *cert. denied*, 535 U.S. 951, 122 S. Ct. 1349, 152 L. Ed. 2d 252 (2002) . . . . . . . . . . . . 39

Shere v. State,
742 So. 2d 215 (Fla. 1999) . . . . . . . . . . . . . . . . . 42

Shere v. State,
742 So. 2d 215 (Fla. 1999) . . . . . . . . . . . . . . . . . 42

Shipman v. State,
842 So. 2d 1021 (Fla. 5th DCA 2003) . . . . . . . . . . . . 40

Spencer v. State,
842 So. 2d 52 (Fla. 2003) . . . . . . . . . . . . . . . . 11,12

State v. Bradshaw,
766 S.W.2d 470 (Mo. App. 1989) . . . . . . . . . . . . . . . 24

State v. Escoe,
78 S.W.3d 170 (Mo. App. 2002) . . . . . . . . . . . . . . . 24

State v. Kelley,
588 So. 2d 595 (Fla. 1st DCA 1991) . . . . . . . . . . . . . 40

State v. Lane,
81 S.E. 620 (N.C. 1914), *overruled on other grounds,* State v. Cotton, 351 S.E.2d 277 (N.C. 1987) . . . . . . . . . . . . . 18

State v. Long,
123 A. 350 (Del. 1923) . . . . . . . . . . . . . . . . . . . 17

State v. Rucker,
613 So. 2d 460 (Fla. 1993) . . . . . . . . . . . . . . . . 41,42

State v. Wadsworth,
210 So. 2d 4 (Fla. 1968) . . . . . . . . . . . . . . . . . . 16

Stephens v. State,
748 So. 2d 1028 (Fla. 1999) . . . . . . . . . . . . . . . . 11

United States v. Coker,
52 F.3d 1123 (D.C. Cir. 1995) . . . . . . . . . . . . . . . 35

United States v. Teague,
953 F.2d 1525 (11th Cir. 1992) . . . . . . . . . . . . . . . 35

United States v. Villa,

46 F.3d 1153 (10th Cir. 1995) . . . . . . . . . . . . . . . . 37

Vining v. State,
827 So. 2d 201 (Fla. 2002) . . . . . . . . . . . . . . . . . . 37

Washington v. Kemna,
16 Fed. Appx. 528 (8th Cir. 2001) . . . . . . . . . . . . . . 35

Woodel v. State,
804 So. 2d 316 (Fla. 2001) . . . . . . . . . . . . . . . . . . 25

Zakrzewski v. State,
2003 WL 22669486 (Fla. Nov. 13, 2003) . . . . . . . . . . . 32

FLORIDA STATUTES

§ 90.406 . . . . . . . . . . . . . . . . . . . . . . . . . 17

§ 812.13(1) . . . . . . . . . . . . . . . . . . . . . . . 24

§ 924.051(1)(b) . . . . . . . . . . . . . . . . . . . . . 40

OTHER

Charles W. Ehrhardt, Florida Evidence . . . . . . . . . 16,17

PRELIMINARY STATEMENT

Appellant, BRODERICK W. MONLYN, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

The trial transcript will be referred to as T followed by the volume and page. (T. Vol. page). The post-conviction record diction will be referred to as PC followed by the volume and page. (PC Vol. page). The evidentiary hearing will be referred to as EH followed by the page as numbered in the trial court. (EH page). 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 an appeal from a trial court's denial of a motion for post-conviction relief, following an evidentiary hearing, in a capital case.

The facts of the crime are recited in this Court's direct appeal opinion:

> Monlyn lived across the road from the victim, Alton Watson. Monlyn had previously fished on Watson's property, and on one occasion Watson ordered him off the property with a rifle. Later, when Monlyn was in prison, he told an inmate that he was going to kill Watson. He told another inmate--Johnny Craddock--that he would kill the first person he saw in order to get a ride. He also stated that he intended to rob the victim and steal his truck and money.
>
> Monlyn escaped from prison on October 6, 1992. He stole some clothes and money and a shotgun from his uncle. He spent a night in Watson's barn hiding from the police. Monlyn encountered Watson in the barn the next morning. Monlyn said that Watson surprised him and that both men grabbed for the shotgun and struggled over it. Monlyn testified that he was trying to get away when he grabbed the gun and hit Watson with it. He said they struggled from the barn into the yard until Watson stopped attacking him. At that point, Monlyn said, he tied Watson's feet together, gagged him, dragged him into the barn, and took his truck. Watson's wallet, containing no money, was found next to the body. A friend who had let Monlyn stay in her trailer called the police, and he was arrested.
>
> Watson's body had over thirty blunt injury wounds, about ten of them defensive. The medical examiner described the bindings at trial, and testified that the cause of death was multiple blunt impact to the head.

*Monlyn v. State*, 705 So.2d 1, 3 (Fla. 1997).

Monlyn was convicted of first-degree murder, armed robbery, and armed kidnapping. (T. XX 2967-2968). The jury recommended death 12-0. (T. Vol. XX 2970). The trial court found five aggravating circumstances: (1) prior violent felony (robbery); (2) commission during the course of or attempt to commit robbery or kidnapping; (3) pecuniary gain; (4) heinous, atrocious, or

cruel; and (5) cold, calculated, and premeditated. (T. Vol. XX 3029-3041). The trial court found no statutory mitigation. However, the trial court found, as nonstatutory mitigation, that Monlyn was affectionate and considerate toward his family, had been helpful to others, and had made a good adjustment to prison life. The trial court also noted Monlyn's good behavior at trial. The trial court ruled that the aggravating circumstances outweighed the mitigation and imposed a death sentence. *Monlyn*, 705 So.2d at 2-3.

Monlyn appealed to the Florida Supreme Court. Monlyn raised thirteen issues on appeal: (1) error to allow the medical examiner's testimony that Watson was still alive and suffered more head blows after being bound and gagged; (2) error to overrule Monlyn's objection when he was asked on cross-examination about the inconsistency between his testimony that he bit the victim and the medical examiner's testimony that there were only blunt injuries to the victim; (3) error not to grant a mistrial after the questions as to why Monlyn had not told anyone about his fight with victim and whether he realized that the victim would die without medical attention; (4) error to admit the victim's wife's testimony that the victim usually carried $200 to $300 in cash, (5) error to deny a motion for mistrial during the State's guilt-phase closing argument; (6) error to admit Johnny Craddock's testimony regarding Monlyn's statements made weeks before the homicides; (7) error to refuse to give Monlyn's requested circumstantial evidence instructions; (8) error to give the standard reasonable doubt instruction; (9)

error to give an unconstitutionally vague instruction on the cold, calculated, and premeditated aggravator; (10) error to find that the murder was cold, calculated, and premeditated (CCP); (11) error to give the standard heinous, atrocious, or cruel instruction; (12) error not to give Monlyn's requested mitigation instruction; and (13) error not to instruct against doubling the pecuniary gain and robbery aggravators. *Monlyn*, 705 So.2d at 3. The Florida Supreme Court affirmed the conviction and sentence.

Monlyn filed a petition for writ of certiorari in the United States Supreme Court arguing the Florida Supreme Court improperly affirmed the trial court's finding of CCP after determining that the jury instruction on the CCP aggravator was invalid and the trial court improperly refused to give a jury instruction prohibiting doubling of aggravators. On June 26, 1998, the United States Supreme Court denied certiorari. *Monlyn v. Florida*, 524 U.S. 957, 118 S.Ct. 2378, 141 L.Ed.2d 745 (1998).

On June 25, 1999, Monlyn filed a motion for post-conviction relief. (PC Vol. III 383-406). The motion contained a request for leave to amend. (PC Vol. III 384). On August 1, 2001, Monlyn filed an amended motion to vacate the judgments of conviction and sentence. (PC Vol. IV 571-605). The amended motion raised twelve grounds for relief: (1) ineffectiveness for failing to challenge a state witness' competency to testify; (2) ineffectiveness for failing to object to the wife's testimony regarding the victim's habit of carrying cash in his wallet; (3)

ineffectiveness for failing to elicit testimony that FDLE had discovered $100.00 hidden in the victim's wallet; (4) ineffectiveness for failing to request a *Frye* hearing regarding the DNA typing of the defendant's saliva on cigarette butts found near the victim's body on the victim's property; (5) ineffectiveness for failing to call as a witness a cell mate of the defendant's during the guilt phase to corroborate the defendant's testimony; (6) ineffectiveness for failing to object to the prior violent felony aggravator not being a crime of violence because Monlyn was a look out; (7) the trial court improperly found the pecuniary gain aggravator because it was not the primary motive for the murder; (8) unconstitutional jury instructions on two aggravators which were found harmless on direct appeal; (9) ineffectiveness for failing to introduce the defendant's remorse as mitigation evidence at the penalty phase; (10) the trial court's failure to inform the defendant he had the right to testify at the penalty phase; (11) ineffectiveness for failing to inform the defendant he had the right to testify at the penalty phase; and (12) various errors at the penalty phase. The State responded agreeing to an evidentiary hearing on claims 1, 9, and 11. (PC Vol. IV 631-651). The State, however, argued that the trial court should summarily deny claims 2, 3, 4, 5, 6, 7, 8, 10 and 12. (PC Vol. IV 651). The trial court held a *Huff* hearing on October 19, 2001. (PC Vol. IX 1410-1446). At the *Huff* hearing, the State did not object to an evidentiary hearing on issue 2, 4, 5 and 6 as well. (PC Vol. IX 1417, 1422, 1424, 1434). The trial court granted an evidentiary

hearing on claims 1, 2, 3, 4, 5, 6, 9 and 11. (PC Vol. IV 666-667).

The trial court held an evidentiary hearing on March 19, 2002. (PC Vol. VII 1097-1225; Vol. VIII 1226-1346). Trial counsel, Judge Jimmy Hunt, testified twice at the evidentiary hearing. (PC Vol. VIII 1230-1335; 1343-1345).

Lead counsel, Jimmy Hunt had been an Assistant Public defender since 1973 and had handled approximately 80 murder cases and 15 capital murder trials. (EH 196)[1] He was named Public Defender of the year in 1994. (EH 197). He was appointed to the bench in 2000. (EH 134). Defense counsel explained that the problem with the case was that the defendant escaped, tied the victim up, severely beat the elderly victim to death, and the defendant had a prior conviction for a violent crime, all of which made it likely that the jury would recommended death and the judge was likely to follow that recommendation. (EH 140). In defense counsel words, "the man was killed on his own property in his own barn by an escapee which did not look good" (EH 140). Moreover, the available mitigating evidence was "extremely weak". (EH 203). While the defense team made a "sincere" effort to gather mitigating evidence, there was not much available. The mental health expert he consulted found the defendant competent and sane. (EH 208-209). Defense counsel attempted to negotiate a plea but the State would not negotiate because the victim's family was opposed to a plea bargain. (EH 142).

[1]Some of these facts are from the Blackshear evidentiary hearing that was introduced at the evidentiary hearing in this case. (Blackshear at 9-11)

He had co-counsel at trial. Co-counsel Jones, who was an Assistant Public Defender at the time of the trial, also testified at the evidentiary hearing. He met with the defendant's family but could not find any mitigation. He recognized that it was "hard to believe" but as “absolutely incredible” as it is, there was no mitigation in the defendant's family background to be found. (EH 110-111). Monlyn testified at the evidentiary hearing. (PC Vol. VIII 1336-1343).

The State submitted a written post-evidentiary hearing memorandum of law. (PC Vol. IV 712-745). The State also submitted a proposed order. (PC Vol. IV 746-750). Collateral counsel also filed a written post-evidentiary hearing memorandum of law. (PC Vol. V 756-803). The trial court then denied the motion for post-conviction relief on June 24, 2002. (PC Vol. V 804-807).

## SUMMARY OF ARGUMENT

**ISSUE I**

Monlyn asserts his trial counsel was ineffective on three grounds and then cumulatively. The State respectfully disagrees. Monlyn asserts his counsel was ineffective for failing to object to habit testimony. IB at 24. The victim's widow testified it was the victim's habit to carry at least a hundred dollars. It is not deficient performance not to object to habit evidence because habit evidence is admissible in Florida. Nor is there any prejudice. The purpose of the habit evidence was to prove robbery. The taking of the wallet, itself, regardless of whether the wallet contained any cash, was robbery. The robbery was also supported by the taking of the truck which the defendant admitted during his testimony in the guilt phase. The defendant's own trial testimony established the crime of robbery regardless of the wife's habit testimony. Moreover, the felony murder theory and aggravator was also supported by the kidnapping conviction. Monlyn's own testimony also established the kidnapping conviction, felony murder based on kidnapping and the felony murder aggravator based on kidnapping regardless of the robbery. Thus, counsel was not ineffective for failing to object to non-critical habit testimony.
Thus, the trial court properly denied the ineffectiveness claim.

Monlyn asserts that his trial counsel was ineffective for failing to elicit testimony that the victim's wallet still had

$100.00 dollars in it after the crime. IB at 30. There was no deficient performance. Regardless of whether the victim's wallet had any cash in a hidden compartment, it still could have had cash in the normal compartment. The defendant had more cash on him when arrested than when he escaped from jail. Regardless of any testimony concerning the cash in the wallet, the taking of the wallet itself, as well as the truck, established the robbery. There was no prejudice. Both the felony murder theory and the felony murder aggravator were supported by the kidnapping conviction. Thus, counsel was not ineffective.

Monlyn asserts that his trial counsel was ineffective for failing to inform him of his right to testify at the penalty phase. IB at 36. Lead trial counsel, Judge Hunt, testified that he absolutely always informed defendants of their right to testify at both the guilt and penalty phase. His standard practice was to discuss the right to testify in the penalty phase in advance of trial and again after the State has rested. The trial court found, as a matter of fact, that trial counsel did inform Monlyn of his right to testify at the penalty phase after an evidentiary hearing. This finding of fact is supported by the evidence and should be affirmed by this Court.

Thus, the trial court properly denied the three ineffectiveness claims. Because none of the individual claims of ineffectiveness has any merit, the cumulative ineffectiveness claim is necessarily meritless.

**ISSUE II**

Monlyn asserts that the trial court failed to rule on issues (7) and (8) of his post-conviction motion. These issues are not preserved for appellate review. Monlyn did not obtain a ruling from the trial court as required. A party abandons an issue by failing to obtain a ruling from the court. Monlyn should have pointed out the oversight to the trial court, not this Court. Monlyn has abandoned issues (7) and (8) by his failure to obtain a ruling from the trial court. Furthermore, both issues are procedurally barred. Issue (7), regarding the finding of pecuniary gain as an aggravator, should have been raised on direct appeal. Issue (8), regarding the CCP findings and jury instruction, was raised in the direct appeal and is barred by the law of the case doctrine. These issues are not preserved and are procedurally barred.

## ARGUMENT

## ISSUE I

DID THE TRIAL COURT PROPERLY DENY THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS FOLLOWING AN EVIDENTIARY HEARING? (Restated)

Monlyn asserts his trial counsel was ineffective on three grounds and then cumulatively. The State respectfully disagrees. Because none of the individual claims of ineffectiveness has any merit, the cumulative ineffectiveness claim is necessarily meritless.

Standard of Review

The standard of review of an ineffectiveness claim is *de novo. Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999); *Holladay v. Haley*, 209 F.3d 1243, 1247 (11th Cir. 2000).

**INEFFECTIVE ASSISTANCE OF COUNSEL**

To prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate that (1) counsel's performance was deficient and (2) there is a reasonable probability that the outcome of the proceeding would have been different. *Spencer v. State*, 842 So.2d 52, 61 (Fla. 2003), citing *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. As to the first prong, the defendant must establish that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. In

reviewing counsel's performance, the court must be highly deferential to counsel, and in assessing the performance, every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Spencer*, 842 So.2d at 61.

## HABIT TESTIMONY

Monlyn asserts his counsel was ineffective for failing to object to habit testimony. IB at 24. The victim's widow testified it was the victim's habit to carry at least a hundred dollars. It is not deficient performance not to object to habit evidence because habit evidence is admissible in Florida. Nor is there any prejudice. The purpose of the habit evidence was to prove robbery. The taking of the wallet, itself, regardless of whether the wallet contained any cash, was robbery. The robbery was also supported by the taking of the truck which the defendant admitted during his testimony in the guilt phase. The defendant's own trial testimony established the crime of robbery regardless of the wife's habit testimony. Moreover, the felony murder theory and aggravator was also supported by the kidnapping conviction. Monlyn's own testimony also established the kidnapping conviction, felony murder based on kidnapping and the felony murder aggravator based on kidnapping regardless of the robbery. Thus, counsel was not ineffective for failing to object to non-critical habit testimony.

<u>Trial</u>

During the guilt phase, the victim's wife, Mrs. Mattie Watson, testified. (T. VI 775). She had been married to the victim for 10 years. (T. VI 776). Testifying was difficult for her and she cried when identifying the victim's wallet. (T. VI 786-787, 790). When the prosecutor asked her how much money was in the victim's wallet on October 8$^{th}$, she states "I don't know exactly

how much." (T. VI 791). She testified that the victim had cashed a check on the 6th and he usually cashed checks "for two or three hundred dollars" (T. VI 791). She then testified that to the best of her knowledge her husband would have had somewhere between two and three hundred dollars with him at the time of his death. (T. VI 791). Defense counsel did not object.[2] On cross-examination, the widow testified that she was familiar with the amount of money he normally carried in his wallet. (T. VI 792). She testified that he always had some money on him but she "didn't make a habit of looking in his wallet. (T. VI 792).

The defendant testified in the guilt phase and admitted to going through the victim's wallet. (T IX 1482-1485). Monlyn testified that he looked through the wallet but found no cash, only credit cards, and then threw the wallet back on the ground. Monlyn also admitted taking the truck and driving to Lake City during his guilt phase testimony. He admitted tying the victim's hands and his feet with the victim's boot strings. Monlyn admitted gagging the victim with a towel and dragging the victim back into barn.

In the guilt phase during closing argument, the prosecutor argued both robbery and kidnapping to establish the felony murder. (XV 2047-2051).[3] The prosecutor relied heavily on the

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[2] As the Florida Supreme Court noted in the direct appeal opinion when rejecting a claim that it was error to admit testimony of the victim's wife that the victim usually carried several hundred dollars in cash, the issue was not preserved for review by objection at trial. *Monlyn*, 705 So.2d at 4.

[3] The prosecutor did rely on both the money and the truck in the opening argument in the guilt phase but focused on taking

taking of the truck mentioning the money only once. (XV 2048-2049). The prosecutor also discussed the kidnapping at length to support the felony murder theory. (XV 2049-2051). The jury convicted Monlyn of armed robbery in Count II and kidnapping in Count III. (T. XX 2967-2968).

In the penalty phase, the prosecutor argued both robbery and kidnapping to establish the felony murder aggravator. (T. XVI 2313-2315). The prosecutor relied solely on the taking of the truck to establish the during the course of a robbery aggravator. The prosecutor did not mention the wallet or any cash.[4] In the sentencing order, the trial court relied mainly on the defendant's intent to take the truck to find robbery to establish the felony murder aggravator. (T. Vol. XX 3031). The trial court found that the defendant took the victim's wallet, money and truck. (T. Vol. XX 3031). The trial court also found the kidnapping to establish the felony murder aggravator. Indeed, due to an improper doubling concern, the trial court really solely relied on the kidnapping to establish the felony murder aggravator.[5]

Evidentiary Hearing

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of the truck. (T. VI 752, 754, 756, 758).

[4] The prosecutor mentioned the wallet in discussing the pecuniary gain aggravator but focused on the taking of the truck to establish this aggravator as well. (T. XVI 2315-2316).

[5] The trial court did rely on the money to establish the pecuniary gain aggravator.

At the evidentiary hearing, defense counsel Judge Hunt, testified that he thought that habit evidence was admissible. (EH 150). He cross-examined the widow at trial and got her to admit that she did not know exactly how much money was in her husband's wallet on the day of the murder. (EH 216). Defense counsel would have like to cross-examine her more but she was emotional at trial. (EH 216).

<u>The trial court's ruling</u>

The trial court rejected ground II of the motion, finding:

> Monlyn asserts his trial counsel was ineffective for failing to object to the victim's widow testifying as to her husband's monetary habits. Because habit evidence is admissible, there was no deficient performance. Charles W. Ehrhardt, Florida Evidence, § 406.1 (2000 ed.). Moreover, there is no prejudice. On cross-examination, the widow admitted that she did not know exactly how much money was in her husband's wallet on the day of the murder. Additionally, the defendant testified during the guilt phase and admitted to going through the victim's wallet.

(PC Vol. V 805)

<u>Merits</u>

Florida courts have held that habit evidence is admissible. *State v. Wadsworth*, 210 So.2d 4 (Fla. 1968)(agreeing that evidence of the prior intemperate habits of a person is relevant to, and may be given as corroborating evidence on, the question of whether such person was intoxicated at any given time and place, when intoxication is a material issue in the cause); *Johnson v. State*,

343 So.2d 110 (Fla. 2d DCA 1977)(Grimes, J.)(holding evidence of a heroin habit was admissible and observing that evidence that the accused has marks on his arm reflecting the prior use of the narcotic which he is accused of possessing is competent corroborating circumstantial evidence that he possessed it on a given date). The drafters of Florida's evidence code deleted any mention of habit from the routine practice statute.[6] However, as Professor Ehrhardt explains, the deletion should not be interpreted as an intention to prohibit habit evidence; rather, the drafters felt that it should be left to the trial court to determine if the habit evidence was sufficiently probative. Charles W. Ehrhardt, Florida Evidence, § 406.1 at 255 (2002 ed).

A wife's testimony regarding her husband's monetary habits is probative. Courts routinely admit such evidence. *People v. D'Arton*, 289 A.D.2d 711, 734 N.Y.S.2d 309 (N.Y App.

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[6] The federal rule of evidence governing habit and routine practice, rule 406, provides:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Florida's statute governing routine practice, § 90.406, provides:

> Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice.

2001)(holding testimony of victim's wife concerning victim's habit of carrying cash on his person was admissible as deliberate and repetitive practice); *Harris v. State*, 394 S.W.2d 13 5 (Ark. 1965)(holding that testimony from witnesses, well acquainted with the victim, that he was in habit of carrying large sums of money on his person was admissible); *State v. Long*, 123 A. 350 (Del. 1923)(holding testimony regarding victim's habit of carrying a considerable sum of money on his person, to show that robbery was the motive, was proper); *State v. Lane*, 81 S.E. 620 (N.C. 1914)(holding deceased's habit of carrying money is admissible to show robbery was the motive for the homicide), *overruled on other grounds, State v. Cotton*, 351 S.E.2d 277, 280 (N.C. 1987). She was married to the victim for a decade and was familiar with his monetary habits. Had counsel objected, the trial court would have overruled the objection and admitted the habit evidence. Counsel properly thought that this evidence was admissible and therefore, there is no deficient performance.

Monlyn, while acknowledging that such evidence is admissible, argues that corroborating evidence is required before habit evidence is admissible. However, as Professor Ehrhardt explains, only a “very minimal” corroboration is required. The defendant’s own testimony admitting looking through the wallet establishes the minimal corroboration required. The fact defendant had more cash on him when arrested than when he escaped from jail also corroborates the wife’s habit testimony.

There is no deficient performance. It is perfectly reasonable for trial counsel not to object to habit evidence of carrying cash when the State can prove robbery regardless of whether the wallet contained any money. Collateral counsel ignores the fact that the taking of the wallet itself is the completed crime of robbery. The defendant testified in the guilt phase and admitted to going through the victim's wallet.

There was no prejudice. Regardless of whether Monlyn obtained any money from the wallet, he was still guilty of and properly convicted of robbery based on the temporary taking of the wallet itself or the taking of the victim's truck. Monlyn also admitted taking the truck and driving it to Lake City in his testimony. So, the robbery was established by alternative means that did not depend on the habit testimony. Any one of these takings, regardless of any cash, was sufficient for the jury to convict the defendant of robbery. Nor was the robbery conviction critical to the State establishing felony murder or the felony murder aggravator because the kidnapping established both as well. Monlyn's testimony admitted kidnapping. The kidnapping conviction supported both the felony murder theory and the felony murder aggravator regardless of the robbery. Thus, counsel was not ineffective.

## MONEY IN WALLET

Monlyn asserts that his trial counsel was ineffective for failing to elicit testimony that the victim's wallet still had $100.00 dollars in it after the crime. IB at 30. There was no deficient performance. Regardless of whether the victim's wallet had any cash in a hidden compartment, it still could have had cash in the normal compartment. The defendant had more cash on him when arrested than when he escaped from jail. Regardless of any testimony concerning the cash in the wallet, the taking of the wallet itself, as well as the truck, established the robbery. There was no prejudice. Both the felony murder theory and the felony murder aggravator were supported by the kidnapping conviction. Thus, counsel was not ineffective.

Trial

During the guilt phase, the victim's wife, Mrs. Mattie Watson, testified. (T. VI 775). She was given the victim's wallet for identification. (T. VI 790). She testified that the victim "always carried a hundred dollars, what he called mad money in his wallet"
(T. VI 791). She testified that the mad money was tucked in a hidden place in his wallet. (T. VI 791). She testified that she did not see the mad money in the wallet now. (T. VI 791).

During the guilt phase, The State presented the testimony of John Craddock, who was a fellow inmate at the Madison County Jail who had helped Monlyn escape. (T. VIII 1054-1055, 1061). Craddock testified that Monyln told him that Monlyn was going to

escape, go home and get a shotgun and kill the first person he saw with a car. (T. VIII 1059,1091-1092). Monlyn was going to steal their car to get a "ride" (T. VIII 1059). The conversation occurred that day before Monlyn escaped from the jail. (T. VIII 1060). Craddock was also charged with the escape based on his helping to get rid of the horseshoe used to escape (T. VIII 1061).

The State also presented the testimony of Monlyn's cousin Darrel Adams. (T. VIII 1100-1101). Monlyn told him, the day before the murder, that he was going to rob Mr. Watson, the victim, to steal his money and truck. (T. VIII 1102, 1106). Monlyn told him that he was going to go to Mexico. (T. VIII 1108,1109,1113).

Monlyn testified at the guilt phase. (T. Vol. XI 1429). Monlyn testified that he had only $4.00 in quarters when he escaped from jail. Monlyn admitted to going through the victim's wallet. (T IX 1482-1485). He also testified that he stole the victim's truck and drive it the Lake City. He admitted tying the victim's hands and his feet with the victim's boot strings. Monlyn admitted gagging the victim with a towel and dragging the victim back into barn.

In the guilt phase during closing argument, the prosecutor argued both robbery and kidnapping to establish the felony murder. (XV 2047-2051).[7] The prosecutor relied heavily on the taking of the truck mentioning the money only once. (XV 2048-

[7] The prosecutor did rely on both the money and the truck in the opening argument in the guilt phase but focused on taking of the truck. (T. VI 752, 754, 756, 758).

2049). The prosecutor also discussed the kidnapping at length to support the felony murder theory. (XV 2049-2051). The jury convicted Monlyn of armed robbery in Count II and kidnapping in Count III. (T. XX 2967-2968).

In the penalty phase, the prosecutor argued both robbery and kidnapping to establish the felony murder aggravator. (T. XVI 2313-2315). The prosecutor relied solely on the taking of the truck to establish the during the course of a robbery aggravator. The prosecutor did not mention the wallet or any cash.[8] In the sentencing order, the trial court relied mainly on the defendant's intent to take the truck to find robbery to establish the felony murder aggravator. (T. Vol. XX 3031). The trial court found that the defendant took the victim's wallet, money and truck. (T. Vol. XX 3031). The trial court also found the kidnapping to establish the felony murder aggravator. Indeed, due to an improper doubling concern, the trial court really solely relied on the kidnapping to establish the felony murder aggravator.[9]

<u>Evidentiary hearing testimony</u>

At the evidentiary hearing, collateral counsel called Investigator Ben Stewart. (EH 146). He was the lead investigator who handled the victim's wallet. (EH 148). The

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[8] The prosecutor mentioned the wallet in discussing the pecuniary gain aggravator but focused on the taking of the truck to establish this aggravator as well. (T. XVI 2315-2316).

[9] The trial court did rely on the money to establish the pecuniary gain aggravator.

victim’s wallet was discovered the day after the murder by the stepson in a trough. (EH 148). He opened the wallet to see if there was any money in it but did not see any. (EH 149, 150). He was concerned about disturbing any latent prints so he did handle the wallet extensively. (EH 151). He did not check any of the compartments of the wallet. (EH 157). He then bagged the wallet and give it to Agent Pfeil of the FDLE to check for latent prints. (EH 149). He received a call from FDLE informing him that they had discovered a $100.00 bill folded up and “tucked away in some compartment in the wallet.” (EH 151). The money was not in the main fold area of the wallet. (EH 158). He documented this information in the search warrant which was drafted with the assistance of prosecutor Page. (EH 152-153). He did not think that defense counsel questioned him regarding the hidden money in his deposition. (EH 154).

At the evidentiary hearing, lead trial counsel, Judge Hunt, testified that the wallet was only one of the items involved. (EH 216). As lead counsel Hunt explained, regardless of the wallet, a robbery conviction was still valid based on the defendant's taking the victim's truck and the guns. (EH 153, 217). Moreover, Monlyn's intent to rob was at issue, not his success in obtaining a large sum of cash. (EH 154, 217). As trial counsel explained, the defendant was still guilty of robbery whether the defendant found $10.00 or $5,000. The amount of cash was a "very minor issue". (EH 154, 158). Alternatively, the State could have proven that the victim, shortly prior to the crime, had cashed a check. (EH 150). Lead

counsel testified that he was aware that the money had been found in the wallet because he had highlighted the document disclosing that a $100 bill had been found in the wallet. (EH 151). He may have over looked the fact that the hidden money was discovered.(EH 156,159)[10]

The trial court's ruling

The trial court rejected ground III of the motion, finding:

> Monlyn asserts that his trial counsel was ineffective for failing to object to the prosecutor's closing argument that the lack of money in the wallet established robbery. A defendant does not have to succeed in obtaining money from the wallet to establish a robbery, taking the wallet is itself sufficient to establish robbery. Counsel is not ineffective for refusing to make baseless objections.

(PC Vol. V 805).

Merits

The robbery statute, § 812.13(1), Fla. Stat. (1992), provides:

> "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

As defense counsel properly explained, a defendant does not have to succeed in obtaining money from the wallet for a robbery conviction. Here, the defendant killed the victim, looked through the victim's wallet but threw it away. The temporary handling of the wallet constitutes the completed crime of

[10] At the evidentiary hearing, co-counsel Jones testified that while he could recall that some kind of issue regarding the wallet arose, he did not recall the wallet issue. (EH 111-112). Mr. Hunt dealt with that issue. (EH 111).

robbery.[11] Moreover, the defendant took the victim's truck. The Florida Supreme Court has repeatedly affirmed the robbery conviction and application of the robbery aggravator in capital cases where the defendant first kills the victim and then takes the victim's wallet and/or truck. *Woodel v. State*, 804 So.2d 316, 322 (Fla. 2001)(affirming a conviction for robbery in a capital case based on taking of the victim's wallet where no other motive for the killing was readily discernible from the record); *Perry v. State*, 801 So.2d 78, 87-88 (Fla. 2001)(rejecting afterthought argument where the defendant took victim's wallet and truck after killing him); *Foster v. State*, 810 So.2d 910, 917 (Fla 2002)(finding no ineffective assistance of appellate counsel for failing to argue the robbery aggravator

[11] *State v. Escoe*, 78 S.W.3d 170 (Mo. App. 2002)(holding the robbery was completed when defendant obtained control of the victim's purse, even though defendant returned the purse to victim after he determined that it contained no money because the victim's regaining possession of her purse, after it was found to contain no money, did not retract the completed crime of robbery despite the fact that the state statute requires that the robber intent to permanently deprive owner of the property); *State v. Bradshaw*, 766 S.W.2d 470 (Mo. App. 1989)(holding robbery completed when a robber took a wallet although robber returned wallet to victim, when after looking through it, he saw it contained no money because the crime of robbery was consummated when the defendant gained control of the wallet, even for a moment); *Brown v. Commonwealth*, 482 S.E.2d 75 (Va. App. 1997)(affirming conviction for robbery and holding that trial court's denial of jury instruction for attempted robbery was proper where robber threw wallet away because it contained no money because this was completed crime of robbery citing *Whalen v. Commonwealth*, 549, 19 S.E. 182, 183 (Va. 1894); *People v. Quinn*, 176 P.2d 404 (Cal. App 1947)(holding robbery complete where the robber pointed a gun at the victim and told him to throw his wallet on the ground but wallet contained no money).

did not apply where defendant directed another person to take the victim's wallet after killing him).

Contrary to Monlyn's claim, the taking of the truck was not an afterthought. IB at 34. Rather, taking the truck, to effect his get away from his escape from jail, was the main motive of this murder. In *Perry v. State*, 801 So.2d 78, 88 (Fla. 2001), this Court rejecting afterthought argument where the defendant took the victim's truck after killing him. This Court noted that Perry did not just "abandon" Johnston's truck after effecting a getaway. Rather, Perry drove the truck all the way to south Florida, his original intended destination. The *Perry* Court also reasoned that the afterthought issue was presented to the jury via a special jury instruction and the "jury obviously found the State's evidence more believable than Perry's self-serving, and frequently inconsistent, claims." Here, as in *Perry*, Monlyn admitted that he did not merely drive the truck to the edge of the property and then abandoned it. Rather, he drove the truck from Madison to Lake City - approximately 50 miles. Here, also, the afterthought issue was presented to the jury and rejected by it. The prosecutor specifically addressed the afterthought issue in his argument. Moreover, here, unlike *Perry*, two state witnesses testified that Monlyn told them, before the murder, that he intented to kill someone and steal their car to effect his escape.

There is no deficient performance. Even if counsel overlooked the fact that money was hidden in the wallet, there is no deficient performance. The fact that the victim had mad money

in a hidden place in his wallet still left wide the possibility that there was money in the normal place in the wallet and that the defendant took it. Any money hidden in a separate part of the wallet is a red herring and the jury would view it as such. Moreover, the defendant admitted to going through the victim's wallet during his trial testimony. While the defendant testified that there was no money in the wallet, only credit cards, the jury was not required to believe this testimony. If defense counsel had elicited testimony that there was money hidden in the wallet, the prosecutor would have just clarified his argument that the defendant took the money that he could find easily in the normal place in the wallet. Monyln seems to view this evidence as stopping the prosecutor from asserting that he took money from the wallet. It does not. The prosecutor was still free to argue that there was money in two places in the wallet and the defendant took the money from the one, normal place. There was no point in objecting under these facts. Thus, counsel was not ineffective for not objecting.

Nor was there any prejudice. Both felony murder theory and felony murder aggravator were established by alternative means that did not depend on the wallet. Monlyn also admitted taking the truck and driving it to Lake City in his testimony. So, the robbery was established by alternative means that did not depend on whether there was any cash in the wallet. Regardless of whether Monlyn obtained any money from the wallet, he was still guilty of and properly convicted of robbery based on the temporary taking of the wallet itself or the taking of the

victim's truck. Any one of these items, regardless of any cash, was sufficient for the jury to convict the defendant of robbery. Nor was the robbery conviction critical to the State establishing felony murder or the felony murder aggravator - the kidnapping established both as well. The kidnapping supported both regardless of the robbery. Thus, counsel was not ineffective.

## RIGHT TO TESTIFY AT THE PENALTY PHASE

Monlyn asserts that his trial counsel was ineffective for failing to inform him of his right to testify at the penalty phase.

IB at 36. Lead trial counsel, Judge Hunt, testified that he absolutely always informed defendants of their right to testify at both the guilt and penalty phase. His standard practice was to discuss the right to testify in the penalty phase in advance of trial and again after the State has rested. The trial court found, as a matter of fact, that trial counsel did inform Monlyn of his right to testify at the penalty phase after an evidentiary hearing. This finding of fact is supported by the evidence and should be affirmed by this Court.

Trial

Monlyn testified twice at the guilt phase. (T. Vol. XI 1429-Vol. XII 1643; T. Vol. XII 1663-1664). On cross, the prosecutor established that Monlyn had been convicted of eleven (11) prior felonies. (T. XI 1504). Defense counsel asked Monlyn how he felt about what happened in this case. (T. Vol. XII 1636). Monlyn responded that he felt bad because . . ., at which point, the prosecutor objected based on relevancy. The trial court noted that it could lead to some interesting recross and asked defense counsel if he was sure he wanted to ask that. (T. Vol. XII 1637). The objection was overruled but defense counsel did

not pursue the matter. (T. Vol. XII 1637).[12] Monlyn did not testify at the penalty phase. After calling several witnesses at the penalty phase, trial counsel announced that he had no other witness but wanted "to confer with my client before I announce rest" (T. XVI 2267). There was a recess. (T. XVI 2271). Defense counsel announced rest in front of the judge during the penalty phase jury instruction conference. (T. XVI 2272). The trial court did not conduct a waiver colloquy of the right to testify in the penalty phase.

Evidentiary hearing testimony

At the evidentiary hearing, lead trial counsel Hunt testified that while he did not specifically recall this case, he "always" discussed the right to testify with his clients (EH 192). He discusses this in every case. He testified that he discusses the right to testify in the penalty phase in advance of trial and again after the State has rested. (EH 193). He testified "I do that in each and every case." (EH 193). When post-conviction counsel stated that it was standard operating procedure and that he "probably" did it in this case, Mr. Hunt responded: "Not probably, I did it." (EH 193,233). While Mr.

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[12] Collateral counsel mistakenly asserts that Monlyn was prohibited from expressing his remorse during the guilt phase. IB at 38. The prosecutor's objection, however, should have been sustained. Remorse testimony is not relevant at the guilt phase. *Cf. Randolph v. State*, 562 So.2d 331 (Fla. 1990)(noting trial court clearly was correct in sustaining Randolph's objection lack of remorse during the guilt phase). The only remorse testimony that is relevant to this issue is Monlyn's testimony at the evidentiary hearing.

Hunt had no notations of the discussions with Monlyn, he normally did not takes notes of right to testify conversations. In rebuttal, lead counsel testified again that he absolutely always informed defendants of their right to testify at both the guilt and penalty phase but he could not recall this particular case. (EH 247-248).[13]

The defendant testified that defense counsel Hunt did not inform him that he had the right to testify at the penalty phase. (EH 240,244). Monlyn testified that he would have testified as to his remorse for the murder. (EH 242). He testified that what happened was he "was in the wrong place at the wrong time." (EH 242). Lead counsel Hunt testified that he did not perceive the defendant as remorseful. (EH 186). Monlyn was only concerned with the effects of the crime on himself, not others. (EH 230). Trial counsel "did not see remorse." (EH 231). The defendant left the victim tied up in a place where he would not be found and did not attempt to report the incident to the sheriff. (EH 231). Monlyn did not attempt to save the victim's life or get help for him despite Monlyn's claim that the victim was still alive when he left. (EH 231-232). The

[13] At the evidentiary hearing, co-counsel Jones testified that he did not make the decision whether to have the defendant testify at the guilt or penalty phase. (EH 108). Rather, Mr. Hunt made those decisions. Co-counsel Jones did not recall having any discussions with the defendant about the decision to testify at the guilt phase or his decision not to testify at the penalty phase. (EH 109).

defendant wrote a letter in which he expressed remorse. (EH 189).[14]

The trial court's ruling

The trial court rejected ground XI of the motion, finding:

> Monlyn asserts that his trial counsel was ineffective for failing to advise him that he had the right to testify during the penalty phase. This Court finds, as a matter of fact, that the Defendant was advised of his right to testify. The Defendant, who testified in the guilt phase, was clearly aware of his right to testify in the penalty phase. Additionally, there is no prejudice because the proposed remorse testimony would not have resulted in a life recommendation.

(PC Vol. V 807).

Merits

When a defendant claims ineffectiveness for failing to advise him of the right to testify, the defendant must establish that he would have testified, but for the incorrect advice of counsel and to show prejudice, the defendant must also show that the testimony at issue would likely have changed the outcome. *Oisorio v. State*, 676 So.2d 1363 (Fla. 1996)(holding that a defendant claiming that counsel was ineffective based on an allegation that counsel interfered with the defendant's right to testify must establish both prongs of the *Strickland* test, *i.e.*,

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[14] At the evidentiary hearing, co-counsel Jones testified he did not recall having any discussions with the defendant about his remorse for the murder. (EH 109)

that he would have testified and that the testimony at issue would likely have changed the outcome). Monlyn failed to meet this burden.

The trial court found that Monlyn was, in fact, informed of his right to testify at the penalty phase. Defense counsel was an experienced public defender, with extensive capital litigation experience, who "always" informed defendants of their right to testify. The trial court found defense counsel's testimony on this issue to be credible. Credibility findings by a lower court may not be overturned if supported by competent, substantial evidence. *Roberts v. State*, 840 So.2d 962, 973 (Fla. 2002); *Zakrzewski v. State*, 2003 WL 22669486 (Fla. Nov. 13, 2003)(rejecting an ineffectiveness claim and affirming the trial court's factual findings because they were supported by competent, substantial evidence). The trial court's finding that trial counsel informed the defendant of his right to testify at the penalty phase is a finding of fact that there was no deficient performance. *McGriff v. Dept. of Corrections*, 338 F.3d 1231, 1237-1238 (11th Cir. 2003)(rejecting a claim of ineffectiveness where trial counsel testified that her ordinary practice was to advise her clients of the right to testify and she never prevented clients from taking the stand and the district court found it more likely than not that trial counsel followed her normal practice and advised her client of his fundamental right to testify because absent evidence of clear error, "we consider ourselves bound by a district court's findings of fact and credibility determinations."); *McQueen v.*

*Scroggy*, 99 F.3d 1302, 1317 (6th Cir. 1996)(rejecting an ineffectiveness claim where trial court made a finding of fact that the defendant had in fact been informed of his right to testify at the sentencing phase).

The trial record, as well as trial counsel's evidentiary hearing testimony, supports the trial court's finding. *Cf. Zakrzewski v. State*, 2003 WL 22669486 (Fla. Nov. 13, 2003)(rejecting an ineffectiveness claim and affirming the trial court's factual findings because they were supported by competent, substantial evidence presented at the evidentiary hearing and also by the original trial record, which indicated that Zakrzewski was present when the trial court deferred ruling on the motion to suppress). At the end of the penalty phase, trial counsel stated he had no additional penalty phase witness but wished to confer with his client before announcing rest. The reasonable assumption is that trial counsel wanted to confer with his client about his testifying in the penalty phase since he had no other witnesses. The trial court's factual finding should be affirmed.

Counsel is not ineffective for failing to obtain an on-the-record of the right to testify at the penalty phase because no such on-the-record waiver is required under Florida law. *Lawrence v. State*, 831 So.2d 121, 132 (Fla. 2002)(explaining that due process does not require that the defendant waive his right to testify on-the-record and rejecting an ineffectiveness claim for failing to inform the defendant of the right to testify at penalty phase because the trial court found that

trial counsel had, in fact, advised the defendant of his right to testify); *Davis v. State*, 2003 WL 22722316 (Fla. Nov. 20, 2003)(holding defense counsel was not ineffective in failing to obtain an on-the-record waiver by Davis of his right to testify in the penalty phase where defense counsel testified at the evidentiary hearing that the subject of whether Davis would testify in the penalty phase was discussed with Davis). As in *Davis* and *Lawrence*, this Court should reject again such a claim of ineffectiveness.

Trial counsel obviously discussed the right to testify in general with Monlyn because Monlyn testified twice in the guilt phase. Monlyn's testimony on this matter is simply not credible. He did not even attempt to explain how he could possibly be unaware of his right to testify at the penalty phase when he had, in fact, testified in the guilt phase. Monlyn obviously knew of his right to testify in general because he exercised that right in this case. Monlyn did not even attempt to explain this contradiction.

In *Daniels v. Lee*, 316 F.3d 477, 490-491(4th Cir. 2003), the Fourth Circuit rejected a claim of ineffectiveness for failing to inform the defendant of his right to testify. The Court explained that while there was no waiver colloquy, the record reflected that Daniels was present during voir dire when his lawyers questioned prospective jurors on how they would react if Daniels decided not to testify. Daniels had initially expressed a desire to testify during the guilt phase but, after discussing the matter with his lawyers, decided not to take the stand. At

the sentencing phase, the court advised all those present, including Daniels, as follows:

> All right, before we bring the jury in, let me say that for this phase of the trial, I have requested that the deputies leave the leg irons on Mr. Daniels. Now, even though I have requested that, they will not be displayed in the presence of the jury if Mr. Daniels decides to take the witness stand and testify.

Based on this evidence, the trial court found that Daniels was aware of his right to testify. The *Daniels* Court noted that other than offering general after-the-fact denials that he was unaware of his right to testify, there was no evidence to rebut the trial court's findings.

Here, Monlyn's testimony at the guilt phase was also evidence that he was aware of his right to testify at the penalty phase. Here, as in *Daniels*, other than Monlyn's general after-the-fact denials that he was unaware of his right to testify at the penalty phase, there was no evidence to rebut the trial court's findings.

Furthermore, there is no prejudice because even if the defendant had testified in the penalty phase about his remorse it would not have changed the jury recommendation. Testifying that you were in "the wrong place at the wrong time" is not remorse. *United States v. Coker*, 52 F.3d 1123 (D.C. Cir. 1995)(affirming denial of sentencing reduction and concluding that a defendant attributing his involvement to being "in the wrong place at the wrong time" is an attempt to minimize his

responsibility). Monlyn was in the "wrong place" because he escaped from jail and broke into the barn, not because of any fortuitous circumstance. The "right place" for Monlyn was in jail but he escaped. No jury would found such testimony compelling mitigation. Furthermore, the jury was unlikely to find credible remorse testimony of an eleven time convicted felon. Monlyn's ambivalent remorse testimony would not have resulted in a life recommendation. *Washington v. Kemna*, 16 Fed. Appx. 528 (8th Cir. 2001)(holding that there was no prejudice from counsel's failure to inform the defendant of his right to testify because Washington's proposed trial testimony would have merely reiterated the alibi defense already provided through the trial testimony of his mother).

Monlyn's reliance on *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992)(en banc) and *Gallego v. United States*, 174 F.3d 1196 (11th Cir. 1999), is misplaced. In *Teague*, trial counsel filed a motion for new trial asserting that while she thought it better if the defendant did not testify, she was concerned that the defendant may not have understood that the final decision was his to make. Here, by contrast, defense counsel did not express any concern that Monlyn may not have understood that the final decision was his to make. Far from it - defense counsel testified that he always discussed the right to testify and he was certain he followed that standard practice in this case as well.

In *Gallego*, the Eleventh Circuit concluded that the district court followed an erroneous legal standard in assessing

defendant's claim that trial counsel rendered ineffective assistance of counsel by failing to properly advise defendant that he had a constitutional right to testify. The district court rejected the claim following an evidentiary hearing. The magistrate incorrectly ruled that "as a matter of law [a] defendant could not carry his burden without presenting some evidence in addition to his own word, which is contrary to counsel's." *Gallego*, 174 F.3d at 1198. The Eleventh Circuit remanded for a new evidentiary hearing in front of a different magistrate because a defendant's testimony that his counsel did not inform him of his rights is sufficient if believed by the trial court. The Eleventh Circuit stated that the magistrate did not weigh the defendant's credibility. Here, by contrast, the trial court made a traditional credibility determination and did not use an incorrect legal standard.

The trial court's credibilty finding that trial counsel informed Monlyn of his right to testify at the penalty phase should be affirmed. There is no prejudice because his quasi-remorse testimony would not have resulted in a life sentence. The trial court denial of this claim should be affirmed.

## CUMULATIVE ERROR

Monlyn asserts that the cumulative errors of trial counsel amounted to ineffective assistance of counsel. IB at 38. Because all three claims are without merit, the cumulative error claim is necessarily without merit. *Griffin v. State*, 2003 WL 22207901 (Fla. Sept. 25, 2003)(concluding that because "the alleged individual errors are without merit, the contention of cumulative error is similarly without merit"); *Vining v. State*, 827 So.2d 201, 219 (Fla. 2002)(same); *Downs v. State*, 740 So.2d 506, 509 n. 5 (Fla. 1999)(finding that claim of cumulative error was without merit where the court found the individual claims to be without merit). Zero plus zero plus zero equals zero. *United States v. Villa*, 46 F.3d 1153 (10th Cir. 1995)(unpublished opinion)(rejecting a cumulative error argument based on four claims of error because "zero plus zero equals zero, and four zeros added together still equal zero."). There is no cumulative error.

## ISSUE II

WHETHER THE TRIAL COURT'S FAILURE TO RULE ON TWO CLAIMS IN THE POST-CONVICTION MOTION IS PRESERVED? (Restated)

Monlyn asserts that the trial court failed to rule on issues (7) and (8) of his post-conviction motion. These issues are not preserved for appellate review. Monlyn did not obtain a ruling from the trial court as required. A party abandons an issue by failing to obtain a ruling from the court. Monlyn should have pointed out the oversight to the trial court, not this Court. Monlyn has abandoned issues (7) and (8) by his failure to obtain a ruling from the trial court. Furthermore, both issues are procedurally barred. Issue (7), regarding the finding of pecuniary gain as an aggravator, should have been raised on direct appeal. Issue (8), regarding the CCP findings and jury instruction, was raised in the direct appeal and is barred by the law of the case doctrine. These issues are also procedurally barred. Monlyn does not even address the merits of either issue.

Facts

In his amended motion, Monlyn asserted, as issue (7), that the trial court improperly instructed the jury on the pecuniary gain aggravator because pecuniary gain was not the primary motive for the murder (PC Vol. IV 580-581). As issue (8), Monlyn asserted that CCP aggravator jury instruction was unconstitutional and the trial court improperly refused to give a anti-doubling instruction but acknowledged that both instruction had been

addressed and rejected in the direct appeal. (PC Vol. IV 581-582). In the State's response, the State noted that issue (7) should be summarily denied. (PC Vol. IV 646-647). Issue (7) was procedurally barred because it should have been raised on direct appeal and was meritless. In the State's response, the State noted that issue (8) should be summarily denied. (PC Vol. IV 647). Issue (8) was procedurally barred because it was rejected by the Florida Supreme Court in the direct appeal.

At the *Huff* hearing, the State explained that issue (7) was procedurally barred. (PC Vol. IX 1434-1435). The State also explained that issue (8) was raised on direct appeal and found meritless by the Florida Supreme Court. (PC Vol. IX 1435). Defense counsel agreed that no evidentiary hearing was required for either issue (7) or issue (8). (PC Vol. IX 1434-1435).

The trial court's order, following the *Huff* hearing, summarily denied several claims "for the reasons set out in the State's response" but ruled that "no evidentiary hearing will be held on the issues raised in section C paragraphs 7 and 8 by agreement of the parties as the issues may be determine without the necessity of an evidentiary hearing." (PC Vol. IV 666-667).

Preservation

The trial court's failure to rule on these two issues is not preserved. It is a well established rule of appellate practice that a party abandons an issue by failing to obtain a ruling from the court. *Rose v. State*, 787 So.2d 786, 797 (Fla. 2001), *cert. denied*, 535 U.S. 951, 122 S.Ct. 1349, 152 L.Ed.2d 252

(2002) (noting that, as a general rule, the failure of a party to get a timely ruling by a trial court constitutes a waiver of the matter for appellate purposes); *Richardson v. State*, 437 So.2d 1091, 1094 (Fla. 1983)(holding the defendant did not preserve the motion to strike certain testimony because he failed to obtain a ruling from the court on the motion); *State v. Kelley*, 588 So.2d 595 (Fla. 1st DCA 1991)(noting the rule is clear that it is the movant's burden to secure rulings on his or her motions, and that failure to obtain a ruling on a motion effectively waives that motion); *Carratelli v. State*, 832 So.2d 850 (Fla. 4th DCA 2002)(stating that a "plethora of Florida cases support the notion that a party must obtain a ruling from the trial court in order to preserve an issue for appellate review."); *Shipman v. State*, 842 So.2d 1021 (Fla. 5th DCA 2003)(holding the defendant abandoned his objection in the trial court by failing to obtain a ruling from the court); see also § 924.051(1)(b), Fla. Stat. (1997)(stating "Preserved" means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor). Monlyn should have pointed out the oversight to the trial court, not this Court. Monlyn has abandoned issues (7) and (8) by his failure to obtain a ruling from the trial court.

Monlyn's reliance *Ottesen v. State*, 28 Fla. L. Weekly D2198, 2003 WL 22149151 (Fla. 2d DCA Sept. 19, 2003)and *Morrison v. State*,
842 So.2d 1071 (Fla. 4th DCA 2003), is misplaced. In *Ottesen*, the trial court failed to address six claims in the post-conviction motion in its order of denial and the Court reversed and remanded for the trial court to consider the merits of the claims pursuant to the procedure set forth in rule 3.850. However, *Ottesen* was an appeal of a summary denial of a post-conviction motion. The Second District remanded for an evidentiary hearing on another claim of ineffectiveness. In other words, the case was being remanded anyway. *Morrison*, likewise, was a summary denial of the motion, that was being remanded for an evidentiary hearing on three other claims anyway. If a case is being remanded anyway, there is no harm is requiring the trial court to rule on the omitted claims on remand. However, if the case is not being remanded, there should be no exception to the rule that a party must obtain a ruling from the trial court.[15] To hold otherwise, would eviscerate this long standing rule of appellate practice and

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[15] *Rentschler v. State*, 838 So.2d 1212 (Fla. 2d DCA 2003) and *Gonzalez v. State*, 829 So.2d 323 (Fla. 2d DCA 2002), were both summary denial cases, but they were not being remanded for an evidentiary hearing on other claims anyway. They were both remanded on the one claim the trial court failed to address. They are incorrectly decided because they ignore the basic rule of appellate practice that a party must obtain a ruling from the trial court to appeal an issue. It is not apparent whether an abandonment argument was made in either case and often there are no briefs filed by the State in appeals from summary denials of 3.850 motions in non-capital cases.

result in legal churning. *State v. Rucker*, 613 So.2d 460, 462 (Fla. 1993)(finding the trial court's failure to make specific findings regarding whether the prior convictions were pardoned or set aside was harmless where the defendant did not assert that the convictions were, in fact, either pardoned or set aside because "[w]ere we to remand for resentencing, the result would be mere legal churning"); *Herrington v. State*, 643 So.2d 1078 (Fla. 1994)(holding trial court's failure to make statutorily required findings of fact where evidence was unrebutted was harmless error and agreeing with the district court that a remand would involve needless waste of time and expense).[16] Monlyn presents no argument on appeal that either issue is not, in fact, procedurally barred or has any merit to it. Rather, he present merely a failure to rule argument.

Procedural Bar

Both issues are procedurally barred. Issue (7), regarding the finding of pecuniary gain as an aggravator, should have been raised on direct appeal. *Griffin v. State*, 2003 WL 22207901 (Fla. Sept. 25, 2003)(holding claims of instructional error in the penalty phase are procedurally barred because they could have and should have been raised on direct appeal); *Shere v.*

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[16] Both *Rucker* and *Herrington* involved the trial court's failure to make findings of fact. Here, by contrast, both issues are pure issues of law. By agreeing that no evidentiary hearing was required on either issue, collateral counsel admitted that both issues were pure issues of law. There is even less reason to remand on pure issues of law. This Court can just as easily determine whether the issues are procedurally barred and the merits as the trial court.

*State*, 742 So.2d 215, 218 n.7 (Fla. 1999)(rejecting an argument that the evidence contradicted most of the court's findings on aggravators and mitigators and noting that, to the extent the defendant was challenging the jury instructions given on the aggravators, the postconviction court correctly found these claims procedurally barred because they should have been raised on direct appeal). Issue (8), regarding the CCP findings and jury instruction, was raised in the direct appeal and is barred by the law of the case doctrine. *Monlyn*, 705 So.2d at 5-6. Monlyn may not relitigate an issue already decided adversely to him in the direct appeal in his post-conviction appeal. *Shere v. State*, 742 So.2d 215, 218 n.7 (Fla. 1999)(explaining, with regard to the CCP aggravator, that where the Court upheld its application to this case on direct appeal, a defendant is precluded from relitigating this claim in his 3.850 motion). Both issues are procedurally barred.

Merits

This Court, in the direct appeal, held:

> We consider Monlyn's tenth and eleventh issues together: he argues that an unconstitutional CCP instruction was given and that it was error both to instruct on and find the CCP aggravating circumstance. The instruction given was the standard jury instruction we invalidated in Jackson v. State, 648 So.2d 85 (Fla.1994). However, we have held that the aggravator can still stand where the facts of the case establish that the killing was CCP under any definition. See, e.g., Reese v. State, 694 So.2d 678 (Fla.1997); Larzelere v. State, 676 So.2d 394 (Fla.), cert. denied, 519 U.S. 1043, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). The sentencing order explicitly sets out the facts supporting the aggravator. The court found that Monlyn told others in prison that when he got out he was going to kill the victim; told Johnny Craddock that he was going to escape, get his shotgun, kill the first person he

> saw, steal the person's vehicle, and leave the area; concealed himself in the victim's barn and waited for him; and then kidnapped and murdered the victim and stole his truck. This provides ample evidence of heightened premeditation; evidence of a careful plan or prearranged design; evidence that Monlyn killed the victim after cool, calm reflection; and no pretense of moral or legal justification. See Jackson, 648 So.2d at 89. Because of this, the erroneous instruction was harmless. We find no error either in instructing on or finding CCP, and we find no reversible error in using the unconstitutional instruction.

*Monlyn*, 705 So.2d at 5-6. The *Monlyn* Court found that the facts established "ample evidence" of CCP. The *Monlyn* Court found "no error either in instructing on or finding CCP," and "no reversible error in using the unconstitutional instruction." Monlyn presents no argument in this appeal explaining how or why this Court's previous merits determination was incorrect.

Additionally, contrary to Monlyn's claim in the trial court, to establish the pecuniary gain aggravator, the State must prove that the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain. This Court has consistently found the pecuniary gain aggravator applies where the murder was committed during the forcible taking of an automobile. *Rogers v. State*, 783 So.2d 980, 993 (Fla. 2001)(citing *Wyatt v. State*, 641 So.2d 355, 359 (Fla.1994) and *Lambrix v. State*, 494 So.2d 1143, 1148 (Fla. 1986)). Only when a defendant abandons the vehicle shortly after the murder has this Court stricken the pecuniary gain aggravator. *Rogers v. State*, 783 So.2d 980, 993 (Fla. 2001)(citing *Allen*, 662 So.2d at 330; *Scull*, 533 So.2d at 1142 and *Peek*, 395 So.2d at 499). Monlyn drove the victim's truck to Lake City - over 50 miles away. Moreover, he stole the truck to facilitate his escape

from jail, not merely his escape from the murder. Moreover, while not necessary, the State’s evidence was that the taking of the truck was the primary motive for this murder. Thus, the trial court should have denied both claims as being procedurally barred and meritless.

## CONCLUSION

The trial court's denial of post-conviction relief should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Baya Harrison, III, Esq., P.O. Drawer 1219, Monticello, FL 32345 this 6th day of January, 2004.

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## CERTIFICATE OF FONT AND TYPE SIZE

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

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