IN THE SUPREME COURT OF FLORIDA

MICHAEL DUANE ZACK,

Appellant,

CASE NO. SC03-1374

v.

STATE OF FLORIDA,

Appellee.

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/

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE

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PRELIMINARY STATEMENT

Appellant, MICHAEL DUANE ZACK, 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. 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 trial transcript will be referred to as (T. Vol. pg). The postconviction record on appeal will be referred to as (PC Vol. pg). The evidentiary hearing transcript, which is contained in PC III 371-477, will be referred to as (EH Vol. pg) with the page reference to upper right hand page numbers. 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 an appeal of 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, as stated in the direct appeal opinion, are:

> Although the murder of Smith took place on June 13, 1996, the chain of events which culminated in this murder began on June 4, 1996, when Edith Pope (Pope), a bartender in Tallahassee, lent her car to Zack. In the weeks prior, Zack had come to Pope's bar on a regular basis. He generally nursed one or two beers and talked with Pope; she never saw him intoxicated. He told her that he had witnessed his sister murder his mother with an axe. As a result, Pope felt sorry for Zack, and she began to give him odd jobs around the bar. When Zack's girlfriend called the bar on June 4 to advise him that he was being evicted from her apartment, Pope lent Zack her red Honda automobile to pick up his belongings. Zack never returned.
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> From Tallahassee, Zack drove to Panama City where he met Bobby Chandler (Chandler) at a local pub. Over the next several days, Zack frequented the pub daily and befriended Chandler.[1] Chandler, who owned a construction subcontracting business, hired Zack to work in his construction business. When Chandler discovered that Zack was living out of a car (the red Honda), he invited Zack to live with him temporarily. On the second night at Chandler's, Zack woke up screaming following a nightmare. Chandler heard Zack groan words which sounded like "stop" or "don't." Although Chandler questioned him, Zack would not discuss the nightmare. Two nights later, on June 11, 1996, Zack left Chandler's during the night, stealing a rifle, a hand gun, and forty-two dollars from Chandler's wallet. Zack drove to Niceville, and on the morning of June 12, 1996, pawned the guns for $225.
> From Niceville, Zack traveled to Okaloosa County and stopped at yet another bar. At this bar, Zack was sitting alone drinking a beer when he was approached by Laura Rosillo (Rosillo). The two left the bar in the red Honda and drove to the beach, reportedly to use drugs Zack said he possessed. Once on the beach, Zack attacked Rosillo and

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[1] Chandler also testified that Zack did not drink much, and he never saw Zack intoxicated.

beat her while they were still in the Honda. He then pulled Rosillo from the car and beat her head against one of the tires. Rosillo's tube top was torn and hanging off her hips. Her spandex pants were pulled down around her right ankle. The evidence suggests she was sexually assaulted; however, the sperm found in Rosillo's body could not be matched to Zack. He then strangled her, dragged her body behind a sand dune, kicked dirt over her face, and departed.

Zack's next stop on this crime-riddled journey was Dirty Joe's bar located near the beach in Pensacola. He arrived there on the afternoon of June 13, 1996, and met the decedent, Ravonne Smith. Throughout the afternoon, Smith, a bar employee, and Zack sat together in the bar talking and playing pool or darts. The bar was not very busy, so Smith spent most of her time with Zack. Both bar employees and patrons testified that Zack did not ingest *14 any significant amount of alcohol and that he did not appear to be intoxicated. In the late afternoon, Smith contacted her friend Russell Williams (Williams) and invited him to the bar because she was lonely. Williams arrived at the bar around 5:30 p.m. Prior to leaving the bar around 7 p.m., Smith called her live-in boyfriend, Danny Schaffer, and told him she was working late. Smith, Williams, and Zack then left the bar and drove to the beach where they shared a marijuana cigarette supplied by Zack. Afterwards, they returned to the bar and Williams departed. Zack and Smith left the bar together sometime around 8 p.m. and eventually arrived at the house Smith shared with her boyfriend.

Forensic evidence indicates that immediately upon entering the house Zack hit Smith with a beer bottle causing shards of glass and blood to spray onto the livingroom love seat and two drops of blood to spray onto the interior door frame. Zack pursued Smith down the hall to the master bedroom leaving a trail of blood. Once in the bedroom Zack sexually assaulted Smith as she lay bleeding on the bed. Following the attack Smith managed to escape to the empty guest bedroom across the hall. Zack pursued her and beat her head against the bedroom's wooden floor. Once he incapacitated Smith, Zack went to the kitchen where he got an oyster knife. He returned to the guest bedroom where Smith lay and stabbed her in the chest four times with the knife. The four wounds were close together in the center of Smith's chest. Zack went back to the kitchen, cleaned the knife, put it away, and washed the blood from his hands. He then went back to the master bedroom, placed Smith's bloody shirt and shorts in her dresser drawer, stole a television, a VCR, and Smith's purse, and placed the stolen items in Smith's car.

During the night, Zack drove Smith's car to the area where the red Honda was parked. He removed the license plate and several personal items from the Honda then moved it to a nearby lot. Zack returned to Panama City in Smith's car and attempted to pawn the television and VCR. Suspecting the merchandise was stolen, the shop owners asked for identification and told Zack they had to check on the merchandise. Zack fled the store and abandoned Smith's car behind a local restaurant. Zack was apprehended after he had spent several days hiding in an empty house.

After he was arrested, Zack confessed to the Smith murder and to the Pope and Chandler thefts. Zack claimed he and Smith had consensual sex and that she thereafter made a comment regarding his mother's murder. The comment enraged him, and he attacked her. Zack contended the fight began in the hallway, not immediately upon entering the house. He said he grabbed a knife in self- defense, believing Smith left the master bedroom to get a gun from the guest bedroom.[2]

The defense additionally contended that Zack suffers from fetal alcohol syndrome (FAS) and posttraumatic stress disorder (PTSD). Thus, the defense postulated Zack was impulsive, under constant mental and emotional distress, and could not form the requisite intent to commit premeditated murder. The State's theory of the case was that Zack was a calculated stalker/predator, who stalked his prey in bars. His method of operation included befriending his prey, gaining each person's sympathy with stories of his mother's death and his abusive childhood, then taking advantage of the persons by either robbing or sexually assaulting them.

After the jury returned verdicts of guilty for first-degree murder, sexual battery and robbery, a second phase was commenced to determine the appropriate punishment--death or life in prison. The defense presented expert witnesses who discussed Zack's mental and emotional health. Dr. William Spence, a forensic *15 psychologist, evaluated Zack in Tallahassee after he had been arrested for grand theft of an automobile. Dr. Spence diagnosed Zack with posttraumatic stress disorder. He admitted the social history was given to him by Zack, who claimed to have witnessed his sister murder his mother. Dr. James Larson, Dr. Barry Crown, and Dr. Michael Maher evaluated Zack and investigated his social history. Each of them also diagnosed Zack as suffering from posttraumatic stress disorder and fetal alcohol syndrome. They further opined

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[2] There is no indication in this record that a gun was in the guest bedroom.

that the murder was committed while Zack was under an extreme mental or emotional disturbance and that Zack's ability to appreciate the criminality of his conduct was substantially impaired. None of them had spoken with anyone who had contact with Zack around the time of the murder.

In addition to experts, Zack presented the testimony of friends and family. The defendant's father testified that he met and married Zack's mother when she was pregnant with Zack. He divorced her because of her excessive drinking. Zack's maternal grandmother testified about his mother's marriage and divorce from Zack's father and her marriage to Anthony Midkiff when Zack was two years old. The grandmother stated she never saw or heard of Midkiff abusing Zack. Theresa McEwing,[3] Zack's stepsister, testified that Midkiff punished Zack when he wet the bed. The punishment would take the form of burning Zack's "privates" with a heated spoon, fashioning an electric blanket to electrocute Zack if the blanket got wet, or pulling hard on Zack's penis.

Ziva Knight,[4] Midkiff's daughter, testified concerning Midkiff's extensive abuse of Zack. Zack's aunt, Ione Tanner, also related instances of abuse of Zack by Midkiff. She admitted she did not get medical attention for Zack nor did she report the abuse. The State demonstrated that she knew, from defense counsel, that the experts would rely on allegations of abuse in formulating their opinions. Phyllis Anglemyer, a friend of Zack's mother, related instances of abuse by Midkiff committed in her presence. However, her husband, who observed Midkiff interact with Zack on a daily basis for five years, only witnessed one instance of abuse. Richard Enfield, a correctional officer, testified that while awaiting trial, Zack volunteered to assist in a project dealing with juvenile delinquents. Enfield said he stopped using Zack in the program after Zack attacked a jail guard.

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[3] McEwing is the sister who allegedly killed their mother. She was declared insane and spent three or four years in a mental hospital. She indicated Midkiff raped her and told her not to tell or he would kill the family.

[4] After undergoing hypnosis, Knight stated that she was hiding under the bed when Midkiff, not Theresa, killed her mother.

> The State, during its initial penalty phase presentation, elicited testimony from Donald Steeley, a probation officer from Oklahoma, that Zack was an absconder from probation. The State also presented testimony from Smith's mother and two brothers. On rebuttal, the State offered testimony from Dr. Eric Mings, Dr. Harry McClaren and Candice Fletcher, Zack's former girlfriend and mother of his child. Dr. Mings, a neuropsychologist, stated Zack has a full scale I.Q. of 86--in the low average range. He could not diagnose Zack with fetal alcohol syndrome because there were too many variables. Mings also stated that neuropsychological testing cannot be used by itself to diagnose posttraumatic stress disorder. Dr. McClaren, a forensic psychologist, who also testified in the guilt phase of the trial, indicated he administered the MMPI to Zack, but the malingering scale was outside of the normal limits, making the test useless. Dr. McClaren opined, after interviews with persons who had contact with Zack around the time of the murder, that the statutory mental mitigators did not apply and that Zack's actions around the time of the murder were more planned than spontaneous.

Zack v. State, 753 So.2d 9, 13-16 (Fla. 2000)(footnotes included)

> On June 16, 1996, the Escambia County Sheriff's Office arrested Michael Duane Zack (Zack) for the sexual assault, robbery, and first-degree murder of Ravonne Kennedy Smith (Smith). Zack, who was twenty-seven at the time of these crimes, was indicted by the grand jury on June 25, 1996. A jury trial was commenced before the Honorable Joseph Q. Tarbuck on September 8, 1997, and guilty verdicts on all counts were returned by the jury on September 15, 1997. In the penalty phase held October 14-17, 1997, the reconvened jury recommended a sentence of death by a vote of eleven to one. The trial court followed the jury's recommendation and on November 14, 1997, sentenced Zack to death.
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> In support of the death sentence, the trial judge found the following six aggravating circumstances: (1) the defendant was convicted of a capital felony while under a sentence of felony probation; (2) the crime was committed in conjunction with a robbery, sexual battery, or burglary; (3) the defendant committed the crime to avoid lawful arrest; (4) the defendant committed the crime for financial gain; (5) the crime was especially heinous, atrocious, and cruel; and (6) the crime was committed in a cold, calculated, and premeditated manner. The trial court found that the following four mitigating circumstances were entitled to little weight: (1) the defendant committed the crime while under an extreme mental or emotional disturbance; (2) the defendant was acting under extreme duress; (3) the defendant lacked the capacity to appreciate the criminality of his conduct or

> to conform his conduct to the requirements of law; and (4) nonstatutory mitigating factors of remorse, voluntary confession, and good conduct while incarcerated. Zack's age was not considered a mitigating factor.

Zack, 753 So.2d at 12-13.

On appeal to the Florida Supreme Court, *Zack* raised twelve issues: (1) the court erred in admitting *Williams* rule evidence; (2) the court erred in denying a motion for judgment of acquittal on the sexual battery charge; (3) the trial court erred in denying the motion for judgment of acquittal on the robbery charge; (4) the trial court erred in instructing the jury on felony murder based upon a burglary; (5) the sentencing order failed to consider all of the mitigating evidence presented; (6) the trial court erred in finding that the murder was committed to avoid or prevent a lawful arrest; (7) the trial court erred in finding that the murder was committed in a cold, calculated and premeditated manner; (8) the trial court erred in using victim impact evidence; (9) the trial court erred in admitting the rebuttal evidence from Candice Fletcher; (10) the trial court erred by failing to give Zack's proposed instruction on the role of sympathy; (11) the trial court erred in retroactively applying the aggravating factor of a murder committed while on felony probation; and (12) the trial court erred in refusing to admit a family photo during the penalty phase. The Florida Supreme Court affirmed the convictions and death sentence.

Zack filed a petition for writ of certiorari arguing that the admission of victim impact evidence violated the Eighth Amendment and due process. The United States Supreme Court

denied certiorari review on October 2, 2000. *Zack v. Florida*, 531 U.S. 858, 121 S.Ct. 143, 148 L.Ed.2d 94 (2000).

On May 10, 2002, collateral counsel filed a motion to vacate the judgment and sentence raising seven claims. (PC I 132-142). On July 12, 2002, the State responded. (PC I 144-190). On October 21, 2002, Zack filed his first amended 3.850 motion raising six claims: (1) ineffective assistance of counsel for failing to request a *Frye* hearing[1] regarding the DNA evidence; (2) the trial court erred in failing to *sua sponte* to hold a *Frye* hearing; (3) ineffective assistance of counsel for failing to prepare him to testify guilt phase resulting in his testimony being "disjointed, poorly delivered and confusing" and failing to inform him of possible cross-examination; (4) that the death penalty is disproportionate due to a possible brain dysfunction and his "mental impairment", which "fall into the same category" as mental retardation, prohibits his execution under *Atkins v. Virginia*, 536 U.S. 304 (2002); (5) ineffective assistance of counsel for using such phrases as "looks real bad", "he done a lot of stuff", "brutally, brutally killed" in his arguments and (6) Florida's death penalty statute violates *Ring v. Arizona*, 536 U.S. 584 (2002). On December 9, 2002, the State filed a response agreeing to an evidentiary hearing on claims 1, 3 and 5 but asserted that the remaining claims, claims 2, 4 and 6, should be summarily denied. (PC II 257-296). On January 23, 2003, the trial court held a *Huff* hearing. (PC II 300-335). On March 20, 2003, the trial court entered an order granting an

[1] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

evidentiary hearing on claims 1,3, and 5 only. (PC II 338-335). On May 14, 2003, the trial court held an evidentiary hearing. (PC III 341-477). Two witnesses testified at the evidentiary hearing, trial counsel Public Defender Elton Killam and the defendant. (PC III 346-425, 427-459). Both parties submitted written post-evidentiary hearing memorandums following the evidentiary hearing. (PC III 480-507; IV 508-566).

The trial court entered a written order denying the motion. (PC IV 567-705). The trial court found, in its order, that trial counsel was a "seasoned criminal defense attorney with over 23 years experience litigating criminal cases" at the time of Zack's trial, who had represented "at least 25 persons for murder charges, and handled at least 6 penalty phases in death cases." (PC IV 569).

SUMMARY OF ARGUMENT

ISSUE I -

Zack asserts his counsel was ineffective for failing to request a *Frye* hearing[2] regarding the DNA evidence and for not challenging the qualifications of the State's two DNA experts. There was no deficient performance. Both decisions were reasonable trial strategy. There were no real grounds to challenge either the DNA results or the expert's qualifications. Moreover, there is no prejudice. Zack did not establish that the scientific evidence used against him at trial was unreliable or that, in fact, the experts were unqualified, as he must do to establish prejudice. No evidence was presented at the evidentiary hearing questioning either the DNA results or the expert's qualifications. Thus, the trial court properly found no ineffectiveness.

ISSUE II -

Zack asserts that counsel was ineffective for calling him as a witness in the guilt phase. Zack claims that his trial counsel did not prepare him to testify resulting in his testimony being "confusing, non-responsive" and making "no sense". Zack also claims that counsel was ineffective for failing to inform him of possible cross-examination by the prosecutor and that if counsel had done so, he would not have testified. Assistant Public Defender Killam testified that he, in fact, discussed the issue of Zack testifying with him and

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[2] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

that he explained cross-examination to Zack. The trial court specifically found this testimony to be credible which rebuts this claim of ineffectiveness. Furthermore, as the trial court found, Zack is complaining about cross-examination that did not occur. The prosecutor was prohibited from cross-examining the defendant regarding the Russillo murder. Thus, the trial court properly rejected this claim of ineffectiveness.

ISSUE III -

Zack asserts that his trial counsel was ineffective in his arguments, when he used phrases such as “looks real bad”, “he done a lot of stuff” and “brutally, brutally killed”, which, in Zack’s words, exacerbated the State’s theory of the case. There was no deficient performance. It is not deficient performance to acknowledge the actual facts of the case. These comments were part and parcel of defense counsel’s theory of the case. His defense was to portray these crimes as fights among persons who were intoxicated. Trial counsel was attempting, in the trial court’s words, “damage control and to “spin unflattering evidence.” Damage control is not deficient performance. Nor was there any prejudice. The jury would have concluded that the murder was brutal without defense counsel telling them so. The trial court properly denied this claim of ineffectiveness.

ISSUE IV -

Zack asserts that the trial court erred in summarily denying two claims. The first claim was procedurally barred and the

second claim was already litigated on direct appeal. The trial court properly denied an evidentiary hearing regarding the mental retardation claim. As the trial court found based on the expert testimony at trial, Zack is not mentally retarded. The trial record conclusively rebuts this claim and therefore, no evidentiary hearing was required. The trial court properly summarily denied the two claims.

ISSUE V -

Zack asserts that the trial court erred by ruling *Ring v. Arizona*, 536 U.S. 584 (2002) was not retroactive. *Ring* is not retroactive. Jury findings do not seriously increase accuracy and therefore, *Ring* should not be applied retroactively. Thus, the trial court properly denied this claim.

ISSUE VI -

Appellate counsel argues that the case should be remanded for a second evidentiary hearing based on ineffective assistance of collateral counsel. This Court has repeatedly held that such a claim is not cognizable. This case should not be remanded for a second evidentiary hearing.

ARGUMENT

ISSUE I

DID THE TRIAL COURT PROPERLY FIND COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST A *FRYE* HEARING? (Restated)

Zack asserts his counsel was ineffective for failing to request a *Frye* hearing[3] regarding the DNA evidence and for not challenging the qualifications of the State's two DNA experts. There was no deficient performance. Both decisions were reasonable trial strategy. There were no real grounds to challenge either the DNA results or the expert's qualifications. Moreover, there is no prejudice. Zack did not establish that the scientific evidence used against him at trial was unreliable or that, in fact, the experts were unqualified, as he must do to establish prejudice. No evidence was presented at the evidentiary hearing questioning either the DNA results or the expert's qualifications. Thus, the trial court properly found no ineffectiveness.

Trial

During the opening of the guilt phase, defense counsel stated: "we're not disputing identity in this case." (T. I 196). "I'm not going to get up and cross-examine witnesses about DNA and fingerprints or blood splatters or this and that just to show off and act like I know something about DNA. We're not going to do that. We don't challenge that evidence." (T. I 196).

[3] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

The State presented two DNA experts at trial, Tim McClure of FDLE and Karen Barnes of FDLE. (T. IV 656-685,691-700). Tim McClure testified that he was a crime lab analyst with FDLE in the forensic serology DNA section. (T. IV 656). He had a B.A. in biology with a second major in chemistry from the University of Georgia. (T. IV 656-657). He had been employed with FDLE for three years and had been previously employed at the University of Georgia's lab. (T. IV 657). He had completed FDLE's training program which lasted over a year and, as a result, was a certified forensic serologist. (T. IV 657-658). He had testified twice previously as an expert - once as a serology expert and once as a DNA expert. (T. IV 658). The prosecutor, Mr. Murray, proffered him as an expert and defense counsel stated no objection. (T. IV 658). He explained DNA to the jury (T. IV 659-664). He identified the DNA types of the defendant, of the victim Smith, and of the victim Russillo with a chart. (T. IV 665-671). Defense counsel stated his willingness to stipulate to "a large amount of what we're going to be doing" in the interest of time. (T. IV 666). He testified that the sperm from the vaginal swabs of the victim matched the six markers of the DNA type of Zack. (T. IV 671-672). He testified that that particular DNA type occurs in one in 18,700 of the Caucasian population. (T. IV 673). He testified that the blood on the baseball cap, the blood on the cigarette butt and the blood in the sand at the scene were victim Russillo's DNA type. (T. IV 674-675). The blood inside the red Honda Civic and several items found inside that car were victim Russillo's DNA type. (T.

IV 675-676). One blood spot found on the defendant's right shoe was victim Russillo's DNA type. (T. IV 674-675). Another blood spot found on the defendant's right shoe was victim Smith's DNA type. (T. IV 677). One spot of blood from the boxer shorts was victim Smith's DNA type. (T. IV 677-678). Another spot of blood from the boxer shorts was victim Russillo's DNA type. (T. IV 677-679). Items from victim Smith's black Conquest contained the DNA of both victims. (T. IV 683). The blood on the waterbed sheet and the cordless phone was victim Smith's DNA type. (T. IV 683). He testified that victim Russillo's DNA type occurs one in 3,400 of the Caucasian population. (T. IV 684). Victim Smith's DNA type occurs one in 8,200 of the Caucasian population. (T. IV 684). On cross, the expert testified that he could not match the vaginal swab of victim Russillo with the defendant's DNA type. (T. IV 687). While unusual, there was not enough sperm to do DNA typing.

Karen Barnes of FDLE testified regarding DNA as well. (T. IV 691-700). She was a senior crime analyst with FDLE who had been employed there approximately eight years. (T. IV 691-692). She had a Bachelors of Science degree in biology from Ohio State. She completed a one year training program with FDLE. (T. IV 692). She had a one week course with Roche Molecular Systems in California dealing specifically with PCR DNA testing. (T. IV 692). She had testified as an expert in about 30 trials, 25 of which were as a DNA expert. (T. IV 692). Defense counsel stipulated that she was an expert. (T. IV 693). She testified that she performed a different type of DNA test on the same

exhibits. (T. IV 693). Tim McClure had performed PCR DNA tests and she performed RFLP DNA testing. (T. IV 693-694). RFLP DNA testing required more DNA material than PCR DNA tests. (T. IV 694). You cannot perform RFLP DNA testing on smaller stains. She was able to type the defendant and Russillo fully but could only type Smith as to four of five markers. (T. IV 696). The stain on the tee-shirt from the black Conquest matched victim Smith on four markers. (T. IV 697). For those four markers, one in 33 million of the Caucasian population has that type. (T. IV 697). She was able to get only one marker from the stain on the shorts from the trunk of the black Conquest which matched Russillo at one in 40. (T. IV 698). The blood on the jeans was the defendant's type at one in 6 billion of the Caucasian population. (T. IV 699). On cross, the expert testified that she did not know where the boxer shorts came from which was true of all the exhibits. (T. IV 700).

Defense counsel in his closing of the guilt phase, reiterated that "I pointed out to you at the very beginning that I was not arguing to be arguing about DNA or fingerprints or most all the pile of stuff that you see over there in the corner" (T. VIII 1420).

Evidentiary hearing testimony

Collateral counsel asked Mr. Killam a series of questions about why he did not challenge the qualifications of the State's DNA experts, Tim McClure of FDLE or Karen Barnes of FDLE. (EH 7-9,20). Assistant Public Defender Killam explained that it "was

not my strategy to question the DNA evidence" which was why he did not challenge the qualifications of the DNA experts or file a motion for a *Frye* hearing. (EH 9-10,20). Trial counsel testified that he went to the FDLE lab to interview Jan Johnson, with whom he had a good working relationship, so he did not have to subpoena her. (EH 15,31). Trial counsel also testified that one aspect of the DNA evidence was to his benefit. (EH 17,21). Trial counsel testified that this case "was not a whodunnit". (EH 18). His defense was not that someone else had committed this crime. (EH 19). Assistant Public Defender Killam testified that he did not think that the jury was going to think that someone else committed the crime and he did not want the jury questioning his credibility for questioning the DNA evidence or experts when that was not his defense. (EH 23). Mr. Killam stated that, in his opening, he told the jury that he was not going to question the scientific evidence. (EH 19). Both PCR and RFLP methods of DNA testing were used. (EH 21). Trial counsel testified that there was no issue regarding who the boxer shorts belonged to. (EH 24). He did not think that the DNA evidence was a battle worth fighting. (EH 24). Trial counsel testified that there was "never" any question from the "get-go" who the perpetrator was. (EH 29). His client admitted that he was the perpetrator to him. (EH 30). Given this admission from his client, he knew that the DNA results were correct and therefore, he decided not to focus on the DNA. (EH 31). He was not going to question something that he knew was true. (EH 32,35). Misidentification was not his defense and the

evidence was going to show that the defendant was involved in both cases. (EH 35). In his professional opinion, juries are turned off by long cross-examination on issues that are not pertinent. (EH 36). Jurors do not appreciate defense attorneys wasting their time on issues that are not of any consequence. (EH 37). Trial counsel testified that his "goal was to save Mr. Zack's life" and he "felt like that questioning DNA evidence was not going to be of any value" and he was not going to "be picky on issues that were of no consequence". (EH 41). He did not think that the DNA was going to "make or break the case". (EH 45). Trial counsel explained that identity would be proven based on the DNA as well as other evidence and there was no reason to fight a battle that he would lose and that the prosecutor would turn on him because it was obvious. (EH 49). The war he was planning on winning was Zack's level of intent. (EH 72).

The trial court's ruling

The trial court ruled:

> The Defendant claims that Trial Counsel's failure to challenge DNA evidence and testimony against him at trial, and his failure to request a *Frye* hearing regarding the admission of that evidence, prejudiced Defendant in the case at hand. Trial Counsel, a seasoned criminal defense attorney with over 23 years experience litigating criminal cases at the time Defendant's case went to trial, testified that he had represented at least 25 persons for murder charges, and handled at least 6 penalty phases in death cases. Trial Counsel testified that he never questioned the validity of the DNA testing results, because he knew they were accurate. Trial Counsel based this strategic decision not to challenge the DNA results, either through a *Frye* hearing or at trial, upon several factors.

First, Defendant had confessed to the police and admitted to killing Victim Smith in the case at hand, as well as to killing Victim Rusillo in the similar fact evidence homicide case in Okaloosa County. Second, Defendant admitted to Trial Counsel that he had, in fact, killed Victim Smith in the case at hand. Third, sufficient and significant evidence of Defendant's guilt existed in this matter, regardless of the DNA: Defendant's fingerprints, which were located in Victim Smith's car and on Victim Smith's stolen audio/visual equipment; eyewitness testimony from people who had seen Defendant with Victim Smith shortly before the crimes occurred; and eyewitness testimony and videotapes from the No Fuss Pawn and Loan shop in Panama City, Florida, where Defendant was clearly identified attempting to pawn Victim Smith's stolen audio/visual equipment shortly after Victim Smith was killed.[4]

Trial Counsel testified that he did not choose to challenge the DNA evidence with a *Frye* hearing because to do so would harm his case and would not be conducive to his trial strategy. Trial Counsel stated that to challenge obviously accurate DNA evidence in the face of the rest of the overwhelming evidence against Defendant in the case at hand would cause Trial Counsel to lose credibility with the jury. Trial Counsel would lose face and potential support for Defendant by "fighting a losing battle." Further, Trial Counsel testified that identity was never an issue in Defendant's case. Trial Counsel knew, based upon the evidence which was being admitted, that there was no question that Defendant was the person who was the perpetrator of the killings in the case at hand, and in the Okaloosa County case. Trial Counsel knew that there was no way to effectively contravene this fact. Such an attack on a "non-issue" would enable the State to "turn" the case against Trial Counsel in closing. This would have caused even more harm to Defendant. Trial Counsel testified that his strategy, after reviewing all of the evidence and speaking with Defendant on over a dozen occasions, was to attempt to save Defendant's life. Trial Counsel opted to attack the State's case in the best way possible, by attempting to disprove "premeditation" through testimony showing that Defendant suffered from mental infirmities which caused him to be unable to control his behavior in a "suddenly hostile" situation, as Trial Counsel urged had occurred in both the Okaloosa and Escambia County killings.[5] Trial Counsel further testified

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[4] *See* limited Evidentiary Hearing transcript (with the testimony of Trial Counsel Killam), attached.

[5] *See* Trial transcript (with the testimony of Defendant and Defendant’s closing), in

that he even used the DNA evidence to Defendant's benefit, stating that because a portion of that evidence was helpful to Defendant, he was certainly not going to object to its admission.

The State's case involved either premeditated or felony murder, the underlying felonies being Sexual Battery and/or Robbery. Trial Counsel, aware of this, used the DNA evidence to Defendant's benefit. In the Okaloosa County case, semen located inside Victim Rosillo could not be specifically matched to Defendant. Because of this helpful fact, Trial Counsel argued that because Defendant did not commit a Sexual Battery in Okaloosa County, then he did not do so in Escambia County. Trial Counsel sought to dispel the State's theory of the case, that Defendant was a budding serial killer, whose "modus operandi" was to hunt his prey in bars, then rob and rape them. Trial Counsel believed that negating the Sexual Battery aspect of the State's case, as well as negating the "premeditation" aspect of the State's case, would greatly lessen the State's chances of achieving a verdict of first degree murder under either a "premeditation" or "felony murder" theory, ultimately, saving Defendant's life.

Finally, Trial Counsel's strategy and complete theory of defense was not identification or "mis"identification, so he had neither the need nor desire to attack the DNA results. Trial Counsel testified that he spent countless hours locating people from Defendant's life to testify on Defendant's behalf. Trial Counsel offered evidence showing that Defendant was a brain damaged and abused child, almost from his conception. Trial Counsel introduced evidence of Defendant's fetal alcohol syndrome, his torture at the hands of his stepfather and his trauma resulting from his mother's murder. Trial Counsel's strategy did not include contesting the DNA results. He tried, instead, to show that Defendant, an abandoned child and troubled adult who was addicted to drugs, was "damaged" and not responsible for his rage against Victim Smith, who was herself intoxicated, and had been taunting the already mentally fragile Defendant about his unsavory family history. Trial Counsel argued at trial through expert witnesses and Defendant's own testimony and Trial Counsel testified at the limited Evidentiary Hearing that Defendant's rage and subsequent hostile actions against Victim Smith was not premeditated and purposeful, but sprang impulsively from Defendant's "tortured" soul.[6] Defendant was unable to control his actions, through any fault or through his own volition, but due to a series of

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appellate file.

[6] *See* #8 and #9, *supra*, and Trial transcript (with the testimony of Defendant's witnesses), in appellate file.

> unfortunate circumstances which formed Defendant's life. This theory was a sound and logical theory of defense in light of the totality of the evidence and facts against Defendant. Trial Counsel had no grounds to challenge the DNA results, so he did not do so. The Court notes that Collateral Counsel for Defendant at the limited Evidentiary Hearing did not suggest or show that legitimate grounds even existed for such a challenge.[7] Accordingly, the Court finds that Trial Counsel was not ineffective for "failing" to challenge the DNA results in trial or in a *Frye* hearing. A decision to not request a *Frye* hearing may be a matter of sound trial strategy. *State v. Schneider*, 597 N.W.2d 889 (Minn. 1999). Trial Counsel's trial strategy, as explained at the limited Evidentiary Hearing and supported by witness and closing argument testimony at trial, was sound.[8] See also *Gudinas v. State*, 816 So.2d 1095 (Fla. 2002) (counsel is not ineffective for failing to further investigate DNA evidence in light of a defendant's incriminating statements regarding the crime to his counsel).

(PC IV 569-573)(footnotes included but renumbered).

Merits

There was no deficient performance in either the decision not to request a *Frye* hearing or to not challenge the experts' qualification. As the trial court found, trial counsel's decision not to request a *Frye* hearing was a sound trial strategy. Likewise, the decision to stipulate to an expert's qualifications is within the realm of trial strategy. A reasonable trial strategy is immune from attack. *State v. Bolender*, 503 So.2d 1247, 1250 (Fla. 1987)(holding that "[s]trategic decisions do not constitute ineffective assistance

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[7] *See* complete limited Evidentiary Hearing transcript, attached, *supra*.

[8] *See* #10, *supra*.

if alternative courses of action have been considered and rejected"). This was a reasonable trial tactic based on counsel's reasoned decision that misidentification was not a viable defense and there were no real grounds to challenge either the DNA results or the expert's qualifications.

As the trial court found, "trial counsel had no grounds to challenge the DNA results, so he did not do so." Trial counsel's performance is not deficient for failing to request a futile *Frye* hearing. As the trial court noted, collateral counsel did not "suggest or show that legitimate grounds even existed for such a challenge." Without some showing that the DNA was subject to being successfully *Frye* challenged or the expert's qualifications were subject to being successfully challenged, there is no deficient performance.

Identity was not the battle that counsel was trying to win. Identity was not seriously in dispute and counsel could not successfully make identity an issue in a case with a confession, items which were taken from the victim that were pawned the day after the murder, as well as fingerprint evidence. (EH 28,29). Trial counsel's strategy was to attempt to dispute premeditation and felony murder to establish a lesser degree of homicide, such as second degree murder or manslaughter, which would preclude the death penalty. Additionally, he testified that because some aspects of the DNA evidence positively helped him, he did not want to challenge the DNA evidence. Just as the State was attempting to establish a similarity between this murder and the Rosillo murder, defense counsel was going to turn the

similarities against the State. By rebutting the sexual battery in this case using the Rosillo case, he was hoping to negated the felony murder theory based on sexual battery in this case.

There can be no deficient performance for failing to challenge identity evidence in a case, as here, where the client tells his trial counsel that he committed the crime. *Gudinas v. State*, 816 So.2d 1095, 1102 (Fla. 2002)(finding no ineffectiveness for failing to further investigate the DNA in light of defendant's incriminating statements about the crime to his attorneys); *Reed v. State*, - So.2d -, 29 Fla.L.Weekly S156, 2004 WL 792837, *4 (Fla. April 14, 2004)(finding no ineffectiveness for failing to retain experts where the trial court had found counsel's "sound tactical and ethical decisions" to be based on counsel's conclusion that his client effectively had admitted guilt of the rape and murder to him). Counsel's performance was not deficient.

Nor can Zack establish any prejudice. No *Frye* hearing was necessary. Both RFLP and PCR DNA testing were widely accepted in the relevant scientific community, as a matter of law, by the time of this trial in 1997. Any request for a *Frye* hearing could have been denied by the trial court without any hearing. The trial court could have made a finding that both methods were widely accepted merely by citing a few cases without conducting any hearing.[9] Indeed, the Florida Supreme Court took judicial

[9] *People v. Venegas*, 954 P.2d 525 (Cal. 1998)(holding that trial court could properly rely on appellate decisions to establish general scientific acceptance of the restriction

notice of DNA testing in 1995. *Hayes v. State*, 660 So.2d 257, 264 (Fla. 1995)(taking judicial notice that DNA tests conducted properly would satisfy *Frye*). At some point, a "new" science becomes standard and therefore, no longer needs to be *Frye* tested. *State v. Sercey*, 825 So.2d 959, 980 (Fla. 1st DCA 2002)(explaining that the *Frye* standard applies only to new or novel scientific principles or procedures, not to standard scientific procedures which are generally accepted in the scientific community). Both types of DNA tests conducted in this case had reached that point by the time of this trial. There can be no prejudice from failing to have the trial court

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fragment length polymorphism (RFLP) methodology and that RFLP analysis was generally accepted in the scientific community by 1992); *People v. Hill* 89 Cal.App.4th 48, 56 (Cal. App. Ct. 2001)(noting that both the RFLP and PCR methodologies have acquired general acceptance in the scientific community); *Turner v. State*, 746 So.2d 355, 362 (Ala. 1998)(explaining that in future cases, judicial notice could be taken of the reliability of the PCR testing method); *United States v. Beasley*, 102 F.3d 1440, 1448 (8th Cir. 1996)(stating: "we believe that the reliability of the PCR method of DNA analysis is sufficiently well established to permit the courts of this circuit to take judicial notice of it in future cases"); *People v. Lee*, 537 N.W.2d 233, 257 (Mich. App 1995)(holding that trial courts in Michigan may take judicial notice of the reliability of DNA testing using the PCR method); *State v. Butterfield*, 27 P.3d 1133, 1141-1143 (Utah 2001)(taking judicial notice of PCR DNA testing relying on the treatise National Research Council, The Evaluation of Forensic DNA Evidence (1996); *State v. Gore*, 21 P.3d 262, 273 (Wash. 2001)(concluding that pre-trial hearings are not necessary with PCR); *State v. Bible*, 858 P.2d 1152, 1193 (Ariz. 1993)(permitting judicial notice of DNA theory and RFLP method and stating that from this point forward, Arizona trial courts no longer need to hold *Frye* hearings regarding the general acceptance of DNA); *Fugate v. Commonwealth*, 993 S.W.2d 931, 937 (Ky.1999)(holding that the reliability of the RFLP and the PCR methods has been sufficiently established as to no longer require a hearing).

make a factual finding of general acceptance that appellate courts have made as a matter of law.

Zack's reliance on *Murray v. State*, 692 So.2d 157, 163 (Fla. 1997), is misplaced. The *Murray* Court excluded PCR DNA results. This case, unlike *Murray*, involved both the RFLP method and the PCR method of DNA testing. RFLP, which was the older, more established method, was generally accepted. Moreover, the *Murray* Court relied on a 1992 NCR report finding, while the PCR method has "enormous promise, it has not yet achieved full acceptance in the forensic setting." However, The National Research Council issued an updated report in 1996 which was a year prior to this trial. National Research Council, The Evaluation of Forensic DNA Evidence: An Update (National Academy Press 1996). The update concluded that: "[t]he state of the profiling technology and the methods for estimating frequencies and related statistics have progressed to the point where the admissibility of properly collected and analyzed DNA data should not be in doubt." National Research Council noted that the PCR method and statistical analysis had improved. The NCR report concluded that "PCR-based methods are prompt, require only a small amount of material, and can yield unambiguous identification of individual alleles. The state of the profiling technology ... [has] progressed to the point where the admissibility of properly collected and analyzed DNA data should not be in doubt." See also George Bundy Smith & Janet A. Gordon, *The Admission of DNA Evidence in State and Federal Court*, 65 FORDHAM L.REV. 2465, 2470-2477(1997)(observing that "PCR technique

has been substantially improved" and noting that: "PCR analysis has received overwhelming acceptance in the scientific community and the courts."). By the time of this trial, both methods were accepted.

As to the particular tests conducted in this case, Zack cannot establish prejudice either. No scientific evidence of any flaws in the particular DNA testing procedures was presented at the evidentiary hearing.[10] The State's DNA testing, showing that Zack is the perpetrator, at one in 33 million, stands unrebutted. (EH 22,23). Therefore, there is no prejudice.

In *Reed v. State*, 29 Fla.L.Weekly S156 (Fla. April 15, 2004), this Court found that trial counsel was not ineffective for failing to retain or consult with scientific experts because the statistical numbers regarding the scientific evidence were correct. This Court found that the circuit court did not err in concluding that trial counsel's consultation with an independent serologist would not have changed the statistical numbers in any way. This Court found that trial counsel's failure to question

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[10] Not only did collateral counsel not actually produce any evidence of any flaws in the testing procedures at the evidentiary hearing, such a showing is probably not sufficient to show prejudice even if such evidence had been presented. Even if the first set of DNA tests had had some flaws in them, the State could have merely conducted a second set of DNA tests using another lab. There would be no prejudice from failing to file a *Frye* motion based on flawed testing because the State could merely retest the evidence. If defense counsel had filed a motion for a *Frye* hearing and succeeded to getting the first DNA testing suppressed due to some minor flaws, the State could have conducted a second DNA testing without any flaws. To establish any real prejudice, Zack needed to produce independent DNA tests showing that he was not the perpetrator. He, of course, did not do so.

the manner in which the State's expert reached that percentage was not deficient performance. Here, as in *Reed*, there has been no showing that the DNA statistical numbers were incorrect in any manner.

Collateral counsel seems to argue that the prejudice is that the DNA results were admitted at trial but that is not the prejudice from failing to request a *Frye* hearing. For example, if counsel filed a motion for a *Frye* hearing and the trial court held such a hearing but ruled that the results were admissible, as indeed the trial court should have under the then existing law, then the results would have been admitted regardless of the request for a *Frye* hearing. Zack suffered no prejudice as a result of trial counsel's decision to not challenge the DNA evidence.

Trial counsel is not deficient for not making baseless objections to the qualifications of the State's experts. Zack argues that Agent McClure had only been twice previously qualified as an expert before this trial. IB at 18. This is true of every expert at some time in their career. If counsel had made such a silly objection, the trial court would have merely overruled it. § 90.702, Fla. Stat.; Charles W. Ehrhardt, Florida Evidence § 702.1, at 598 (2002)(noting that whether a witness is qualified is "largely a matter for the discretion of the trial court."). Collateral counsel seems to argue that defense counsel did not fully understand DNA evidence. IB at 19. But it is not defense counsel's understanding of DNA that is at issue when counsel attacks the qualification of an

expert, it is the expert's. No trial court is going to rule that the State's expert is not qualified based on defense counsel's understanding of the science involved. Collateral counsel must show that Agent McClure did not understand DNA and there was no such showing. Indeed, neither expert was called to testify at the evidentiary hearing and no evidence regarding the qualifications or lack of qualifications of either expert was presented at the evidentiary hearing. Trial counsel was not ineffective for not challenging the DNA results or the qualifications of the State's experts.

ISSUE II

DID THE TRIAL COURT PROPERLY DENY THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR FAILING TO PREPARE THE DEFENDANT PROPERLY BEFORE HIS TESTIMONY? (Restated)

Zack asserts that counsel was ineffective for calling him as a witness in the guilt phase. Zack claims that his trial counsel did not prepare him to testify resulting in his testimony being "confusing, non-responsive" and making "no sense". Zack also claims that counsel was ineffective for failing to inform him of possible cross-examination by the prosecutor and that if counsel had done so, he would not have testified. Assistant Public Defender Killam testified that he, in fact, discussed the issue of Zack testifying with him and that he explained cross-examination to Zack. The trial court specifically found this testimony to be credible which rebuts this claim of ineffectiveness. Furthermore, as the trial court found, Zack is complaining about cross-examination that did not occur. The prosecutor was prohibited from cross-examining the defendant regarding the Russillo murder. Thus, the trial court properly rejected this claim of ineffectiveness.

Trial

Zack testified at the guilt phase of the trial. (T. VI 1085-1118). He testified that he had been "drinking quite a bit of alcohol, smoking marijuana, taking LSD and some cocaine" during the period of June 5th through June 13th. (T. VI 1087). He was talking to the victim in the bar about his problems including stealing a car and being in jail. He testified that he was

taking drugs on the night of the murder including half a hit of LSD and smoking marijuana. (T. VI 1091). Zack testified that they went to the victim's house and had sex. (T. VI 1095). They got in a an argument (T. VI 1095). Zack admitted he hit the victim with a beer bottle. (T. VI 1095). He thought the victim was going to get a "gun or something". He admitted stabbing the victim. (T. VI 1095). Defense counsel asked Zack if he put back on his clothes after they had sex and Zack answered he was sure he did, "I mean, nobody didn't tell me that I was naked anywhere whenever I had left that place I'm sure the police would arrest me for indecent exposure somewhere if I didn't have any clothes on. So I'm assuming . . ." (T. VI 1096). The prosecutor objected, at that point, because the answer was not responsive. The trial court overruled that objection. Zack was describing his childhood and abuse by his step-father. Defense counsel asked what kind of problems did Zack have on Fort Polk military base and Zack answered: "I've always had problems when I'm around Tony." (T. VI 1099-1100). The prosecutor again objected that the answer was not responsive. (T. VI 1100). The trial court sustained the objection and requested that Zack listen to the question and answer the question. (T. VI 1100). Before cross-examination, the trial court limited the prosecutor cross-examination "to those things defense counsel has gone into in the direct examination of his client." (T. VI 1111). The trial court noted that counsel did not go into Okaloosa County murder. (T. VI 1112). Defense counsel explained that that murder was beyond the scope. The trial court again limited cross to

matters testified on direct examination. The trial court asked the prosecutor if he was going to try to go into anything about the Okaloosa County murder and the prosecutor said no, not in light of the trial court's ruling. (T. VI 1113). The prosecutor noted his objection but was going to abide by the trial court's ruling. The trial court permitted the prosecutor to cross-examine Zack about taking the TV and VCR even though it was not explored in the direct examination because it was pertinent to the State's felony counts but "nothing about Okaloosa County." (T. VI 1114).

Evidentiary hearing testimony

Zack testified that he spoke with his trial attorney a couple of times while he was in county jail here and a few times while he was in the county jail in Okaloosa about this case. (EH 90). They spoke between four and six times. (EH 90). They discussed mainly his family background. (EH 95). He spoke with the investigator as well. (EH 90). Zack testified that he never spoke with his attorney about testifying until trial. (EH 91,92). Zack thinks that they discussed his testifying for the first time the day he took the stand or the day before. (EH 92). Collateral counsel asked Zack if Mr. Killam explained that the prosecutor would cross-examine him and Zack responded that he doesn't understand lot of stuff and that he was not aware of the situation. (EH 92). He testified that his attorney never told him that the prosecutor would cross-examine him. (EH 93). He did not understand or did not remember. (EH 93). Zack testified

that his trial attorney did not go over with him the possible questions that the prosecutor would likely ask or he didn't think so. (EH 94). Zack testified that if trial counsel explained cross-examination to him he did not understand it, but he didn't recall. (EH 95). Zack could not remember whether he was cross-examined on the Rosillo murder in Okaloosa during the trial. (EH 101-102). Zack admitted that he never objected to testifying. (EH 103). Zack also admitted that he wanted the jury to hear his side of the story. (EH 104). He wanted to testify that he and the victim had consensual sex before the murder - that it was not rape. (EH 104,106). He did not get to tell his side completely because every time he would start to explain the prosecutor would stop him. (EH 105). Mr. Murray, the prosecutor, would cut him off and ask another question. (EH 107). Zack testified that it seemed like the prosecutor was trying to trick him into saying something. (EH 108). Zack admitted that he saw other witnesses testifying before he took the stand and saw the prosecutor cross-examining them. (EH 111-113). He saw the concept of cross-examination during the trial. (EH 113). He testified that he did not understand that he had a choice not to testify and that he did not understand that if he testified poorly it would affect the outcome of the trial. (EH 115,116). Zack admitted that he wished he had not testified at trial because of the outcome of the trial. (EH 116). He was angry at the prosecutor's portrayal of him as a serial killer and rapist. (EH 116, 117).

Assistant Public Defender Killam knew that the defendant was going to testify before trial. (EH 81). Trial counsel testified that he discussed the decision to testify with Zack. (EH 125). Zack's testimony was crucial because counsel needed his version to argue his defense. (EH 125-126). Zack never told counsel that he did not want to testify. (EH 126). Zack wanted to get his story out and tell people what he went through. (EH 130). Assistant Public Defender Killam testified that he explained that the prosecutor could cross-examine Zack if he took the stand (EH 126). He was "positive" that he talked with Zack about cross-examination and that there would be some unpleasant questions. (EH 133). Mr. Killam testified that he specifically went over the rape with Zack as a possible area of cross-examination. (EH 134). Trial counsel avoided the Rosillo murder in his direct examination of Zack. (EH 126). The prosecutor was prohibited from cross-examining Zack regarding the Rosillo murder because it was outside the scope of defense counsel's direct. (EH 127; T. 1111-1113).

The trial court's ruling

The trial court ruled:

> Defendant claims that Trial Counsel called him as a witness at trial, but did not assist him in preparation to testify on direct or cross examination. Defendant claims that his "disjointed" trial testimony was the result of his Trial Counsel's failure to prepare him to testify and his failure to inform him about cross-examination. Defendant states that had he been prepared to testify and informed of the potential hazards of cross examination, he would not have testified.
>
> Defendant stated that Trial Counsel had only told Defendant that he "had" to take the stand and testify and that Trial Counsel did not discuss cross-examination with

him at all. Defendant alleged that Trial Counsel discussed his testifying at trial only after the trial began during the course of the trial, but not before the trial.

Trial Counsel testified that, contrary to Defendant's claim otherwise, he fully discussed with Defendant the procedure for Defendant's side to be told at trial, Defendant's "story", and that Defendant would have to take the stand and testify if he wanted to get his "story" out. Trial Counsel further testified that he had discussed the need for him to "tell his story" in order for Trial Counsel to argue it for Defendant. Additionally, Trial Counsel testified that prior to the trial, the Defendant was made aware of testifying and completely understood that the State prosecutor would cross-examine him. Trial Counsel testified that he advised Defendant of the specifics of what to expect while on the stand. Finally, Trial Counsel testified that Defendant never told him, either before or during trial, that he did not wish to testify.

The record supports the fact that Defendant never mentioned to the Court, either before or during the course of the trial, that he did not wish to testify. Defendant testified at the limited Evidentiary Hearing that he never conveyed to the Court or Trial Counsel that he did not wish to testify. Defendant admitted that he wanted the jury to hear his story.[11] Defendant further testified at his limited Evidentiary Hearing, and complained about cross-examination which did not even take place. Defendant complained that he was not prepared to be cross examined or questioned about the Okaloosa County homicide. Such a complaint is spurious as the record shows that Trial Counsel successfully fought against the State cross-examining Defendant at trial regarding any Okaloosa County issues. As a result, Defendant was never cross-examined about the Okaloosa County homicide during his Escambia County trial.

The Court finds that Defendant's third claim revolves around the issue of credibility. The Court chooses to accept Trial Counsel's sworn testimony at the limited Evidentiary Hearing as credible, and to reject Defendant's claim and sworn testimony that he was not prepared to testify or to be cross-examined due to Trial Counsel's failure to prepare him or advise him. Because the Court finds that Trial Counsel met with Defendant on numerous occasions and discussed with Defendant his testimony and what to expect while giving direct testimony and while being cross-examined, Defendant's third claim must be denied.

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[11] *See* limited Evidentiary Hearing transcript (with testimony of Defendant), attached, *supra*, and #2, *supra*.

(PC IV 574-576)(footnotes included but renumbered).

Merits

The trial court found, as a matter of fact, that trial counsel, as he had testified at the evidentiary hearing, discussed the decision to testify with Zack. The trial court also found, as a matter of fact, that trial counsel did inform Zack that the prosecutor would cross-examine him. This is a finding of fact of no deficient performance.

Trial counsel's decision to have the defendant testify was a reasonable tactical decision. Defense counsel was attempting to establish that this murder was a crime of passion to negate premeditated murder. (EH 37-38). A crime of passion defense involves the defendant's state of mind. Optimally, to present a state of mind defense, defendant should testify. Trial counsel was not ineffective for calling the defendant to the stand in an attempt to establish his state of mind and thereby, establish that the crime was second degree murder or manslaughter, not first degree murder. Such a defense, while not absolutely requiring the defendant's testimony, is more likely to succeed with it than without it. So, the decision to have Zack testify in the guilt phase was reasonable. ***Chandler v. State***, 848 So.2d 1031, 1041 & n.14 (Fla. 2003)(finding no ineffectiveness in deciding to have the defendant testify in a capital case where the defendant testified in the guilt phase invoking his Fifth Amendment privilege at certain points regarding the ***Williams*** rule evidence where defense counsel

decided that, based on his experience with 11 other capital cases, he thought it was important for Chandler to testify at trial when the defendant wanted to testify).

Zack also asserts that counsel did not prepare him for cross-examination by the prosecutor regarding the Okaloosa murder. No such cross-examination occurred at the trial. The trial court found this claim "spurious" because this cross-examination "did not even take place". During the trial, the judge prohibited the prosecutor from fully cross-examining Zack based on defense counsel's objection. (T. VI 1111-1113). The trial court improperly prohibited the prosecutor from exploring the collateral crime of the Rosillo murder because it was outside the scope of direct.

In *Fitzpatrick v. United States*, 178 U.S. 304, 20 S.Ct. 944, 44 L.Ed. 1078 (1900), the United States Supreme Court held that once a criminal defendant takes the stand, the prosecutor may examine him on any relevant subject. The *Fitzpatrick* Court explained that a defendant "has no right to set forth to the jury all the facts which tend in his favor without laying himself open to cross examination." *Fitzpatrick*, 178 U.S. at 315, 20 S.Ct. at 948.

In *Brown v. United States*, 356 U.S. 148, 78 S.Ct. 622, 627, 2 L.Ed.2d 589 (1958), the Supreme Court stated:

> [A] witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts ..., not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only the choice, but if he elects to testify, an immunity from cross-examination on matters he has himself put into dispute. It would make the Fifth Amendment not only a humane safeguard against

> judicially coerced self-disclosure but a positive invitation to mutilate the truth.... The interests of the other party and regard for the function of the courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.

The Florida Supreme Court recently observed that a defendant, by a selective reliance upon the Fifth Amendment to prevent cross-examination, would be able to present a distorted factual picture by bringing to the jury's attention only those facts favorable to the defense. *Chandler v. State*, 848 So.2d 1031, 1044, n.19 (Fla. 2003)(quoting *United States v. Weber*, 437 F.2d 327, 334-335 (3d Cir. 1970)).

The trial court, in violation of this century old precedent that is routinely cited to this day, ruled that a defendant cannot be crossed on matters outside the scope of the direct. Normally, of course, any trial attorney can get around this type of ruling by calling the witness to the stand himself. However, with the defendant, a prosecutor may not call the defendant to the stand during the State's case-in-chief due to the Fifth Amendment right against self-incrimination. In the unique situation of a criminal defendant, who takes the stand, the rule regarding the scope of the direct does not apply because the prosecutor cannot call the defendant to the stand until the defendant waives the constitutional privilege by taking the stand during the defense case. For this reason, a prosecutor may cross-examine a defendant on any matter whether or not it was explored in the direct examination. The trial court should have allowed cross-examination of matters outside the direct or

gone through the technicality of allowing the State to reopen its case and recalling Zack to the stand as its own witness. Zack should have been cross-examined more throughly than he was. The trial court's ruling was, in the words of the United States Supreme Court, an invitation to mutilate the truth.

Here, trial counsel, by objecting to the prosecutor's questioning regarding matters outside the scope of his direct, managed to limit the prosecutor's cross-examination to the instant crime. Trial counsel was more effective in limiting the prosecutor's cross-examination of Zack than Zack had any right to expect under the caselaw. Counsel cannot be said to be ineffective when he has managed to limit the prosecutor's cross more narrowly than what the law permits. Trial counsel's performance was not deficient. Thus, the trial court properly denied this claim of ineffectiveness.

ISSUE III

DID THE TRIAL COURT PROPERLY FIND THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN DESCRIBING THE MURDER AS BRUTAL? (Restated)

Zack asserts that his trial counsel was ineffective in his arguments, when he used phrases such as “looks real bad”, “he done a lot of stuff” and “brutally, brutally killed”, which, in Zack’s words, exacerbated the State’s theory of the case. There was no deficient performance. It is not deficient performance to acknowledge the actual facts of the case. These comments were part and parcel of defense counsel’s theory of the case. His defense was to portray these crimes as fights among persons who were intoxicated. Trial counsel was attempting, in the trial court’s words, “damage control and to “spin unflattering evidence.” Damage control is not deficient performance. Nor was there any prejudice. The jury would have concluded that the murder was brutal without defense counsel telling them so. The trial court properly denied this claim of ineffectiveness.

Trial

During the opening of the guilt phase, defense counsel, after an extensive discussion of Zack’s background including fetal alcohol syndrome and posttraumatic stress disorder from his sister’s axe murder of his mother, stated: “you’re going to hear all of this evidence and, you know it looks real bad. He’s done a lot of stuff. But if you look at it as one episode of this man spiraling down as a result of this long-term illness and his addiction to drugs and alcohol which is really something that he

uses to cope with the depression caused from the underlying mental defects, you can understand what happened." (T. I 190-191). He then discussed Zack's confession to the police where Zack explained that the first murder occurred when they had an argument over cocaine and "he lost it and started having a fight with her", "he loses it" and "they have a big fight and - yes, she's brutally, brutally killed" (T. I 192). Defense counsel disputed that any sexual battery of Smith occurred, argued that the victim was attracted to Zack and "huddled up" with Zack at the bar and there was "a lack of evidence of any sexual battery". (T. I 194-195). He argued it was consensual sex. (T. I 196). He stated "we're not disputing identity in this case." (T. I 196). Defense counsel noted that intoxication was a defense to robbery. (T. I 196). Defense counsel argued there was reasonable doubt and "your verdict will have to be that he's not guilty of first degree premeditated murder" (T. I 197)

During the guilt phase, the defendant testified. (T. VI 1086-1118). Zack testified that they went to the victim's house and had sex. (T. VI 1095). They got in an argument. (T. VI 1095). Zack admitted he hit the victim with a beer bottle. (T. VI 1095). He thought the victim was going to get a "gun or something". He admitted stabbing the victim. (T. VI 1095).

In closing of the guilt phase, the prosecutor noted that the defendant testified conceding that he was the person who killed Ravonne Smith. (T. VII 1362). The prosecutor also told the jury twice "don't convict the defendant because he's a bad person" (T. VII 1365, 1378). Defense counsel, in his closing of the

guilt phase, argued that it was a “horrible, messy scene and it’s disorganized. It shows rage and passion. And I don’t see any purposeful scheme coming out of that” (T. VIII 1421). Counsel also argued: “I’m not asking you to find him not guilty of anything. He’s guilty of second degree murder or manslaughter in this case.” (T. VIII 1422). Referring to the uncharged ***Williams*** rule murder defense counsel stated: “He killed her” and “he brutally killed her.” (T. VIII 1427). He again argued that the sex was consensual in closing. (T. VIII 1434). Defense counsel stated that: “yes, after there was a homicide and he’s guilty of that, but he is not guilty of sexual battery.” (T. VIII 1436). Defense counsel argues: “this was a crazy crime scene. . . we really don’t know what happened in there. You have to engage in speculation, and to take that act of faith is to disregard the evidence regarding the proof in this case beyond a reasonable doubt.” (T. VIII 1442). Defense counsel closed his guilt phase argument with: “your verdict must be not guilty.” (T. VIII 1442).

Evidentiary hearing testimony

Trial counsel testified that he used the phrase that this is the “most serious charge that can be tried in a courtroom” and that the evidence “looks real bad” and “he had done a lot of stuff” in his opening as part of his argument about a man spiraling down due to illness and addiction. (EH 51). Trial counsel knew that the jurors had never seen bloody crime scene photographs and wanted to prepare the jurors for them by

acknowledging that they were bad. (EH 64-65). He also did not want to be viewed by the jurors as hiding the bad photographs from them. (EH 65). The “problem” was that the photo showed her head banged against the tire rim. (EH 71). He was attempting to equate brutality with rage which is inconsistent with premeditation. (EH 72). The brutality of the murder doesn’t reflect the level of intent. (EH 83). Trial counsel said Zack “lost it” as part of an argument that they fought over cocaine and that they had a big fight and “she’s brutally, brutally killed”. (EH 52). Trial counsel noted that the brutality of the murder would be conveyed to the jury via the crime scene photographs. (EH 59). He was not going to misrepresent the crime scene but he was “going to put his spin on it” as to Zack’s level of intent. (EH 62). This comment related to the Rosillo murder for which the defendant was not on trial. (EH 70). Trial counsel argued that the crime made no sense except that it was the act of someone that was “crazed, impulsive and drunk” (EH 53,60,65). Defense counsel was attempting to establish that Zack, as well as the victim, was intoxicated at the time of the murder. (EH 65,66). He was not going to make an issue about matters that the jury was going to believe at the close of the evidence. (EH 54).

Trial counsel testified that his argument during closing argument of the guilt phase, when he argued that the crime scene was a “horrible, messy scene and it’s disorganized. It shows rage and passion. And I don’t see any purposeful scheme coming out of that” was part of his theme that Zack was not engaged in

purposeful conduct; rather, he had lost control of his emotions. (EH 54-55). The overall argument counsel was making was that this was not a premeditated act. (EH 56). It was the act of somebody who was enraged, who had no intent. (EH 56,58). This argument was designed to show that Zack did not have a plan to rebut the prosecutor's claim that he did. (EH 69). Trial counsel noted that a rage and passion murder is not a premeditated murder. (EH 57). This also fit with his mitigation of fetal alcohol syndrome, post-traumatic stress and substance abuse, which would make him messy, brutal, and disorganized. (EH 72,73-74). Trial counsel told the jury that Zack was guilty of second degree murder or manslaughter. (EH 55).[12]

PD Killam testified that he prepared his opening and closing statements to the jury. (EH 62). His comments took into account what evidence was admitted and what evidence was excluded. (EH 69-70). His opening statement was designed to focus the jury on the level of intent. (EH 62). He was attempting to rebut the prosecutor's evidence of purposeful conduct which equated with premeditation. (EH 63). He had to talk about the Rosillo murder in his arguments because the evidence regarding it, including Zack's confessions, was going to be admitted into evidence. (EH 67). There is "no sense" in not referring to admissible evidence in trial counsel's opinion. (EH 67). He often admits some bad evidence to seem credible to the jury. (EH 68). When

[12] Trial counsel testified at the evidentiary hearing that he was sure that he informed Zack that he was going to admit that he killed Rosillo. (EH 61)

you know something is going to come in and be obvious, you admit to it and move on to the important battles. (EH 68).

The trial court's ruling

The trial court ruled:

> Defendant claims Trial Counsel's opening remarks in the guilt phase that "it looks real bad....he's done a lot of stuff", that the charge was "a serious charge", that Defendant was "losing it", that Defendant was "brutally, brutally" killing Victim Smith, that the crime "made no sense", that Defendant's act was that of somebody "crazed, impulsive and drunk" and Trial Counsel's closing argument during the guilt phase that "I agree with the State", that the crime scene was a "horrible, messy scene," "disorganized" and showed "rage and passion" in the killing, that "he brutally killed her" and "this was a crazy crime scene," presented Defendant in a distasteful manner and exacerbated and helped the State's case.
>
> Trial Counsel testified at the limited Evidentiary Hearing regarding the statements he made during his opening remarks and closing argument. First, Trial Counsel admitted to the Okaloosa County homicide because he knew it was admissible. The Court, pretrial, had determined that the Okaloosa County homicide was admissible in the State's case. Trial Counsel unsuccessfully fought to keep the Okaloosa County case out of the trial, but successfully fought to keep the State from cross-examining Defendant about the Okaloosa County case..[13] Trial Counsel, therefore, made the strategic decision to mention this case to alleviate the damage it would cause for the Escambia County case had he ignored it. Trial Counsel testified that to refuse to acknowledge evidence of the Okaloosa County homicide, which was "coming in" would be senseless. Trial Counsel also used the Okaloosa County homicide to Defendant's advantage at trial, arguing that it was a crime of "rage and impulse", and not a crime of premeditation, as claimed by the State. Further, the fact that the Okaloosa County homicide had been fueled by drug use on the part of both Defendant and Victim Rusillo assisted Trial Counsel in his strategy in the Escambia County case. Specifically, that the "troubled" Defendant, who was a drug abuser due to his terrible upbringing, was in a drug addled and mentally dysfunctional "rage" when he killed Victim Smith, also a drug user. This strategy focused on Trial Counsel's

[13] *See* Motion and Order on Williams Rule Evidence, in appellate file, and #10, *supra*.

conscious effort to avoid the Death Penalty for Defendant, and to show that Defendant was incapable of the premeditated act of murder, as charged in both cases.[14]

Trial Counsel testified that the language he used in portraying the homicides as "brutal" was meant to show that "brutality" was not equal to "premeditation". Rather, Trial Counsel used the terms "brutal killing" to show that the killing of Victim Smith and Victim Rusillo was from an unintended "rage". Trial Counsel was well aware that photographs would be shown, depicting both victims' injuries and bloody crime scenes, which did, indeed "look real bad" and did not "make sense", unless you assumed they were committed by someone in a "brutal rage", not in control of his own impulses. Additionally, Trial Counsel had to maintain credibility and anticipate jury reaction by explaining why the victims and the scenes looked as they did. To further maintain credibility, Trial Counsel explained that the crimes Defendant was charged with were "serious" and that the crime scene was, in fact, "messy and disorganized". Trial Counsel's consistent theme, that Defendant was in an uncontrollable rage when he killed, fueled by years of abuse, trauma and substance abuse and "fired" by sudden arguments with both victims, was perhaps the only effective strategy by which to combat the State's case. Trial Counsel theorized that a "messy, disorganized" crime scene, in which Defendant "brutally killed" Victim Smith made "no sense", thus, the crimes were not committed by a sane and rational "serial" killer, but by a man, Defendant, unable to control his own passion and rage when "cornered" by both Victims Rusillo and Smith, each of whom was "angry, taunting or somewhat cruel" to Defendant. Trial Counsel's attempt to "spin" unflattering evidence or make remarks regarding such evidence and to do "damage control" with Defendant's case was not ineffective assistance, but sound trial strategy. When all of Trial Counsel's comments and remarks from opening statement through closing argument are taken into context, it is clear that Trial Counsel was not ineffective. Tactical decisions during trial, in which statements which appear to be unflattering to a defendant are made by counsel, are done in the name of sound trial strategy for the purpose of diluting damaging testimony which a jury will hear. *See Brown v. State*, 28 Fla.L.Weekly S355 (Fla. April 24, 2003). Such an interpretation of a trial lawyers' activities in court may be further applied and extended to damaging evidence which a jury will see, such as the photographs in the case at hand. Trial Counsel was not ineffective in making his remarks and arguments because he was attempting to deal

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[14] *See* Trial transcript (with the opening remarks and closing statements of Trial Counsel), in appellate file, and #9, *supra*.

> with evidence which was "bad" and to use it in a way which would help Defendant and spare his life.

(PC IV 577-580)(footnotes included but renumbered).

Merits

Both the United States Supreme Court and this Court have rejected similar claims of ineffectiveness. In *Yarborough v. Gentry*, 124 S.Ct. 1 (2003), the United States Supreme Court found that trial counsel was not ineffective in closing argument. Trial counsel referred to the defendant as a "bad person, lousy drug addict, stinking thief, jail bird" but argued that these traits were irrelevant to the issues before the jury. The Ninth Circuit had found ineffectiveness based on counsel's "gratuitous swipe at Gentry's character." The *Yarborough* Court disagreed, reasoning while confessing a client's shortcomings might remind the jury of facts they otherwise would have forgotten, it might also convince them to put aside facts they would have remembered in any event. The Court observed that this is precisely the sort of calculated risk that lies at the heart of an advocate's discretion and that by candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case. See J. Stein, Closing Argument § 204, p. 10 (1992-1996) ("[I]f you make certain concessions showing that you are earnestly in search of the truth, then your comments on matters that are in dispute will be received without the usual apprehension surrounding the remarks of an advocate"). The Court also observed that the same criticism could been

leveled at famous closing arguments such as Clarence Darrow's closing argument in the Leopold and Loeb case: " 'I do not know how much salvage there is in these two boys.... [Y]our Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind."

In *Brown v. State*, 846 So. 2d 1114, 1125 (Fla. 2003), this Court rejected an ineffective assistance of counsel claim based on arguments defense counsel made during opening and closing. In opening, his counsel said:

> Mr. McGuire and Mr. Brown, they don't go play golf together. They don't do things like that. They do things like consume a lot of alcohol. They do crack cocaine. They hang out on the Boardwalk area, unemployed. It's not a good life and it's not a--it's not something any of us would do, but it's just a--that's the way it was.

Brown alleged that his trial counsel was ineffective due to remarks he made in his opening statement. The trial court found that counsel made a tactical decision to make the statements that he did, for the purpose of trying to dilute some of the damaging testimony the jury would hear later. The trial court observed that defense counsel was explaining the real world the defendant lived in. The trial court also concluded that prejudice had not been established. The Florida Supreme Court found no error in the trial court's conclusions. Brown also alleged that trial counsel was ineffective as a result of stating that the victim was "gurgling" on his own blood. Counsel's comment is consistent with his explanation at the evidentiary hearing that he was trying to point out the overdramatization of the prosecutor's argument. The trial court

found that counsel's statement did not prejudice Brown. The Florida Supreme Court agreed, reasoning that "we will not second-guess counsel's strategic decisions on collateral attack and trial counsel's comment, when weighed against the two-part test in *Strickland,* does not satisfy either prong. This Court observed that "though the word 'gurgling' may have shock value, it does not rise to the level required by *Strickland,* particularly where trial counsel chose to use the word as a method of rebutting and minimizing the State's argument." Brown also asserted that counsel was ineffective for admitting that Brown had "turned bad" in his closing argument in the penalty phase. At the evidentiary hearing, counsel testified that his purpose in making such a statement was to be honest with the jury about what type of person they were dealing with. The trial judge found that this statement was a reasonable trial tactic on counsel's part, that he was just being honest with the jury, and that it was not ineffective or deficient. The Florida Supreme Court agreed. They noted that the comment was made during the penalty phase, a point at which Brown had already been found guilty of first-degree murder. At that point, counsel sought to lessen negative juror sentiment against Brown, and appealing to the jurors by pointing out Brown's real life shortcomings was a tactic geared toward Brown's benefit. The *Brown* Court noted that any claim that this particular statement led the jurors to vote to recommend the death penalty is wholly speculative. Accordingly, the *Brown* Court rejected this ineffectiveness claim.

In *Atwater v. State*, 788 So. 2d 223 (Fla. 2001), the Florida Supreme Court held that counsel was not ineffective. During closing arguments, Atwater's trial counsel displayed gruesome crime scene photographs and argued the crime was one of malice. Atwater contended that defense counsel's actions were more like those of a prosecutor than a defense attorney. The Florida Supreme Court explained, it is commonly considered a good trial strategy for a defense counsel to make some halfway concessions to give the appearance of reasonableness and candor and to thereby gain credibility. *Atwater*, 788 So. 2d at 230 (quoting *McNeal v. State*, 409 So. 2d 528, 529 (Fla. 5th DCA 1982).

It is not ineffective for trial counsel to describe a brutal murder as brutal. Just as trial counsel may describe his client as a "bad person, lousy drug addict, stinking thief, jail bird" as in *Yarborough*, or admit that the defendant had "turned bad" and the victim was "gurgling" in his own blood as in *Brown*, or describe the crime as one of "malice" as in *Atwater*, trial counsel may describe a brutal murder as "brutal" without being ineffective. Here, as in *Yarborough* and *Atwater*, defense counsel was attempting to maintain credibility with the jury by being candid.

Collateral counsel argues that trial counsel "could have articulated his defense" without making these comments. IB at 30. While true, this is a non sequitur. Trial counsel had only two options regarding the "bad" evidence - one was it ignore it and the other was to acknowledge it. Collateral counsel does

not even attempt to articulate a theory that ignoring it would have been the better option. There is no deficient performance.

Nor is there any prejudice. The jury would have concluded that the murder was brutal without defense counsel telling them so. The victim was beaten with a beer bottle, raped, had her head beaten against a wooden floor and then was stabbed several times with an oyster knife. Moreover, the prosecutor explicitly told the jury "don't convict the defendant because he's a bad person" (T. VII 1365,1378). The prosecutor did not use the defendant's character as a basis for a conviction. The trial court properly denied this claim of ineffectiveness.

Nixon **issue**

Preservation

For the first time on appeal, collateral counsel attempts to morph this claim into a *Nixon* issue. IB at 29-30. This issue is not properly before this Court. *Griffin v. State*, 866 So.2d 1, 11, n.5 (Fla. 2003)(finding issue not properly before the Court where the defendant raised for the first time on appeal a new ground for his judicial bias claim that was not presented to the trial court in his postconviction motion); *Doyle v. State*, 526 So.2d 909, 911 (Fla. 1988)(finding a postconviction claim that was not presented to the trial court in the postconviction motion but was raised for the first time on appeal was procedurally barred). No claim regarding ineffective assistance of counsel for conceding to any crime was raised in either the original or amended postconviction motion. (PC I 140-141, II 235). *Nixon* was not cited in either motion. (PC I 140-141, II 235). The State's answer to the postconviction motion did not address any such claim. (PC I 156, 188, II 273). *Nixon* was not discussed during the *Huff* hearing. (PC II 300-335). The trial court did not grant an evidentiary hearing on any such claim. The claim was not explored at the evidentiary hearing. The defendant was not asked if he agreed to the strategy at the evidentiary hearing. The trial court did not rule on any *Nixon* claim. (PC IV 577-580). In short, the *Nixon* claim was not litigated in the trial court. Zack may not raise a *Nixon* claim for the first time on appeal. *Stewart v. Crosby*, SC02-2716 (Fla. May 13, 2004)(Pariente, J., concurring)(explaining that a claim

of ineffectiveness for conceding requires an evidentiary hearing to determine if the defendant consented to the concession and therefore must be raised in the trial court in a 3.850 motion, not in a habeas petition).

Evidentiary hearing

The *Nixon* claim was not explored at the evidentiary hearing. No testimony regarding concessions was adduced at the evidentiary hearing. PD Killam testified at the evidentiary hearing that he admitted the collateral crime murder and that he was sure that he informed Zack that he was going to admit that he killed Rosillo. (EH 58, 61). While Zack testified at the evidentiary hearing, he did not testifying regarding whether he consented to any concessions involving either the charged crime or the uncharged *Williams* rule murder.

Merits

In *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000)(*Nixon II*), this Court remanded for an evidentiary hearing. Nixon claimed that his counsel was *per se* ineffective for conceding his guilt to first degree murder in closing of the guilt phase. During closing, Nixon's trial counsel said:

> I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Nixon, 758 So.2d at 620. The *Nixon II* Court concluded that *Cronic*,[15] not *Strickland*,[16] applied because a concession to the charged crime fails to subject the prosecution's case to meaningful adversarial testing. *Nixon*, 758 So.2d at 621-623. The *Nixon II* Court reasoned that counsel's concession to the charged crime operated as the "functional equivalent of a guilty plea." *Nixon*, 758 So.2d at 624. The *Nixon II* Court observed that the dispositive question was whether Nixon had given his consent to the trial strategy of conceding guilt. *Nixon*, 758 So.2d at 624. The *Nixon II* Court concluded that "Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy" and "[s]ilent acquiescence is not enough." *Nixon*, 758 So. 2d at 624. The *Nixon II* Court stated:

> We hold that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy. This will ensure that the defendant has in fact intelligently and voluntarily consented to counsel's strategy of conceding guilt.

Nixon, 758 So. 2d at 625 (citations omitted). The trial court had originally denied the claim without an evidentiary hearing. This Court reversed the summary denial and ordered an evidentiary hearing be held. *Nixon*, 758 So. 2d at 625.[17]

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[15] *United States v. Cronic*, 466 U.S. 648 (1984).

[16] *Strickland v. Washington*, 466 U.S. 668 (1984).

[17] The claim originated in the direct appeal. This Court attempted to develop the record by relinquishing jurisdiction during the direct appeal. However, when that could not be done

In *Nixon v. State*, 857 So.2d 172 (Fla. 2003) (*Nixon III)*, *cert. granted*, *Florida v. Nixon*, 124 S.Ct. 1509 (U.S. March 1, 2004)(No 03-931), this court reversed the trial court's denial of postconviction relief and remanded for a new trial. At the evidentiary hearing held to follow the mandate of *Nixon II*, Nixon's trial counsel testified that Nixon did nothing when asked his opinion regarding this trial strategy. Nixon provided neither verbal nor nonverbal indication that he did or did not wish to pursue counsel's strategy of conceding guilt. Nixon did not testify at the evidentiary hearing. The trial court found, based on the history of interaction between Nixon and his trial counsel where counsel would inform Nixon of something and Nixon would remain silent, that Nixon had approved of counsel's strategy. However, the *Nixon III* Court disagreed with the trial court's conclusion, reasoning that the evidentiary hearing testimony, at most, demonstrated silent acquiescence by Nixon to his counsel's strategy. The *Nixon III* Court found there was no competent, substantial evidence establishing that Nixon affirmatively and explicitly agreed to counsel's strategy. The United States Supreme Court has granted certiorari review of *Nixon III*.

However, this court has repeatedly held that trial counsel may concede to lesser included offenses without obtaining the defendant's consent. *Atwater v. State*, 788 So.2d 223, 229 (Fla. 2001)(holding, in a capital case, that it is not *per se*

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due to attorney/client privilege, this Court declined to rule on the claim in the direct appeal without prejudice to raise the claim collaterally where the privilege would be waived.

ineffectiveness to concede to second degree murder in closing); *State v. Williams*, 797 So.2d 1235, 1240 (Fla. 2001)(distinguishing situation where counsel in effect told the jury, "If you believe my client's version of events, then you must find him not guilty; if you do not believe him, then he still is not guilty of first-degree murder, but only of a lesser-included offense" from *Nixon* where counsel conceded his client's guilt to the charged crime); *Griffin v. State*, 866 So.2d 1, 6 (Fla. 2003)(finding trial counsel's concession of guilt to the lesser offenses was proper trial strategy and observing that sometimes a concession of guilt to some of the prosecutor's claims is good trial strategy and within defense counsel's discretion in order to gain credibility); *Reed v. State*, 29 Fla.L.Weekly S156, 2004 WL 792837, *15 (Fla. April 15, 2004)(rejecting an ineffective assistance of counsel claim for conceding guilt to the lesser included offense of theft in a capital case where "by all appearances at trial, the same person committed all three crimes of robbery, rape, and murder" where trial counsel's testimony at the evidentiary hearing that he was trying to convince the jury that although Reed may have done something, it was not premeditated murder supported the trial court's ruling that a concession to a lesser included offense is a tactical decision appropriately made by trial counsel.). Conceding to second degree murder when the charge is first degree and the jury convicts of first degree murder is not the functional equivalent of a guilty plea. Or more precisely, the jury has rejected the "involuntary plea" of second degree

murder. The jury's verdict of first degree murder in that situation is the result of adversarial testing at trial, not the guilty plea to second degree murder, whether voluntary or not.[18]

In *Harvey v. State*, 28 Fla.L.Weekly S513 (Fla. July 3, 2003), this Court found that, while counsel argued for second degree murder, his concession to the underlying facts amounted to a concession of premeditated murder. In opening, defense counsel admitted that Harvey was guilty of "murder" and acknowledged that Harvey and his coperpetrator discussed killing the victims. The *Harvey* Court found that by admitting this discussion about the murder, trial counsel, in effect, conceded premeditation and therefore, conceded first degree murder. The *Harvey* Court concluded that this concession was the functional equivalent of a guilty plea which requires the "affirmative, explicit" consent of the defendant. Relying on *Nixon II*,[19] the *Harvey* Court concluded defense counsel was ineffective. The evidentiary

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[18] Even if the jury convicts the defendant of second degree murder when counsel concedes to second degree in a first degree murder case, the jury's verdict is not the result of trial counsel's concession. In such a case, the prosecutor is going to dispute the concession either directly or by implication when he argues for a first degree murder conviction. Normally, in a true plea, the State is silent and does not dispute the degree of the crime. In this situation, the prosecutor is taking an adversarial position to the concession and the jury had to decide facts that were disputed by the parties which is the hallmark of adversarial testing. Such a verdict is not the result of a guilty plea, it is a result of a true trial.

[19] The *Harvey* Court states that "[w]e are aware that *Nixon* did not involve a confession." This is not accurate. *Nixon* did involve a confession. Nixon confessed in detail on tape to the local Sheriff.

hearing testimony established, at best, that Harvey's counsel had obtained his consent to concede but only to second degree murder, not first degree. Furthermore, the *Harvey* Court also found that an admission that the murder occurred during the robbery was a concession to felony murder as well.

First, this Court should recede from *Harvey*. *Harvey* ignores the difference between the concepts of weight and sufficiency. When an attorney acknowledges the facts of the crime but argues for a conviction for a lesser crime, he is NOT conceding to the greater crime. Rather, he is acknowledging the sufficiency of evidence of the greater crime, not its weight. Counsel is telling the jury that, while they could vote for the greater crime, they should not. The fact that evidence is legally sufficient does not compel a particular result. He is arguing the weight of the evidence supports the lesser crime. This is not the functional equivalent of a guilty plea to the greater crime; rather, it is the functional equivalent of not making a motion for judgment of acquittal to the greater crime. Just as an attorney may decline to make a motion for judgment of acquittal, an attorney can admit the underlying facts but argue, even given those facts, that the greater weight of the evidence supports a verdict for the lesser crime. This is not conceding to the greater crime.

Second, unlike *Harvey*, counsel did not concede to the facts underlying the charged crimes. He disputed premeditated murder in opening. Nor did he concede to felony murder or to the facts underlying felony murder. He argued that there was no sexual

battery. He asserted that Zack had consensual sex with the victim. Counsel did not concede to robbery or burglary or the facts underlying either robbery or burglary. Counsel did concede identity but Zack took the stand in the guilt phase and admitted stabbing the victim. He argued for second degree or manslaughter in closing. Therefore, *Atwater*, *State v. Williams*, and *Griffin* control, not *Harvey*.

Defense counsel's statement in opening of the guilt phase - "yes, she's brutally, brutally killed" - referred to the first murder not the murder Zack was on trial for in this case. (T. I 192). Referring to the uncharged murder in closing, defense counsel stated: "He killed her" and "he brutally killed her." (T. VIII 1427). The references were to the *Williams* Rule evidence, not the instant murder.

In *Chandler v. State*, 848 So.2d 1031, 1040 (Fla. 2003), this Court rejected an ineffective assistance of counsel claim where counsel conceded to the crime associated with the *Williams* Rule evidence but did not concede to the charged crime. Chandler was charged with three counts of first-degree murder for the murders of a woman and her two daughters. During the trial, the State introduced *Williams* Rule evidence of a rape that occurred several weeks before the murder. *Chandler*, 848 So.2d at 1039. Chandler had not been tried or convicted of the rape at the time of the murder trial. *Chandler*, 848 So.2d at 1040, n.12. This Court had previously held in the direct appeal that the rape was sufficiently similar to the murders to be admissible as *Williams* Rule evidence. *Chandler*, 848 So.2d at 1039 *citing Chandler*, 702

So.2d at 192-97. Relying on *Nixon II*, Chandler claimed that trial counsel was ineffective for conceding to the *Williams* Rule evidence. *Chandler*, 848 So.2d at 1038 & n.11. This Court observed that the jury would inevitably hear the *Williams* Rule evidence, despite any tactical decision Chandler's trial counsel could make and that the evidence was likely to do some damage to Chandler's case because of its similarity to the murder. *Chandler*, 848 So.2d at 1039-1040. This Court explained that trial counsel decided the best way to address the *Williams* Rule evidence was not to challenge it vigorously; rather, trial counsel conceded the rape and then drew distinctions between the rape and the murders, in an attempt to show that even if the State could prove the alleged rape, the evidence on the murders was weak. At the evidentiary hearing, Chandler asserted that he had not agreed to this strategy but counsel testified that he had explained the strategy to Chandler and Chandler had agreed to it. *Chandler*, 848 So.2d at 1040, n.11. The trial court found counsel's testimony more credible than Chandler's and this Court accepted the trial court's finding of fact on the credibility issue. This Court held there was no *Nixon* violation because Chandler agreed to the strategy. The *Chandler* Court seems to have applied *Strickland* rather than *Cronic* to this claim. *Chandler*, 848 So.2d at 1041.[20] The Court observed that trial counsel's strategy may have seemed questionable at first blush

[20] Collateral counsel in *Chandler* acknowledged on appeal that *Nixon* was not directly on point but compared a concession to *Williams* rule evidence to a concession to the charged crime. *Chandler*, 848 So.2d at 1040, n.11.

and trial counsel's strategy might have raised doubts as to its efficacy, but explained that all questions were removed at the evidentiary hearing. The Court noted that trial counsel had written a detailed memorandum regarding the *Williams* Rule evidence which was introduced at the evidentiary hearing, which showed that counsel's choices were the result of "painstaking and deliberate thought". Trial counsel had filed a motion in limine to prevent the introduction of the *Williams* Rule evidence which collateral counsel acknowledged was well-researched. Trial counsel wanted to make it clear to the jury that the rape case was a different case from the murder case as part of his "comprehensive strategy" for dealing with the *Williams* Rule evidence. Trial counsel testified that he did not want the jury to hear Chandler's denial of the rape because it was not credible; whereas, the rape victim's testimony was highly credible. The trial court had observed that Chandler's denial of the rape "would have been devastating for the jury to see and hear in the murder trial" and this Court agreed with the trial court's characterization of Chandler's evidentiary hearing testimony. This Court found that counsel was not ineffective in conceding to the rape. *Chandler*, 848 So.2d at 1043.

Strickland, not *Cronic*, should govern concessions of uncharged crimes or stipulations of evidence. *Nixon* should not be applied to concessions to *Williams* Rule evidence. The basis for *Nixon* is that a concession to the charged crime is the functional equivalent of a guilty plea and that there is no meaningful adversarial testing when there is a concession. Neither of

these rationales apply to a concession to *Williams* Rule evidence. Even if a concession to the *Williams* Rule charge could be viewed as the functional equivalent of a guilty plea to the *Williams* rule charge, it certainly is not functional equivalent of a guilty plea to the charged crime.[21] Moreover, when defense counsel disputes the charged crime, there is meaningful adversarial testing of the charged crime regardless of any concession to the uncharged crime. Here, as in *Chandler*, trial counsel conceded to the facts associated with the *Williams* Rule evidence, not to the charged crime. Here, as in *Chandler*, trial counsel had filed a motion in limine to prevent the introduction of the *Williams* Rule evidence. Here, as in *Chandler*, the jury would inevitably hear the *Williams* Rule evidence, despite any tactical decision by trial counsel and that the evidence was likely to do some damage to the defendant case because of its similarity to the charged murder. Here, as in *Chandler*, trial counsel made it clear to the jury that the

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[21] Actually, a concession to the *Williams* Rule charge cannot be viewed as the functional equivalent of a guilty plea even of the *Williams* Rule charge. If the *Williams* Rule charge is tried later, the State could not introduce the lawyer's concession as evidence in the *Williams* Rule trial. As the jury is instructed in every jury trial, the attorney's arguments or concessions are not evidence. The attorney could concede to the *Williams* Rule evidence in the first trial on the different charge and then the attorney trying the *Williams* Rule case could dispute the charge in the second trial of *Williams* Rule charge. The prosecutor certainly could not estop the defendant from this conduct or introduce into evidence the earlier concession during the first trial. The jury in the *Williams* Rule trial would never hear about the concession. This concession has the same legal effect as a concession by counsel that his client is guilty during a cocktail party - absolutely none. So, it is not at all analogous to a guilty plea.

Okaloosa murder case was a different case from the charged murder case. Here, as in *Chandler*, trial counsel conceded to the facts of the *Williams* Rule evidence and then drew distinctions between the *Williams* Rule crime and the charged murder. Most importantly, here as in *Chandler*, trial counsel testified that Zack consented to the concession to the uncharged crime. (EH 58, 61). Furthermore, Zack, unlike Chandler, did not dispute that counsel discussed the concession. Zack did not testify at the evidentiary hearing regarding the concession. Here, however, unlike *Chandler*, who was cross-examined regarding the *Williams* Rule evidence and asserted his Fifth Amendment rights against self-incrimination in front of the jury, Zack was not cross-examined regarding the *Williams* rule evidence. There was no damage done to Zack's credibility due to counsel concession of the Williams Rule evidence. Thus, the ineffective assistance of counsel claim for conceding to the facts underlying the *Williams* rule evidence should be denied.

ISSUE IV

DID THE TRIAL COURT ERR IN SUMMARILY DENYING TWO CLAIMS AS PROCEDURALLY BARRED AND PROHIBITED BY THE LAW OF THE CASE DOCTRINE? (Restated)

Zack asserts that the trial court erred in summarily denying two claims. The first claim was procedurally barred and the second claim was already litigated on direct appeal. The trial court properly denied an evidentiary hearing regarding the mental retardation claim. As the trial court found based on the expert testimony at trial, Zack is not mentally retarded. The trial record conclusively rebuts this claim and therefore, no evidentiary hearing was required. The trial court properly summarily denied the two claims.

SUA SPONTE *FRYE* HEARING

Zack asserts that the trial court committed fundamental error by not *sua sponte* conducting a *Frye* hearing prior to admitting the DNA evidence. This claim is procedurally barred because it could have and should have been raised in the direct appeal. Moreover, it is meritless because no *Frye* hearing was required. DNA evidence was generally accepted as a matter of law by the time of this trial. Thus, the trial court did not err by not conducting a *Frye* hearing *sua sponte*.

The trial court's ruling

> Defendant claims that the Court's failure to *sua sponte* conduct a *Frye* hearing regarding the DNA evidence in the case at hand prejudiced him. A defendant's claim of trial court error may not, in general, be raised in a 3.850 motion, but should be raised on appeal. See *Washington v.*

State, 835 So.2d 1083 (Fla. 2002); *Bruno v. State*, 807 So.2s 55 (Fla. 2001). Defendant's claim of Trial Court error in the case at hand is procedurally barred, because it could have and should have been raised on direct appeal.

Assuming *arguendo*, however, that Defendant's second claim is properly brought in his 3.850 Motion, it is without merit. As a matter of law, when Defendant's case was tried in 1997, and when it was later heard on appeal, both RFLP and PCR methods of DNA testing were already generally accepted as reliable by the scientific community, rather than a "new or novel" scientific principle or procedure. Only novel scientific evidence would have necessitated a *Frye* hearing. *See State v. Sercey*, 825 So.2d 959 (Fla. 1st DCA 2002). RFLP and PCR DNA methods are admissible as a matter of law in Florida. See *Hayes v. State*, 660 So.2d 257 (Fla. 1995); *LeMour v. State*, 802 So.2d 402 (Fla. 3rd DCA 2001). Accordingly, the Court finds that it had no duty or obligation to *sua sponte* hold a *Frye* hearing on the DNA evidence in the case at hand. The Court's decision to not *sua sponte* conduct a *Frye* hearing was not error, fundamental or otherwise.

The Court further finds that Defendant and his Collateral Counsel failed to present or argue that there were any flaws or errors in the DNA testing procedure ro results from either the Okaloosa or Escambia County cases. Defendant had an opportunity to make any such showing at his limited Evidentiary Hearing or in his written closing argument, but he failed to do so. Because Defendant did not present expert testimony indicating that there were any errors of flaws in the DNA testing in his case, he has failed to show how he was prejudiced by the Court's purposed "failure" to hold a *Frye* hearing on the DNA evidence. The Court notes that the non-DNA evidence against Defendant in this case was overwhelming. Even without the DNA evidence and testimony, the State's case included confessions to the killings made by Defendant, Defendant's latent fingerprints found inside Victim Smith's vehicle and on items stolen from her home, eyewitness identification of Defendant by witnesses placing Defendant with Victim Smith directly prior to her murder and eyewitness and video evidence of Defendant attempting to sell the items stolen from the Victim Smith's home.

(PC IV 573-574).

Procedural bar

This issue is procedurally barred. The trial court's failure to hold a *Frye* hearing is a direct appeal issue. Claims that

should have been raised on direct appeal are not cognizable in postconviction litigation.

Merits

As the trial court found, no *Frye* hearing was required because DNA was not new or novel by the time of this trial. At some point, a "new" science becomes standard and therefore, no longer needs to be *Frye* tested. *State v. Sercey*, 825 So.2d 959, 980 (Fla. 1st DCA 2002)(explaining that the *Frye* standard applies only to new or novel scientific principles or procedures, not to standard scientific procedures which are generally accepted in the scientific community). Any request for a *Frye* hearing could have been denied by the trial court without any hearing. Both types of DNA tests conducted in this case were widely accepted by the time of this trial. The trial court could have made a finding that both methods were widely accepted merely by citing a few cases without conducting any hearing.[22] There can be

[22] *People v. Venegas*, 954 P.2d 525 (Cal. 1998)(holding that trial court could properly rely on appellate decisions to establish general scientific acceptance of the restriction fragment length polymorphism (RFLP) methodology and that RFLP analysis was generally accepted in the scientific community by 1992); *People v. Hill* 89 Cal.App.4th 48, 56 (Cal. App. Ct. 2001)(noting that both the RFLP and PCR methodologies have acquired general acceptance in the scientific community); *Turner v. State*, 746 So.2d 355, 362 (Ala. 1998)(explaining that in future cases, judicial notice could be taken of the reliability of the PCR testing method); *United States v. Beasley*, 102 F.3d 1440, 1448 (8th Cir. 1996)(stating: "we believe that the reliability of the PCR method of DNA analysis is sufficiently well established to permit the courts of this circuit to take judicial notice of it in future cases"); *People v. Lee*, 537

fundamental error when a trial court fails to make a factual finding of general acceptance that appellate courts have made as a matter of law. Thus, the trial court properly summarily denied this claim.

PROPORTIONALITY AND MENTAL RETARDATION

Zack asserts that his death sentence is not proportionate. Zack also asserts that his "mental impairment", which "fall into the same category" as mental retardation, prohibits his execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). *Atkins* is limited to mental retardation. *Atkins* claims may not be premised on childhood abuse, depression, addiction, PSTD, fetal alcohol syndrome, emotional age or mental impairments. Zack is not mentally retarded and therefore, *Atkins* does not apply. As the trial court found based on the expert testimony at trial, Zack is not mentally retarded. The trial record conclusively rebuts this claim and therefore, no evidentiary hearing was required.

N.W.2d 233, 257 (Mich. App 1995)(holding that trial courts in Michigan may take judicial notice of the reliability of DNA testing using the PCR method); *State v. Butterfield*, 27 P.3d 1133, 1141-1143 (Utah 2001)(taking judicial notice of PCR DNA testing relying on the treatise National Research Council, The Evaluation of Forensic DNA Evidence (1996); *State v. Gore*, 21 P.3d 262, 273 (Wash. 2001)(concluding that pre-trial hearings are not necessary with PCR); *State v. Bible*, 858 P.2d 1152, 1193 (Ariz. 1993)(permitting judicial notice of DNA theory and RFLP method and stating that from this point forward, Arizona trial courts no longer need to hold *Frye* hearings regarding the general acceptance of DNA); *Fugate v. Commonwealth*, 993 S.W.2d 931, 937 (Ky.1999)(holding that the reliability of the RFLP and the PCR methods has been sufficiently established as to no longer require a hearing).

The trial court's ruling

The trial court ruled:

> Defendant claims that he is borderline mentally retarded and that *Atkins v. Virginia*, 536 U.S. 304 (2002), prohibits his execution. Defendant claims that the death penalty is a "disproportionate" sentence in his case.
>
> First, the law of the case prohibits the Court from relitigating the proportionality of the death penalty in Defendant's case. When an issue is litigated and decided on the merits, and thereafter raised again in a separate motion, the issue fails on an application of the law of the case and on res judicata grounds as well. *See Isom v. State*, 800 So.2d 292 (Fla. 3rd DCA 2001). Furthermore, even a *per curiam* decision, without an opinion, establishes a law of the case doctrine on the same issues and facts which are raised, or were raised, or which could have been raised on appeal. *See Isom*, *supra*; *Canty v. State*, 715 So.2d 1033 (Fla. 1st DCA 1998). In Defendant's case, the Florida Supreme Court reviewed the proportionality of the death penalty in the case at hand despite this not being a specific ground raised on appeal, and held adversely to Defendant. Specifically, that "[a]fter consideration of these factors", which included Defendant's purported brain damage/dysfunction, "we find this case to be in line with other cases in which we have affirmed the death penalty." *See Zack*, 753 So.2d at 26. The evidence regarding Defendant's mental status was thoroughly and fully presented to the Court and the jury at trial and was exhaustively reviewed by the Florida Supreme Court on appeal. Defendant may not attempt a "second appeal" via a 3.850/8.851 [sic] motion regarding this issue. A claim which was raised and decided adversely to a defendant on direct appeal is procedurally barred from being further litigated. *See Shere v. State*, 742 So.2d 215 (Fla. 1999).
>
> Defendant's Eighth Amendment argument is not persuasive. There is nothing in the expert testimony presented at trial which absolutely supports Defendant's claim that he is mentally retarded and not subject to execution. A review of the expert trial testimony on his issue shows that not one expert found Defendant's I.Q. to be near the statutory figure, 70, which would be required to establish mental retardation.[23] Because Defendant is not mentally retarded as defined by Fla.Stat. 921.137, he is not entitled to the Eighth Amendment protections afforded mentally retarded persons who may face the Death Penalty.

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[23] *See* Trial transcript (with the testimony of expert witnesses regarding Defendant's I.Q.), in appellate file.

(PC IV 576-577)(footnotes included but renumbered).

Law of the case

Zack asserted that the death penalty is disproportionate due to a possible brain dysfunction in his pleadings below. This claim is barred by the law of the case doctrine. The proportionality of a death sentence was litigated on direct appeal adversely to Zack. The Florida Supreme Court reviewed the proportionality of the penalty and held "[a]fter consideration of these factors and the circumstances of this case, we find this case to be in line with other cases in which we have affirmed the death penalty." *Zack*, 753 So.2d at 26. Post-conviction litigation is not a second appeal. The evidence regarding Zack's mental mitigation was fully presented to the jury, judge and Florida Supreme Court and should not be relitigated in post-conviction.

Merits

Zack also asserts that his "mental impairment" which "fall into the same category" as mental retardation prohibit his execution under *Atkins v. Virginia*, 536 U.S. 304 (2002)(holding that executions of mentally retarded criminals were "cruel and unusual punishments" prohibited by Eighth Amendment). *Atkins* is limited to mentally retardation. *Atkins* claims may not be premised on childhood abuse, depression, addiction, PSTD, fetal alcohol syndrome, emotional age or mental impairments. Zack is not mentally retarded and therefore, *Atkins* does not apply.

Zack does not meet the statutory definition of mentally retarded. Zack's IQ was established that the penalty phase as 92 or 86. Dr. Larson, who was called by the defense, testified at the penalty phase that Zack's IQ was a full scale of 92. (T. X. 1866-1867). According to Dr. Larson, his performance score was 104 and his verbal score was 84. (T. X. 1867). Dr. Mings, a neuropsychologist, who was called by the State, testified at the penalty phase that Zack had a full scale I.Q. of 86. (T. XI 1890).

The neuropsychological evaluation prepared by Brett Turner, Ph.D. for collateral counsel refers to IQ test, performed in 1980, when Zack was eleven years old, showing his full scale I.Q. of 92 (PC II 241-256 at 245). The report also refers to a 1995 evaluation by Dr. James Larson showing borderline to low average intelligence. (PC II 246). Brett Turner, Ph.D., performed his own WAIS-III I.Q. test in 2002 which showed a current full scale IQ of 79. (PC II 253). He also conducted the Shipley Institute of Living Scale test. (PC II 249). None of these score show mental retardation. The most relevant IQ score is the 92 score because it was the one conducted prior to his 18th birthday as required by the statute. § 921.137. Fla. Stat. (prohibiting the execution of mentally retarded defendants as determined prior to age 18). The 92 score shows a basically normal IQ. Zack is not mentally retarded. ***Stallworth v. State***, 2003 Ala. Crim. App. LEXIS 21 (Ala. Crim App. 2003)(rejecting an ***Atkins*** claim where the record established that the defendant's IQ was 78 and explaining that, in most states, the defendant

must have an I.Q. of 70 or below to meet the various statutory definitions of mentally retarded); *Cf. Bottoson v. Moore*, 833 So.2d 693, 695 (Fla. 2002)(rejecting a mental retardation claim and finding *Atkins* inapplicable, after an evidentiary hearing on the issue of mental retardation, because the evidence did not support the claim)*, cert. denied*, 537 U.S. 1070 (2002); *Watts v. State*, 593 So.2d 198, 204 (Fla.1992)(stating that even if the defendant's premise was correct that it was cruel and unusual to execute mentally retarded persons, he would not be entitled to its benefits because two out of three mental health experts found that he was not mentally retarded and the defense psychologist found him to be only mildly retarded); *Carter v. State*, 576 So.2d 1291, 1294 (Fla.1989)(stating that the evidence that the defendant was mentally retarded was "so minimal as to render the *[Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989),] issue irrelevant"). Zack's *Atkins* claim is conclusively rebutted by the trial transcript. As the trial court noted, "a review of the expert trial testimony on this issue shows that not one expert found Defendant's I.Q. to be near the statutory figure, 70, which would be required to establish mental retardation" and "because Defendant is not mentally retarded as defined by Fla.Stat. 921.137, he is not entitled to the Eighth Amendment protections afforded mentally retarded persons." The trial court correctly denied this claim without an evidentiary hearing because it is conclusively rebutted by the trial court record.

ISSUE V

DID THE TRIAL COURT ERR BY RULING THAT *RING V. ARIZONA*, 536 U.S. 584 (2002) IS NOT RETROACTIVE? (Restated)

Zack asserts that the trial court erred by ruling *Ring v. Arizona*, 536 U.S. 584 (2002) was not retroactive. *Ring* is not retroactive. Jury findings do not seriously increase accuracy and therefore, *Ring* should not be applied retroactively. Thus, the trial court properly denied this claim.

The trial court's ruling

> Defendant claims that Florida's Death Penalty is unconstitutional pursuant to *Ring*, supra. Similar arguments have been raised by defendants in other Death Penalty litigation and such claims have been denied by the Florida Supreme Court. Specifically, the Florida Supreme Court has held that Florida's capital sentencing scheme and Death Penalty are constitutional. See *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), *cert. denied*, 123 S.Ct. 662 (2002); *King v. Moore*, 831 So.2d 143 (Fla. 2002), *cert. denied*, 123 S.Ct. 657 (2002); *Pace v. Crosby*, 28 Fla.L.Weekly S145 (Fla. May 22, 2003). Further, *Ring* is not retroactive. See *Colwell v. State*, 59 P.3d 463 (Nev. 2002)(holding *Ring* is not retroactive); *State v. Towery*, 64 P.3d 828 (Ariz. 2003)(holding *Ring* is not retroactive); *Figarola v. State*, 841 So.2d 576 (Fla. 4th DCA 2003)(holding that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), upon which *Ring* is based, is not retroactive); *Hughes v. State*, 826 So.2d 1070 (Fla. 1st DCA 2002) (holding that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), upon which *Ring* is based, is not retroactive). Finally, the statutory aggravators relied upon by the Court when imposing the Death Penalty in the case at hand include that the murder was committed "while the Defendant was under a sentence of imprisonment or placed on community control or on probation."[24] This factor is significant because even if *Ring* were retroactive this aggravator alone need not be found by a jury pursuant to *Ring* and *Apprendi*, supra. Accordingly, Defendant's challenge fails based upon the Court's finding that statutory aggravator

[24] *See* Sentencing Memorandums and Sentencing Order, in appellate file.

Fla.Stat. 921.141(5)(a) existed. See *Allen v. Crosby*, 2003 Fla. LEXIS 1156 (Fla. July 10, 2003).

(PC IV 580-581)(footnotes included but renumbered).

The retroactivity of *Ring*

Substantive changes in the law are retroactive. *Bousley v. United States*, 523 U.S. 614 (1998).[25] New rules of criminal procedure, however, generally are not applied retroactively.

[25] Florida uses the old constitutional test for retroactivity rather that the new *Teague* test. *Teague v. Lane*, 489 U.S. 288, 299-310 (1989); *Witt v. State*, 387 So.2d 922 (Fla. 1980). Florida courts should also adopt the *Teague* test for retroactivity. *Witt* raises serious due process concerns. One of the prongs of *Witt* is that the new rule is constitutional in nature, implying that changes in the interpretation of a statute are automatically not retroactive, but it is changes in the meaning of the statute that raise actual innocence problems. *Bousley v. United States*, 523 U.S. 614 (1998)(noting that *Teague* applies to procedural rules, not when courts decide the meaning of a criminal statute and explaining that decisions involving a substantive federal criminal statute which hold that the statute does not reach certain conduct "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal" citing *Davis v. United States*, 417 U.S. 333 (1974)). Any state with a retroactivity test which lacks a substantive/procedural distinction runs the risk of violating due process, just as the Pennsylvania Supreme Court did in *Fiore v. White*, 528 U.S. 23 (1999)(applying, in a habeas petition from a state conviction, a due process insufficiency of the evidence analysis when the element of the crime changed); *see also Bunkley v. Florida*, 538 U.S. 835 (2003)(remanding for reconsideration of a retroactivity issue where this Court employed the *Witt* test). Despite the canard about states being free to adopt any test of retroactivity, states without the equivalent of a substantive retroactivity test will encounter due process problems. Florida should adopt *Teague* to avoid these concerns.

Teague v. Lane, 489 U.S. 288, 299-310 (1989).[26] *Ring* is a new rule of criminal procedure, not a new substantive rule and therefore, *Teague* applies. *Ring*, because it overruled *Walton v. Arizona*, 497 U.S. 639 (1990), created a "new" rule for *Teague* purposes. *Saffle v. Parks*, 494 U.S. 484, 488 (1990)(explaining that an explicit overruling of an earlier holding "no doubt" creates a new rule for *Teague* purposes); *Bulter v. McKellar*, 494 U.S. 407, 412 (1990)(explaining that a new decision that explicitly overrules an earlier holding "obviously" breaks new ground or imposes a new obligation.) According to *Teague*, a new procedural rule must seriously enhance accuracy to be applied retroactively. *Ring* does not increase the accuracy of capital sentencing. Accordingly, *Ring* is not retroactive.

Under *Teague*, there are two exceptions to the general rule of non-retroactivity. The first exception, relating to substantive rules, requires retroactive application if the new rule places private conduct beyond the power of the State to proscribe or addresses a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense. *Saffle v. Parks*, 494 U.S. 484, 494 (1990). The second exception is "watershed" rules of criminal procedure which (1) greatly affect the accuracy and (2) alter understanding of the bedrock procedural elements essential to the fairness of a

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[26] *Teague* was a plurality opinion, however, a majority of the Court adopted the *Teague* test for retroactivity in *Penry v. Lynaugh*, 492 U.S. 302 (1989)(adopting *Teague* and applying it in a capital case).

proceeding. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)). Both *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), upon which it was based, are rules of procedure, not substantive law. They both concern who decides a fact, i.e., the jury or the judge, which is procedural. *Curtis v. United States*, 294 F.3d 841, 843 (7th Cir. 2002)(holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" - who decides a given question (judge versus jury) and under what standard (preponderance versus reasonable doubt) and explaining that *Apprendi* did not alter which facts have what legal significance), *cert. denied*, 537 U.S. 976 (2002). Because both *Ring* and *Apprendi* are new procedural rules, they involve only second *Teague* exception, not the first.

Ring does not enhance the accuracy of the conviction or involve a bedrock procedural element essential to the fundamental fairness of a proceeding. Only those rules that *"seriously"* enhance accuracy are applied retroactively. *Graham v. Collins*, 506 U.S. 461, 478 (1993)(explaining that the exception is limited to a small core of rules which seriously enhance accuracy). Jury involvement in capital sentencing does not enhance accuracy. The *Ring* Court did not require jury involvement because juries were more rational or fair; rather, it was required regardless of fairness. The *Ring* Court explained that even if judicial factfinding were more efficient or fairer, the Sixth Amendment requires juries. *Ring*, 536 U.S. at 607 (observing that the Sixth Amendment jury trial right,

however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders). Jury findings were required by the Sixth Amendment, not any empirical evidence about jury accuracy. Jury sentencing does not increase accuracy. A jury is comprised of people who have never made a sentencing decision before. Furthermore, even if one views jury sentencing as equally accurate to judicial sentencing, jury involvement does not *"seriously"* enhance accuracy. Judicial sentencing is at least as accurate.

While the *Ring* Court did not address the retroactivity of their decision, Justice O'Connor stated that *Ring* was not retroactive. *Ring v. Arizona*, 122 S.Ct. 2428, 2449-2450(2002)(O'Connor, J., dissenting)(noting that capital defendants will be barred from taking advantage of the holding on federal collateral review, citing 28 U.S.C. §§ 2244(b)(2)(A), 2254(d)(1) and *Teague*). The Court has refused to apply right to jury trial cases retroactively in a prior case. *DeStefano v. Woods*, 392 U.S. 631, 633 (1968)(holding that the right to jury trial in state prosecutions was not retroactive and "should receive only prospective application."). The United States Supreme Court recently held that an *Apprendi* claim is not plain error. *United States v. Cotton*, 535 U.S. 625 (2002)(holding an indictment's failure to include the quantity of drugs was an *Apprendi* error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to the level of plain error). If an error is not plain error, the error is not of sufficient magnitude to

allow retroactive application of such a claim in collateral litigation. *United States v. Sanders*, 247 F.3d 139, 150-151 (4th Cir. 2001)(emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively under *Teague* and because *Apprendi* claims have been found to be subject to harmless error, a necessary corollary is that *Apprendi* is not retroactive)*, cert. denied*, 535 U.S. 1032 (2001). The issue of the retroactivity of *Ring* is currently pending in the United States Supreme Court. *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003)(en banc), *cert. granted, sub. nom. Schriro v. Summerlin*, 124 S. Ct. 833 (Dec. 1, 2003)(No. 03-526). The Seventh Circuit, the Eleventh Circuit, and four state supreme courts have held *Ring* is not retroactive. Moreover, numerous courts, including federal circuit courts, state supreme courts and Florida district courts, have held that *Apprendi*, which was the precursor to *Ring*, is not retroactive either.

Federal Decisions

The Eleventh Circuit has held that *Ring* is not retroactive.[27] In *Turner v. Crosby*, 339 F.3d 1247, 1279-1286 (11th Cir. 2003), the Eleventh Circuit concluded that *Ring* was a new procedural rule that did not met either of the two *Teague* exceptions. The *Turner* Court determined that *Ring* was a new procedural rule, not a new substantive rule, because "*Ring* altered only who decides . . ." The *Turner* Court explained that *Ring* did not alter the facts necessary to establish the aggravating factors or the State's burden to establish those factors beyond a reasonable doubt. The Court reasoned that because *Apprendi* was a procedural rule, it axiomatically follows that *Ring* is also a procedural rule. The Turner Court concluded that Ring was "new" because it expressly overruled, in part, *Walton v. Arizona*, 497 U.S. 639 (1990). *Turner*, 339 F.3d at 1284. The Eleventh Circuit reasoned that the retroactivity analysis of *Apprendi* applies equally to *Ring*. The Eleventh Circuit also concluded that *Ring* does not warrant retroactive application under *Teague* because it does not enhance accuracy or fairness. The Court noted that pre-*Ring* sentencing procedure did not diminish the likelihood of

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[27] The Eleventh Circuit also held that the *Ring* claim was procedurally barred but specifically, "alternatively" held that *Ring* was not retroactive. *Turner*, 339 F.3d at 1280, 1282. Both were holdings. Alternative holdings are alternative holdings, not dicta. *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537, 69 S.Ct. 1235, 93 L.Ed. 1524 (1949)(observing where a decision rests on two or more grounds, one ground can be relegated to the category of obiter dictum). An appellate court may hold that the issue procedurally barred, and alternatively, hold that the issue is also *Teague* barred. Cf. *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997)(deciding the case on *Teague* grounds where there was also a procedural bar).

a fair sentencing hearing. Rather, *Ring's* new rule, at most, would shift the fact-finding duties during Turner's penalty phase from an impartial judge to an impartial jury alone. The Eleventh Court explained that *Ring* was based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding in a capital sentencing context. The Eleventh Circuit relied on two state supreme court decisions holding that *Ring* was not retroactive as well as their own prior decision holding that *Apprendi* was not retroactive. *Colwell v. State*, 59 P.3d 463 (Nev. 2002); *State v. Towery*, 64 P.3d 828 (Ariz. 2003); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001), *cert. denied*, 536 U.S. 906 (2002). The *Turner* Court also relied on United State Supreme Court precedent finding that *Apprendi* was not plain error. *United States v. Cotton*, 535 U.S. 625, 632-33 (2002)(holding the failure of an indictment to include the quantity of drugs was an *Apprendi* error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings and thus did not rise to the level of plain error).

In *Lambert v. McBride*, No. 03-1015, 2004 WL 736876 (7th Cir. Apr. 7, 2004), the Seventh Circuit held that *Ring* is not retroactive. The Seventh Circuit explained that *Ring* established a new rules of criminal procedure, not a substantive changes in the law. The Court explained that *Ring* does not fit under either of the *Teague* exceptions. The Seventh Circuit reasoned that because *Apprendi* was not retroactive, it followed

that *Ring*, "an *Apprendi* child," was not retroactive for the same reasons. *Lambert*, - F.3d at -, citing *Curtis v. United States*, 294 F.3d 841 (7th Cir. 2002). The Seventh Circuit noted that it was joining the Tenth and Eleventh Circuits in holding that *Ring* is not retroactive.[28]

The Ninth Circuit, however, in *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003)(en banc), *cert. granted, sub. nom. Schriro v. Summerlin*, 124 S. Ct. 833 (Dec. 1, 2003)(No. 03-526), held that *Ring* was retroactive. The Ninth Circuit reasoned that *Ring* is substantive and changes in substantive law are automatically retroactive under *Bousley v. United States*, 523 U.S. 614 (1998). Alternatively, the Ninth Circuit held that even if *Ring* is procedural, it is still retroactive under *Teague*. The Ninth Circuit reasoned that the second exception to *Teague* applied because jury factfinding seriously enhances the accuracy of capital sentencing proceedings and the right to a jury trial is a bedrock procedural element.

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[28] The Tenth Circuit in *Cannon v. Mullin*, 297 F.3d 989, 992-94 (10th Cir. 2002) concluded that *Ring* does not apply retroactively, but in the context of successive habeas petitions. Successive petitions do not involve a *Teague* analysis; rather, the statutory based test of retroactivity discussed in *Tyler v. Cain*, 533 U.S. 656, 669-670, (2001) governs successive habeas petitions. *Horn v. Banks*, 536 U.S. 266, 272 (2002)(noting that the AEDPA and *Teague* inquiries are distinct). The Eleventh Circuit did not rely on *Cannon* for this reason. *Turner*, 339 F.3d 1247, 1283, n.30. The Tenth Circuit has held that *Ring* is not retroactive in the context of an initial petition as well albeit without doing a *Teague* analysis. *Workman v. Mullin*, 342 F.3d 1100, 1115 (10th Cir 2003)(stating that *Ring* may not be applied retroactively to cases on collateral review relying on *Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002)).

However, contrary to the Ninth Circuit's reasoning, *Ring* is not substantive. While *Bousley* did limit *Teague* to procedural rules, it did so because of the danger present when courts decide the meaning of a criminal statute. Decisions, involving a substantive federal criminal statute, which hold that the statute does not reach certain conduct, "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal." *Bousley*, 523 U.S. at 621 citing *Davis v. United States*, 417 U.S. 333 (1974). Changes in substantive law are applied retroactively because they raise the possibility of legal innocence. When the definition of an element of a crime is changed, it raises the possibility that a defendant has been convicted of conduct that is not criminal under the correct definition. *Ring* does not involve any possibility of legal innocence or legal innocence of the death penalty. *Ring* did not decide the scope of a criminal statute. Statutory interpretation was not at issue in either *Ring* or *Summerlin*. Nor did *Ring* create the concept of narrowers. Arizona required narrowers, *i.e.*, aggravators, by statute, prior to *Ring*. The substantive law regarding aggravators in Arizona did not change in the wake of *Ring* and was not at issue in *Summerlin*.[29] The *Ring* Court did not substantively define any

[29] The Ninth Circuit seems to imply that the meaning of a criminal statute was at issue because the prosecution was based on a criminal statute. This is true of all Arizona prosecutions because Arizona, like many states, has abolished common law crimes. *State v. Cotton*, 5 P.3d 918, 920-921 (Ariz. App. Ct. 2000)(explaining that "[w]hen the Arizona Legislature revised the criminal code in 1978, the drafters abolished all common law crimes and provided that "[n]o conduct or omission constitutes

aggravator and did not exclude any capital defendant's conduct from the scope of any aggravator. Therefore, *Ring* is not substantive and *Bousley* does not apply.

The Ninth Circuit concluded that *Ring* was retroactive under a *Teague* analysis as well. The *Summerlin* majority gave five reasons for its belief that juries seriously enhance the accuracy of capital sentencing proceedings compared to judges: (1) presentation of inadmissible evidence to judges; (2) truncated and informal presentation of evidence and argument; (3) judge's decision did not reflect the "the conscience of the community"; (4) judges' view of the capital sentencing process as being "routine"; and (5) the political pressure on judges facing election. The first and second observations are *non sequiturs*. They concern alleged flaws in penalty phase proceedings, not the accuracy of judges versus juries. Juries, like judges, are also exposed to inadmissible hearsay and victim impact statements during penalty phase.[30] Unlike juries,

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an offense unless it is an offense under this title or under another statute or ordinance" citing A.R.S. § 13-103 (1989)). The great majority of prosecutions are bottomed on statutes. *Cf. United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812)(prohibiting federal common law crimes). Under the Ninth Circuit's logic, nearly all prosecutions are substantive because they are bottomed on a criminal statute and therefore, nearly all cases are automatically retroactive. However, it is not the mere presence of a criminal statute that gives rise to *Bousley* concerns; rather, it is defining a crime in a manner that excludes certain conduct from its reach that raises *Bousley* concerns. *Ring* raises no such concerns.

[30] 21 U.S.C. § 848(j)(providing "information relevant to such mitigating or aggravating factors may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at

however, judges are trained to think about the accuracy of hearsay. The third and fifth observations are contradictory. Either judges live in ivory towers far from the maddening crowd or they respond to the community's desires due to the political pressures of elections. Judges are either out of touch with the community OR they are in touch with the community; they cannot be both. The fourth observation is just plain silly. The Ninth Circuit uses descriptions such as: "acclimation" to the capital sentencing process; "routine"; "habituation" brought about by imposing capital punishment under "near rote conditions" and "just another criminal sentence" to describe judges' view of capital sentencing. Translated, this means that judges are experienced in capital sentencing and juries are not. Experience, if anything, increases accuracy. Judges have extensive prior experience with factfinding and are legally trained. The *Ring* Court, itself, explained that while judge fact-finding may be more efficient, the Sixth Amendment requires juries. The *Ring* Court also noted that the superiority of judicial factfinding in capital cases was far from evident. *Ring*, 536 U.S. at 607. However, the *Ring* Court did not take the

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criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury,"); § 921.141(1), Fla. Stat. (2002)(providing any evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements); § 921.141(7), Fla. Stat. (2002)(providing that the prosecution may introduce, and subsequently argue, victim impact evidence, once it has provided evidence of one aggravating circumstance).

position that jury factfinding was superior to judicial factfinding as the Ninth Circuit did. Judges are actually more accurate than juries due to their experience and legal training. Even if judges and juries are viewed as equally accurate in their fact-finding, jury factfinding does not seriously enhance accuracy in capital sentencing and therefore, *Ring* does not meet this prong of *Teague*.

The Ninth Circuit's holding that *Ring* is retroactive is contrary to its prior holding that *Apprendi* is not retroactive. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667 (9th Cir. 2002)(holding *Apprendi* does not meet either prong of *Teague* because it does not decriminalize conduct and does not involve the accuracy of the conviction and therefore, *Apprendi* is not retroactive), *cert. denied*, 537 U.S. 939 (2002). If juries seriously enhance the accuracy of capital proceedings, then juries also seriously enhance the accuracy of non-capital proceedings. Yet, the Ninth Circuit had previously held that they do not. Most of the reasons given by the *Summerlin* Court regarding the alleged increased accuracy of juries in the capital context apply equally to juries in the non-capital context. Judges certainly view non-capital sentencing proceedings as routine. Furthermore, *Ring* was an extension of *Apprendi* to capital cases. Logically, if *Apprendi* is not retroactive, then neither is *Ring*. *In re Johnson*, 334 F.3d 403, 405 n.1 (5th Cir. 2003)(declining to reach the issue of the retroactivity of *Ring* but noting that "logical consistency"

suggests that *Ring* is not retroactive since *Ring* is essentially an application of *Apprendi* and *Apprendi* is not retroactive).

As to the Ninth Circuit's conclusion that because the issue involved the Sixth Amendment right to a jury trial, the matter involved a bedrock procedural element essential to fairness, United States Supreme Court precedent does not support the view that cases involving the Sixth Amendment right to a jury trial are automatically bedrock. The Court has previously declined to apply cases retroactively that involve the right to a jury trial. *DeStefano v. Woods*, 392 U.S. 631, 633 (1968)(holding that the right to jury trial in state prosecutions was not retroactive and "should receive only prospective application."). Thus, the *Summerlin* Court's conclusion that *Ring* was a bedrock procedural element merely because it involved the Sixth Amendment is contrary to United States Supreme Court precedent.

State Decisions

Four state supreme courts have held that *Ring* is not retroactive. In *State v. Lotter*, 664 N.W.2d 892 (Neb. 2003), the Nebraska Supreme Court, using the *Teague* test, held that *Ring* was not retroactive. In 1996, a three-judge panel sentenced Lotter to death. Lotter contended *Ring* is substantive, not procedural, and therefore, *Teague* did not apply. The *Lotter* Court concluded that *Ring* was procedural. The Nebraska Supreme Court explained that a substantive rule is one which determines the meaning of a criminal statute or addresses the criminal significance of certain facts; whereas,

a procedural rule is one which determines fact-finding procedures to ensure a fair trial. They observed that *Ring* altered *who* decides whether any aggravating circumstances exist, thereby altering fact-finding procedures. They explained that there are two exceptions to the general rule of nonretroactivity announced in *Teague*. *Ring* did not fall within the first *Teague* exception because *Ring* "clearly does not place any type of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe." Nor did *Ring* fall within the second *Teague* exception because *Ring* could not be viewed as enhancing the accuracy of the sentence. The *Lotter* Court discussed the Arizona Supreme Court's decision in *State v. Towery*, 64 P.3d 828 (Ariz. 2003), and the Nevada Supreme Court's decision in *Colwell v. State*, 59 P.3d 463 (Nev. 2002), both of which had held that *Ring* was not retroactive. The *Lotter* court found the numerous decisions from state and federal courts finding *Apprendi* not to be retroactive highly persuasive because *Ring* was based on *Apprendi*. The *Lotter* Court also found guidance in the United States Supreme Court's recent decision in *United States v. Cotton*, 535 U.S. 625 (2002), which held that an *Apprendi* error is not plain error. The Nebraska Supreme Court concluded that *Ring* announced a new constitutional rule of criminal procedure which does not fall within either of the *Teague* exceptions and thus, does not apply retroactively.

In *Colwell v. State*, 59 P.3d 463 (Nev. 2002), *cert. denied*, 124 S.Ct. 462 (2003), the Nevada Supreme Court held that *Ring* was not retroactive. In his state post-conviction petition,

Colwell contended that his sentencing by a three-judge panel violated his Sixth Amendment right to a jury trial established in *Ring*. The *Colwell* Court explained that in *Ring*, the United States Supreme Court held that it was impermissible for a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. However, the Court declined to apply *Ring* retroactively on collateral review. *Colwell*, 59 P.3d at 469-472. The Nevada Supreme Court used an expanded *Teague* test to determine retroactivity. The *Colwell* Court reasoned that *Ring* does effect the accuracy of the sentence. The *Colwell* Court explained that the United States Supreme Court, in *Ring,* did not determine that factfinding by the jury was superior to factfinding by a judge; rather, the United States Supreme Court stated that "the superiority of judicial factfinding in capital cases is far from evident". The *Colwell* Court explained that *Ring* was based simply on the Sixth Amendment right to a jury trial, not on enhanced accuracy in capital sentencings, and does not throw into doubt the accuracy of death sentences decided by three-judge panels. They concluded that the likelihood of an accurate sentence was not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances. *Colwell*, 59 P.3d at 473.

In *State v. Towery*, 64 P.3d 828 (Ariz. 2003), the Arizona Supreme Court also held that *Ring* is not retroactive. Following a *Teague* analysis, the Arizona Supreme Court first determined that *Ring* was a new rule but that the new rule was procedural,

not substantive. The *Towery* Court reasoned that *Ring* did not determine the meaning of a statute, nor address the criminal significance of certain facts, nor the underlying prohibited conduct; rather, *Ring* set forth a fact-finding procedure designed to ensure a fair trial. *Ring* altered who decided whether aggravating circumstances existed. The *Towery* Court noted that the *Apprendi* Court itself described the issue as procedural. *Apprendi*, 530 U.S. at 475, 120 S.Ct. 2348 (stating that: "[t]he substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is."). Because *Ring* was merely an extension of *Apprendi*, logic dictates that if *Apprendi* announced a new procedural rule, then so did *Ring*. Therefore, *Ring* was procedural. Nor did *Ring* announce a watershed rule because it did not seriously enhance accuracy nor alter bedrock principles necessary to fairness. It did not seriously enhance accuracy because *Ring* merely shifted the duty from an impartial judge to an impartial jury. Nor is allowing an impartial jury to determine aggravating circumstances, rather than an impartial judge, implicit in the concept of ordered liberty. The *Towery* Court found *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), which held that the right to a jury trial was not to be applied retroactively, "particularly persuasive".

The Georgia Supreme Court, using federal retroactivity principles, has also held that *Ring* was not retroactive. *Head v. Hill*, 587 S.E.2d 613 (Ga. 2003)(rejecting a claim that *Ring* required a finding of mental retardation be made by the jury

rather than a judge). The Mississippi Supreme Court has declined to apply *Ring* retroactively. *Stevens v. State*, 867 So. 2d 219, 227 (Miss. 2003)(noting the retroactive application of Ring is in doubt and declining to apply *Ring* retroactively "until instructed otherwise by the Supreme Court.").

One state supreme court, however, has held that *Ring* is retroactive. In *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003), the Missouri Supreme Court reopened a direct appeal by recalling the mandate. The *Whitfield* Court held that all four steps in the penalty phase including any factual findings related to mitigation and any balancing of aggravation versus mitigation, not just the finding of one aggravator, must be made by the jury. The *Whitfield* Court declined to adopt the federal test of retroactivity announced in *Teague*. The *Whitfield* Court held that *Ring* was retroactive under the old *Linkletter/Stovall* test.[31] The *Whitfield* Court determined that the remedy was the imposition of a life sentence, not a remand for a new jury to determine the penalty.

While state courts are free to do so, no appellate court should recall a mandate six years after it was issued merely because of a subsequent development in the law. Cf. *Calderon v. Thompson*, 523 U.S. 538 (1998)(disapproving the practice of using motions to recall the mandate to reopen cases that are final minus "extraordinary circumstances" such as a strong showing of actual innocence and finding a "grave" abuse of discretion in a

[31] *Linkletter v. Walker*, 381 U.S. 618 (1965); *Stovall v. Denno*, 388 U.S. 293 (1967).

federal appellate court granting a motion to recall the mandate in a habeas case). However, having done so, the Missouri Supreme Court does not recognize the consequence of its actions. Because the Missouri Supreme Court recalled the mandate of the direct appeal, the result was to render the case still pending on direct appeal. The recalling of the mandate made the case unfinal. *Whitfield* is now a direct appeal case. Retroactivity in collateral review is not an issue in a case pending on direct review. Any new rule applies to a case on direct review regardless of whether the rule existed at the time of the trial. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)(holding that a new rule for the conduct of criminal prosecutions is to be applied to all cases, state or federal, pending on direct review or not yet final). The *Whitfield* Court's entire discussion of *Teague* and the retroactivity of *Ring* is rendered dicta by the recalling of the direct appeal mandate. There was no issue of retroactivity in *Whitfield* once the mandate was recalled.

The Missouri Supreme Court had previously held that *Apprendi*, upon which *Ring* was based, was not retroactive. *Whitfield*, 107 S.W.3d at 267, n.13; *State ex rel. Nixon v. Sprick*, 59 S.W.3d 515, 520 (Mo. 2001)(holding in *Apprendi* is not applied retrospectively to cases on collateral review). So, according to the Missouri Supreme Court, *Apprendi* is not retroactive, but *Ring* is. The Missouri Supreme Court provides no explanation for these incongruous holdings. *Apprendi* involved both the right to a jury trial and the due process standard of proof. *Ring* involves only the right to a jury trial, not the standard of

proof, because most, if not all states, including Missouri, determined the existence of aggravators at the higher, beyond a reasonable doubt, standard of proof prior to *Ring*.[32] Aggravators were already decided at the higher standard of proof before *Apprendi* or *Ring*. The standard of proof wing is probably the more critical part of *Apprendi* in terms of accuracy and that wing is not at issue in a capital case. The "who" wing of *Apprendi* is the only part at issue in a *Ring* claim. So, *Ring* actually is only half of *Apprendi*. If *Apprendi* is not retroactive, then half of *Apprendi* cannot be.

The holding that all steps must be made by the jury is tantamount to a holding that the jury, not the judge, must be the ultimate sentencer in a capital case which is a conclusion specifically rejected by Justice Scalia in his *Ring* concurrence. *Ring*, 122 S.Ct. at 2445 (Scalia, J., concurring)(stating that "today's judgment has nothing to do with jury sentencing" and "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so . . ."). Contrary to the reasoning of the *Whitfield* Court, there is nothing "hollow" about a defendant having his penalty determined by a jury in a new penalty phase. The correct remedy for a violation of the Sixth Amendment right to a jury trial is to provide the

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[32] In Florida, aggravators are found beyond a reasonable doubt. *Geralds v. State*, 601 So.2d 1157, 1163 (Fla. 1992)(stating it is axiomatic that the State is required to establish the existence of an aggravating circumstance beyond a reasonable doubt). Florida has always required the higher standard of proof in the determination of aggravators. *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973).

defendant with a jury. A determination by appellate court fiat is not the correct remedy.

Florida Courts

In *Windom v. State*, 29 Fla.L.Weekly S191, 2004 WL 1057640 (Fla. May 6, 2004), three Justices of this Court decided that *Ring* was not retroactive. Justice Cantero, joined by Justice Well and Justice Bell, explained that retroactivity is a threshold issue. The *Windom* concurrence noted that the United States Supreme Court has long considered retroactivity a threshold issue, which must be considered first in determining whether a defendant seeking post-conviction relief is entitled to the benefits of a new rule. Justice Cantero also observed that considering retroactivity first makes sense because, "if we address the merits of a claim in a post-conviction case but then decide that a prior case does not apply retroactively, our discussion of the merits becomes mere dictum." The concurring opinion would adopt the federal standard for determining retroactivity enunciated in *Teague* and reject the "now-outmoded test" announced in *Witt*. Adopting *Teague* would result in a uniform standard for determining the retroactivity which would ensure consistency among the states and between the state and federal courts. The concurrence explained that *Ring* was procedural, not substantive, because *Apprendi*, upon which *Ring* was based, was procedural. Justice Cantero observed that the *Ring* Court itself described the question before it in *Ring* as "who decides, judge or jury." *Ring*, 536 U.S. at 605. According

to Justice Cantero, *Ring* did not fall within either of the two *Teague* exceptions. *Ring* implicated neither the accuracy nor the fundamental fairness. The *Ring* Court did not even suggest that its holding reflected concerns for the accuracy or fairness. The *Ring* Court held that the Constitution granted the absolute right to jury factfinding regardless of its fairness or accuracy. Relying on *DeStefano v. Woods*, 392 U.S. 631 (1968), in which the United States Supreme Court had held that Sixth Amendment right to a jury trial was not retroactive, Justice Cantero, reasoned that "if the right to a jury trial itself does not implicate such fundamental rights as to apply retroactively, I fail to see how a mere subset of that right--the right to have a jury determine facts relevant to sentencing--can do so." Therefore, *Ring* does not apply retroactively. The concurring opinion also concluded that *Ring* was not retroactive under the old *Witt* standard either.

Retroactivity of *Apprendi*

While only a few courts have addressed the retroactivity of *Ring*, numerous court have addressed the related issue of the retroactivity of *Apprendi*. All eleven federal circuits that have addressed the issue have held that *Apprendi* is not retroactive.[33] Several state supreme courts have held that

[33] *Sepulveda v. United States*, 333 F.3d 55 (1st Cir. 2003)(holding that *Apprendi* is not retroactive because it does not seriously enhance the accuracy of convictions and agreeing with the Seventh Circuit's observation that findings by federal judges, though now rendered insufficient in certain instances by *Apprendi*, are adequate to make reliable decisions about

punishment because "[a]fter all, even in the post-*Apprendi* era, findings of fact made by the sentencing judge, under a preponderance standard, remain an important part of the sentencing regimen" and determining that a decision by a judge (on the preponderance standard) rather than a jury (on the reasonable-doubt standard) is not the sort of error that undermines the fairness of judicial proceedings and rejecting any reliance upon Justice O'Connor's characterization, in her dissent, of *Apprendi* as "a watershed change in constitutional law" because her concern was a practical one regarding the "flood of petitions by convicted felons seeking to invalidate their sentences" that the decision would cause); *Coleman v. United States*, 329 F.3d 77 (2d Cir. 2003)(joining the "chorus" and reasoning that while *Apprendi* was a "new" rule of law, it was a procedural rule, not a substantive rule and explaining that new substantive rules change the definition of a crime and therefore create a risk that the defendant was convicted of an act that is no longer criminal and to mitigate such a risk, new rules of substantive law are applied retroactively but because new procedural rules create no such risk, they are not applied retroactively and noting that *Apprendi* itself said that the substantive basis of New Jersey's enhancement was not at issue; rather, it was the adequacy of its procedures and rejecting the argument that *Apprendi* was substantive because it turned a sentencing factor into an element because the fact of drug quantity was a fact in dispute before *Apprendi* and *Apprendi* merely changed who decided the fact and at what standard of proof and observing that drug quantity was always an element in the sense that it was something that the government had to prove to someone at some standard and therefore, was not "new" in this sense and was not truly a new element), *cert denied*, 124 S. Ct. 840 (2003); *United States v. Swinton*, 333 F.3d 481 (3d Cir. 2003)(relying on the Supreme Court's own description of *Apprendi* as procedural and holding *Apprendi* is not retroactive), *cert. denied*, 124 S. Ct. 458 (2003); *United States v. Sanders*, 247 F.3d 139, 146-51 (4th Cir. 2001)(explaining that because *Apprendi* is not retroactive in its effect, it may not be used as a basis to collaterally challenge a conviction), *cert. denied*, 535 U.S. 1032 (2001); *United States v. Brown*, 305 F. 3d 304 (5th Cir. 2002)(holding *Apprendi* is not retroactive because it is a new rule of criminal procedure, not a new substantive rule and is not a "watershed" rule that improved the accuracy of determining the guilt or innocence of a defendant), *cert. denied*, 123 S. Ct. 1919 (2003); *Goode v. United States*, 305 F. 3d 378 (6th Cir. 2002)(holding *Apprendi* is not a watershed rule citing *Neder v.*

Apprendi is not retroactive either.[34] Several Florida district court have held that *Apprendi* is not retroactive. *Figarola v. State*, 841 So.2d 576 (Fla. 4th DCA 2003)(concluding that *Apprendi* would not be retroactive under either *Witt* or *Teague* but certifying the question as one of great public importance);

United States, 527 U.S. 1, 15 (1999)), *cert. denied*, 537 U.S. 1096 (2002); *Curtis v. United States*, 294 F.3d 841 (7th Cir. 2002)(holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" and it is not fundamental because it is not even applied on direct appeal unless preserved), *cert. denied*, 537 U.S. 976 (2002); *United States v. Moss*, 252 F.3d 993, 1000-1001 (8th Cir. 2001)(holding that *Apprendi* is not of watershed magnitude and that *Teague* bars petitioners from raising *Apprendi* claims on collateral review), *cert. denied*, 534 U.S. 1097 (2002); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667 (9th Cir. 2002)(holding *Apprendi* does not meet either prong of *Teague* because it does not criminalize conduct and does not involve the accuracy of the conviction and therefore, *Apprendi* is not to be retroactively applied), *cert. denied*, 537 U.S. 939 (2002); *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002)(concluding *Apprendi* is not a watershed decision and hence is not retroactively applicable to initial habeas petitions), *cert. denied*, 537 U.S. 961 (2002); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001)(holding that the new constitutional rule of procedure announced in *Apprendi* does not apply retroactively on collateral review), *cert. denied*, 536 U.S. 906 (2002).

[34] *People v. De La Paz*, 791 N.E.2d 489 (Ill. 2003)(holding *Apprendi* is not retroactive); *State v. Tallard*, 816 A.2d 977 (N.H. 2003)(reasoning that *Apprendi* is not retroactive because it is not a watershed rule of criminal procedure that increases the reliability of the conviction); *Whisler v. State*, 36 P.3d 290 (Kan. 2001)(holding that *Apprendi* is not retroactive because it is procedural rather than substantive and is not a watershed rule of criminal procedure that implicates the fundamental fairness of trial), *cert. denied*, 122 S.Ct. 1936 (2002); *State ex rel. Nixon v. Sprick*, 59 S.W.3d 515, 520 (Mo. 2001)(holding in *Apprendi* is not applied retrospectively to cases on collateral review).

Hughes v. State, 826 So.2d 1070 (Fla. 1st DCA 2002)(holding that *Apprendi* did not apply retroactively to a claim being raised under rule 3.800 based on a *Witt* analysis), *rev. granted*, 837 So.2d 410 (Fla. 2003)[35]; *Gisi v. State,* 848 So.2d 1278, 1282 (Fla. 2d DCA 2003)(stating, in dicta, *Apprendi* does not apply retroactively to sentences that were final prior to its issuance). *Ring* involves only half of an *Apprendi* error. So, if *Apprendi* does not warrant retroactive application, *Ring* cannot.

Merits

The Florida Supreme Court has repeatedly rejected *Ring* challenges to Florida's death penalty statute. *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), *cert. denied*, 537 U.S. 1070 (2002); *Duest v. State*, 855 So.2d 33 (Fla.2003), *cert. denied*, No. 03-8841 (U.S. Apr. 19, 2004). The jury made a finding of the felony murder aggravator in the guilt phase by convicting Zack of sexual battery and robbery. One of the aggravators was found by jury in the guilt phase. *Belcher v. State*, 851 So.2d 678, 685 (Fla.)(concluding that aggravators of prior violent felony conviction and murder in the course a felony supported by separate guilty verdict exempt sentence from holding in *Ring*), *cert. denied*, 124 S.Ct. 816 (2003)). Zack's death sentence does not violate *Ring*.

[35] Briefing is complete and the oral argument has been held in *Hughes*. *Hughes*, SC02-2247. This Court issued an order to stay the proceedings pending resolution of *Hughes* in *Figarola*, SC03-586.

ISSUE VI

WHETHER COLLATERAL COUNSEL WAS INEFFECTIVE? (Restated)

Appellate counsel argues that the case should be remanded for a second evidentiary hearing based on ineffective assistance of collateral counsel. This Court has repeatedly held that such a claim is not cognizable. This case should not be remanded for a second evidentiary hearing.

Merits

There is no constitutional right to effective assistance of collateral counsel. *King v. State*, 808 So.2d 1237, 1245 (Fla. 2002)(rejecting a claim that postconviction counsel was ineffective because a defendant has no constitutional right to effective collateral counsel *citing Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989), *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), and *Lambrix v. State*, 698 So.2d 247 (Fla.1996)); *Carroll v. State*, 815 So. 2d 601, 609 (Fla. 2002)(rejecting an ineffective assistance of post-conviction claim due to lack of funding for collateral counsel as "without merit" because claims of ineffective assistance of postconviction counsel do not present a valid basis for relief citing *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996)); *Waterhouse v. State*, 792 So. 2d 1176, 1193 (Fla. 2001)(holding that an ineffective assistance of postconviction counsel is not a cognizable claim citing *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 408 (Fla. 1998), and *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996)). While

Florida does provide a statutory right to counsel in capital post-conviction cases, the statute also provides: "this chapter does not create any right on behalf of any person, provided counsel pursuant to any provision of this chapter, to challenge in any form or manner the adequacy of the collateral representation provided." § 27.7001, Fla. Stat. (2003).

Zack's reliance on *Arbelaez v. Butterworth*, 738 So. 2d 326, (Fla. 1999), and *Peede v. State*, 748 So. 2d 253, 256, n.5 (Fla. 1999), is misplaced. This Court's comment in a footnote in *Peede* regarding the poor quality of the initial brief in a particular case does not create a constitutional right to collateral counsel. Furthermore, both cases predate *King, Carroll, Waterhouse, supra*, wherein this Court reaffirmed its long-standing position that there is no constitutional right to collateral counsel.

Appellate counsel asserts that collateral counsel should have made supplemental public records requests; retained an DNA expert for collateral litigation and should not have abandoned post-conviction issues such as venue without Zack's consent. Appellate counsel fails to identify what the additional public records would disclose. Nor does appellate counsel provide this Court with any explanation of what an DNA expert would have been able to establish at the evidentiary hearing. Both these claims of ineffectiveness of collateral counsel seem to be mere fishing expeditions. Which issues to raise in postconviction litigation are properly counsel's decision, not the defendant's. Zack's personal agreement to litigated certain issues and not other

issues was not required. This case should not be remanded for a second evidentiary hearing.

CONCLUSION

The State respectfully requests that this Honorable Court affirm appellant's convictions and death sentences.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE

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 Linda McDermott, 141 N.E. 30th Street, Wilton Manors, FL 32334 17th day of May, 2004.

_____
Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

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

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