

IN THE SUPREME COURT OF FLORIDA

OBA CHANDLER,

Appellant,

vs.
1468

CASE NO. SC01-

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF CASE

On November 10, 1992, Oba Chandler was indicted for the first degree murders of Joan, Michelle and Christe Rogers. He pled not guilty, and his trial was held on September 19-29, 1994., more than five years after the murders occurred. The jury, which was selected in Orange County, Florida, and brought to and sequestered in Pinellas County, Florida for the trial, returned three verdicts of guilty as charged on September 29, 1994. On September 30, 1994, the jury recommended death for each murder by a vote of 12-0. The court followed the recommendation and Chandler was sentenced to death on November 4, 1994.

This Court affirmed the judgments and sentences of death in 1997, Chandler v. State, 702 So. 2d 186 (Fla. 1997) and a petition for *certiorari* review was denied by the United States Supreme Court. Chandler v. Florida, 523 U.S. 1083 (1998).

Chandler filed a "shell" motion to vacate, with leave to amend on June 17, 1998. After substitution of counsel, an amended motion was filed on May 30, 2000. A *Huff* hearing was held on the motion on September 15, 2000, followed by an evidentiary hearing on November 2, 2000. Relief was denied on June 27, 2001 and this appeal followed.

STATEMENT OF FACTS

A. Trial

In the opinion affirming Chandler's original conviction and sentence, this Court set forth the salient facts as follows:

FACTS

The record reflects that the body of Joan Rogers and those of her two daughters, Michelle and Christe, were discovered floating in Tampa Bay on June 4, 1989. Each body was nude from the waist down. Joan's hands were tied behind her back, her ankles were tied together, and the yellow rope around her neck was attached to a concrete block. Christe's hands and ankles were similarly tied, and she had duct tape on her face or head and a rope around her neck. (FN1) Michelle's left hand was free with only a loop of rope attached, her ankles were bound, she had duct tape on her face or head, and the rope around her neck was attached to a concrete block.

The assistant medical examiner, Dr. Edward Corcoran, performed autopsies that same day. He determined that the cause of death for each victim was either asphyxiation due to strangulation from the ropes tied around their necks or drowning.

The Rogers family was vacationing in Florida and had checked into a Days Inn in Tampa on June 1. One week later, housekeepers notified the general manager that the Rogers' room had not been inhabited for several days. The general manager contacted the police, who secured the room and obtained the hotel's records for the room. The police subsequently found the Rogers' car parked at a boat ramp on the Courtney Campbell Causeway.

Among the items recovered from the car was a handwritten note on Days Inn stationery and a Clearwater Beach brochure. The note read, "Turn right. West W on 60, two and one-half miles before the bridge on the right side at light, blue w/wht." FBI agent James Mathis determined that the handwriting was that of Joan Rogers. Theresa Stubbs from FDLE determined that some of the handwriting on the Clearwater Beach brochure was Chandler's, while other writing may have been Joan Rogers'. Samuel McMullin, a fingerprint expert for the Hillsborough County Sheriff's Department, found Chandler's palm print on the brochure.

Rollins Cooper worked as a subcontractor for Chandler at the time of the murders. He testified at trial that on June 1, Chandler appeared to be in a big hurry after bringing Cooper some screen. When asked why, Chandler told Cooper that he had a date with three women. Cooper met Chandler the next morning at 7:05 a.m.; when asked why he looked grubby, Chandler replied that he had been out on his boat all night.

Judy Blair and her friend, Barbara Mottram, both Canadian tourists, testified regarding Chandler's rape of Blair several weeks prior to the Rogers' murders. After meeting the women at a convenience store, Chandler, who identified himself as "Dave," arranged to take them out on his boat the next day. The following morning, May 15, 1989, Mottram decided not to go out on Chandler's boat, so Blair met Chandler alone. Blair testified that Chandler seemed disappointed when told Mottram would not be joining them. After boating for several hours, Blair and Chandler returned to the dock. Chandler asked Blair to get Mottram to join them for an after-dinner boat trip.

Again, Blair could not convince Mottram to join them. Blair testified that Chandler

seemed "ticked off" when she told him Mottram would not be joining them. Subsequently, Chandler began making advances to Blair after the boat entered the Gulf of Mexico. Despite Blair's refusals and attempts to resist him, Chandler raped her. Chandler and Blair then returned to shore. The next day, Blair told Mottram what happened and reported the rape to the police. At trial, she identified the clothing Chandler had been wearing that night. Mottram picked Chandler's photograph out of a photo pack and identified him in a lineup and in court.

Chandler visited his daughter, Kristal Mays, and her husband Rick in Cincinnati in November 1989. Kristal later testified that Chandler told her he could not go back to Florida because the police were looking for him for killing some women. While Chandler never admitted to the killings, Kristal testified that he likewise never claimed innocence. Similarly, Rick Mays thought Chandler had committed the murders from the way he described how the police were looking for him as a murder suspect.

During another visit to Cincinnati in October 1990, Chandler had Rick Mays set up a drug deal. Before absconding with some of the drug dealers' money, Chandler put a gun to Rick's head and said, "Family don't mean s___ to me." After Chandler fled, Rick was badly beaten up and almost killed. The Mays' house was also damaged by the drug dealers. This series of incidents forced Kristal Mays to drop out of nursing school. She was upset and told Rick to call the police and report that Chandler "put a gun on him."

After Chandler was arrested in September 1992, Kristal was contacted and cooperated with the police and she began to tape their conversations. She gave a sworn statement

to the state attorney's office on October 6, 1992. Kristal had been convicted of a crime involving dishonesty and appeared on the television show Hard Copy in 1994 to discuss her father's alleged role in the murders in return for a \$1000 fee.

Robert Carlton testified that he bought a blue and white boat from Chandler in July or August 1989. Carlton recalled seeing concrete blocks at the Chandler house and that some of the concrete blocks had three holes and some had two.

Arthur Wayne Stephenson shared a cell with Chandler for ten days in late October 1992. He testified at trial that after viewing television reports about the recovery of the victims' bodies from Tampa Bay, Chandler said that he had met the three women and given them directions to a boat ramp on the Courtney Campbell Causeway. Chandler told Stephenson that one of the girls was very attractive.

Blake Leslie, an inmate at the Pinellas County Jail with Chandler in the fall of 1992, testified that Chandler told him that he took a young lady from another country for a ride in his boat. Her friend did not want to go. Once he got out twenty to thirty miles, Chandler told her to have sex with him or swim for it. Chandler allegedly said that the only reason that woman was still around is because somebody was waiting for her at the boat dock. Leslie, who had been convicted of nine felonies, never heard Chandler speak of murders, only rapes.

Several marine operators for GTE (FN2) testified to collect calls made from a caller identifying himself as Oba, Obey, Obie, or no personal name and his boat as Gypsy or Gypsy One, from March 17 to June 2, 1989. The calls were placed to a number registered to Debra Chandler, Chandler's

wife. One of the operators, Elizabeth Beiro, testified that she received three collect calls for Debra Chandler's telephone number, at 1:12 and 1:30 a.m. on June 2, 1989. The caller did not give a first name, although he identified his boat as Gypsy One. Later that same morning, at 9:52 a.m., Frances Watkins received a collect call from Gypsy One; the caller identified himself as Obie.

Chandler testified that he met Michelle Rogers when he stopped at a gas station. He testified that he had a very brief conversation with Michelle, giving her directions to the Days Inn on Highway 60. Chandler maintained that he never saw any of the Rogers family again after this short encounter and adamantly denied killing them. He also testified that he never told Rollins Cooper that he had a date with three women. Chandler claimed that he was out on his boat all night because his engine died after a hose burst, spilling all of his fuel. He testified that two men in a boat gave him a tow to Gandy Bridge Marina, where he put some fuel in his boat. In rebuttal, James Hensley, a certified boat mechanic, testified that Chandler's fuel line was possibly still the original, was in good shape, and showed no signs of repair. Hensley stated that even if there had been a hole in the fuel line, it would not have leaked because of the anti-syphoning valve.

When asked about details surrounding the rape of Judy Blair, Chandler invoked his Fifth Amendment right to remain silent twenty-one times, although he did answer some questions regarding his perception of the link between the rape and the murders.

After the jury trial concluded, Chandler was found guilty of all three counts of murder on September 29, 1994. The jury reconvened for the penalty phase the next

day. During the penalty phase, Chandler waived the presentation of any testimonial mitigating evidence. However, he did present some documentary evidence, including records showing that he obtained his high school equivalency diploma and earned college credits while in prison. The State presented the judgments and sentences of Chandler's prior armed robberies. The robbery victims also testified about the details of those crimes.

Chandler v. State, 702 So. 2d 186, 189-191 (Fla. 1997)

B. Evidentiary Hearing

The evidentiary hearing in this case was limited to three claims. In support of those claims, Chandler presented the following evidence.

Chandler's trial counsel, Fred Zinober testified that he graduated from Catholic University Columbia School of Law where he was editor of law review. (PCR V9/1651, V10/1747)¹ Zinober worked with the State Attorney's Office for the Sixth Judicial Circuit from June 1, 1982 to July 1, 1986. (PCR V9/1654) While there, he handled several murder cases, two of which actually

¹ The record from the 2002 Evidentiary Hearing will be designated as (PCR V#/#) The appellate record from the original trial will be designated as (TR V#/#). The Wilson Media Report was not introduced into evidence but was authorized by Judge Schaeffer to be included in the record and is in Supplemental Volumes One and Two. It will be referred to as (PCR SV#/#).

went to trial. In private practice, Zinober handled fourteen first degree murder cases. One case resulted in a plea to third degree murder and of the others that went to trial, only six were found guilty. (PCR V10/1749) In addition to being board certified in criminal law since 1993, Zinober is also AV-rated by Martindale-Hubbell. (PCR V9/1651, V10/1753)

He testified that before he took the case he knew that the State was going to seek to introduce Williams² rule evidence and that a motion in limine would have to be filed. Accordingly, he took the deposition of Barbara Mottram and Judy Blair regarding the Williams rule case, otherwise referred to as the Blair rape. (PCR V9/1662-63) Zinober testified that he knew there was no physical evidence to support the charge, only the testimony of Blair and Mottram. (PCR V9/1665)

Zinober testified that he made a tactical decision to deal outright with the Blair allegation in opening statements and that Chandler agreed with the decision. (PCR V9/1674-76) He identified a memorandum from his file delineating his strategy for dealing with the Blair rape in the event Judge Schaeffer denied their motion in limine. (PCR V9/1671; PCR V12/2127) The memorandum stated, in pertinent part:

² Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).

Last Friday, we discussed with Chandler, two important issues of this case. . . . However, we also mapped out with him another strategy call, which we discussed, at length, and which Chandler agreed would be the best course to pursue. . . . In essence, it is my belief that I do not want to be in a position where they have to believe [sic] Oba twice; once on the rape case, and then the second time on the murder case. I do not want the State to be able to use an argument that he is lying on the rape case, therefore, he is a liar, therefore he is lying on the murder case, therefore he is a murderer. In essence, I want Chandler to only have to explain one scenario: the murder case in front of the jury that is trying the murder. This would also avoid being sucked into the State's strategy of having us have residual detriment by trying the rape case, thus generating tremendous amount of emotion on that, to have it spill over into the murder case. It will be bad enough with the fact of the rape coming out. I do not want to have Chandler cross-examined by Crow on the rape. In essence, I want the jury to have to believe Chandler only once, and that relating to the murder case, in the murder trial. We can leave to the rape jury whether or not they wish to believe him in relation to the facts of the rape case. Additionally, I believe, quite frankly, it does not hurt for the jury trying the murder to think that he will be convicted on the rape, thereby allowing them solace of finding him not guilty on the murder, and letting the other jury hand out the disposition on the rape. I see no reason to shoot the moon, to try to acquit him on the rape in front of the murder jury, as well as acquit him on the murder. I believe that that would work to our detriment. Chandler heard of this discussion, participated in it, and agreed with it. We explored the other alternatives for approximately one hour, as well.

Zinober did not agree with collateral counsel's suggestion that the State did not have a very strong case and "therefore, the proper thing would have been to vigorously have Mr. Chandler deny he ever raped this lady" and stated that he thought it would have been highly detrimental. (PCR V9/1682) He testified that he filed approximately eleven motions trying to limit the introduction of the evidence but he believed that to try and defend against it would be a mistake. Zinober noted that his perception of Judy Blair was very different after meeting her than it was based upon the police reports and Chandler's version of the facts. (PCR V9/1686) He remembers thinking when he saw her with prosecutor Doug Crow, "please do not let that be Judy Blair, because basically Miss Blair was - - she wasn't just a very attractive woman, she was a very wholesome looking woman." He noted that he had described her as an Olivia Newton John look-alike to his co-counsel, but that when co-counsel saw her he told Zinober that he had underestimated her. (PCR V9/1687) Blair's description of the event during the deposition was such that he knew she would come off very, very powerfully to the jury. (PCR V9/1688)

Zinober testified that another factor in his decision to not litigate the rape charge was Chandler's response to his question

regarding why Blair would lie about the rape. Chandler told him that her reason for lying was that they had anal sex and she did not like it, that she became very angry at him over it. (PCR V9/1689) He recalled that Chandler had not returned her to the dock but, rather, had dropped her off in the water and she had to walk back. Even before they met Judy Blair, he discussed with other members of the defense team Chandler's explanation of what happened on the water that night with Blair in order to get their independent assessment of Chandler's story. They did not feel comfortable with his explanation. (PCR V10/1766) Zinober believed that testimony would have been very damaging to Chandler; that the jury would believe he was admitting to a sexual battery. (PCR V9/1690) He repeatedly explained that he wanted to put the rape question aside because he did not want to get sucked into a debate over the rape versus the murder and the identity issue on the rape. (PCR V9/1693) He also believed that if he challenged the rape issue the State would probably spend a long time going over the facts of the rape and on every point where Chandler disagreed with Blair argue that you cannot believe him on the rape, you cannot believe him on the murders. Zinober believed that Blair came off very strongly and to put Chandler on the stand and have him deny the rape would have, in his opinion, been suicidal to his chances of winning the murder

case. (PCR V9/1695) He felt that not denying the State could prove the rape would improve his credibility in front of the jury and yet allow Chandler to take the Fifth on questions concerning the rape. (PCR V9/1696) Moreover, he felt that if the jury believed he was going to receive a life sentence for the rape, that because of the lack of evidence, they might not vote to convict on the murders. (PCR V9/1697-98) Zinober also emphatically noted that he did not concede that Chandler committed the rape, but only that the State could prove it. (PCR V9/1699) Zinober also noted with regard to the rape, that another of his concerns about Chandler denying the rape is that Chandler had been in jail for a few years and he was getting heavy and did not look very good, whereas the victim looked very professional and not like the type who would agree to have consensual sex with Chandler. Zinober noted that even though he could have pointed out that Chandler was better looking at the time of the rape, he still had to contend with the fact that the jury was looking at something else. (PCR V9/1734-35)

Zinober testified that the ID in the Judy Blair case was very strong. His recollection was that Blair did not initially pick anybody out of the lineup when the event happened which showed to Zinober that she had a pretty stable state of mind and wasn't just trying to hang a crime on someone. Years later when

Chandler had been determined a suspect in the homicide, both Blair and Mottram picked Chandler out of a photopac and then later, out of a lineup. Zinober believed it was also Blair who drew a picture of a boat that looked exactly like the boat. She picked the boat out at FDLE. Blair described the clothes that Chandler had been wearing. Additionally, Zinober testified that he was aware of the SAVE exam that had been done. (PCR V10/1767-68)

Zinober agreed that since the State could prove the rape, there was no need for them to produce other evidence to corroborate the rape itself. Zinober's strategy was to minimize the rape because he did not want the jury to be confused about what related to the rape and what related to the murder. (PCR V10/1769)

With regard to Zinober's not sending a copy of the May 17, 1994 memorandum to the defendant, Zinober agreed that the reason he did not do so was because in his experience sending a number of follow-up memos or correspondence trying to corroborate his position would probably have the effect of diminishing the client's confidence in him. (PCR V10/1770)

Zinober identified the people who were working with him and Chandler on the case as Stevie, his paralegal Laura Good and Amy Saltzman. Chandler agreed with the strategy that Zinober laid

out to him; that he should take the Fifth as opposed to testifying to the facts of the rape. (PCR V10/1771)

Zinober testified that his Ju-Jitsu approach to handling the rape case was that if it was going to come in, then they would use it as best they could to put into the jury's mind that if they were concerned whether or not there is enough evidence to convict Chandler on the homicide, then they can find solace in the fact that another jury is going to convict him on the rape and probably sentence Chandler to life. Chandler heard the discussion, participated in it, and agreed with it. Zinober disagreed that Chandler's response at trial to the State's question that he was facing life in prison on the rape case was inappropriate. However, Chandler did follow the strategy they had agreed to. (PCR V10/1773-74) Zinober testified that there wasn't anything he did not do as far as investigating the Blair rape case. (PCR V10/1774)

Zinober testified that he did not expect that Judge Schaeffer would allow the State to repeatedly question him and have him invoke the Fifth. He thinks the court was wrong to allow the continued questioning and corresponding invocation of the Fifth Amendment, but was convinced that if he had denied the rape it would have legitimately opened the door to the State being allowed to question Chandler about the rape. (PCR

V9/1701-03) He still believes that both Judge Schaeffer and the Florida Supreme Court were wrong in allowing the State to question Chandler. (PCR V9/1705) In response to Judge Schaeffer's questioning, Zinober admitted that if his choice was between Chandler answering the questions and taking the Fifth, he would still rather Chandler take the Fifth. (PCR V9/1706) Zinober explained on cross, that his strategy for having Chandler take the Fifth was to preserve the matter for appellate review. Likewise, Zinober made the decision to keep that strategy from the State for as long as possible. (PCR V10/1775-76) He testified that it wasn't until the night before Chandler was going to testify that he first discussed the Fifth Amendment issue with Judge Schaeffer and the State. (PCR V10/1776-77)

In reply to the court's inquiry, Zinober testified that it was his position that the State should not be allowed to ask Chandler questions regarding the Blair rape case because Chandler shouldn't have to take the Fifth. Zinober responded in the affirmative to the court's question of whether he and Chandler had discussed what they would have done had the trial court directed Chandler to answer the question at trial. Zinober's position, in that event, was that he was prepared to tell Chandler to disobey the trial court's order and not testify because he believed Chandler had a Fifth Amendment right.

Zinober was ready to subject himself to a contempt hearing, if necessary, in those circumstances. Zinober did not tell Chandler how far he was willing to go. Nor did he tell Chandler that if he had refused to follow the trial court's directive that his testimony would have been stricken. (PCR V10/1781-84)

Zinober noted that he spent countless hours and days talking to Chandler about everything involving the case, different evidence. They discussed Chandler's taking the stand and how he would respond to direct and cross-examination questions. (PCR V10/1778) He explained that the reason he did not rehearse each question with Chandler was that based on his previous experience in a case where he and the defendant had rehearsed the defendant's testimony, the jury did not like the way the defendant testified and he was convicted. Zinober believes there are certain spontaneous things that can be said during testimony that are real and go a long way with the jury. Zinober asked Chandler everything he thought he could ask him and he was satisfied with the answers Chandler gave him and so Zinober wasn't concerned about rehearsing his testimony. (PCR V10/1779-80)

Zinober testified that his strategy was agonizing and creative. (PCR V10/1791) He discussed the theory with Chandler (PCR V10/1792) He told Chandler that in the Blair rape case the

jury would believe her and they would not believe him. And then the State would argue that if the jury could not believe Chandler on the rape, they could not believe him on the murder. Zinober believed that Chandler understood him and he preferred to take the Fifth over saying that he didn't do it. Chandler was a particularly cooperative client who trusted Zinober's judgment. (PCR V10/1793-95) For Chandler to be allowed to take the Fifth on the stand was at the defendant and defense counsel's request. (PCR V10/1795)

Zinober testified that on the morning Chandler was to testify, he met with Chandler in the holding cell and expressed to him that he would be convicted if he didn't testify, and his best chance of winning was if he would testify. Once the trial court ruled that Chandler could take the Fifth, Zinober recommended to Chandler that he testify and follow his advice. It was Chandler's decision to testify. (PCR V10/1799-1800) Zinober testified that his position as far as first degree murder cases were concerned is if the client is going to deny culpability, then Zinober would prefer for the client to testify. That is a strategy that he used in most of his murder cases. (PCR V10/1751)

With regard to Chandler's consent to the strategy taken by counsel, Zinober explained that he made a memo to the file and

did not send it in a letter to Chandler because the memo was more to remind him in the event of a post conviction claim his reasons for making the decisions he made and he would have sent such a letter to a client only when the client disagrees with him. He also was concerned about the possibility of others in the jail having access to confidential material and seeking to trade information against Chandler. (PCR V9/1709-11) He believed that Chandler understood the decision; that Chandler was an intelligent man. (PCR V9/1712) Zinober pointed out that Chandler has been convicted before, that he understood the system. He said that they had discussed his testimony and that Chandler was instructed to just keep asserting his Fifth Amendment privilege if and when particular questions were asked. (PCR V9/1714-15)

Prior to Zinober's becoming involved in the Chandler case, Mr. McCoun was involved. McCoun withdrew because he became a federal magistrate. The same day that McCoun withdrew, Zinober was appointed and he met with Chandler in the holding cell. Zinober testified that it was at that point that they started formulating the strategy that unless something incredible happened, Chandler was going to be testifying. Chandler "absolutely" wanted to testify and Zinober strongly encouraged him based on his experience and success with prior murder cases.

(PCR V10/1753) Zinober volunteered that he felt Chandler's testimony was believable. Zinober spent countless hours and days with Chandler; probably more time with Chandler than with his family. He visited Chandler at all times of the day and night. (PCR V10/1754) Zinober said that he lived the case for seven, eight, nine months. (PCR V10/1755) There were times when Zinober would visit Chandler in the middle of the night about the case. Zinober explained that from the very beginning of the case due to the fact that the death penalty was involved, he made sure that everything he did was based on some strategy or tactical decision. (PCR V10/1756) Zinober agreed that it was one of the reasons he dictated the May 17, 1994 memorandum to the file reflecting his strategy as far as the Fifth Amendment and the Williams Rule evidence. (PCR V10/1757)

With regard to the venue issue, Zinober explained that he and Chandler discussed using jurors from Orange County and that Chandler agreed with the decision to do so. The main thing they wanted was to not have jurors from the Tampa Bay area. (PCR V9/1715-17) Judge Schaeffer noted that even though she thought they could easily pick a jury in Tampa, she agreed to not hold the trial in Tampa, if Chandler agreed to bringing in a jury from Orlando. It was a package deal-either they all were going to agree to this or they would try to pick a jury from

Hillsborough County because she did not believe there would be a problem in picking a jury in Tampa. (PCR V9/1720-24) Zinober agreed that the court had said that if they could not get a jury from Orlando then he should file his motion for change of venue, that the issue was not waived by agreeing to an Orlando jury pool. (PCR V9/1725-26) On cross, the State confirmed this statement by producing an excerpt from the trial record, Volume 91, page 1606, that Zinober preserved the right to file a motion for change of venue. The trial record also reflected that Chandler affirmatively agreed on the record to the decision. (PCR V10/1741-42)

Zinober agreed that they discussed Orange County and that it was not the favored county but that it was better than Hillsborough. (PCR V10/1743) They had no problems picking a jury from Orange County and did not use all of the peremptory challenges available to them. (PCR V10/1745) Chandler was very involved in the jury selection process and with virtually everything that was done on the case. He had no objection to the final jury panel. (PCR V10/1746)

Zinober testified that his whole goal based on his experience as a prosecutor and as a defense attorney is to win. He considers himself to be a very aggressive, creative defense attorney. (PCR V10/1758) Zinober explained that the strategic

reason he did not object continuously during the State's closing argument was that he felt the State did a very good closing argument. Zinober recalled that his closing took about three hours and he felt he had established a good rapport with the jury and that his closing was going very, very well; that they were receptive to what he was saying. Then, during the State's rebuttal argument, Zinober did not want to jump up and object because in general he thinks it looks bad in front of the jury to continually interrupt the other side's closing arguments. (PCR V10/1758-59)

Zinober testified that he felt that the State's closing argument was pretty mean-spirited and that the prosecutor was hurting himself. He watched the jurors' reactions and felt they were not responding well to the prosecutor when he was saying contentious things about Zinober. Zinober did make several objections when he felt that the State had pushed him a little bit too far and that an objection was necessary. He recalled that he moved for a mistrial three times. Zinober testified that this was his strategy. (PCR V10/1762-63)

Oba Chandler also testified at the hearing. He agreed that he had discussed many things with Zinober, including his taking the stand, that the State had invoked the Williams Rule to bring in the Blair case, and that he had known the State was going to

present evidence of the Blair case in the murder case before Zinober was even on the case. (PCR V10/1810-11, 1834) He gave his version of the Blair incident from his own perspective, and as he had related it to defense counsel Zinober. (PCR V10/1812-21) He testified that he had not authorized Zinober to admit his guilt of the Blair rape to the jury and that Mr. Zinober had not believed that he had done so, although the newspaper reported it that way. (PCR V10/1822-23) He testified he would rather have testified against the rape charges than take the Fifth, which seemed to him to be admitting his guilt by not answering. (PCR V10/1822) He described his own demeanor as very angry about not being able to answer every time he had to assert it. (PCR V10/1826-27) He was angry at the prosecutor. (PCR V10/1827)

On cross-examination, although claiming the sex was initially consensual, Chandler admitted that he had continued to have sex with the victim after she indicated she wanted him to stop. (PCR V10/1843-1849) He admitted he had not heard defense counsel Zinober admit his guilt of the Blair rape during opening statement, (PCR V10/1863-65, 1872) and that he had expected defense counsel to tell the jury that they were not defending the rape case. (PCR V10/1870) He admitted he was the person on the boat with Judy Blair, had used a false name to identify

himself to her, and had fled the area when the composite was printed in the newspaper in November, 1989 that might identify him as a rapist. (PCR V10/1835-1838, 1849-1850, 1871-1872) For those reasons, he was not concerned with Zinober's concession on opening statement that the State could prove beyond a reasonable doubt that he was the one on the boat with Judy Blair. (PCR V10/1872) He admitted he knew that the State's evidence about the Blair rape was intended to show identity of the murderer and, therefore, harmful to his case, and the reason the defense was trying to keep it out. (PCR V10/1875-76) He claimed, however, that Mr. Zinober did not discuss with him that it would be better to take the Fifth than to give his version of the consensual sex. (PCR V10/1866, 1868-1869, 1876-1877) Although once denying it, Chandler twice agreed he had, pretrial, discussed with his counsel about taking the stand. (PCR V10/1833-1834) He testified he wanted to testify to attack some of the State's witnesses, and to deny the Blair allegations. (PCR V10/1831) He admitted that he knew it was his decision whether to testify and that no one could make him testify, but said that he went along with defense counsel's decision that he should do so. (PCR V10/1882-1883) He had heard defense counsel tell the jury in opening statement that he would be taking the stand. (PCR V10/1883-1884) Chandler did not dispute that he

had discussed the strategy of their not defending the Blair rape case with Zinober, and that he agreed with the strategy, as Zinober had testified. (PCR V9/1666; V10/1866-1867, 1881-1882) He took the Fifth Amendment because the rape charge was a separate case that he wanted to go to trial on separately. (PCR V10/1866) Zinober testified that he was aware that Chandler felt that Ms. Blair consented to the sexual conduct, (PCR V9/1667), and had not confessed. (PCR V9/1669-1670)

SUMMARY OF THE ARGUMENT

Chandler's first claim is that counsel was ineffective for failing to seek a second change of venue from Orange County. This claim is procedurally barred as a direct appeal issue. Moreover, in light of the fact counsel sought and received a change of venue, he was able to select a jury with little or no difficulty and the trial judge acknowledged that a second motion for change of venue would not have been granted, there has been no showing of deficient performance or prejudice from counsel's decision to not request a second change of venue from Orange County.

Chandler next argues that defense counsel's admission in opening statement that the State could prove the sexual battery of Judy Blair was an impermissible concession of Chandler's guilt. The facts as set forth below, and as found by the lower court, clearly establish that defense counsel's tactical, strategic decision to take that approach was one to which Chandler agreed and one within the range of reasonably effective assistance of counsel.

Chandler's final claim is that counsel was ineffective for failing to object to certain prosecutor comments during closing arguments. As this Court has previously reviewed those comments and found that they do not constitute fundamental error, this

claim is barred. Moreover, counsel's decision to not assert an objection was a reasonable tactical decision and does not support a claim of either deficient performance or prejudice.

As the following will demonstrate the trial court correctly concluded that Chandler was afforded constitutionally effective assistance of counsel and no relief is warranted.

STANDARD OF REVIEW

All of Chandler's claims raised in the instant collateral proceeding rest upon an assertion of ineffective assistance of counsel. The standard of review for claims of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), is *de novo*. Stephens v. State, 748 So. 2d 1028 (Fla. 1999) (requiring *de novo* review of ineffective assistance of counsel); Sims v. State, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the Strickland test, i.e., deficient performance and prejudice, present mixed questions of law and fact reviewed *de novo* on appeal. Cade v. Haley, 222 F.3d 1298, 1302 (11th Cir. 2000) (stating that, although a district court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, citing Byrd v. Hasty, 142 F.3d 1395, 1396 (11th Cir. 1998); Strickland, 466 U.S. at 698

(observing that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact).

As to the claims for which an evidentiary hearing was held, the standard of review applied by an appellate court when reviewing a trial court's ruling on a rule 3.850 motion to vacate following an evidentiary hearing is: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" " Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997), quoting Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984), quoting Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955); Melendez v. State, 718 So. 2d 746 (Fla. 1998).

ARGUMENT

CLAIM I

WHETHER THE LOWER COURT ERRED IN DENYING
CHANDLER'S REQUEST FOR AN EVIDENTIARY
HEARING ON HIS CLAIM THAT DEFENSE COUNSEL
WAS INEFFECTIVE FOR FAILING TO SEEK A VENUE
CHANGE FROM ORANGE COUNTY.

Chandler initially challenges Judge Schaeffer's denial of his claim that counsel was ineffective for agreeing to the decision to move the trial from Hillsborough County to Pinellas County and bring in a jury pool from Orange County.³ While he frames the issue as error for denying an evidentiary hearing regarding this claim, the argument rests upon the assertion that there was presumed and actual prejudice from the publicity which denied Chandler a fair trial. This argument fails for a number of reasons.

First, while it is true that Judge Schaeffer denied the request for an evidentiary hearing on the *amount* of publicity generated about the Rogers' murders, she accepted as true Chandler's assertion that there was a lot of publicity and she agreed to hear evidence concerning Chandler's venue waiver and

³ Chandler was indicted for three murders alleged to have occurred in either Hillsborough County or Pinellas County, Florida. Chandler elected to be tried in Hillsborough County but later sought a change of venue due to extensive publicity. (PCR V4/662-675)

Zinober's strategy regarding the venue issue. (PCR V9/1579-80, 1637-38) Chandler concedes that evidence was permitted on facets of the claim but urges that more was needed to substantiate his position that the publicity was extensive. As Judge Schaeffer heard the following testimony, accepted as true that there was extensive publicity and the State did not challenge the finding, there is no need for further evidentiary proceedings.

Chandler and trial counsel agreed at the evidentiary hearing that the defense filed the motion for change of venue from Hillsborough County, that Chandler discussed that change of venue with defense counsel and agreed to the court's proposal that it be moved to Orlando for the attempt to select an impartial jury and then return to Pinellas County with those selected jurors for the trial. (PCR V9/1715, 1726; V10/1737, 1742-45, 1855-59) Zinober's letter to Judge Schaeffer concerning venue and the note that appellant had read and agreed with it, was further support of the testimony. (State's Exhibits 1A and 1B) Defense counsel acknowledged he had not used all his peremptories in selecting the jurors and that he had consulted closely with Chandler in the jury selection process. (PCR V10/1745-46) Zinober recollected and Chandler agreed that they had talked extensively during jury selection.

Chandler admitted he had not objected to any individual juror who was selected. (PCR V10/1746, 1859-60)

Defense counsel and appellant acknowledged that a major concern had been to receive a speedy trial, (PCR V9/1721-23; V10/1862-63), and that Orange County was preferable for jury selection over Pinellas or Hillsborough Counties. (PCR V9/1724-25; V10/1743, 1858) Defense counsel agreed that the court had felt that an impartial jury could be selected in Hillsborough County. (PCR V9/1719, 1723-26)

Zinober felt and the lower court agreed that he had not waived the right to challenge the Orange County venue should there have been any problem in selecting an impartial jury. (PCR V9/1716, 1723; V10/1740-42) Chandler acknowledged that he had signed the stipulation agreeing to the Pinellas County venue for the trial after the attempted selection of the jurors in Orange County. (PCR V9/1736; V10/1737-38) Chandler also agreed that the court had informed them they retained the right to object to the Orange County venue if the jury selection process reflected a problem in obtaining a fair jury. (PCR V10/1828-29) He added that he had paid attention every time the judge had spoken to him. (PCR V10/1855) He acknowledged his agreeing during the pretrial venue hearing to the Orange County venue for jury selection, (PCR V10/1855-57)(State's Exhibit 3, Vol. 37, R

12057-12065) and that his signed Change of Election of Venue, (PCR V9/1736; V10/1737-38)(State's Exhibit 2, R 6000) and the Court's Order, dated July 18, 1994, nunc pro tunc, to July 5, 1994, (State's Exhibit 4, R 6309-6310), reflected his stipulation for jury selection in Orange County and Change of Venue for trial from Hillsborough to Pinellas County. (PCR V10/1877-78)

"This Court has long held that trial courts have 'wide latitude' to regulate proceedings before them 'in order that the administration of justice be speedily and fairly achieved in an orderly, dignified manner' and that '[i]n this function the trial judge exercises the sound discretion with which he is vested.'" Asay v. State, 769 So. 2d 974, 981 (Fla. 2000), (quoting Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) and Hahn v. State, 58 So. 2d 188, 191 (Fla. 1952)). See, also, Robinson v. State, 707 So. 2d 688, 695 (Fla. 1998); Garcia v. State, 622 So. 2d 1325, 1327 (Fla. 1993). In the instant case, Judge Schaeffer accepted as true the assertion that publicity was extensive and Chandler was permitted to present testimony concerning Zinober's and Chandler's decisions with regard to this claim. Accordingly, Chandler cannot show that the limitation was an abuse of the trial court's discretion or that the court's findings were not supported by competent substantial

evidence.

Moreover, as Judge Schaeffer found, to the extent that Chandler is asserting the merits of the underlying claim it is procedurally barred. Challenges to venue or issues concerning jury selection could have been raised on direct appeal issue and are not appropriately raised in a motion for post conviction relief. Gaskin v. State, 737 So. 2d 509 (Fla. 1999) (denial of change of venue request barred as direct appeal issue.) Counsel cannot circumvent this procedural bar by asserting ineffective assistance of counsel. State v. Riechmann, 777 So. 2d 342, 366 (Fla. 2000), (quoting, Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (stating that claims of ineffective assistance of counsel should not be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal.))

Finally, the claim of ineffective assistance of counsel is without merit. This Court, upon reviewing similar claims regarding a failure to request a change of venue has held that such claims are properly denied where the claimant fails to argue sufficient facts demonstrating he suffered prejudice due to counsel's failure to request a change of venue or that had counsel made the request, the court would likely have granted it. Patton v. State, 784 So. 2d 380, 389-390 (Fla. 2000), relying upon, Rolling v. State, 695 So. 2d 278, 284-88 (Fla.

1997). See, also, Sireci v. State, 773 So. 2d 34 (Fla. 2000); Owen v. State, 773 So. 2d 510 (Fla. 2000); Gaskin v. State, 737 So. 2d 509 (Fla. 1999); Jones v. State, 732 So. 2d 313 (Fla. 1999); Haliburton v. Singletary, 691 So. 2d 466 (Fla. 1997); and Van Poyck v. State, 694 So. 2d 686 (Fla. 1997) (all cases approving the denial of postconviction claims of ineffective assistance of counsel for failing to seek change of venue.)

This Court has also held that trial courts are encouraged to attempt to impanel a jury before ruling on a change of venue as it "provides trial courts an opportunity to determine through voir dire whether it is actually possible to find individuals who have not been seriously infected by the publicity. See, Rolling, 695 So. 2d at 285. If the trial court finds such individuals, a jury is selected. Where the voir dire fails to produce these individuals, the trial court must grant the motion for change of venue." Foster v. State, 778 So. 2d 906, 912-914 (Fla. 2000).

In her order denying relief, Judge Schaeffer explained, "Quite to the contrary of defendant's assertion that defendant's trial counsel was ineffective, he was very effective. He won his Motion for change of venue. No other lawyer who has appeared before me can make that claim, for I have granted no other motion for change of venue in 20 years of trying cases,

many of them high profile cases." (PCR V11/2060) She also noted that, "In light of this, had defendant moved for a second change of venue, from Orlando to some other place, it would have been denied." (PCR V11/2060)

Judge Schaeffer further noted "there is nothing in the record to suggest that the jury actually chosen from Orange County, Florida, was anything but fair, impartial, and objective" and that:

"1) Only 4 of the 12 jurors who served knew anything about this case. None of them had formed any opinion about the guilt or innocence of the defendant. 2) In this case that was to last four weeks, with jurors having to come to Pinellas County from Orange County and be sequestered for the entire time, it took only 1 ½ days to pick a jury. 3) Neither side exercised all its preemptory challenges, the defendant choosing to exercise only 4 of his 10 challenges.

(P C R
V11/2060)

The record in this case further reveals that, of the fifteen (15) jurors excused for cause, none were excused because of any knowledge of the case. (PCR V4/569) It shows that two individuals who ultimately served as jurors, DeVault and Pittman, indicated that they had heard of the case, on Unsolved Mysteries, but formed no opinion of Chandler's guilt. (PCR V4/570-571) Carsone and Jones, who also served on the jury,

heard on the radio that morning that a new system was being used to select Orange County jurors to return to Pinellas County to serve on a case. (PCR V4/571) One individual, Ulibarri, who served as an alternate juror, said he had visited his son in Ohio and had heard on a restaurant television, that the bodies had been found, and had later heard more in Orlando, but, interestingly, he believed he had heard no more information via the media than he had heard in the court's introductory statement of the case. (PCR V4/571-572) In the end, only four (4) jurors and one alternate had any knowledge of the case and none of them believed they possessed sufficient information to form any opinion, agreeing their decision would be based upon the evidence presented in the courtroom. (PCR V4/572)

Perhaps the most interesting response to the questions concerning pretrial publicity and knowledge of the case was obtained from a prospective juror who did not ultimately sit on the case. This prospective juror was a media person himself, who worked as a local news reporter and morning radio anchor. Mr. Johnson told the court that while he did recall hearing media coverage of the finding of the bodies and return of the indictment in the case, the details he was aware of were no more in-depth than the details provided by the court in the introductory statement. (PCR V4/571)

Defense counsel's closing argument and supplementation of the record with report of Paul Wilson do not support the allegation that counsel was ineffective for failure to move for change of venue from Orange County. There was no difficulty in the actual selection of the jury and collateral counsel's supplementation of the record has not managed to show any unduly inflammatory publicity. In Foster v. State, 778 So. 2d 906 (Fla. 2000), this Court stressed that "the mere existence of some pretrial publicity does not necessarily lead to an inference of partiality" and listed five circumstances for the trial court's consideration of pretrial publicity:

"(1) when it occurred in relation to the time of the crime and the trial; (2) whether the publicity was made up of factual or inflammatory stories; (3) whether the publicity favored the prosecution's side of the story; (4) the size of the community; and (5) whether the defendant exhausted all of his peremptory challenges. See Rolling, 695 So. 2d at 285."

Id. at
913

Based on the consideration of these circumstances, collateral counsel has not demonstrated that the trial court would have granted a change of venue from Orange County even had defense counsel made such motion. Quoting Rolling, quoting McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977), Foster repeated the ultimate test for consideration of change of venue,

which has been the law in Florida since at least 1959:

“The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.”

Id. at 912

Ignoring Judge Schaeffer's express findings to the contrary, Chandler asserts that if defense counsel had sought to avoid Orange County jurors there is a distinct likelihood that he would have been successful as the murders were the most horrific homicides in the history of Central Florida or Orange County. First, as previously noted, Judge Schaeffer has specifically rejected the contention that she would have granted the motion. Moreover, his contention that these murders were the most horrific in Central Florida, is not supported by his citations to the "Wilson Media Report." There is no evidence in the report of same, but, rather, it merely contains Chandler's media consultant's conclusory allegations that Orange County residents were shocked to the point of disbelief - that shock was replaced by fear, then loathing, hatred, a communal sense of outrage and anger towards Chandler, followed by a virtually unanimous demand for the imposition of the death penalty. There is absolutely no

such evidence, and counsel's attempt to mix St. Petersburg and Tampa media publicity with the relatively sparse coverage in Orange County is not only misplaced, but is undone by an examination of the contents of the Report relied upon as the basis of Chandler's argument.

The Report, despite attempts to supplement it with materials written or broadcast after the jury was selected and even **after** the trial was concluded, wholly fails to provide any support for an allegation of ineffectiveness on the part of Mr. Zinober or withstand even cursory scrutiny. The Report simply shows:

1. Certain radio and television stations within the Tampa Bay area may (or may not) broadcast into parts of Orange County.
2. Some of those stations did broadcast stories concerning the investigation of the Rogers' murders and Chandler's arrest and trial.
3. A Bay area newspaper, the Tampa Tribune, has some subscribers or retail outlets in Orange County.
4. There was at least some national reporting of the homicides and of Chandler's prosecution.
5. The Orlando Sentinel did publish a number of articles concerning the murders, Chandler's arrest and the trial.
6. WFTW, an Orlando television station ran a number of stories concerning the

murders, Chandler's arrest, the trial and events following the trial including appellate court proceedings.

The report, however, contains no information (or even a bare allegation) that any juror on the Chandler case was a subscriber to or read any Chandler-related story in the Tampa Tribune, or that any juror heard any Tampa Bay radio or television broadcast. The Report does not, in any manner, suggest that the jurors who sat on Chandler's trial had any media-supplied information beyond the matters stated by these potential jurors in the voir dire stage of the proceedings.

The Report's real purpose seems to be to raise speculative concerns about how much media coverage may have existed within Orange County and, thereby, to boot-strap the argument that Zinober was somehow deficient in failing to protest a jury from some media-saturated county. In so doing, the document begins with a summary, which claims the goal of the Report is "... to demonstrate the role media may have played in preventing juror impartiality." (PCR SV1/6) While there may have been some articles that appeared in the newspaper prior to the selection of the jury which could be considered by the defense to be inflammatory, the vast majority simply recount the various stages and activities in the case.

The direct appeal case of Foster included news articles

recognized by the Court as inflammatory. However, this Court concluded that most of the news articles relied on by the defense were not inflammatory, but "objective and factual", and found that the media coverage as a whole did not reach such an inflammatory level to have irreversibly infected the community so as to preclude an attempt to secure an impartial jury. Similarly, here, the defense reliance on seven pre-trial articles in the Orlando Sentinel does not establish an "inflammatory level" which required defense counsel to have objected to the trial court's effort to select an impartial jury from Orange County.

Perhaps more importantly, a significant number of the articles or broadcasts contain little more information than the court supplied in its introductory statement of the case and even the defense report calls only seven of them inflammatory. In that introductory statement, the potential jurors learned there were three victims, a mother and her two daughters, visiting from Ohio, and that their bodies were found, in June of 1989, floating in Tampa Bay, bound at their hands and feet, duct tape covering their mouths and, at least two of them being weighted down by an object tied around their necks. Further, the statement revealed that, in November, 1992, Chandler was indicted by a Pinellas County grand jury for murder in the first

degree for the deaths of the three women and that he had entered a plea of not guilty, denying responsibility for the deaths. (TR V84/36)

When one considers the actual answers of the potential jurors, it is clear that those jurors who were summoned, as well as those who were chosen, were not influenced by media coverage of these homicides and that Mr. Zinober did everything that he should have done to ensure Chandler received a fair trial from an impartial panel of citizens. There was no great difficulty in selecting a jury and what pretrial publicity actually existed in Orange County appears, based on the information supplied in the Report, to have been largely factual in nature. None of the potential jurors questioned were excused for possible bias because they had formed an opinion as to Chandler's guilt as a result of media influence. See, Copeland v. State, 457 So. 2d 1016 (Fla. 1984) Since no juror read these articles and since Zinober never used all of his peremptory challenges, there has been no showing of any impact on Chandler's right to a fair trial. In light of the fact that counsel sought and received a change of venue, he was able to select a jury with little or no difficulty and the trial judge acknowledged that a second motion for change of venue would not have been granted, there has been no showing of either deficient performance nor prejudice from

counsel's decision to not request a second change of venue from Orange County. Accordingly, the trial court's ruling on this claim should be affirmed.

CLAIM II

WHETHER COUNSEL WAS INEFFECTIVE FOR ADMITTING THAT THE STATE COULD PROVE CHANDLER'S GUILT IN THE BLAIR CASE AND IN ADVISING HIM TO INVOKE HIS FIFTH AMENDMENT PRIVILEGE REGARDING SAME.

Conceding that "defense counsel filed a well-researched motion in limine to exclude" the Williams Rule evidence concerning the testimony of Judy Blair accusing Chandler of sexual battery, Chandler challenges defense counsel's decision not to contest Ms. Blair's testimony. He contends that once the trial court ruled that it was relevant, admissible evidence in the trial of the three homicides, it was error to have Chandler assert his Fifth Amendment privileges on cross-examination as to any questions concerning the Blair testimony. (Brief of Appellant at 53) Chandler argues that defense counsel's strategy concerning the Williams Rule testimony was an impermissible concession of Chandler's guilt of the sexual battery of Judy Blair, which was a pending charge in a separate case at the time of Chandler's trial for the three homicides. Although Chandler had asserted below that the concession was error based upon this Court's ruling in Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000), Chandler now concedes that Nixon is not directly on point because defense counsel Fred Zinober did not actually concede guilt regarding the Rogers homicides. He

contends, however, that Zinober "came too close to doing exactly that" and resulted in being "no strategy at all." (Brief of Appellant at 60-61, 63)

This position is not supported by the law or the facts. "Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected." Shere v. State, 742 So. 2d 215, 220 (Fla. 1999), quoting, State v. Bolender, 503 So. 2d 1247, 1250 (Fla. 1987) The facts as set forth below, and as found by the lower court, clearly establish that defense counsel's tactical, strategic decision to take that approach was one to which Chandler agreed and one within the range of reasonably effective assistance of counsel. As this Court recently explained in Atwater v. State, 788 So. 2d 223 (Fla. 2001), 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 and acceptance of the jury" and that under such circumstances there is no showing of ineffective assistance of counsel. Specifically, this Court stated:

When faced with the duty of attempting to avoid the consequences of overwhelming evidence of the commission of an atrocious crime, such as a deliberate, considered killing without the remotest legal justification or excuse, it is commonly considered a good trial strategy for a defense counsel to make some halfway

concessions to the truth in order to give the appearance of reasonableness and candor and to thereby gain credibility and jury acceptance of some more important position. [Quoting McNeal v. State, 409 So. 2d 528, 529 (Fla. 5th DCA 1982).]

In light of the evidence against Atwater, defense counsel properly attempted to maintain credibility with the jury by being candid as to the weight of the evidence. Faced with the prospect of a guilty verdict for first-degree murder and in light of the State's evidence, defense counsel's concession, which was made only in rebuttal to the State's closing argument, was reasonable and does not amount to a constitutional violation. The concession was made to a lesser crime than charged, during rebuttal closing argument, and after a meaningful adversarial testing of the State's case.

Atwater v. State, 788 So. 2d 223, 230-231 (Fla. 2001)(emphasis added)

Zinober testified that he made a tactical decision to deal outright with the Blair allegation in opening statements and that Chandler agreed with the decision. (PCR V9/1674-76) He identified a memorandum from his file delineating his strategy for dealing with the Blair rape in the event Judge Schaeffer denied their motion in limine. (PCR V9/1671; V12/2127) He testified that he filed approximately eleven motions trying to limit the introduction of the evidence. He believed it would have been highly detrimental to try and deny the rape. Zinober noted that his perception of Judy Blair was very different after

meeting her than it was based upon the police reports and Chandler's version of the facts. (PCR V9/1682, 1686) He remembers thinking when he saw her with prosecutor Doug Crow, "please do not let that be Judy Blair, because basically Miss Blair was - - she wasn't just a very attractive woman, she was a very wholesome looking woman." (PCR V9/1687) Blair's description of the rape during the deposition was such that he knew she would come off "very, very powerfully" to the jury. (PCR V9/1688)

Zinober testified that another factor in his decision to not litigate the rape charge was Chandler's response to his question regarding why Blair would lie about the rape. Chandler told him that her reason for lying was that they had anal sex and she did not like it, that she became very angry at him over it. (PCR V9/1689) He recalled that Chandler had not returned her to the dock but, rather, had dropped her off in the water and she had to walk back. Zinober believed that testimony would have been very damaging to Chandler; that the jury would believe he was admitting to a sexual battery. (PCR V9/1690) He repeatedly explained that he wanted to put the rape question aside because he did not want to get sucked into a debate over the rape versus the murder and the identity issue on the rape. (PCR V9/1693) He also believed that if he challenged the rape issue the State

would probably spend a long time going over the facts of the rape and on every point where Chandler disagreed with Blair argue that "you cannot believe him on the rape, you cannot believe him on the murders." Zinober believed that Blair came off very strongly and to put Chandler on the stand and have him deny the rape would have, in his opinion, been suicidal to his chances of winning the murder case. (PCR V9/1695) He felt that by not denying the State could prove the rape, it would improve his credibility in front of the jury and yet allow Chandler to take the Fifth on questions concerning the rape. (PCR V9/1696) Moreover, he felt that if the jury believed he was going to receive a life sentence for the rape, that because of the lack of evidence, they might not vote to convict on the murders. (PCR V9/1697-98) Zinober also emphatically noted that he did not concede that Chandler committed the rape, but only that the State could prove it. (PCR V9/1699)

Zinober testified that he did not expect that Judge Schaeffer would allow the State to repeatedly question the defendant and have him invoke his Fifth Amendment privileges. He thinks the court was wrong to allow the continued questioning and corresponding invocation of the Fifth Amendment, but was convinced that if he had denied the rape it would have legitimately opened the door to the State being allowed to

question Chandler about the rape. (PCR V9/1701-03) Zinober admitted, however, that if his choice was between Chandler answering the questions and taking the Fifth, he would still rather Chandler take the Fifth. (PCR V9/1706)

With regard to Chandler's consent to the strategy taken by counsel, Zinober explained that he made a memo to the file to remind himself, in the event of a post conviction claim, his reasons for making the decisions he made. (PCR V9/1709-11) He believed that Chandler understood the decision; that Chandler was an intelligent man. (PCR V9/1712) Zinober pointed out that Chandler had been convicted before, that he understood the system. He said that they had discussed his testimony and that Chandler was instructed to just keep asserting the Fifth if and when particular questions were asked. (PCR V9/1714-15)

Defense counsel explained his belief in the importance of maintaining his own and Chandler's credibility with the jury as to his testimony about the murder charges:

"It was very important to me, okay, recognizing that Oba was going to testify from the get-go, it was critical to us that his creditability [sic] be preserved. Okay? And if the jury considered him to be lying on any substantial matter, that was going to be fatal. So to the extent that he would be put head-on-head against Judy Blair, who came off believable - again I consider it to be part of my professional role to advise my client as to how I believe somebody is going to come off in court, and I think my

assessment was very correct. I think Judy Blair came off very, very strong - to put Oba on the stand to say, 'No, she is lying about all this and I didn't commit the murder,' in my mind would have been suicidal to his chances of winning the murder case and to convince the jury, which he had to do in my opinion, at least - not all, but at least enough jurors to go back to the jury room to convince the other jurors that he had nothing to do with the homicide."

(PCR
V9/1695)

"So, you know, I don't want to get in front of the jury - my credibility is at issue too. Obviously I'm a lawyer and credibility is important. I'm not going to tell them that they're not going to be able to prove a rape case when obviously I'm not going to be contesting it.

(P C R
V10/1788)

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So I wanted to convey to the jury, look, jury, I know what the State has, and you're going to see this guy's not guilty. If I went in there and tried to contest something I knew darn well the State was going to prove, my credibility was to the - the jury says, oh, the lawyer didn't know that they were going to prove this. That's why he told us in opening statements they wouldn't be able to prove the case. He was wrong.

So again, that all goes into it. I viewed the Madeira Beach case as a piece of evidence to help them prove the murder case. And I was not going to fall into Doug's trap - no offense, Doug - of getting sucked in to say - to nail his credibility knowing that

he was going to be testifying.

And to me his credibility was critical. It was obviously critical. If the jury believed he didn't do it - he's sitting here saying he didn't do it. If the jury believed he didn't do it, or at least enough people on the jury believed that to go back and convince the others, I have a chance. If they don't believe him, then I'm dead.

So, I'm not going to come in recommending he commit suicide, what I consider to be suicide, by trying to shoot the moon, as I said in the memo, and try to defend a rape case which is very weak in and of itself not to the point where I did not feel I had a good chance of winning it even if it went on the rape case.

If you couple that with the fact that the guy's also on trial for committing a murder of three ladies, the likelihood of them believing his story as to what he said happened with Judy Blair diminishes."

(PCR V10/1788-90)

Mr. Zinober related spending a good deal of time with Chandler over numerous occasions. Any time of the day or night that he thought of something, he would go to the jail and discuss it with Chandler. (PCR V10/1754-56, 1778) He did not rehearse Chandler's answers with him, having found from experience that the loss of spontaneity affected the jury adversely. He had gone over with Chandler the questions he

would ask him and how he would respond to cross-examination questions. (PCR V10/1778-80)

Chandler agreed that he had discussed many things with Zinober, including his taking the stand, that the State had invoked the Williams Rule to bring in the Blair case, and that he had known the State was going to present evidence of the Blair case in the murder case before Zinober was even on the case. (PCR V10/1810-11, 1834) He gave his version of the Blair incident from his own perspective, and as he had related it to defense counsel Zinober. (PCR V10/1812-21) He testified that he had not authorized Zinober to admit his guilt of the Blair rape to the jury and that Mr. Zinober had not believed that he had done so, although the newspaper reported it that way. (PCR V10/1822-23) He testified he would rather have testified against the rape charges than take the Fifth, which seemed to him to be admitting his guilt by not answering. (PCR V10/1822) He described his own demeanor as very angry about not being able to answer every time he had to assert it. (PCR V10/1826-27) He was angry at the prosecutor. (PCR V10/1827)

On cross-examination, although claiming the sex was initially consensual, Chandler admitted that he had continued to have sex with the victim after she indicated she wanted him to stop. (PCR V10/1843-49) He admitted he had not heard defense

counsel Zinober admit his guilt of the Blair rape during opening statement. (PCR V10/1863-65, 1872) He testified that he had expected defense counsel to tell the jury that they were not defending the rape case. (PCR V10/1870) He admitted he was the person on the boat with Judy Blair, had used a false name to identify himself to her, and had fled the area when the composite was printed in the newspaper in November, 1989 that might identify him as a rapist. (PCR V10/1835-38, 1849-50, 1871-72) For those reasons, he was not concerned with Zinober's concession on opening statement that the State could prove beyond a reasonable doubt that he was the one on the boat with Judy Blair. (PCR V10/1872) He admitted he knew that the State's evidence about the Blair rape was intended to show identity of the murderer and, therefore, harmful to his case, and the reason the defense was trying to keep it out. (PCR V10/1875-76) He claimed, however, that Mr. Zinober did not discuss with him that it would be better to take the Fifth than to give his version of the consensual sex. (PCR V10/1866, 1868-69, 1876-77) Although once denying it, Chandler twice agreed he had, pretrial, discussed with his counsel about taking the stand. (PCR V10/1833-34) He testified he wanted to testify to attack some of the State's witnesses and to deny the Blair allegations. (PCR V10/1831) He admitted that he knew it was

his decision whether to testify and that no one could make him testify, but said that he went along with defense counsel's decision that he should do so. (PCR V10/1882-83) He had heard defense counsel tell the jury in opening statement that he would be taking the stand. (PCR V10/1883-84) Chandler's testimony did not dispute that he had discussed the strategy of their not defending the Blair rape case with Zinober, and that he agreed with the strategy, as Zinober had testified. (PCR V9/1666; V10/1866-67, 1881-82) He took the Fifth Amendment because the rape charge was a separate case that he wanted to go to trial on separately. (PCR C10/1866) Zinober testified that he was aware that Chandler felt that Ms. Blair consented to the sexual conduct (PCR V9/1667) and had not confessed. (PCR V9/1669-70)

Zinober testified that neither he nor his staff thought that the jury would accept Chandler's version. (PCR V9/1687; V10/1766) He believed Ms. Blair was an extremely attractive, articulate, intelligent and credible witness and that it would be suicidal for Chandler, a six-time convicted felon, to engage in a head-to-head contest of credibility. (PCR V9/1687-89; V10/1695)

Chandler's testimony in the post conviction hearing gives credence to Zinober's concerns and represents the realization of his worst nightmare. Chandler was unable to contain his

contempt for the victim. He volunteered insulting comments about her and in answers that were frequently unresponsive, suggested that she was profane, sleazy, drunk, loud, provocatively dressed and promiscuous. He suggested that within minutes of meeting Ms. Blair he sized her up as someone "you could sleep with". (PCR V10/1813-26, 1836)

Chandler stated that he had used a false name because "he was a married man" and "just out for a good time" and later adding that it was force of "habit" - that he had used many false names in his lifetime. (PCR V10/1815, 1837-38) According to Chandler, the victim had allowed him to fondle her breasts throughout the ride on the boat and posed topless for photos for him. (PCR V10/1816, 1818) He personally accused the prosecutor of sending investigators to convince the victim to change her statement because "the state needed a stronger case". (PCR V110/1819) Chandler was evasive and accusatory throughout the cross-examination.

The fact that his own lawyers did not find Chandler's version of events credible is certainly understandable. Chandler's testimony was a contrived and unsuccessful attempt to establish a motive for Judy Blair to falsely accuse Chandler without making damaging admissions on the rape charge itself. At the evidentiary hearing, he testified:

"Well, it was just normal sex. There was no attempt to have anal sex. And during the sexual act itself, Judy Blair had her legs all the way back over her shoulders, and my penis accidentally came out of her vagina and went into her anus and her whole attitude changed at that moment. She was pissed.

I mean, just literally she started arguing, wanted me to stop. I didn't stop. You know, I wanted to continue with the act until completion. And she was angry. And when I finished, that was it. She got up. She got dressed and she was very argumentative. And like I say, she cussed like a sailor, literally." (*emphasis supplied*)

(P C R
V10/1820)

This version of events is facially ludicrous. Certainly, it seems anatomically unlikely that in the course of vaginal intercourse the male's penis would slip out of the female's vagina and then "by accident" be reinserted into the rectum of a resisting victim without the use of considerable force and leaving recognizable injury. Even if it were believed, however, Chandler's testimony would neither exonerate him on the rape charges nor endear him to the jury. Chandler's initial testimony seemed to imply that he had continued to actually engage in anal sex with the victim after his "accidental" penetration of her. (PCR V9/1689-90; V10/1820) On cross-

examination he modified his story to suggest that after withdrawing his penis from her rectum he reinserted it into her vagina knowing that she did not want to continue. (PCR V10/1844) He continued notwithstanding her disagreement because "he wanted to complete the act" and because "he was *entitled* to finish". (PCR V10/1846-47)

In short, Chandler's testimony is not only as unbelievable as Zinober predicted, his own words would have revealed him to jurors as self-centered, evasive, insensitive, shallow and vindictive - a thoroughly unsympathetic defendant who had an ingrained "habit" of lying about his identity and taking what he wanted without regard for the victim. Rather than supporting a claim of inadequate assistance, Chandler's long-awaited testimony concerning the rape case confirms the reasonableness - indeed the necessity - of the defense strategy.

To the extent that Chandler's testimony contradicts that of Zinober, Chandler is bound by the findings of the lower court as this Court has repeatedly stated that it "will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997), quoting Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984), quoting Goldfarb v.

Robertson, 82 So. 2d 504, 506 (Fla. 1955); Melendez v. State, 718 So. 2d 746 (Fla. 1998). After hearing all of the evidence, Judge Schaeffer made the following findings:

What about this strategy? Actually it was very ingenious. Zinober managed to preserve for appeal the issue of Chandler being required to take the 5th, and still preserve his main strategy -- over the state's objection -- of not having Chandler pit his credibility against Blair's credibility in front of the jury, which Zinober believed would be "suicidal to his chances of winning the murder case...." (T. 39, 50, 146).

In addition to not wanting Chandler's credibility pitted against Blair's, there was a secondary benefit to the strategy of not defending the rape, and having Chandler take the 5th in his cross. That benefit would be that the jury would believe that if they acquitted defendant of the murder, he would still face a life sentence on the separate rape charge. (defendant's exhibit 1, attached; T.51-53; 127-129).

There was a third benefit to this strategy, and that was creating a novel, and what Mr. Zinober considered a "good appellate issue", which Mr. Zinober still considers a good issue for Chandler's Federal appeal, even though rejected by the Florida Supreme Court. (T. 59-60; 130-131; 146-147; 150-151). I will agree that this was one of the most unusual rulings I have made in my 20 years on the bench. It was raised the night before Chandler testified, and by the next day, the state had found no law on point (and there still may be none except for the Florida Supreme Court's opinion on this case).

The state's position was if Chandler

testified, I should require him to answer questions about the rape. They knew he was going to deny the rape. They wanted him to pit his credibility against Judy Blair's. The defense strategy was to avoid this at all costs, even if it meant a contempt hearing for refusing to answer if I had done what the state wanted and required Chandler to answer. And so the defense had another proposition, allow Chandler to take the 5th Amendment. This allowed them to preserve the issue for appeal (I shouldn't have allowed the state to ask any questions about the rape), and to accomplish their main objective -- not having Chandler pit his credibility against Blair's.

In retrospect, I should have indeed compelled defendant to answer the state's questions. I had ruled, in allowing the *Williams* Rule testimony in the first place, that it was a relevant to prove the murder. Once defendant denied committing the murder, the state should have been allowed to pursue, on cross, his explanation of the entire boat trip with Judy Blair. In essence, by my ruling, I allowed the defense to pull a ruse -- take the 5th Amendment, allowing the jury to infer if I had compelled his answers he would have incriminated himself as to the rape, when in fact he would have incriminated himself as to the murder. His attorney felt that if the jury thought he lied about the rape, they would think he was lying about the murder. (T. 139-143), 147-149). He had no 5th Amendment right as to the murder once he took the stand. By my incorrect ruling, brought on by the defense strategy, I assisted the defense, at their request, and with Chandler's consent. *How can Zinober's strategic decision be challenged. In retrospect, it borders on brilliance.*

Collateral counsel doesn't agree. He

says defense counsel should have vigorously defended the rape. Unfortunately, collateral counsel did not see and hear Judy Blair testify. Judy Blair was, without question, the best rape victim this court has ever seen. In my three years with the public defender's office, my five years as a private defense attorney, and my more than 10 years on the criminal bench, I have no equivocation in making that statement. But, of course, I was not a witness, under oath. Mr. Zinober, a very experienced criminal defense attorney, was such a witness, who did testify under oath at the evidentiary hearing. What did he say about Ms. Blair?

He assessed Judy Blair at various times in his testimony as follows: "She wasn't just an attractive woman, she was a very wholesome witness." (T. 42). "She's the winner of the Olivia Newton-John look-alike contest." (T. 42). "My co-counsel, who had not seen her yet (when she came to trial to testify) whispered in my ear that I underestimated her." (T. 42) "She was a very intelligent woman." (T. 42). "She was well-read, she spoke very well, she was very adamant about what the facts were. She was very convincing... she just came off very, very strongly." T. 42-43). "[They had a very strong rape victim who testified very strongly." (T. 49). [If they were ever going to make a mold of what the state wants to bring to court for a rape victim, that mold is going to be this lady. It's going to be Judy Blair.]" (T. 49, emphasis mine).

I saw Judy Blair at the trial and heard her testimony. I concur with everything Mr. Zinober says. Collateral counsel did not have the benefit of seeing and hearing Ms. Blair. Neither will any appellate court. But, collateral counsel could have called any of the probable 300 witnesses who saw her testify to refute Mr. Zinober's assessment. None were called at the

evidentiary hearing.

Now, let's look at the defendant's testimony about the rape charge. He finally had his opportunity to tell his real (as opposed to taking the 5th Amendment) version at the evidentiary hearing. What did he tell us?

1. When he first met Judy Blair, she was "pretty loaded. Not staggering drunk, but pretty loaded. She was loud and boisterous. She looked nothing like when she walked into court here. She had a very tube-type thing, cut-off shorts and so forth, tight over. It looked like two different people. And her actions spoke two different ways too. Her language and the ways she talked and so forth." (T. 168-169).

2. He gave her a false name, because, "well, I was married and I was just out for a good time. I didn't want anyone to know who I was. Just like you meet a chic at a bar or any place else, give a name, one night stand and you're gone....That's it." (T.170).

3. "And she was, you know-believe me, she can cuss like a sailor...." (T. 171).

4. "She got into the boat. She was half looped again. She never really came all the way down from being high. She had her cooler with her again." (T. 172).

5. He says she gave him the roll of film to develop, even though there were family photos on the roll, because he had taken two topless pictures of her and wanted them. He had a friend who would develop them and only "me and her would have them." (T. 173). Later, after the sex, she wanted the film back, but he threw it overboard. (T.175).

6. They were "touching and feeling, just a prelude to having sex." (T.173).

7. They had "normal sex. There was no attempt to have anal sex with Judy Blair or oral sex with Judy Blair. Just normal sex. And during the sexual act itself Judy Blair had her legs all the way back up by her shoulders, and my penis accidentally came out of her vagina and went into her anus and her whole attitude changed at that moment. She was pissed." (T. 175, emphasis mine).

8. When this "accidental" anal sex started, "she started arguing, wanted me to stop. I didn't stop. You know, I wanted to continue with the act until completion. And she was angry. And when I finished that was it. She got up. She got dressed and was very argumentative. And like I say, she cussed like a sailor, literally." (T. 175).

9. They argued back to the dock. She was very "loud and boisterous". He tried to "calm her down and get her out of this argument. Seemed like the wine kept her in this state." (T.175).

10. He told her he was "very sorry" (for what?) and that they would "make up and nothing like this would ever happen again." (what - consensual sex?) "And that was it. She left. I never saw her again." (T. 176).

11. When he was arrested for the sexual battery, he did not tell the police, as one might expect, about this consensual sex. "I maintained my rights at all time." (T. 182).

That was the essence of the defendant's testimony on direct examination at the evidentiary hearing. He tells us more on cross-examination by Mr. Crow, who also cross-examined him at the trial.

12. Mr. Chandler was asked if, since he used a false name right after meeting Judy Blair, he knew he was going to have a sexual liaison with her within two minutes of meeting her. He answered "You had to know Judy.... You are producing her as a prim and proper lady. Judy was drinking, half drunk, you know, bumping up against me, talking and everything, you knew that Judy Blair, right, was somebody you could sleep with." (T. 191).

He later realized how this sounded - that he used a false name because he knew he was going to have sex with Ms. Blair within minutes of meeting her. He then said "I've used many false names in my lifetime meeting strangers ... it was just a formed habit. I always do." (T.191-193).

13. During cross-examination, the defendant admits he didn't stop having sex with the victim after she demanded he stop because "I wanted to complete the act," (T. 201), and "we was having sex, I was entitled to finish." (T. 201-202). Then he changed hi[s] mind when the state questioned whether that was consensual sex and said, "it wasn't so much she didn't want to, because she got right back into it after a while, you know, she was just - she lost interest in the sex act." (T. 202).

Mr. Zinober was correct in his assessment of the credibility between Mr. Chandler and Ms. Blair. No one would believe that Mr. Chandler's penis "accidentally" slipped into Ms. Blair's anus. This is preposterous. Further, Mr. Chandler kept changing his testimony on cross when Mr. Crow confronted him on the so-called consensual nature of the sex act. Further, Mr. Chandler painted a picture of Ms. Blair that would have been difficult, if not impossible, to believe, having seen and

heard Ms. Blair.

For me, personally, a very damaging portion of his testimony about the Blair rape was his lack of respect - almost disdain - for Judy Blair. Having sat through the murder trial, it was extremely difficult to imagine anyone having such hatred/disdain for women that he could have done what was done to the Rogers' women. Mr. Chandler let some of that part of his personality appear when he testified about the Blair rape. This would have been devastating for the jury to see and hear in the murder trial.

I conclude this part of the order convinced that Mr. Zinober's strategy was correct as to his handling of the entire *Williams* Rule issue, including conceding in his opening statement that the state could prove the rape, as he was not there to defend it, but was going to defend the murder charge.

But, it doesn't matter legally if Mr. Zinober's strategy was better, or if, as Mr. Harrison suggests, the better strategy was to vigorously defend the rape charge. The question is was Mr. Zinober's performance deficient? *Strickland v. Washington*, 466 U.S. 668 (1984) tells us that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 690. (emphasis mine).

Both Mr. Zinober and Mr. Harrison are fine criminal defense attorneys. The fact that they would have defended Mr. Chandler differently regarding the Blair piece of evidence would not render either of them ineffective.

As to whether or not Mr. Chandler agreed

to Mr. Zinober's strategy, Mr. Zinober's testimony that he did is more credible than Mr. Chandler's, who waffles on this issue. (T. 218-226). I heard both Mr. Chandler and Mr. Zinober testify at the evidentiary hearing and saw their demeanor and Mr. Zinober was, without question, the more credible witness.

Chandler's reliance on *Nixon v. State*, 758 So.2d 618 (Fla. 2000), is totally misplaced. Zinober never conceded Chandler was guilty of the Rogers' homicides, the case that was being tried. He, at all times, vigorously denied the defendant had committed the murders. He merely conceded the Blair rape, just one of the pieces of evidence that state had in its arsenal to prove Chandler committed the murders. Chandler agreed to this strategy. But, even if he hadn't, a lawyer can concede part of the state's evidence in any case, with or without his client's consent. To hold otherwise would deny defense counsel the valuable and necessary tool of credibility with the jury.

Chandler has proved, as to this claim, neither prong of *Strickland*. Defense counsel's performance was not deficient, and there has been no showing of prejudice. That is, there has been no showing that if Chandler had given his version of the Blair incident, the results would probably have been different. I agree with Mr. Zinober, it would have been "suicidal."

(PCR V11/2062-67)

As Judge Schaeffer found, Zinober's version is the more reliable and credible account and defense counsel's strategic decision is not shown to be deficient nor outside the range of

reasonably effective assistance and did not adversely affect the outcome of the trial. Sheer speculation or conjecture that the outcome may have been different had Chandler given his version of the sexual allegation and not taken the Fifth Amendment is legally insufficient for post conviction relief. See, Zeigler v. State, 654 So. 2d 1162, 1164 (Fla. 1995); McCrae V. State, 510 So. 2d 874, 879 (Fla. 1987). Zinober thoroughly considered his options and made a reasonable, informed decision to which Chandler agreed. As Chandler has demonstrated no deficiency of performance of defense counsel nor undermined confidence in the outcome of the trial on this claim, this claim was properly denied.

CLAIM III

WHETHER COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO STATEMENTS MADE DURING THE STATE'S CLOSING ARGUMENTS.

Chandler's final claim is that the lower court erred in denying his claim of ineffective assistance of counsel regarding counsel's failure to object to certain statements during closing argument. Upon rejecting this claim the lower court held:

At the Huff Hearing, the court determined, and both counsel agreed, that no evidentiary hearing was necessary to determine this issue. The record would speak for itself as to this claim. The court did indicate that she would allow both the defendant and the state to inquire of defense counsel, Mr. Frederic S. Zinober, as to any strategy he may have used in deciding not to object to certain statements made by Mr. Bruce Bartlett, or Mr. Douglas Crow, the Assistant State Attorneys who presented the state's closing arguments. (HH. 6-16). This inquiry, regarding any strategy involved in not objecting, was made at the evidentiary hearing. (T.113-119; 151-152).

This claim fails for several reasons:

1) The Florida Supreme Court has already ruled in Defendant's direct appeal that the defendant could not show that the matters unobjected to constituted fundamental error because he could not show they were so "prejudicial as to vitiate the entire trial" *Chandler v. State*, 702 So.2d 186, 191 fn 5 (Fla. 1997). This court agrees that any improper remarks of the prosecutor are not sufficient to undermine confidence in the outcome of the case, a requirement to meet the prejudice prong of

Strickland. The defendant could not show sufficient prejudice required to give him relief in the direct appeal, and he can't meet the prejudice prong of *Strickland* to give him relief in his collateral attack on his conviction.

2) Mr. Zinober, a very seasoned, excellent defense attorney, (T. 101-107) explained at the evidentiary hearing why he did not object to many of the remarks made during the prosecution's closing, in particular those the Florida Supreme Court characterized as "thoughtless and petty." His explanation is summarized in the state's written closing argument, 2-3. His full explanation of his strategy is found in the evidentiary hearing transcript. (T. 113-119; 151-153). While defendant suggests Zinober's explanation "stretches credulity," (defendant's written closing argument, 36), it is this court's opinion that his strategic decision not to object to certain remarks was well founded and should not be second-guessed which is prohibited by *Strickland* at 689:

"It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence.... A fair assessment of attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight.... [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"

In essence, the defendant is unable to meet the first prong of *Strickland* -- that counsel's performance in failing to object

to portions of the state's closing argument was deficient.

3) Many of the specifics raised by defendant in his motion and in his written closing argument as objectionable are not. The state, in its written closing argument, details defendant's objections and gives explanations as to why the argument it made was proper and necessary (state's written closing argument, 3-19). This court agrees that most of the state's closing argument made at the defendant's trial was permissible and proper. If an objection had been made, it would not have been sustained. Counsel cannot be ineffective for failing to make objections that would not have been sustained.

In summary, the state's closing arguments at trial were, for the most part, proper. In the few instances where defense counsel could have objected and been sustained, he had a sound strategic reason for not doing so. Even if certain items were objectionable, and the Florida Supreme Court does not feel Mr. Zinober's explanation of why he didn't object was either not strategic or the strategy was not sound, the defendant cannot demonstrate that the results of his trial would probably have been different. For all, or any one of these reasons, he cannot succeed in this claim.

(PCR V11/2056-57)

Despite Judge Schaeffer's well reasoned and supported findings, Chandler maintains that the court erred in rejecting this claim. He contends that although this Court found that the comments in question did not constitute fundamental error, they

could, nevertheless, support his contention that counsel was ineffective for failing to object to the now challenged comments. Essentially, Chandler is trying to achieve through the post conviction process what he was not able to do on direct appeal. This Court has repeatedly held that issues which could have been, should have been and/or were raised on direct are procedurally barred in the post conviction proceeding and that "allegations of ineffective assistance of counsel cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal." Thompson v. State, 759 So. 2d 650, 663-64 (Fla. 2000)(quoting, Teffeteller v. Dugger, 734 So. 2d 1009, 1023 (Fla. 1999)).

Additionally, when questioned at the evidentiary hearing about the challenged comments, trial counsel testified that he felt that he had "lived" with the case for the duration of his appointment and that everything he did was based on strategy and technical decisions. (PCR V10/1755-56) He had not objected during the State's initial closing argument because, in his experience, it looked bad with the jury to be interrupting the other side's closing argument, and he had felt it was a good recap of the evidence. From body language of the jury, he felt his own closing went well and that he had established rapport with some of the jurors. He also felt that the State's final

closing argument did not go well for the State and, instead, hurt the State's case as some of the jurors seemed to be reacting against the State's argument. In his prior experience, jurors held it against the State for attacking the defense. Zinober recalled that he had finally made several objections and had moved for mistrial several times during the State's final closing. (PCR V10/1758-59, 1762-64) He realized he had failed to object, but that it had been more important to him at the time to win the case. (PCR V10/1796-97) Trial counsel's testimony confirmed a reasonable trial strategy as to any objections which were not made and lends no further support for the claim that counsel was ineffective. Ventura v. State, 794 So. 2d 553 (Fla. 2001) (no error where counsel's failure to object appears to have been a reasonable tactical decision given the strategy pursued by defense counsel); Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998) ("In order to show that an attorney's strategic choice was unreasonable, a petitioner must establish that no competent counsel would have made such a choice"); Muhammad v. State, 426 So. 2d 533, 538 (Fla. 1982) ("Whether to object is a matter of trial tactics which are left to the discretion of the attorney so long as his performance is within the range of what is expected of reasonably competent counsel.")

In the effort to paint defense counsel as ineffective, Chandler has unfairly represented the record of the prosecutor's closing argument. While the State accepts the Supreme Court's criticism concerning the State's rebuttal closing that some comments were thoughtless and inappropriate, the State does not concede collateral counsel's position that the arguments as a whole were either unfair or grossly improper. Chandler exaggerates the import of the statements by isolating them from their context and ignoring the defense conduct or arguments to which they responded. He also takes unrelated comments, separated in time and context, and conjoins them out of sequence as if they were made in connection with one another.

For instance, Chandler chastises the State for using a series of adjectives which characterized the defense arguments as misleading. While the descriptions may have been poorly chosen and more strident than necessary, the State is allowed and indeed ethically required to respond to defense claims that it feels are legally or factually inaccurate and logically inconsistent. The entire relevant quote is as follows:

Sometimes it's frustrating to sit there for an hour and listen and not be able to talk and listen to the defense's desperation, distortion, and half-truths and sit and wait for your turn to come up and talk.

Mr. Zinober told you that it is not your

job to resolve conflicts in the evidence. That is simply not true. The Judge told you in her initial instructions to you that you are the finders of the fact in this case and your job is to establish and resolve conflicts in the evidence, deciding who is telling the truth and relying on that truthful testimony in deciding whether or not the case is proved beyond a reasonable doubt is precisely what your job is. To suggest otherwise is in direct contradiction to the Judge's instructions.

(TR V101/2614-15)

Thus the State was correcting what it believed to be a direct misstatement of the law by defense counsel concerning the Judge's instructions on reasonable doubt and the jurors' responsibility to deal with conflicts in the testimony, (TR V101/2492), a misstatement whose significance did not go unnoticed by this court. (TR V101/2507) The criticism was clearly relevant and valid, even if poorly expressed.

The State also permissibly criticized Zinober's argument for challenging the State to prove the content of the marine phone calls between husband and wife. (TR V101/2586) The defense had successfully argued that the information was privileged and kept the State from discovering the conversations or introducing them into evidence. These comments exacerbated an earlier misstatement made by Zinober in which he interrupted his client when Chandler began to testify about those husband-wife

conversations. Instead of just directing his client not to talk about the issue, Zinober also offered a pretextual explanation that the conversations were hearsay and therefore inadmissible and that the defendant "was not allowed" to talk about them. (TR V98/2189) These misstatements suggested that introduction of the conversations was legally impermissible and objectionable to the State and concealed that his real concern was that by voluntarily revealing the conversation his client might waive the husband-wife privilege that had been previously asserted. The comments by the State were permissible response to what it believed to be misleading conduct and comments by defense counsel and, as a result, the trial court overruled the defense counsel's objection to them.

It would have also been clear to the jury from the State's objections, a number of which were sustained, that the State disagreed on both the law and the facts articulated in the defense closing. For instance, the State objected to what it felt were factual misrepresentations concerning the testimony of Chandler's daughters and son-in-law and misrepresentations concerning the credentials of the expert witness called by the State in rebuttal. (TR V101/2579)

The State also believed that Zinober's argument had misstated law of circumstantial evidence and that he had urged

the jury to misapply the court's instruction. Zinober repeatedly argued that the instruction required the jury to examine each circumstance in isolation, rather than the proven circumstances as a collective whole, and to disregard any circumstances which were not by themselves inconsistent with innocence. (TR V101/2497-2504) The text of the instruction as well as case law over the last 75 years, however, indicate that the circumstances which have been proven should be considered together when determining if the State's circumstantial evidence is inconsistent with innocence. See, Hall v. State, 107 So. 2d 246 (Fla. 1925); Chavez v. State, 702 So. 2d 1307 (Fla. 2d DCA 1997). The court advised the prosecution to deal with the difference of opinion in closing argument. (TR V101/2647)

During the course of his closing argument, defense counsel made recurring comments on his client's credibility, defending Chandler's evasive or inaccurate responses on cross-examination as being a genuine lack of recollection:

"...That's if he wanted to lie, he could have done that. But he came in here and told you where he was. If he was trying to cover his tracks, if he's trying to lie to you to cover his tracks like the prosecutor is suggesting, then he's not going to put himself stuck at the Gandy Bridge all night if he's not stuck at the Gandy Bridge all night." (V 101, R 2578-9)

"The guy is doing the best he can to remember what happened five years ago. It

was five years ago - to tell you as best he can recall that night what it was when he went to - smelled the gas, went to crank the engine, the boat wouldn't start, figures he's out of gas." (R 2581)

"[y]ou heard Mr. Chandler yesterday, two days ago, on the stand talking to you and telling you that he did not do this. He is an innocent man. He is an innocent man who was accused of a rape and ran.

And he sat there - he was a little nervous, of course and he was a little bit combative with Mr. Crow - but, ladies and gentlemen, you can judge the way he acted, his demeanor, to decide if he's telling you the truth or if, as Mr. Bartlett suggested, I'm sure Mr. Crow will suggest on his second closing, he was lying. He was lying. He was trying to hide.

This is the way he remembered it. Like other people in the case, he's doing the best he can to recall what happened five years ago.

There's one thing he does remember that night. That he was making those calls. He wasn't killing anybody. He wasn't killing anybody."

(TR V101/2602-
2603)

The State, in response, characterized Chandler's explanation (which had been repeatedly supported by his counsel's argument) that he couldn't remember details because the incident occurred five years ago and it was not significant to him at the time, as a "half-truth". (TR V101/2617) While indeed it had been five years between his contact with the Rogers women and the trial,

Chandler admitted he had known he was a suspect in the case since November of 1989, only five months after the murders. (TR V101/2223)

While Chandler now portrays the prosecution's use of certain words and phrases as constituting a general attack on his character, examining the comments in context makes clear that they were specific references to relevant evidence in the trial. Trial counsel characterized the murders as "monstrous" and whoever perpetrated the crime as a "monster". (TR V101/2562) Counsel went on to argue that the depravity of these acts were inconsistent with Chandler's character as reflected in the facts of the rape case: he had relented from anally raping Blair when she told him she had rectal cancer and had apologized to her after the rape. (TR V101/2562-2563) The defense argument further suggested that the rape case was irrelevant to the homicide and that the facts of the rape were dissimilar and even inconsistent with the commission of the murders. After rebutting Mr. Zinober's argument that the rape was a romantic or consensual encounter, the prosecution continued:

"What Mr. Zinober says is not evidence. The evidence from the witness stand does not support that in any fashion.

What does the rape tell you? The rape gives you a little bit of insight, a slight window into the malevolent inner workings of Oba Chandler. Two attractive college women

in their mid-twenties, unsuspecting, in a foreign country, in an unfamiliar town, in a convenience store, are met by an ingratiating stranger.

What the rape will tell you is that Mr. Chandler is a chameleon-like person. He can one minute portray that ingratiating Samaritan; and when that is under control, he becomes a brutal rapist or conscienceless murderer.

Judy Blair and Barbara Mottram are in the parking lot. He initiates a conversation. A year after his wedding, he is out on Madeira Beach. And what is the first thing he does in that conversation?

Well, he doesn't say, "Hi, I'm Oba Chandler." He uses a false name. From the inception, there is a plan. There is a scheme to commit a crime.

It didn't start the next morning. It didn't start the next day. It didn't start when things got, quote, out of hand on the boat. It started with the conversation.

And he told a convincing tale. Half-truth, half-lie. "Well, I'm from New York. That's not too far from the Canadian border." Is he from New York? No, he's from Ohio, where the Rogers are from.

But, you know, when he met Robert Foley, the man he was closest to in the whole world, Mr. Foley didn't know for a number of years that he was Oba Chandler and was told that he was from upstate New York and found out with some surprise later on that he was actually Oba Chandler from Ohio.

This was a mechanism to lure the people out. The blue-and-white boat is a trap to enable him to accomplish his purpose.

How does he? Judy Blair is an intelligent, articulate, and as Mr. Zinober has conceded, a very attractive woman. She didn't need to get a ride from a forty-year-old man like Oba Chandler. I'm sure there are plenty of guys on the beach that would have taken her just about anywhere she wanted to go.

But her guard was down. Here is an older man who was ingratiating, kind, nonthreatening, and simply offering a ride; and she takes it.

And what does that tell you? Well, you probably wonder how he could accomplish that with the Rogers women. How did he do that? They were fresh in town, in the same day they show up in town, somebody's got them out on a boat.

How do you know he could accomplish it? Because he did the exact same thing eighteen days earlier with people that were intelligent and attractive."

(TR V101/R 2630-31)

Thus, in responding to defense arguments challenging the pertinence of the rape case, the prosecutor used adjectives that were consistent with both the crimes and the underlying circumstances proven by the evidence. Certainly, the intent behind the crimes as detailed by the evidence and this court's sentencing order can be no less than malevolent. "Conscienceless" is an accurate description of the kidnapping and murder of a mother and two children accomplished by throwing

them overboard, bound, gagged and weighted, while still alive. It is certainly milder than the adjectives used by defense counsel in describing the murder of Joan Rogers and her two children. It is not error to accurately describe what the evidence shows about the crimes and the defendant who was proven to have committed them.

The prosecutor's most caustic comments were in response to defense suggestions that the rape of Judy Blair resulted from a "romantic situation" in which Ms. Blair had been flirting with the defendant and sending presumably sexual "signals" throughout the day. The defense had not contested the fact that Chandler was the person who had been on the boat with Blair and argued that they would not challenge the facts of the case or the credibility of the victim. (TR V101/2555-2556) Despite this strategic concession, during cross-examination of the victim, defense counsel kept referring to Blair's assailant by the false name given to her by Chandler as if the person she was testifying about was someone other than Chandler. (TR V101/1626-1643) In light of the inconsistency of this new approach to the rape case, the prosecution referred to the defense approach as being "dishonest" in "trying to suggest what his position is" and referred to this tactic as a "charade." (TR V101/2629) The prosecution believed that the defense

implication that the rape was a "romantic" situation involving either inducement by the victim or consent was not based upon any evidence before the jury. Further, the prosecution believed that this defense stratagem was based upon a fear that allowing the victim to respond to these assertions on cross-examination would have been more damaging to the defense case than avoiding the issue. Since these assertions were made for the first time from the podium in closing argument after the defense denied that they would be an issue in opening statement and after the defense failed to address the issues on cross-examination, the prosecutor suggested that the argument had been made in a "cowardly" fashion. (TR V101/2630)

In light of the powerful and unimpeached testimony of the victim Judy Blair and witness Barbara Mottram, the prosecution's use of these terms was an unnecessary overreaction to what was probably an ineffectual defense argument. Nonetheless, these comments cannot be construed as an attempt to enhance the State's case by personally attacking the defense attorney's character. The underlying points being made were validly directing the jury to the absence of evidence to support a defense argument and the inconsistency of arguing a position seemingly contradicted by the victim's testimony while purporting not to litigate the facts.

Chandler also complains that the prosecution characterized "the defense" as "totally irrational," commenting that "It's just throw out some confusion, and maybe there will be enough smoke that you can't see through the compelling evidence to Oba Chandler." (TR V101/2654-2655) Examination of the context of the quote however, shows that these comments were not a derogation of the role of defense counsel or a specific defense, but a comment on the fact that certain defense testimony was not explained in the defense closing as having any relevance to the defendant's guilt or innocence. The defense had called a number of witnesses whose testimony the State believed bore no apparent relationship to any plausible defense theory of the case. One such witness was Jeffrey Gaines, who cleared tables in the restaurant at the Gateway Inn in Orlando where the victims had stayed before leaving for the Tampa area. Gaines testified that although he never spoke to Joan Rogers he believed he had seen her sitting with a man in the restaurant on one occasion. He specifically recalled this occurring on a weekend. (TR V96/1921-24) According to a detective, Gaines had been interviewed within three months of the murders and had denied ever seeing the victims with anyone. (TR V99/2314) Moreover, other evidence made it clear that the Rogers were nowhere near Orlando or the Gateway Inn during the weekend preceding their

death. (TR V95/1761; V96/1836-37)

The defense's only reference to Gaines' testimony suggested his inaccurate memory was due to the passage of years since the incident (TR V101/2582) and that Gaines was "the best" they could do in showing that someone in Orlando might have given the Rogers directions. (TR V101/2592) However, Chandler acknowledged giving the directions located on the brochure found in the car, which contained both his handwriting and his fingerprints. (TR V90/1066-1105; V98/2177) The directions to the boat ramp and description of the boat were in Joan Rogers' handwriting on stationery from the Days Inn where they were staying in Tampa. (TR V90/1007-1011) Thus, the State believed that Gaines' testimony was not only highly suspect and significantly impeached, it bore no apparent materiality to disproving the State's theory of the case or advancing any defense theory.

Accordingly, the prosecution's comments were not only permissible, they were quite similar to comments made by defense counsel who claimed to not understand the prosecution's theory of the case, to not understand the prosecution's theory concerning certain evidence, and that either certain prosecution evidence or the prosecution case as a whole didn't make sense. (TR V101/2574, 2576, 2586, 2596, 2606) The prosecution's

comments were also made in the context of defense counsel berating the quality and content of prosecution testimony as being unreliable and "unworthy of belief", and accusing prosecutors of "mixing and muddling" the evidence of the Blair rape with the Rogers murders, and of "going nuts" over a particular witness' testimony. (TR V100/2521-23, 2527, 2532, 2534; V101/2556, 2570) The defense also suggested that witnesses had falsified their testimony because the State had given them a "get out of jail free" card and would control their future in the state prison system. (TR V101/2527)

In arguing that the prosecution expressed personal opinion about the defendant's guilt, Chandler combines two isolated statements, one from ASA Bartlett's initial closing and a second from ASA Crow's closing in which he expresses agreement with Zinober's claim in opening statement that Chandler was the only person in the courtroom with firsthand knowledge of whether he murdered the Rogers women. When these disparate comments are placed in the context of several hours of arguments by two separate prosecutors covering well over one hundred pages of transcript, it is clear they are not what collateral counsel claims. Throughout all three closings the prosecutors and defense counsel analytically argued the import and credibility of the evidence and witnesses in the case by making direct

statements and without predicating each sentence with the qualifications that "the evidence shows". Yet the prosecution's arguments are repeatedly based on analysis of the substantive evidence before the jury and do not contain an attempt to bolster the State's case either by relying on their personal credibility as public servants or by implying that they have knowledge beyond that contained in the evidence which the jurors heard. No reasonable juror would have interpreted the closings as an attempt to do so.

Chandler also claims that Zinober failed to timely object to comments by the State that allegedly concerned his client's exercise of his rights to remain silent. This position assumes that Chandler retained legal right to refuse to answer questions without any detriment to his credibility and that the prosecutors, who did not mention his invocation of the Fifth Amendment,⁴ did improperly comment on this alleged right. A review of Chandler's testimony, however, reveals that he gave numerous evasive and inaccurate answers to relevant cross-examination questions. His claim that this was due to genuine lack of recall was belied by his ability to provide many alleged

⁴ In fact, it was defense counsel that first referred to Chandler's repeated invocation of the Fifth and asked the jury to hold his use of the Fifth against counsel rather than Chandler. This comment was objected to by the State and the objection sustained by the Court.

details when it was beneficial to him. Moreover, during his direct examination Chandler had failed to counter the incriminating testimony of his daughters, Valerie Troxell and Krystal Mays and his son-in-law Rick Mays.⁵ Chandler did not claim the Fifth Amendment in regard to the various matters as to which they testified, even though according to his later explanations, their testimony related more to the Madeira Beach rape case rather than the Rogers homicides. (TR V98/2199, 2224, 2226-2233) In this context, the State's comment to consider Chandler's avoidance of relevant issues and his evasiveness on other issues, was a permissible and appropriate response to the defense counsel's own attempts to bolster his client's credibility.

During the trial, Chandler claimed his refusal to talk about the rape case was not based on a concern that the answers might incriminate him or chose to answer questions without asserting the Fifth. (TR V98/2200, 2236, 2238, 2278) Since the Court had ruled that the Williams Rule evidence was relevant to prove issues of intent and identity in the Rogers murders, it was

⁵ He defended his failure to talk about the testimony of his daughters and son-in-law as being because "he had not had the opportunity" to do so. He then attempted to redirect examination to categorically deny everything they testified to as false, but was forced on re-cross to admit the accuracy of much of their testimony.

clearly permissible cross-examination both because it was within the scope of defendant's testimony and because it was relevant to test the credibility of his fabrications. Chandler v. State, 702 So. 2d 186 (Fla. 1997); U.S. v. Beechum, 582 F.3d 898 (5th Cir. 1978); U.S. v. Brannon, 546 F.2d 1242 (5th Cir. 1977); Cf. Johnson v. U.S., 318 U.S. 189 (S. Ct. 1943).

Clearly, the rape of Judy Blair was relevant to Chandler's claimed denials of intent and culpability in the Rogers homicides. Moreover, inquiry into his flight and other bizarre behavior in November of 1989 was relevant to issues raised by his explanations and denials on direct examination. His dubious explanation for this incriminating behavior was inextricably intertwined with evidence of his responsibility for the Madeira Beach rape. As this Court found on direct appeal, by voluntarily taking the stand in his own defense, a defendant waives any privilege to avoid testifying about relevant incidents, and a jury would be constitutionally permitted to draw an adverse inference from his refusal to answer relevant questions. Chandler v. State, 702 So. 2d 186, 196 (Fla. 1997)

As Zinober made clear during his testimony at the evidentiary hearing, the defense invoked this strategy not from a genuine concern for incrimination in a future trial of the rape case but to avoid juxtaposing Chandler's explanation

against the victim's highly credible testimony in the murder case. It was equally clear that the court would allow inquiry and that Chandler would be forced to suffer the inferences that would follow from his conduct. The court did not give curative instructions concerning the defendant's invocation of the "Fifth", refused repeated requests for mistrials based upon the State's questions and rebuffed the defense counsel's attempt to suggest to jurors that the decision was counsel's rather than the client. Thus, while the State had an arguable basis for commenting on the defendant's silence, it refrained from doing so. Certainly, in light of the rulings of the court, the inconsistency of defendant's invocation of the Fifth Amendment, his selective use of the Fifth Amendment even for questions concerning the Blair rape case, and his repeated invocation of the Fifth Amendment in front of the jury, any improper comment would have been harmless and did not constitute reversible error.

Taken as a whole, the prosecutor's closing focused on the strength of the evidence against Chandler and responded to factual and legal misstatements and logical inconsistencies in the defense evidence and argument. Under these circumstances, defense counsel's strategic decision not to object to what he considered a "mean-spirited" and ineffectual rebuttal argument,

the lower court properly found that this was a reasonable decision and did not constitute ineffective assistance of counsel.

In conclusion, Chandler has neither established deficient performance nor prejudice from the actions of his trial counsel. Rather, as Judge Schaeffer found:

Mr. Zinober (and his staff who worked on this case - he had co-counsel from his firm, an investigator, and his paralegal who assisted him throughout this case) gave Mr. Chandler all he had to offer, and he had plenty to offer. He was and is one of Pinellas County's finest lawyers. His preparation was exhausting. His strategy (that he agonized over) was creative, integrated and sound. His trial performance was exemplary. In short, Mr. Zinober, in all respects, provided effective assistance to Mr. Chandler, for which he should be intensely grateful. No lawyer could have done more for his client that Mr. Zinober did for Mr. Chandler. This court is very grateful that Mr. Zinober accepted her phone call, now many years ago, and agreed to take the defendant's very complex case. Mr. Zinober was, in all respects, "functioning as counsel guaranteed by the Sixth Amendment." Mr. Chandler received a "fair trial, a trial whose result is reliable." *Strickland*, 687.

(PCR V11/2072)

This Court should decline Chandler's attempt to use these proceedings as a second appeal and to supplant Judge Schaeffer's factual findings and credibility determinations based upon the record before it. Relief should be denied.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Baya Harrison, Esq., 738 Silver Lake Road, Post Office Drawer 1219, Monticello, Florida 32345-1219, this _____ day of April, 2002.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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