NO.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

ROBERT LUNDBERG,

Petitioner,

v.

MARK INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

---

APPENDIX TO PETITION FOR WRIT OF CERTIORARI, VOLUME 1

REGINALD (TONY) MOSS, JR.
The Tony Moss Firm, L.L.C.
8101 Biscayne Boulevard #PH-701
Miami, Florida 33138-4634
(786) 219.5467 (office)
(305) 373.3832 (fax)
Email: tony@tonymosslaw.com
Attorney for ROBERT LUNDBERG

INDEX TO APPENDIX

Volume 1

Volume 2

A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-15793

D.C. Docket No. 2:14-cv-14347-RLR

ROBERT T. LUNDBERG,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(March 31, 2020)

Before JORDAN, JILL PRYOR, and WALKER,* Circuit Judges.

PER CURIAM:

Robert T. Lundberg, a Florida prisoner, is serving a total 45-year sentence after a jury found him guilty of attempted sexual battery on a child under 12 by a perpetrator 18 or older, in violation of Fla. Stat. § 794.011(2), and lewd or lascivious molestation of a child under the age of 12 by a perpetrator 18 or older, in violation of Fla. Stat. § 800.04(5)(b). After the district court denied his petition for a writ of habeas corpus, *see* 28 U.S.C. § 2254, Mr. Lundberg filed a notice of appeal and obtained a certificate of appealability on a number of claims. Following review of the extensive record in this case, and with the benefit of oral argument, we affirm the district court's denial of habeas relief.

I

To place Mr. Lundberg's claims in context, we begin with the facts and procedural history.

A

When V.C. was nine years old, she told her paternal aunt, Lillian Cassaude, that Mr. Lundberg had touched her inappropriately on two occasions. Ms. Cassaude then told V.C.'s parents, and they reported these allegations to the Port St. Lucie

* The Honorable John M. Walker Jr., United States Circuit Judge for the Second Circuit, sitting by designation.

Police Department, which began a criminal investigation. At the time of V.C.'s allegations, Mr. Lundberg was in a romantic relationship with Xiomara Figueroa, V.C.'s maternal aunt. Mr. Lundberg and Ms. Figueroa had previously been married and were dating again after their divorce.

Detective Teressa Dennis, who was in charge of the investigation, interviewed V.C. in March of 2002. V.C. told her of two different incidents where Mr. Lundberg touched her inappropriately: in one incident, Mr. Lundberg touched her vagina; in the other, Mr. Lundberg penetrated her vagina with his fingers.

On May 2, 2002, Mr. Lundberg voluntarily went to the police station to speak to Detective Dennis regarding V.C.'s allegations. Detective Dennis placed Mr. Lundberg in an interview room, which had a visible tape recorder on the table. After Detective Dennis started recording the interview on the tape recorder, she advised Mr. Lundberg that he was not under arrest. But "because of the nature of the allegations," she read him his *Miranda* rights, *see Miranda v. Arizona*, 384 U.S. 436 (1966), and had him sign a form acknowledging that he understood his rights. Mr. Lundberg said that he was willing to answer questions and understood that the interview was being recorded.

During the interview, Mr. Lundberg told Detective Dennis that he was aware that V.C. had told Ms. Cassaude that he had "touched her in a sexual manner." Mr. Lundberg also volunteered to Detective Dennis that he and Ms. Cassaude did not get

along very well, and implied that she could have told V.C. to make up the allegations against him.

As an interrogation tactic, Detective Dennis lied to Mr. Lundberg by embellishing V.C.'s allegations—mainly, she told him that V.C. alleged that he had tried to have sex with her. Mr. Lundberg denied trying to have sex with V.C. and explained to Detective Dennis that the only time when he could have touched V.C. was on a night when he was babysitting V.C., his nephew, and his son. He remembered that V.C. had fallen asleep on the couch, and while he was carrying her to the bed, he tripped over his sleeping son and fell with V.C. on top of the bed. At that time, V.C. woke up and said "ow," but when he asked her if she was okay, she answered "yes." Mr. Lundberg denied touching V.C. any other time before or after that incident.

Detective Dennis told Mr. Lundberg that sometimes children "blow things out of proportion," and that there was a big difference in the crime of having "full-blown sex and penetration . . . as opposed to a touch." Then, Detective Dennis implied that Mr. Lundberg would get probation for just a rub or a tap, but that more severe conduct could result in a capital sexual battery charge with the possibility of life in prison or the death penalty. After hearing this, Mr. Lundberg told Detective Dennis that on another night, he remembered drinking and carrying V.C. to her bed and that

he "might have touched her." Mr. Lundberg also said, "I remember touching her," and that he "put [his] hands down her panties and rubbed her vagina."

After his confession, Detective Dennis informed Mr. Lundberg that she was arresting him for sexual battery on a minor. Mr. Lundberg asked if he could speak with his girlfriend, Ms. Figueroa, who was at the police station. Detective Dennis handcuffed Mr. Lundberg and told him that she would bring Ms. Figueroa to the interview room. Before bringing Ms. Figueroa, Detective Dennis told Mr. Lundberg that she would turn off the tape recorder on the table. When Ms. Figueroa entered the interview room, Detective Dennis exited the room while saying, "I'm going to give you all privacy."

Unbeknownst to Mr. Lundberg, the interview room was equipped with a hidden video camera that recorded his exchange with Ms. Figueroa. After Detective Dennis left the room, the camera captured Mr. Lundberg telling Ms. Figueroa that he was going to jail for sexual battery. When Ms. Figueroa asked, "did you do it?" Mr. Lundberg replied, "I kind of remember touching her." He told Ms. Figueroa that "when I drink I do stupid stuff, man, you know, sexual stuff, and I don't know why I do it."

B

Florida charged Mr. Lundberg with sexual battery, or attempted sexual battery on a child under 12 by a perpetrator 18 or older, in violation of Fla. Stat. § 794.011(2)

(Count 1), and lewd or lascivious molestation of a child under the age of 12 by a perpetrator 18 or older, in violation of Fla. Stat. § 800.04(5)(b) (Count 2). Mr. Lundberg's counsel moved to suppress Mr. Lundberg's statements to Detective Dennis after she threatened him with the death penalty because such a threat rendered his confession involuntary.

The trial court held a hearing on the motion to suppress. Detective Dennis and Mr. Lundberg testified at the hearing, and the state played the video recording containing the interview and Mr. Lundberg's conversation with Ms. Figueroa. The trial court noted that immediately following Detective Dennis' mention of the death penalty and life imprisonment, Mr. Lundberg displayed a marked change in demeanor, and shortly thereafter, he confessed. The trial court determined that Detective Dennis' actions rendered Mr. Lundberg's inculpatory statements involuntary and suppressed any statements made after the death penalty reference.

Mr. Lundberg's counsel moved for clarification on the suppression order to delineate its scope. Counsel asserted that the statements to Ms. Figueroa were unreliable because they were made after Detective Dennis coerced Mr. Lundberg into confessing. The state argued in response that Mr. Lundberg's statements to Ms. Figueroa should not be suppressed because he voluntarily made those statements, and no police officer was present. The trial court clarified that Mr. Lundberg's

videotaped statements to Ms. Figueroa were admissible because Mr. Lundberg did not make them to a police officer. Mr. Lundberg's case proceeded to trial.

C

The state called V.C. as its first witness, and she identified Mr. Lundberg in the courtroom. She testified that one night she woke up to Mr. Lundberg tapping on her vagina with his finger. Another time, she woke up to find that he had put his hand inside her pajama bottoms and underwear and inserted his finger into her vagina. He stopped when she woke up.

Lillian Cassaude, V.C.'s paternal aunt, testified that V.C. told her that Mr. Lundberg had touched her. According to Ms. Cassaude, she wanted to make sure that the incidents had actually occurred, so she asked V.C., "are you sure?" and "are you sure you're not lying?" Ms. Cassaude acknowledged that she and Mr. Lundberg did not have a good relationship. On redirect, Ms. Cassaude denied telling V.C. that she should say that Mr. Lundberg molested her because of her own dislike for him.

V.C.'s father testified that he had known Mr. Lundberg for over 15 years. After Ms. Cassaude told him of V.C.'s accusations, he repeatedly asked V.C. if she was sure "that it happened" because he "had a problem believing her." He told V.C. that Mr. Lundberg could "get in serious trouble if [she was] lying," but she maintained that she was not lying, and that the incidents did occur. Because he and his wife "wanted to be totally sure" that the incidents occurred, they took V.C. to a

counselor named Larry Arbach. V.C.'s father testified that Mr. Arbach said he believed her "without a doubt." Mr. Lundberg's counsel did not object to this line of questioning.

V.C.'s mother testified that when she found out what V.C. had told Ms. Cassaude, she contacted Mr. Arbach. Mr. Lundberg's counsel made a hearsay objection, which the trial court sustained.

Detective Dennis testified that she interviewed V.C. and that her story remained consistent. On redirect, Detective Dennis said that she could tell when children would blow cases out of proportion and that it was "very obvious" when that happened. She added that V.C. was able to "clearly" articulate what Mr. Lundberg did.

The state then played the recording of Detective Dennis' interview with Mr. Lundberg, and the video recording containing the conversation between Mr. Lundberg and Ms. Figueroa. Consistent with the trial court's suppression order, the state excised the portion of the interview where Detective Dennis mentioned the death penalty and Mr. Lundberg subsequently confessed.

Mr. Lundberg then presented his case. Taking the stand, he testified and denied that he touched or placed his finger in V.C.'s vagina. He told the jury that on one occasion, he was carrying V.C. to her bed when he tripped and dropped her, and that he could have inadvertently touched or punched her in the groin. Mr.

Lundberg also testified that he did not recall sexually touching V.C. Mr. Lundberg said that he admitted to his girlfriend that he might have touched V.C. because he had just had a long interview with Detective Dennis, had been awake for hours, and his "brain was fried." He explained that when he told his girlfriend that he "kinda remember[ed] touching" V.C., he did not mean that he touched her in a sexual way.

After closing arguments, the trial court instructed the jury that Mr. Lundberg was accused of sexual battery, but that in reviewing the evidence, if it did not conclude that he committed that crime, it could consider the lesser-included crime of attempted sexual battery. The trial court also read to the jury the elements of both sexual battery and attempted sexual battery. Mr. Lundberg's counsel did not object to the jury instructions.

Following deliberations, the jury found Mr. Lundberg guilty of attempted sexual battery. The jury also found Mr. Lundberg guilty of lewd or lascivious molestation of a child under the age of 12 by a perpetrator 18 or older. The trial court sentenced Mr. Lundberg to 30 years' imprisonment on Count 1, and 15 years' imprisonment on Count 2, to be served consecutively.

D

Mr. Lundberg, through counsel, appealed his convictions to Florida's Fourth District Court of Appeal. Mr. Lundberg argued that the trial court erred in refusing to suppress his statements to Ms. Figueroa in the interview room because the

statements were part of the involuntary confession to Detective Dennis and were "fruit of the poisonous tree."

The Fourth District ruled that Mr. Lundberg's statements to Ms. Figueroa were not obtained through Detective Dennis' actions but were voluntarily made after he requested to speak to Ms. Figueroa. *See Lundberg v. State*, 918 So. 2d 444, 445 (Fla. 4th DCA 2006). Thus, the statements were sufficiently dissipated from the involuntary confession and did not violate Mr. Lundberg's Fifth Amendment rights. *See id.* Mr. Lundberg appealed to the Supreme Court of Florida, which denied review. *See Lundberg v. State*, 932 So. 2d 193 (Fla. 2006).

E

On May 16, 2008, Mr. Lundberg filed a motion for post-conviction relief in state court under Fla. R. Crim. P. 3.850, raising multiple claims of ineffective assistance of counsel. Relevant to this appeal, he argued that his trial counsel was ineffective for (1) not moving to suppress the statements he made to Ms. Figueroa at the police station because they violated his expectations of privacy; (2) not objecting to the jury instruction on attempted sexual battery; and (3) not objecting to the admission of testimony that bolstered V.C.'s credibility. He also asserted that the cumulative effect of his counsel's deficient representation deprived him of a fair trial.

The state court denied the first claim, finding that there was no expectation of privacy in the interview room where Mr. Lundberg was detained. The state court also rejected the second claim, concluding that the attempt instruction would have allowed the jury to find Mr. Lundberg guilty of a lesser crime, and his counsel's failure to object to the instruction did not prejudice him. The state court granted an evidentiary hearing on Mr. Lundberg's third claim.

At the evidentiary hearing, Mr. Lundberg's counsel testified about his trial strategy. He explained that because the state would produce Mr. Lundberg's incriminating statements to Ms. Figueroa, he had to formulate a strategy to discredit V.C.'s testimony. Part of that strategy was to show that V.C.'s own family was not sure she was telling the truth and that V.C. may have been manipulated by Ms. Cassaude and by law enforcement. Mr. Lundberg's counsel believed that if he could show the efforts of V.C.'s family to ensure she was telling the truth, he could create reasonable doubt as to V.C.'s credibility. Following the evidentiary hearing, the state court denied Mr. Lundberg's third claim as well, ruling that counsel's strategic and tactical choices were not deficient.

Mr. Lundberg appealed the denial of post-conviction relief to Florida's Fourth District Court of Appeal, arguing that the state court erred in denying each of his ineffective assistance of counsel claims. As to the first claim, the Fourth District noted that Mr. Lundberg had waived his *Miranda* rights and did not expressly

request privacy with Ms. Figueroa. *See Lundberg v. State*, 127 So. 3d 562, 567 (Fla. 4th DCA 2012). As a result, Detective Dennis did not deliberately create a reasonable expectation of privacy in the interview room where Mr. Lundberg confessed to Ms. Figueroa. *See id.* at 567–68. Counsel therefore was not ineffective in failing to file a motion to suppress on Fourth Amendment grounds. *See id.* The Fourth District summarily affirmed the state court's denial of Mr. Lundberg's second claim with respect to the attempted sexual battery instruction. *See id.* at 570. The Fourth District also affirmed the denial of relief on the third claim, holding that counsel did not render ineffective assistance because he had a valid strategy to discredit V.C.'s credibility. *See id.* at 568–69.

Mr. Lundberg then unsuccessfully petitioned the Supreme Court of Florida to review the Fourth District's decision. *See Lundberg v. State*, 149 So. 3d 1126 (Fla. 2014). Mr. Lundberg filed a petition for a writ of *certiorari* in the United States Supreme Court, which was denied. *See Lundberg v. Florida*, 135 S. Ct. 1459 (2015).

F

Mr. Lundberg filed a *pro se* habeas corpus petition on August 25, 2014, raising numerous claims for relief. On November 30, 2015, the district court denied Mr. Lundberg's petition, entered judgment against him, and denied a certificate of appealability ("COA"). Mr. Lundberg applied for a COA from our court, and we granted a COA on the following issues:

(1) Whether the state violated the Fifth Amendment by creating a coercive environment to induce Mr. Lundberg to make incriminating statements to Ms. Figueroa, or whether these statements should have been suppressed as the fruit of Mr. Lundberg's involuntary confession to Detective Dennis.

(2) Whether Mr. Lundberg received ineffective assistance of counsel, where trial counsel failed to seek suppression of his statements to Ms. Figueroa based on Detective Dennis' actions in fostering an expectation of privacy.

(3) Whether Mr. Lundberg received ineffective assistance of counsel based on trial counsel's failure to object to the trial court's jury instruction on attempted sexual battery.

(4) Whether Mr. Lundberg received ineffective assistance of counsel, where trial counsel failed to object to hearsay testimony that bolstered V.C.'s credibility.

(5) Whether the cumulative effect of these errors deprived Mr. Lundberg of a fair trial.

App. D.E. 12 at 22–23. We also appointed appellate counsel for Mr. Lundberg.

II

"When reviewing a district court's grant or denial of habeas relief, we review questions of law and mixed questions of law and fact *de novo*, and findings of fact for clear error." *Rambaran v. Sec'y, Dep't of Corr.*, 821 F.3d 1325, 1330 (11th Cir. 2016). Under the Antiterrorism and Effective Death Penalty Act, we may only grant habeas relief when the adjudication of claims on the merits in state court are (1) "contrary to, or involved an unreasonable application of, clearly established Federal

law, as determined by the Supreme Court of the United States" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"A state court decision is 'contrary to' clearly established federal law when it arrives at an opposite result from the Supreme Court on a question of law, or when it arrives at a different result from the Supreme Court on 'materially indistinguishable' facts." *Owens v. McLaughlin*, 733 F.3d 320, 324 (11th Cir. 2013) (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000)). Under the unreasonable application clause, we "grant relief only 'if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the . . . case.'" *Pope v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 1254, 1262 (11th Cir. 2014) (citations and some punctuation omitted). To be an unreasonable application of clearly established federal law, the state court's decision "must be objectively unreasonable, not merely wrong; even clear error will not suffice." *White v. Woodall*, 572 U.S. 415, 419 (2014) (internal quotation marks omitted).

A state court's factual determinations are presumed correct unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). "[T]he 'clear and convincing' standard is a fairly high one," *United States v. Owens*, 854 F.2d 432, 435–6 (11th Cir. 1988), for which the

petitioner must present a proposition that is "highly probable." *Fults v. GDCP Warden*, 764 F.3d 1311, 1314 (11th Cir. 2014) (brackets omitted).

III

Mr. Lundberg argues that the Florida courts violated his Fifth Amendment rights by concluding that his confession to Ms. Figueroa was sufficiently dissipated from the initial illegality (the death penalty threat made by Detective Dennis). We disagree.

The Fifth Amendment provides that an individual has a right against compelled self-incrimination. *See* U.S. Const. amend. V. In *Miranda*, the Supreme Court held that officers are required to inform suspects of their right against self-incrimination and the consequences of waiving that right during a custodial interrogation. 384 U.S. at 467–73. To be admissible, a confession must also "be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight." *Bram v. United States*, 168 U.S. 532, 542–43 (1897).

Even when the police comply with *Miranda*, a confession may still be involuntary if, considering the totality of the circumstances, the officers created a coercive environment. *See United States v. Lall*, 607 F.3d 1277, 1285 (11th Cir. 2010) (observing that a court must address the voluntariness of a confession even if a suspect was not in custody and, thus, *Miranda* warnings were not required); *Jarrell*

v. Balkcom, 735 F.2d 1242, 1252 (11th Cir. 1984) ("[E]ven if a court finds compliance with *Miranda*, the court must still rule on the confession's voluntariness."). An involuntary confession may be suppressed even if it is not the direct product of police misconduct but is merely "derived from the illegal conduct, or 'fruit of the poisonous tree.'" *United States v. Terzado-Madruga*, 897 F.2d 1099, 1113 (11th Cir. 1990) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)). When determining whether evidence is "fruit of the poisonous tree," the relevant question is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (quotation omitted). Thus, a second confession may be voluntary—and not be the fruit of the poisonous tree—if the coercion surrounding the first statement had "sufficiently dissipated" by a break in the stream of events. *See Leon v. Wainwright*, 734 F.2d 770, 773 (11th Cir. 1984).

In the absence of questioning by law enforcement, we have held that "[v]oluntary and spontaneous comments by the accused, even after *Miranda* rights are asserted, are admissible evidence." *Cannady v. Dugger*, 931 F.2d 752, 754 (11th Cir. 1991). Further, "incriminating statements made in the course of casual conversation are not products of a custodial interrogation." *United States v.*

Satterfield, 743 F.2d 827, 849 (11th Cir. 1984), *superseded by statute on other grounds as stated in United States v. Edwards*, 728 F.3d 1286, 1292 (11th Cir. 2013).

Here, the Fourth District correctly identified the governing legal principle from *Wong Sun*, and determined that Mr. Lundberg's confession to Ms. Figueroa was not the "fruit of the poisonous tree." *See Lundberg*, 917 So. 2d at 445. The record reveals that the state trial court suppressed Mr. Lundberg's initial confession to Detective Dennis because her implied threat regarding the death penalty created a coercive environment. But Mr. Lundberg's voluntary request to speak to Ms. Figueroa was likely sufficient to "purge the taint" of Detective Dennis' earlier threat. *See Wong Sun*, 371 U.S. at 488; *see also Cannady*, 931 F.2d at 754. This is particularly so because Detective Dennis was no longer in the interrogation room when Mr. Lundberg confessed to Ms. Figueroa, and because Mr. Lundberg's statements to Ms. Figueroa were "voluntary and spontaneous comments" rather than the result of questioning by law enforcement. In the absence of any on-point Supreme Court authority, it was reasonable for the Fourth District to conclude that Mr. Lundberg's confession to Ms. Figueroa was not obtained through the exploitation of Detective Dennis' primary illegality.

In sum, the Fourth District's holding was not contrary to, and did not involve an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1). Nor was it an

unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d)(2).

IV

Mr. Lundberg also seeks habeas relief under the Sixth Amendment based on claims of ineffective assistance of counsel. First, he contends that he received ineffective assistance when his counsel failed to seek suppression of the statements he made to Ms. Figueroa. Second, he asserts that he received ineffective assistance when his counsel did not object to the jury instruction on attempted sexual battery. Third, he argues that his counsel rendered ineffective assistance by not objecting or preventing extensive testimony which bolstered V.C.'s credibility.

A

To establish ineffective assistance, Mr. Lundberg must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, to show that counsel's performance was deficient, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687. To show that counsel's actions were unreasonable, a petitioner must establish that "no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) (en banc). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible

options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Second, to show prejudice, Mr. Lundberg "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

When reviewing counsel's performance, courts must be "highly deferential" and must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The question is whether "some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc).

When the *Strickland* deferential standard for measuring performance is viewed through the lens of AEDPA's own deferential standard for habeas corpus claims, the result is a "doubly deferential" form of review, *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011), which asks only "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). We have stated that "it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding." *Gissendaner v. Seaboldt*, 735 F.3d 1311, 1323 (11th Cir. 2013).

B

Mr. Lundberg contends that he received ineffective assistance when his counsel failed to seek suppression of the statements he made to Ms. Figueroa in the interview room because those statements were obtained in violation of his expectation of privacy. He relies on several Florida state cases holding that although a suspect generally does not have an expectation of privacy in a police interview room, such an expectation can arise if the police deliberately foster it. *See, e.g.*, *State v. Calhoun*, 479 So. 2d 241 (Fla. 4th DCA 1985). Specifically, Mr. Lundberg asserts that Detective Dennis fostered such an expectation when she exited the interrogation room and said that she would give Mr. Lundberg and Ms. Figueroa privacy, and that Detective Dennis then violated that expectation by recording their conversation with the hidden video camera.

The Fourth District denied Mr. Lundberg's ineffectiveness claim on the merits, ruling that counsel was justified in not seeking suppression on expectation of privacy grounds because Mr. Lundberg enjoyed a diminished expectation of privacy when he confessed to Ms. Figueroa. *See Lundberg*, 127 So. 3d at 567. Again, we must defer to that determination unless Mr. Lundberg shows that decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1); *see Kokal v. Sec'y, Dep't of Corr.*, 623 F.3d 1331, 1345–46 (11th Cir. 2010) (reviewing, with AEDPA deference, the highest state-

court decision to have decided the petitioner's claim on the merits). We recognize that Mr. Lundberg may have had a plausible Fourth Amendment claim, but even "a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). Accordingly, we conclude that the Fourth District could conclude that counsel's decision not to object did not fall below an "objective standard of reasonableness." *See Strickland*, 466 U.S. at 687.

Generally, "[t]he expectations of privacy of an individual taken into police custody 'necessarily [are] of a diminished scope.'" *Maryland v. King*, 569 U.S. 435, 462 (2013) (brackets in original) (quoting *Bell v. Wolfish*, 441 U.S. 520, 557 (1979)). Even though there was no Florida case precisely on point at the time of Mr. Lundberg's suppression hearing, there were multiple cases indicating, as Mr. Lundberg argues, that although a suspect in custody has no expectation of privacy in a police interview room, such an expectation can arise if the police deliberately foster it. After a thorough review of case law, the Fourth District concluded that whether the police deliberately fostered an expectation of privacy turned on whether the police made a "deliberate attempt to circumvent the defendants' assertions of the right of silence." *Lundberg*, 127 So. 3d at 567.

The Fourth District's analysis is not contrary to, and is not an unreasonable interpretation of, established federal law. Mr. Lundberg's case is factually comparable to cases in which Florida courts held that the police did not foster an expectation of privacy and thereby declined to suppress the challenged statements. *See Larzelere v. State*, 676 So. 2d 394, 405 (Fla. 1996) (officers did not foster an expectation of privacy simply by placing defendant in a holding cell with her son, where defendant had not asked to speak with her son privately); *Allen v. State*, 636 So. 2d 494, 496–97 (Fla. 1994) (voluntary jailhouse statements between inmates, recorded via electronic eavesdropping, were admissible because "there was no improper police involvement in inducing the conversation nor any intrusion into a privileged or otherwise confidential or private communication"); *Boyer v. State*, 736 So. 2d 64 (Fla. 4th DCA 1999) (police did not foster an expectation of privacy in defendant's jailhouse conversation with his sister-in-law merely because the officer exited the interview room before their conversation, where defendant had not asked for privacy); *Johnson v. State*, 730 So. 2d 368, 370 (Fla. 4th DCA 1999) (police did not violate the Fourth Amendment by recording, without a warrant, conversations between arrestee and his wife in a secretly monitored interview room at a police station because no reasonable expectation of privacy existed in the interview room). Here, Mr. Lundberg was under arrest and handcuffed in a police interview room at the time he spoke to Ms. Figueroa. As noted by the Fourth District, Mr. Lundberg

did not expressly request privacy to speak with Ms. Figueroa. *See Lundberg*, 127 So. 3d at 567.

In contrast, Mr. Lundberg's case is distinguishable from those in which the police deliberately fostered an expectation of privacy. *See, e.g.*, *Cox v. State*, 26 So. 3d 666 (Fla. 4th DCA 2010) (officer fostered and violated defendant's expectation of privacy when she promised co-defendant leniency if he could elicit incriminating statements from the defendant and orchestrated a conversation between the two defendants to that end, but had reassured the defendant that his conversations in the interview room were not being recorded); *Calhoun*, 479 So. 2d 666 (police fostered inmate's expectation of privacy by questioning him about another case because, although he was read *Miranda* rights, he was not informed that he was a suspect in the new case, and police subsequently violated that expectation of privacy by surreptitiously videotaping inmate's conversation with his brother). In Mr. Lundberg's case, the Fourth District concluded that "the surreptitious taping of the conversation in this case was not employed to circumvent the exercise of the defendant's right to remain silent, as he had already relinquished that right when interviewed with the detective." *Lundberg*, 127 So. 3d at 565. For that reason, the Fourth District held that the statements were likely admissible.

Conducting the *Strickland* analysis, the Fourth District explained:

> "While we acknowledge that this is a close case factually, and each case turns on its specific facts, for that very

> reason we cannot conclude that counsel made a serious error such that he was not functioning as counsel within the Sixth Amendment. As he stated at the evidentiary hearing, 'I think it's well founded in the case law that you don't have a reasonable expectation of privacy under those conditions . . . . You're in an interrogation room, you're in handcuffs . . . .'"

Lundberg, 127 So. 3d at 568. Counsel's statements suggest that he had evaluated the circumstances under which Mr. Lundberg made his incriminating statements and concluded that those statements were admissible, as the state trial court had ruled. In light of the fact-specific case law on the circumstances in which police do and do not foster a defendant's expectation of privacy, it was reasonable for counsel to conclude that attempting to suppress the statements under an expectation of privacy theory was not a viable strategy, and therefore to try to suppress the statements using a fruit of the poisonous tree argument instead.

Although it is possible an objection to the admission of the challenged statements would have been successful, we cannot say on AEDPA's doubly deferential review that the Fourth District was unreasonable to conclude that counsel's decision not to object did not fall below an "objective standard of reasonableness." *Strickland*, 466 U.S. at 687. We therefore agree with the district court that Mr. Lundberg was not entitled to habeas relief on this claim.

C

Next, Mr. Lundberg asserts that his counsel provided ineffective assistance when he failed to object to the trial court's jury instruction on attempted sexual battery. He argues that there was no evidence to support a conviction for attempted sexual battery, and that the evidence showed either a completed offense or none at all. We disagree.

In Florida, "when the commission of one offense always results in the commission of another, the latter offense is a category-one necessarily lesser included offense." *Taylor v. State*, 608 So. 2d 804, 805 (Fla. 1992). Under Florida law, a jury must be instructed on category one lesser included offenses. *See id.* But if the lesser offense has at least one statutory element not contained in the greater offense, then it is classified as a "category two permissive lesser included offense." *Id.* A jury may be instructed on category two lesser included offenses only if the elements of the offense are alleged in the charging document and sufficient proof of them is presented at trial. *See State v. Wimberly*, 498 So. 2d 929, 931 (Fla. 1986). Attempted sexual battery is a category two, or permissive, lesser included offense of sexual battery. *See* Fla. Std. Jury Instr. (Crim.) § 11.1.

The Florida Rules of Criminal Procedure state that the jury may convict the defendant of attempt to commit an offense "if such attempt is an offense and is supported by the evidence." Fla. R. Crim. P. 3.510(a). Nevertheless, the court "shall

not instruct the jury if there is no evidence to support the attempt and the only evidence proves a completed offense." *Id.* Thus, the trial court could have not instructed the jury on attempt unless the elements of attempt were properly alleged and sufficiently proven. *See* Fla. R. Crim. P. 3.510. *See also Brock v. State*, 954 So. 2d 87, 88–89 (Fla. 1st DCA 2007) (holding that it was error to give an attempted sexual battery instruction where the evidence established a completed crime or no crime at all).

To convict a defendant of sexual battery on a minor under 12 by a perpetrator aged 18 years or older, the state must prove (i) the ages of victim and perpetrator, and (ii) that the defendant committed an act upon the victim in which the anus or vagina of the victim was penetrated by an object. *See* Fla. Stat. § 794.011(1)(h), (2)(a). To prove attempt, the state must show that the defendant completed some act towards committing the crime that went beyond just thinking or talking about it, and that he would have committed the crime except that some event prevented him from committing the crime or that he failed. *See* Fla. Stat. § 777.04(1).

After reviewing the facts and relevant case law, we conclude that the trial court's application of *Strickland* and the Fourth District's summary affirmance were reasonable because Florida alleged attempt when it charged Mr. Lundberg, and there was sufficient evidence at trial to support the attempt instruction. The incident where V.C. woke up to Mr. Lundberg tapping her vagina could reasonably be seen as an

attempted sexual battery. The act of tapping her vagina went "beyond just thinking or talking about" committing a completed sexual battery, and it could be reasonably understood by the jury that Mr. Lundberg was attempting to penetrate V.C. and "would have committed the crime" of sexual battery had she not woken up. Accordingly, the state courts had a reasonable basis for concluding that Mr. Lundberg's counsel did not render ineffective assistance. We therefore agree with the district court that the rejection of this claim was not contrary to, or an unreasonable application of *Strickland*.

D

Mr. Lundberg next argues that he received ineffective assistance because his counsel failed to object to hearsay testimony from several witnesses that bolstered V.C.'s credibility.

Under *Strickland*, counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." 466 U.S. at 690. "[C]ounsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken might be considered sound trial strategy." *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) (en banc) (internal quotation marks omitted). For a petitioner to show that his counsel's conduct was unreasonable, he must establish that "no

competent counsel would have taken the action that his counsel did take." *Id.* at 1315.

Here, the Fourth District reasonably applied *Strickland* by determining that counsel's failure to object to certain hearsay testimony that bolstered V.C.'s credibility did not constitute ineffective assistance. *See Lundberg*, 127 So. 3d at 568–69. It is true that Mr. Lundberg's counsel likely could have raised successful objections to the testimony in question. For example, V.C.'s parents and aunt testified that they initially did not believe V.C., but later could see that she was telling the truth; V.C.'s father testified that he took V.C. to a counselor, who told him that he believed V.C.'s allegations "without a doubt"; and Detective Dennis testified that she believed V.C. was not deceptive. The Fourth District nonetheless found that counsel's failure to object to hearsay testimony that bolstered V.C.'s credibility constituted part of his trial strategy, *see Lundberg*, 127 So. 3d at 568–69, and we conclude that its ruling did not constitute an unreasonable application of *Strickland.*

Mr. Lundberg's counsel explained that because the trial court did not suppress Mr. Lundberg's confession to Ms. Figueroa, he chose a strategy designed to discredit V.C.'s testimony, and highlight Ms. Cassaude's possible manipulation of V.C. At trial, counsel focused on revealing to the jury all the efforts that V.C.'s parents made to determine that she was telling the truth. Such an approach could permit the jury

to conclude that reasonable doubt existed because even V.C.'s parents did not initially believe her. On this record, the Fourth District reasonably concluded that counsel engaged in a reasonable trial strategy based on his consideration of the facts and law of the case. *See Strickland*, 466 U.S. at 690. The district court therefore properly denied relief on this claim.

V

Finally, Mr. Lundberg argues that the cumulative effect of the alleged errors deprived him of a fair trial. "We address claims of cumulative error by first considering the validity of each claim individually, and then examining any existing errors in the aggregate and in light of the trial as a whole to determine whether one was afforded a fundamentally fair trial." *Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1132 (11th Cir. 2012). Where there is no error in any of the district court's rulings, reversal under the cumulative error doctrine is inappropriate. *See United States v. Taylor*, 417 F.3d 1176, 1182 (11th Cir. 2005). Because we have found no Fifth Amendment or Sixth Amendment errors, we reject Mr. Lundberg's cumulative error argument.

VI

We affirm the district court's denial of Mr. Lundberg's petition for a writ of habeas corpus.

AFFIRMED.

A-2

918 So.2d 444 (2006)

Robert T. LUNDBERG, Appellant,

v.

STATE of Florida, Appellee.

No. 4D04-904.

District Court of Appeal of Florida, Fourth District.

January 25, 2006.

Carey Haughwout, Public Defender, and Gary Caldwell, Assistant Public Defender, West Palm Beach, for appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Jeanine M. Germanowicz, Assistant Attorney General, West Palm Beach, for appellee.

WARNER, J.

The defendant appeals his convictions for attempted sexual battery and lewd and lascivious molestation. He contends that
445 the trial court erred in admitting his taped *445 conversation with his girlfriend in a police interview room. We affirm.

After the police were informed of allegations that the defendant sexually abused a child, the defendant voluntarily went to the police station to discuss the allegations with a detective. The defendant waived his *Miranda* rights and began making incriminating statements. At the end of the interrogation, the interrogating officer arrested the defendant and informed him of the charges he would face. The defendant then asked to see his girlfriend before he left for jail. The police brought the defendant's girlfriend to the interview room, but surreptitiously tape recorded the defendant's conversation with his girlfriend.

Before trial, the court suppressed the statements that the defendant made to the police, finding that his statements had been coerced because the interrogating officer told the defendant that he could face the death penalty. However, the trial court declined to suppress any statements the defendant made to his girlfriend in the police interview room after the interrogation was over.

On appeal, the defendant argues that the police obtained his statements to his girlfriend through an exploitation of the initial coercion and that the taped statements were "fruit of the poisonous tree." In *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the Supreme Court explained the application of the fruit of the poisonous tree doctrine:

> We need not hold that all evidence is `fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is `whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'

(Citations omitted).

As *Wong Sun* makes clear, the "fruit of the poisonous tree" analysis in this case does not turn on whether the defendant would have requested to speak to his girlfriend in the absence of the coercive interview with the detective. Instead, the question is whether the statements were obtained through an exploitation of the primary illegality. We hold that they were not.

The statements the defendant made to his girlfriend were made at his insistence. He asked that she be brought to see him, and he voluntarily spoke to her. These were not coerced by any interrogation. Thus, the statements the defendant made to his girlfriend were sufficiently attenuated from the initial illegality and accordingly we reject the defendant's "fruit of the poisonous tree" argument.

The defendant also argues on appeal that the police deliberately induced in him a reasonable expectation of privacy in his conversation with the girlfriend, relying on *State v. Calhoun*, 479 So.2d 241 (Fla. 4th DCA 1985). Because this particular argument was not made at trial, we find that this issue is not properly preserved for appellate review.

Affirmed.

GUNTHER and HAZOURI, JJ., concur.

A-3

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

2 order den in pt grant evid hrg in pt

STATE OF FLORIDA

FELONY DIVISION
CASE NO.: 562002CF1597A

vs.

ROBERT T. LUNDBERG,

Defendant.
_______________________/

ORDER ON DEFENDANT'S POST CONVICTION MOTION, DENYING IN PART, GRANTING A HEARING, AND SETTING STATUS HEARING WITH THE DEFENDANT TO APPEAR TELEPHONICALLY

THIS CASE came before the Court in chambers on Defendant's pro se amended motion filed May 16, 2008, pursuant to Florida Rule of Criminal Procedure 3.850. The Court finds and determines as follows.

On December 5, 2003, the Defendant was convicted of attempted battery on a child under 12 by a person 18 years or older, and lewd or lascivious molestation of a victim under 12 by a person 18 years or older. (Exhibit 1: Information; Statement of Particulars; Verdict). On February 18, 2004, the Defendant was sentenced as a sexual predator to a total of 45 years in prison. (Exhibit 2: Judgment and sentence; punishment scoresheet, as corrected *nunc pro tunc*).

The Defendant appealed his conviction and sentence; the judgment and sentence were affirmed with opinion; and he sought and was denied review in the Florida Supreme Court. (See attached, composite Exhibit 3: notice of appeal of 3/3/2004; judicial acts to be reviewed; opinions and mandates) *Lundberg v. State*, 918 So.2d 444 (Fla. 4th DCA 2006) *cert. denied* 932 so.2d 193 (Fla. 2006)(Issued May 22, 2006).

The Defendant challenges his convictions and sentences, raising multiple claims of ineffective assistance of counsel. In order to establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that

the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 677 (1984). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. A defendant is entitled to an evidentiary hearing on an ineffective assistance of counsel claim if he specifies facts, not conclusively rebutted by the record, demonstrating that counsel rendered ineffective assistance and that the defendant was prejudiced as a result. *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). If the defendant fails to satisfy either prong, the ineffectiveness claim fails. *Stancle v. State*, 980 So.2d 619, 621 (Fla. 4th DCA 2008).

The State has filed an extensive Response to the Defendant's motion, to which the Defendant has filed an unauthorized Reply. Rule 3.850(d) of the Florida Rules of Criminal Procedure does not provide for the filing of a reply, although in practice, replies are often filed and considered by the court before it rules. The rule provides that after the state's "answer" to the motion is filed, if the trial court finds that an evidentiary hearing is not required, "the judge shall make appropriate disposition of the motion. *Evans v. State*, 764 So.2d 822, 823 (Fla. 4th DCA 2000).

The State has provided a detailed procedural history. (Response, items 1-16).

Facts of the Case as adduced at trial

The Defendant alleges 7 pages of "facts," interspersed with argument, and citing to trial transcripts. (See motion, pp.6-13). In *Lundberg*, 918 So.2d at 445, the court summarized the facts of the case as to the appeal affirming the Court's decision that the Defendant's statements to his girlfriend should not be suppressed. (See Exhibit 3: Opinion).

First criminal incident

At trial, the victim, 11 years old at the time of the trial, (Transcript, p.235), testified

that on one occasion when she was in the first or second grade, during a period when the power was out, (Transcript, p.247, 249, during a hurricane), she was sleeping on the couch when she felt something and woke up. (Transcript, pp. 206-212). The victim testified that the Defendant had stuck his hand inside her underwear and tapping—touching—the outside of her vagina with his hand. (Transcript, pp. 212-216; 249, 262-263).

Second criminal incident

The victim testified that when she was about eight, still in second grade, (Transcript, pp.218-225), she awoke because "something was hurting me and it was Robert ...[p]utting his finger – he put it inside me," (Transcript, p.225, ll. 22-25), "He went under my clothes and put it in." (Transcript, p.226, l.8).

She testified further that the Defendant had pulled her clothes down to her knees, and put his finger *in* her vagina. (Transcript, p.226, 257-258, 262). When she awoke, he stopped, she went to the bathroom, and testified "it was hurting me," (Transcript, p.227, ll.16-17), and that the hurting began when she started to use the bathroom. (Transcript, p.229).

The victim testified that the abuse only occurred twice, (Transcript, p.232, ll.24-25), and testified that her hope for the outcome of the case was for the Defendant to say he was sorry and not do it again. (Transcript, p.246).

The Defendant gave a statement to police in which he remembered touching the victim when her panties were down and rubbing her vagina. (State's Response, exhibit 1: interview 5/2/2002). However, much of the statement, including that admission, was suppressed and is not being considered by the Court in regard to the Defendant's claims in this motion. (*See* Transcript, pp.500-501, Defense counsel attempted to bring up subject matter from suppressed part of interview).

However, part of his statements did become evidence, including statements made

to his girlfriend/ex-wife:

> THE DEFENDANT: I was talking about I was drunk. I really don't remember a lot of what happened, you know? She said that I touched her. I could have. I have to pay the price of what I did.
>
> MS. FIGUEROA: Did you do it?
>
> THE DEFENDANT: I kind of – I kind of remember touching (the victim). I don't –

(Transcript, p.454, l.22 through p. 455, l.3)

> (THE DEFENDANT): Drinking at night – when I drink, I do stupid stuff, you know, sexual stuff, and I don't know why I do it. I don't understand why I do it. You know, I don't do it sober, it's only when I get drunk, I just do stupid shit.

(Transcript, p.455, ll.14-18).

The Defendant testified in his own behalf, and denied that the touched the child inappropriately. (Transcript, pp. 520, 531).

GROUND ONE: DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL (motion, p.5)

Claim I: Waiver of speedy trial (restated) (Motion pp.13-14).

The Defendant claims counsel was ineffective for waiving the Defendant's right to speedy trial without discussing the matter with the Defendant or explaining the "ramifications" of waiving speedy trial. (Motion, p.13, item I and fn4). The Defendant claims the State did not formally charge the second crime until after speedy trial had run on the first charge, despite the State knowing that grounds for the charge existed. He claims this was prejudicial, in that it permitted the State to amend the Information after speedy trial, and to add the second charge, leading to a second conviction.

As the Defendant indicates, speedy trial was waived by counsel's requests for continuances. (Motion, p.13). The Defendant does not claim that the continuances were

not necessary, or that he did not agree with the continuances, but claims rather that he was unaware of the ramifications of waiving speedy trial.

The State argues that the Prosecution could have charged the Defendant at any time, and provides a quote from the Prosecutor as to why the Information was amended at the time it was. (Response, item 23, citing Transcript, p.4, ll.9-23). Essentially, the Defendant's successful motion to suppress—which also came after speedy trial had run—caused the State to decide to add the second count. (*id.*).

For this claim to be sufficient, the Defendant must show that the proceeding was rendered fundamentally unfair or that the State could not have brought him to trial within the time periods allowed by the speedy trial rule. *Newkirk v. State*, 947 So. 2d 548 (Fla. 4th DCA 2006). The Defendant fails to allege that the State could not have brought him to trial within the recapture period had counsel moved for speedy trial. *See Dexter v. State,* 837 So.2d 595 (Fla. 2d DCA 2003). *Andre v. State*, 16 So.3d 179 (Fla. 4th DCA 2009). However, even had the Defendant claimed that the State could not have brought him to trial within the recapture period; it is clear from his own argument that the State could do so. The Defendant admits that the State could have charged him with the additional crime at any time, as it was "based upon the same events and conduct of which the prosecutor knew already existed at the time of" the arrest. (Motion, p.14).

Given the fact that the State could have amended the Information at any time prior to the running of speedy trial, the Defendant's claim that counsel was ineffective for waiving speedy trial cannot be said to show prejudice. Allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for post-conviction relief. *See Melendez v. State,* 612 So.2d 1366, 1369 (Fla.1992) (holding counsel cannot be deemed ineffective for failing to make meritless argument).

There is a strong presumption that trial counsel's performance was not ineffective. *See Strickland,* 466 U.S. at 690, 104 S.Ct. 2052. "A fair assessment of attorney

performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052.

The Defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy:' " *Id.* (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* In *Occhicone v. State,* 768 So.2d 1037 (Fla.2000), the court explained that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Id.* at 1048.

Here, it is clear from the record and the Defendant's motion that strategic decisions was made and that alternative courses of conduct were considered. Given the facts of the case, especially that the addition of the second charge was in reaction to a tactical win by the Defendant, he cannot show prejudice. The Defendant has failed to prove either prong of *Strickland* and this claim is meritless.

Claim II: Failure to object to a lesser included jury instruction of attempted sexual battery (Motion, pp.14-15).

The Defendant claims that counsel was ineffective for failing to object to jury instructions on *attempted* capital sexual battery by vaginal penetration, because the State's evidence *only showed a completed offense.* The Defendant admits that the evidence at trial was testimony by the victim that he penetrated the victim's vagina with his finger, (citing to Transcript, p.225-227, 229), but claims that the State failed to produce medical, physical, or forensic evidence to corroborate the victim's claims. (Motion, p.14).

The Defendant claims that counsel was ineffective for allowing the Court to instruct the jury on a "permissive" category 2 lesser included crime, "for which there was no

evidence to support," resulting in designation as a sexual predator and 30 years in prison.

The Court adopts and has attached the State's well reasoned response to this claim, with record references, which fully refutes the Defendant's claim. (Response, items 29-42) (Attached as Exhibit 4: Response items 29-42).

The Defendant was facing a mandatory life sentence if convicted as charged, and giving the attempt instruction would allow the jury to "pardon" the Defendant and find him guilty of a lesser crime. "Despite their suspect pedigree, jury pardons have become a recognized part of the system; so much so that, in direct appeals, '[t]he failure to instruct on the next immediate lesser included offense (one step removed) constitutes error that is per se reversible.'" *Reddick v. State*, 394 So. 2d 417, 418 (Fla. 1981). "Such a standard is appropriate on direct review because 'it would be difficult for an appellate court to conclude beyond a reasonable doubt that a jury in a particular case, given the opportunity, would not disobey the law and grant a pardon.'" *Sanders v. State*, 847 So. 2d 504, 507 (Fla. 1st DCA 2003) (quoting *Hill v. State*, 788 So.2d 315, 319 (Fla. 1st DCA 2001). *Sanders v. State*, 946 So.2d 953, 959 (Fla. 2006).

As the Supreme Court has warned, to demonstrate prejudice "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S., at 693. Rather, "the defendant must show that they actually had an adverse effect on the defense." *Id.; Sanders v. State*, 946 So.2d, at 956.

The Defendant has not and cannot show that trial counsel's failure to object to a proper lesser included instruction adversely affected him. Furthermore, even had counsel objected, it is clear that the State could and would have requested the instruction, the request would have been granted, and the objection would have been fruitless.

Allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for post-conviction relief. *See Melendez,* 612 So.2d, at 1369. The Defendant has failed to show either prong of *Strickland* and this claim is

without merit.

Claim III: Failure to object to leg restraints (restated) (Motion pp.15-17).

The Defendant claims that counsel was ineffective for failing to object to his being placed in leg restraints during the trial. He claims counsel never inquired of the Defendant regarding the leg restraints, or asked if they were too tight or a hindrance, or whether the Defendant wanted him to object or request a hearing regarding them. (Motion, p.16, fn6). He claims the jury could hear the restraints when he moved his legs, and that the jury saw the leg restraints when he stepped down from the witness stand. (Motion, p.16, and fn.7). He claims prejudice in that he was more focused on the leg restraints than the trial, and in the jury having heard and seen the restraints which undermined the presumption of innocence. (Motion, p.17).

A defendant cannot be compelled, *over objection*, to stand trial in shackles *unless necessary to prevent an escape, a disturbance, or potential injury. Deck v. Missouri,* 544 U.S. 622, 626-32, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005); *Weaver v. State,* 894 So.2d 178, 193 (Fla.2004). If an objection is made by the defendant, the trial court must state on the record why the restraint is necessary or hold a separate evidentiary hearing. *See Bello v. State,* 547 So.2d 914, 918 (Fla.1989); *Brown v. State,* 856 So.2d 1116, 1117 (Fla. 4th DCA 2003). *Torres v. State*, 9 So.3d 746 (Fla. 4th DCA 2009).

Under *Strickland,* a defendant seeking post conviction relief must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Id.* at 697. To prove prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *See also Hendrix v. State*, 908 So. 2d 412, 425-426 (Fla. 2005) (where the shackles were hidden from the jury, and court made an individual determination defendant was an escape risk, it was not ineffective assistance to fail to object because the objection was unlikely to produce any result).

The Defendant claims that the jury could hear the shackles and that they saw the shackles and that counsel was ineffective for failing to object to their use. The allegation cannot be refuted from the face of the record and a hearing is required.

Claims IV, V, VI, and VII: eliciting, presentation of, failure to object to, and otherwise allowing testimony regarding the victim's statements to others and their comments on her truthfulness(restated)
(*See also* claims IX and XII, below)

The Court adopts and has attached the State's Response to the following four claims, (Attached as Exhibit 5: Response, items 47-80), and finds, as did the State that the four claims are variations on the same issues. However, the Court shall further address the issues. The claims presented are:

Claim IV (Motion, pp.17-18).

The Defendant claims counsel was ineffective for failing to object or request relief, where the prosecution "repeatedly elicited" from the victim "self-serving testimony" that the victim swore to other state witnesses that she was telling the truth. (Motion, p.17). He claims the evidence, detailed in the motion on pp.17-18, was admitted only because defense counsel failed to timely object and failed to move to strike the questions, or request a curative instruction. He claims the prejudice is that the jury "may/would have been inclined to give credence" to the victim's "inconsistent" testimony of sexual abuse. (Motion, p.18).

Claim V (Motion, pp.18-20).

The Defendant claims trial counsel was ineffective for failing to object and request relief, where the prosecution elicited "prejudicial, self-serving hearsay testimony" that the victim stated "to each one of them that she swore she was telling the truth..." (Motion, p.18). The Defendant lists the testimony (Motion, pp.18-20) and claims it was only admitted because counsel failed to object. (Motion, p.19). As in claim IV, the Defendant claims the testimony invaded the province of the jury and impermissibly bolstered the victim's testimony, and the jury "may/would have been inclined to give credence" to the victim's "inconsistent" testimony of sexual abuse. He claims absent the alleged bolstering, the evidence "may/would not have amounted to proof beyond a reasonable doubt." (motion, p.20).

Claim VI (Motion, pp.20-21).

The Defendant claims counsel was ineffective for failing to object and request relief, where the victim's father testified that he took the victim to a psychologist who said "without a doubt" he believed the victim's accusations. (Motion, p.20). The Defendant claims this hearsay would not have been admissible, but for counsel's failure to object, that it improperly invaded the province of the jury, and resulted in a guilty verdict. (Motion, p.21).

Claim VII (Motion, pp.22-23).

The Defendant claims that counsel was ineffective for failing to timely and adequately move to exclude evidence that the victim had been to a counselor / psychologist. (Motion, p.22). He claims that three members of the victim's family testified that she went to a counselor to determine the truthfulness of her allegations against the Defendant, that the testimony had no probative value, and was unduly prejudicial. (Motion, p.22). The Defendant claims that trial counsel knew or should have known from discovery that the victim went to the counselor, not for counseling, but to determine the truthfulness of her accusations, and that failure to object or suppress the evidence was ineffective and prejudicial. (Motion, p.22-23).

The State has responded well, and shown what appears to be a tactical decision to attack the victim's credibility and her version of what happened, through questioning her actual veracity.

A strategic or tactical decision is not a valid basis for an ineffective claim unless a defendant is able to show that no competent trial counsel would have utilized the tactics employed by trial counsel. *See White v. State,* 729 So.2d 909 at 912 [Fla. 1999] (citing *Provenzano v. Singletary,* 148 F.3d 1327, 1332 (11th Cir.1998)). There is a strong presumption that counsel's performance was not deficient. *Strickland.* 466 U.S., at 689.

However, it is error to admit the testimony of a witness that is offered to vouch for the credibility of another witness. *Norris v. State,* 525 So.2d 998 (Fla. 5th DCA 1988); *see also Francis v. State,* 512 So.2d 280 (Fla. 2d DCA 1987)(testimony of expert witness

cannot be used to vouch for credibility of another witness). *Rhue v. State*, 693 So.2d 567, 568 (Fla. 2d DCA 1996). An expert cannot comment on or vouch for a child-victim's credibility. *See Feller v. State,* 637 So.2d 911, 915 (Fla.1994); *State v. Townsend,* 635 So.2d 949, 958 (Fla.1994); *Tingle v. State,* 536 So.2d 202, 205 (Fla.1988). While the *Tingle* court suggested that expert testimony may be helpful to a jury in assessing the veracity of a child sexual abuse victim by " 'generally testifying about a child's ability to separate truth from fantasy,' " the court concluded that "the ultimate conclusion as to the victim's credibility always will rest with the jury. *Cunningham v. State*, 801 So.2d 244, 247 (Fla. 4th DCA 2001).

This case was essentially a swearing match between a child-victim and her accused abuser, with the Defendant's statements *that were not suppressed* weighing heavily against him. That the victim saw a psychologist not for counseling, but to ascertain the truth of her allegations, and testimony that the counselor found her allegations to be truthful appears to be inadmissible.

While the State argues well, it remains unclear from the record that allowing the admission of statements vouching for the victim's credibility without objection was a clear tactical decision, or that the admission was not prejudicial. "A trial court cannot deny a motion for post conviction relief by finding that defense counsel's decision was tactical or trial strategy without first holding an evidentiary hearing ." *Button v. State,* 941 So.2d 531, 533 (Fla. 4th DCA 2006). *Coissy v. State*, 957 So.2d 53 (Fla. 4th DCA 2007); *Evans v. State*, 737 So. 2d 1167, 1168 (Fla. 2d DCA 1999).

As these issues cannot be refuted from the face of the record, a hearing is required.

Claim VIII: Failure to object to testimony regarding child victims blowing allegations out of proportion (Motion, p. 23).

The Defendant claims counsel was ineffective because in cross-examination of

Detective Dennis, he elicited damaging testimony that the defective had only found a handful of children who had ever blown something out of proportion. (Motion, p.23). The detective stated during the interrogation of the Defendant that "a lot of times kids say something that's not true and it gets blown out of proportion." (citing transcript, T-470-471) (Motion, p.23). Then, on cross-examination, counsel's question allowed the detective to clarify the statement, as noted above. The Defendant claims this was ineffective assistance of counsel, and prejudicial.

However, it is noted in his next claim (IX) the Defendant quotes the detective as stating on direct that : "I'd say five max" have ever blown these things out of proportion. (citing transcript, p.374) (Motion, p.24).

The State has responded that this was not error and that the questioning and answer was to the *benefit* of the Defendant. (Response, items 81-86).

The only real defense was that the victim was wrong or lied, and thus the Defendant was not guilty. From trial counsel's argument in closing (Transcript, p.643, ll.10-13), it appears that trial counsel made a tactical decision to not challenge the statements, but rather to use them to the Defendant's benefit. Furthermore, the detective's statement appears to have been to the Defendant's benefit and not prejudicial and the Defendant has not shown that the alleged error had even a conceivable effect on the outcome of the proceeding. Strickland, 466 U.S., at 693.

It is unnecessary to address both prongs if one or the other is not met. *See Atkins v. Dugger*, 541 So. 2d 1165, 1166 (Fla. 1989); *Kennedy v. State*, 547 So. 2d 912, 914 (Fla. 1989) ("A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied."). This claim is denied for lack of prejudice.

Claim IX: testimony bolstering victim credibility (Motion, pp.23-25)
(*See also* claims IV through VII and XII).

The Defendant claims that counsel was ineffective at trial for failing to object and request relief where the prosecution elicited testimony from the detective regarding the credibility and truthfulness of the victim. (Motion, p.23-24). The Defendant claims this testimony would not have been admitted but for counsel's failure to object, and that the defense theory was that the victim's aunt had instigated the allegations. (Motion, p.24).

The Court adopts and has attached the State's response. (Exhibit 6: Response, items 87-93). A strategic or tactical decision is not a valid basis for an ineffective claim unless a defendant is able to show that no competent trial counsel would have utilized the tactics employed by trial counsel. *See White*, 729 So.2d, at 912; *Provenzano*, 148 F.3d, at 1332. However, it is error to admit the testimony of a witness that is offered to vouch for the credibility of another witness. *Norris*, 525 So.2d.

As in Claims IV through VII and XII, it is unclear from the face of the record that the decision not to challenge the testimony regarding the victim's credibility was tactical, or whether it was prejudicial, and a hearing is required on this claim.

Claims X and XI: defense counsel was ineffective by allowing evidence of prior crimes to go before the jury. (restated).

The State has responded to claims ten and eleven as one, as shall the court, since the claims essentially attack the conviction based on claiming erroneous entry of prior crimes or bad acts during the detective's questioning of the Defendant (that was not suppressed).

> **Claim X: firing from job for stealing** (Motion, p.25).
>
> The Defendant claims counsel was ineffective for failing to object or move to strike testimony counsel elicited on cross-examination, that the Defendant had been fired from the Jensen Ale House for stealing. (citing transcript, p.283)(Motion, p.25). The Defendant claims this established the Defendant's propensity for criminal behavior and was prejudicial. (Motion, p.25).

The Defendant is complaining of a single non-responsive answer in cross-examination known to be hostile toward him. The Court adopts and has attached the State's response regarding this issue. (Exhibit 6: Response, items 94-105). The testimony of which the Defendant complains mentions the firing of an alcoholic named Darren for stealing and clearly does not demean the Defendant or accuse him of stealing. (Transcript, p.283, ll.15-20). The Defendant's claim is without merit.

> **Claim XI: *reference to criminal history*** (Motion, pp.25-26).
>
> The Defendant claims counsel was ineffective for failing to move pre-trial, to suppress recorded statements of the Defendant, which were furnished counsel pre-trial and played before the jury, which revealed or inferred that the Defendant had a criminal history. (Motion, p.25). On the tape, the detective told the Defendant not to mention that his attorney "from before" had called, that she had run the Defendant's file and "you've got things," that "I think with your past, taking that into consideration, because it can't be used against you," and that "jail people will tell you, you've gone through this before." (no citations given) (Motion, pp.25-26). The Defendant also was heard to say: "but my past is my past" and "am I going to be able to get bonded out for this?" (Motion, p.26).
>
> The Defendant claims that the statements indicating he had a criminal history or propensity would not have gone before the jury had trial counsel moved for suppression or objected, and that the statements created jury bias and were prejudicial. (Motion, p.26).

The Defendant claims that the detective interviewing him told the Defendant to not mention that his attorney from before had called. He does not explain where in the record this alleged discussion took place, but upon review, the Court found a non-responsive statement by the Defendant:

> ...are you willing to answer my questions now without an attorney present?
>
> (DEFENDANT): Uh-huh.
>
> * * *
>
> Q: So I just want to make sure that he is not mentioned and, uh, that when

we called you, it wasn't because you hired him.

(Defendant): No – no, not at all. No, he is my attorney. A lawyer from before and I was was just, you know.

Q: Okay, that's cool

A: Ask me some questions.
(Transcript, p.406, l.8 through p. 407, l.6).

If there is error in the above statement, it is invited error. However, given the nature of the statement and the circumstances surrounding it, the statement does not appear susceptible to interpretation as commenting on other bad acts or crimes. As the State has argued, the comment only is clarification as to whether or not the Defendant is represented by counsel. (Response, item 106).

The next exchange that the Defendant challenges regards the statement: "Because I ran your file." (Transcript, p.437, l.23). When this statement is taken in context, it appears to be speaking of alcohol problems, problems which the Defendant admitted during not only the interview, but in his taped conversation with his ex-wife. (See Transcript, p. 455, " I do stupid stuff, you know, sexual stuff..." (ll. 14-15)

Given the nature of the comments and the context, and given the Defendant's statements to his ex-wife, the comments are not susceptible to being construed as evidence of prior bad acts or crimes, and this claim is without merit.

Claim XII: Suppression of victim credibility (Motion, pp.26-27).

The Defendant claims counsel was ineffective for failing to move, pre-trial, to suppress recorded statements of the detective which were furnished to counsel pre-trial, and played for the jury at trial. The statements complained of are: that the victim's memory was pretty good; she told details that made the detective believe she was telling the truth; that the detective didn't think the victim's aunt had anything to do with the allegations; that the victim wasn't lying or influenced; and that "...what I'm seeing in your

background and her allegations, maybe you need help." (Motion, pp.26-27). The Defendant claims that counsel was ineffective for failing to move to suppress these statements, and that the evidence was prejudicial. The Defendant does not cite where within the record these statements may be found.

It is error to admit the testimony of a witness that is offered to vouch for the credibility of another witness. *Norris*, 525 So.2d. As in Claims IV through VII and IX, above, it is unclear from the face of the record that the decision not to challenge the testimony regarding the victim's credibility was tactical, or whether it was prejudicial, and a hearing is required on this claim.

Claim XIII: Suppression issue videotape (Motion, pp.27-28)

The Defendant claims that counsel was ineffective for failing to move pre-trial to suppress the hidden video recording of the Defendant talking to his girlfriend. *See Lundberg v. State*, 918 So.2d 444 (Fla. 4th DCA 2006). Here, he claims the error is allowing the jury to see him in handcuffs during his conversation with his girlfriend, which he claims undermined the presumption of innocence and marked him as a dangerous character. (Motion, pp.27-28). (See also claims XIV and XV, below).

The Court adopts and has attached the State's response to this claim. (Exhibit 7: Response, items 110-112). Given the nature of the comments and the circumstances of the video—made after the Defendant had been arrested, the fact that he was in handcuffs was not prejudicial. This claim is without merit.

Claim XIV: Suppression issue, videotape (Motion, pp.28-32).

The Defendant claims counsel was ineffective for failing to move, pre-trial, to suppress the conversation between the Defendant and his girlfriend which was surreptitiously recorded at the jail. (Motion, pp.28). In the tape recorded conversation, the Defendant admits remembering touching the victim when he was drunk. (generally, Motion, pp.20-32, citing Defendant's exhibit A, transcript to interview of 5/2/2002,

pp.96-97)(see also, Motion, p.31, transcript pp.624-627). The appellate court found the fruit of the poisonous tree analysis did not apply. *Lundberg v. State*, 918 So.2d at 445. *See Christopher v. State*, 489 So.2d 22, 24 (Fla. 1986) (a defendant may not submit additional grounds for relief on a piecemeal basis). However, the Defendant has filed an unauthorized motion for rehearing of this issue, in which he points to the *Lundberg* as holding that, because this issue was not directly raised, it was not decided, a point well taken. As the order attacked was *not final*, it is now amended.

At the end of the interview, the Defendant *requested* to see his girlfriend/ex-wife and was allowed to do so, but told he must remain in handcuffs. (Transcript, pp. 92-96). The Defendant claims he had a legitimate belief that his conversation with his girlfriend was private, based upon the detective telling them that she was leaving the room "to give you all privacy." (Transcript, p.96, ll. 5-6).

"A citizen's right to privacy ... is determined by a two prong test: 1) whether the citizen had a subjective expectation of privacy; and 2) whether that expectation was one that society recognizes as reasonable." *Williams v.* State, 982 So.2d 1190, 1194 (Fla. 4th DCA 2008) (citing *State v. Smith,* 641 So.2d 849, 851 (Fla.1994)). *See also Springle v. State,* 613 So.2d 65 (Fla. 4th DCA 1993). *Boyer v. State*, 736 So.2d 64, 66 (Fla. 4th DCA 1999).

It has long been held that inmates do not have a reasonable expectation of privacy in jail. *See Lanza v. New York,* 370 U.S. 139 (1962); *see also Allen v. State,* 636 So.2d 494, 496-97 (Fla.1994). Therefore, most conversations and confessions in a police interrogation room are admissible as evidence. *See Pestano v. State,* 980 So.2d 1200, 1202 (Fla. 3d DCA 2008) (citing *Larzelere v. State,* 676 So.2d 394 (Fla.1996)). However, when law enforcement deliberately fosters an expectation of privacy, especially for the purpose of circumventing a defendant's right to counsel, subsequent jailhouse conversations and confessions are inadmissible. *Allen,* 636 So.2d at 497. *Cox v. State,*

26 So.3d 666 (Fla. 4th DCA 2010).

State v. Calhoun, 479 So.2d 241 (Fla. 4th DCA 1985), mentioned in *Lundberg* and relied upon by the Defendant is not applicable to the facts of this case. The Defendant in *Calhoun* had invoked his *Miranda* rights and was speaking with his co-defendant after police deliberately fostered an expectancy of privacy in the inmates' conversations.

The Defendant in this case had waived his *Miranda* rights and was speaking with his girlfriend/ex-wife. The Defendant's girlfriend was not a co-defendant and was not speaking to him on request of law enforcement; she was not placed with him to induce a confession, but was there solely at the Defendant's request.

Even if the Defendant had *not* voluntarily relinquished his right to remain silent, that fact alone need not lead to a conclusion that he had a reasonable expectation of privacy. In *Larzelere v. State,* 676 So.2d 394 (Fla.1996), the defendant had invoked her right to remain silent and right to counsel; nonetheless, the supreme court held that police recording of her jailhouse conversation with her son was not improper because the police had not fostered a reasonable expectation of privacy. *See also State v. McAdams,* 559 So.2d 601 (Fla. 5th DCA 1990)(defendants had no expectation of privacy in conversation held in backseat of police cruiser despite exercise of right to remain silent). *Boyer*, 736 So.2d, at 67.

Here, even though the detective mentioned giving the Defendant "privacy," the Defendant was well-aware that his previous conversations in the interview room had been recorded, thus his expectancy of "privacy" was not reasonable. Furthermore, in this case as in *Allen*, the surreptitious taping of the conversation was not employed to circumvent the exercise of the Defendant's right to remain silent, which he had voluntarily relinquished during the interview with the detective. *Boyer*, 736 So.2d, at 66.

This case meets the two prong test enunciated in *Smith,* as the Defendant clearly had no subjective expectation of privacy; nor would the law afford him, as an arrestee, an

expectation of privacy as to conversations in the interview room where he had just confessed, knowing the interview was being tape recorded, and where the police had done nothing improper to induce such an expectation. *See Allen; Johnson v. State*, 730 So.2d 368, 369-70 (Fla. 5th DCA 1999) (defendant and wife did not have reasonable expectation of privacy in conversation in police interview room).

The Defendant's allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for post-conviction relief. *See Melendez v. State*, 612 So.2d 1366, 1369 (Fla.1992) (holding counsel cannot be deemed ineffective for failing to make meritless argument); *Teffeteller v. Dugger*, 734 So.2d 1009, 1023 (Fla.1999) ("Trial counsel cannot be deemed ineffective for failing to raise meritless claims or claims that had no reasonable probability of affecting the outcome of the proceeding.").

The Defendant has failed to prove either prong of *Strickland* and this claim is without merit and is denied.

Claim XV: Suppression issue, *Miranda* (Motion pp.33-34).

The Defendant claims trial counsel was ineffective for failing to move to suppress all audio and videotaped statements made by the Defendant to the detective or by the Defendant to his girlfriend, which were furnished to counsel before trial, and played for the jury. (Motion, p.33). The Defendant claims that the *Miranda* warnings given him were defective, in that it failed to inform the Defendant that he had the right to counsel to be present *during* the interview. (Motion, p.33). The Defendant claims that had he known that he could have an attorney present during the interview, he would not have spoken to anyone without an attorney present. (Motion, p.33). At trial, the tapes were played, which the Defendant claims revealed or suggested the Defendant had a criminal history, supported the victim's allegations, and in which the Defendant incriminated himself. (Motion, p.33). The Defendant claims that the evidence would have been suppressed had

counsel objected, and it was prejudicial.

Miranda v. Arizona, 384 U.S. 436 (1966) prescribed the following four now-familiar warnings:

> "[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."

Id., at 479, 86.

Miranda's third warning—the only one at issue here—addresses our particular concern that "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege [to remain silent] by his interrogators." *Id.*, at 469. Responsive to that concern, the Supreme court stated, as "an absolute prerequisite to interrogation," that an individual held for questioning "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." *Id.*, at 471. The only question is whether the warnings the Defendant received satisfied this requirement. *Florida v. Powell*, 559 U.S. ____, 130 S. Ct. 1195 (2010).

A review of the warnings given the Defendant indicates he was informed of the right to have counsel present at the time of questioning and that he could stop the questioning at any time and speak with an attorney. These warnings were sufficient to properly advise the Defendant of his rights. *Canete v. State*, 921 So.2d 687 (Fla. 4th DCA 2006). *Williams v. State*, 998 So.2d 650, 651(Fla. 4th DCA 2008).

Furthermore, any doubt that the Defendant knew of and waived his right to have an attorney present during the interview is refuted by the Defendant's statements found in the suppressed part of his confession. (Exhibit 8: Statement, p.69, ll.2-4 (from the State's Response, exhibit 1).

The *Miranda* warnings given were sufficient and the Defendant's claim is wholly without merit.

Claim XVI A, B, C and XVII: The Defendant challenges the tapes on predicate and admission grounds (Motion pp.34-41).

The Defendant claims that counsel was ineffective for failing to move to suppress the videotape (State's trial evidence item "ZB") of the Defendant's May 2, 2002 interview with detective Dennis, and all other tapes, for the following reasons.

XVI- A: the prosecution failed to establish the required predicates necessary to authenticate videotape "ZB" before it was entered into evidence.

The Defendant claims that the State did not establish that the operator of the recording equipment was competent, and that the detective was incompetent as an operator of the equipment, as shown by the audiotape player being stopped and started during the interview. (Motion, p.34). He claims further, that the detective mishandled the equipment and forgot to record specific portions of the interview. (Motion, p.35, and fn.16). He claims further that the State had failed to show that the equipment functioned accurately, where the operator was incompetent to operate it. (Motion, p.35). He claims that the State failed to establish that the tape had not been materially altered, and claims that the tape was materially altered. (Motion, p.35). He claims at the suppression hearing, "flashes/splices" appeared on the TV screen, and that trial counsel did not challenge it, because it would make "the police look like liars," based on the altered tapes. (Motion, p.36). The Defendant claims the State's trial exhibit "ZB" was a copy of the interview, which was not previewed, and that the detective had previewed another copy depicting the entire interview. (Motion, p.35). The Defendant claims that while the detective claimed in the tape recorded statements, that the Defendant admitted to penetration of the victim, (Motion p.35), but that the admission is not found on the tapes. (Motion p.36). He claims the tape was altered so much that his admissions which the detective testified to, were removed. (Motion, p.37).

Based on the above, the Defendant claims that the detective was unable to truthfully testify that the tape was an "actual depiction representing the entire May 2, 2002: interview, nor could she testify it was not materially altered. (Motion, p.37).

He claims counsel was ineffective for not challenging the tape and

that it would have been suppressed had counsel not been ineffective.

XVI – B: The state failed to establish a chain of custody for all taped evidence. (Motion, pp. 37-40).

The Defendant claims that, in addition to the above, Detective Dennis told of comparing the videotape with the transcribed audiotape and that the transcript was accurate. (Motion, p.37). The Defendant claims there is a 24 page difference between the transcripts comparing the videotape and audiotape, and thus one or both were not authentic, and that the State or "an agent thereof" edited, spliced, or otherwise tampered with videotape "ZB." (Motion, p.38). The Defendant claims that based on the differences in the audio and video tapes, counsel should have moved to suppress due to tampering and lack of custody, and that counsel was aware of the lack of a chain of custody, but failed to so move. (Motion, p.39). The Defendant claims that the errors indicate more than a mere probability of tampering, and render the tapes inaccurate, such that they would have been suppressed. (Motion, pp.39-40).

XVI – C Counsel was ineffective for failing to investigate apparent gaps / tampering of videotape "ZB" and stopping and starting of the audiotape (Motion, pp.40-41)

In a continuation of the above two sub-claims, the Defendant claims counsel was ineffective for failing to investigate the alleged tampering with the video and audio tapes. (Motion, p.40). He claims that had counsel brought the above claimed problems to the Court's attention, that the tapes would have been examined by an expert and that the expert would have determined the tapes were tampered/spliced/ stopped and started, (Motion, p.40), and therefore inaccurate. The Defendant argues: "Although successful in part, counsel had the means and legal support to suppress <u>all</u> taped statements made by Defendant Lundberg at the police station on May 2, 2002..." He claims that counsel's failure allowed incrimination evidence to go before the jury which could have been suppressed, and as such, counsel's failure was prejudicial.

Claim XVII (Motion, pp.41-43).

The Defendant claims counsel was ineffective for failing to object in response to the admonition given the jury regarding blank spots on the videotape (Motion, p.41). The State played tapes for the jury which had blank spots on them, where portions were edited out. (Motion, p.42). The

Defendant claims that the words used by the judge (Motion, p. 42, citing Transcript p. 402), were comments on the evidence giving the judge's opinion of the weight of the evidence, and that the failure of counsel to object was prejudicial. (Motion, pp. 42-43).

The Court adopts and has attached the State's response, (*See* Exhibit 9: Response, items 149-167), in addition to the following findings and law.

The detective who interviewed the Defendant testified that the tape recordings of both her conversation with the Defendant, and the Defendant's conversation with his girlfriend/ex-wife were accurately reflected on the tapes. (Transcript, p. 387, l.5, through p. 388, l.5). Trial counsel had reviewed the tapes and the redaction of objectionable items from the tapes was discussed in open court. (Transcript, pp.393-401).

(PROSECUTOR): ...it's very obvious that the tape has been edited and there's going to be some spots where it's blank and there's a loud noise. (Transcript, p.401, ll.2-4).

The fact that the tape was edited was obvious, open, discussed, and the redaction of objectionable parts was to the Defendant's benefit. The Court admitted the tapes after authentication. (Transcript, p.401, ll.23-25).

The Court properly instructed the jury that it was to disregard the editing:

THE COURT: I do want to mention though that you'll see when you look at the tapes, there are, if you will, blank spots. There are some things that have been edited out that are not relevant to your consideration of the case, so you need not be concerned if there are, if you will, blank spots. What you are concerned with is what is on the tape for your viewing. (Transcript, p.402, ll.19-25).

Here the tape recording was authenticated and was therefore properly admitted. The laying of the predicate requires "evidence sufficient to support a finding that the matter in question is what its proponent claims." Sect. 90.901, Fla. Statutes. The test for authentication under the code is whether the evidence is "sufficient to support a finding

that the matter in question is what its proponent claims." Sect. 90.901, Fla. Statutes. Further, in determining whether the evidence is sufficient for this purpose "the trial judge must evaluate each instance on its own merits, there being no specific list of requirements for such a determination." *Justus v. State,* 438 So.2d 358, 365 (Fla.1983). *Allen v. State,* 492 So.2d 802, 803 (Fla. 1st DCA 1986).

To the extent that the Defendant is alleging prosecutorial misconduct or trial court error in the admission of the tapes, this claim is not cognizable in a collateral post conviction motion. *See Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983) ("Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack.").

As shown above, the tapes were properly authenticated and admitted into evidence with proper instruction to the jury. Allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for post conviction relief. *See Melendez v. State,* 612 So.2d 1366, 1369 (Fla.1992) (holding counsel cannot be deemed ineffective for failing to make meritless argument); *Teffeteller v. Dugger,* 734 So.2d 1009, 1023 (Fla.1999) ("Trial counsel cannot be deemed ineffective for failing to raise meritless claims or claims that had no reasonable probability of affecting the outcome of the proceeding.").

The defendant has failed to prove either prong of *Strickland* and these claims are without merit and are denied.

Claim XVIII: challenge to Information and date of crime based on hurricane date (Motion pp.43-44) (*See also* claim XXII, below)

The Defendant claims counsel was ineffective for failing to request the Court take judicial notice that Hurricane Floyd and its evacuation occurred September 14-15, 1999, and no hurricanes affected Florida in 2000-2002. (Motion, p.43). He claims this is error, because count II was alleged to have occurred during on an evacuation due to a

hurricane, which the victims thought, was Floyd. (Motion, p.43). The Defendant claims counsel was ineffective for failing to move for acquittal on count II, as it alleged the offense had occurred between August 1, 2001 and December 31, 2001. (Motion, p.43).

The Defendant testified that Hurricane Floyd occurred in 1998 or 1999 and that he was living in Hillmoor at the time. (Transcript, pp. 516-517)

The Defendant claims further, that the crime charged in count II, was not properly charged and was not a crime if it occurred during Hurricane Floyd, in September 14-15, 1999, as sect. 800.04(5)(b), Fla. Stat. did not become effective until October 1, 1999. (Motion, p.43). The Defendant claims that had counsel raised this issue, the Defendant would have been granted a Judgment of Acquittal (JOA). (Motion, pp.43-44). He claims also, raising this issue would have countered the State's assertion that, although a variance occurred in the dates, there was no prejudice. (Motion, p.44). (See also, claim XXII).

The Defendant claims that but for this alleged ineffectiveness, counsel would have succeeded in moving for a JOA on count II, and the Defendant would not have been convicted and received the 15 year consecutive sentence imposed. (Motion, p.44).

The Court adopts and has attached the State's response to this issue. (Exhibit 9: Response, items 168-203). The Defendant's conduct was illegal before and after the change in statutes—thus the act would have been criminal if committed during either hurricane, Floyd or Irene. *See sect.* 800.05(5) Fla. Statutes, 1998; *See sect.* 800.05(5) Fla. Statutes, 1999.

Trial counsel moved for judgment of acquittal on count two, arguing that:

> ...the testimony from everyone, including Detective Dennis, is that the second incident occurred during a hurricane back in 1998 or 1999. The child testified I was five. Well, if you believe what Detective Dennis and the rest of them had to say about it, (indiscernible) late nineties – '98 – '99, back when she was either five or six years old. as far as the time period itself, it could not possibly have occurred during the time period that's set forth in

the Information.
(Transcript, p.504, ll.9-11; renewed p. 630).

The State has responded that the variance in time did not prejudice the Defendant, that it was clearly within the statute of limitation, and act clearly occurred prior to the Information. (Transcript, p.506, ll.1-10).

Trial counsel noted that after winning the motion to suppress, counsel requested a statement of particulars, which was granted, and stated that the incident "occurred during the hurricane," but that the Information was not amended to reflect the time period. (Transcript, p.507, ll.1-10).

The State responded that, indeed, the only time frame they could relate, was during *a hurricane*, and they did not know when that particular hurricane occurred. (Transcript, p.507, ll.11-19).

The Court ruled that the only time there is a requirement that the State must prove a particular time or date is if there is an actual statement of particulars that limits the State. (Transcript, p.508, ll.3-11).

Given the above, this issue was raised at trial and preserved, could have and should have been raised on appeal, and is not cognizable on post conviction. *See Smith*, 445 So. 2d, at 325 ("Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack.").

Even if there was ambiguity in the date, the court still correctly denied the motion. As the supreme court has explained:

[T]ime is not ordinarily a substantive part of an ... information and there may be a variance between the dates proved at trial and those alleged in the ... information as long as: (1) the crime was committed before the return date of the indictment; (2) the crime was committed within the applicable statute of limitations; and (3) the defendant has been neither surprised nor hampered in preparing his defense. *Tingley v. State*, 549 So.2d 649,

651 (Fla. 1989). *McGee v. State*, 19 So.3d 1074, 1077 (Fla. 4th DCA 2009).

Any failure of proof was merely a technical variance between the allegations and the proof, which did not negate the fact that the Defendant committed the act; there was evidence tending to show approximately when the incident occurred, and the Defendant was neither surprised nor hampered in his defense. *See Corderre v. State,* 883 So.2d 385 (Fla. 4th DCA 2004); *Magee*, 19 So.3d, at 1077.

The Defendant also claims that his is a special case, because Hurricane Floyd occurred prior to the statute under which he was charged. However, neither the charging document nor the State argued that the crime occurred during Hurricane Floyd, only during a hurricane in 1998-1999.

The State has presented evidence that Hurricane Floyd did not strike St. Lucie County when it arrived off of the coast September 7-17, 1999. However, as the State has shown, there was another hurricane that year, Hurricane Irene, which did make landfall, and the eye of which passed over St. Lucie County—and that Hurricane Irene occurred October 13-19, 1999, after the new statute became effective. (Exhibit 9: Response, items 168-203) (*See also* Exhibit 10: NOAA storm tracks, hurricanes Floyd and Irene, 1999).

The Defendant pins his claim on the date of Hurricane Floyd, and the fact that a witness mentioned that name. However, a close review of the transcript indicates that the hurricane discussed was not Floyd, but rather Irene:

> Q: Do you remember a time when there was a hurricane supposed to be coming through St. Lucie County?
>
> (VICTIM'S FATHER): It was so long ago, I don't remember the exact date or time. I know there was a hurricane. I don't know if it was Hurricane Floyd that was threatening St. Lucie.

(Transcript, p.305, ll.6-10).

On the next page, the witness spoke of hanging out wondering if the storm would get worse and his conversation with a maintenance man who indicated if the wind were to

go over 70 miles an hour he was leaving. (Transcript, p.305, ll.9-18). There is no identification of the hurricane, nor does this testimony support the Defendant's claim of an evacuation.

Hurricane Floyd was next mentioned on transcript page 326, where the Prosecutor referenced the witness' testimony above: "...the evening of the hurricane, I believe you said you thought it was – was Floyd..." (Transcript, p.326, ll.21-23). Again, this does not support the claim that the hurricane in question *was* hurricane Floyd, but that the witness had testified that they *thought* it had been Floyd.

The next place the Defendant claims proves it was hurricane Floyd that was occurring is allegedly found on pages 351-353. However, a review of those pages must be considered in context of the surrounding testimony:

> Q: Did you learn that one occasion happened at a time when there was a hurricane supposedly coming through St. Lucie County?
>
> (VICTIM'S MOTHER): Yes.
>
> Q: Do you remember that particular time?
>
> A: I remember some – some of it.

(Transcript, p.348, ll.15-20).

The witness continued by narrating how her husband had gone to work, it was "raining really, really hard," she was scared to be alone with the kids, the Defendant came over, and they were lighting candles because the lights had gone out. (Transcript, p.348, l.24 through p.349, l.10). She continued:

> Before the lights went out, the TV was on, we were watching TV, we were talking about the hurricane, we had the weather channel on and we were tracking – because I guess the eye was supposed to hit West Palm first.

(Transcript, p.349, ll.20-23).

The witness told how a maintenance man had indicated that the apartment might

not be safe—he was leaving, and that they were using candles and talking with the neighbors. (Transcript, p.349, l.24 through p. 350, l.15). The story continued:

> I had talked to George once on the phone and he was saying they have bad winds in Stuart and it was really bad. Uh, so I have – it had to be sometime after midnight.
>
> Q: Do you remember when this was as far as the date –
>
> A: No.
>
> Q: Or the month or the year. Do you know how old the children were when this was occurring?
>
> A: No...I don't remember a date.

(Transcript, p.351, ll.4-15).

The witness told where the storm was the following morning when they awakened:

> ...the eye was supposed to be in Port St. Lucie, it was supposed to hit Port St. Lucie and all the neighbors were leaving, so we talked about leaving that day. We moved all the furniture into the living room and we left.

(Transcript, p.353, ll.14-17).

The Defendant would have the Court find that the incident occurred during Hurricane Floyd during an evacuation. The Defendant relies upon an excerpt from a publication called the Florida Almanac, 2004-2005, which apparently provides an *overview of the highlights* of the season's weather. The Almanac may or may not be correct, but it is not published by a recognized government agency, nor does the Almanac or the Defendant indicate upon what the documentation is based.

The Defendant also relies upon testimony which does not support his conclusions—the witnesses were clear that they did not know for sure it was hurricane "Floyd," only that the incident occurred in "a hurricane," a hurricane in which the eye passed over land near St. Lucie County.

The Court takes judicial notice of the data and documentation from the National Oceanographic and Atmospheric Administration (NOAA), a federal agency with a stellar reputation for recording what *has* happened, if not always 100% accurate as to what is about to happen, in the nation's weather. NOAA records indicate that Hurricane Floyd passed parallel to, and well off of, the coast of Florida and did not pass over St. Lucie County. However, NOAA records also indicate that Hurricane Irene passed *through* northern Palm Beach County on its way across the state and tracking maps indicate the eye passed offshore just south of Stuart—just south of St. Lucie County.

The Court has considered the testimony at trial, and compared it with the storm histories of both Hurricane Floyd and Hurricane Irene. (State's Response exhibits 16 & 17) (Exhibit 10: NOAA diagrams). The Court finds that, based on the comparison of the testimony to the storms records; the hurricane discussed at trial was Hurricane Irene, not Hurricane Floyd.

Hurricane Irene struck the Port St. Lucie area between October 13 and October 19, 1999. Thus, the Defendant's claim factually fails as Hurricane Irene struck St. Lucie County after the implementation of the later statute during which the crime could have been committed. (*See also* claim XXII, below).

The Defendant's claim is without merit.

Claim XIX: Parental alienation syndrome defense (Motion, pp.44-45).

The Defendant claims that trial counsel was ineffective for failing to investigate and call a child psychologist who "could/would" explained to the jury "parental alienation syndrome" and that the victim's aunt convinced the victim that the Defendant "was a jerk and thereby secured the victim's alliance" whereby the aunt intentionally or accidentally perpetuated a false memory of sexual abuse. (Motion, pp.44-45). The Defendant claims the only reason such testimony was not presented, was that trial counsel failed to investigate, consult with, and call an expert, familiar and well versed in parental alienation

syndrome. (Motion, p.45). He claims this would have changed the outcome of the case.

While failure to obtain an expert is a facially sufficient claim, the defendant must allege the proposed testimony and possibly attempt to obtain or at least name an expert who could have appeared. *Bryant v.* State, 901 So.2d 810 (Fla. 2005); *Nelson v. State*, 875 So.2d 579, 583 (Fla. 2004) (holding that a 3.851 claim of ineffective assistance was legally insufficient where the motion did not allege the specific facts to which the witness would testify and how the lack of testimony prejudiced the case). *See also Nelson v. State,* 875 So.2d 579, 583 (Fla.2004).

Parental alienation syndrome (PAS) is defined as a systematic programmed alienation of a child from one **parent** brought upon by the other **parent**. *Ellis v. Ellis*, 952 So.2d 982, 992 (Miss. 2006). PAS as a diagnosable disorder is considered controversial, and PAS testimony has been criticized as lacking an adequate scientific basis for admissibility. Jennifer Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, 26 Children's Legal Rts. J. 1 (2006)(noting that "science, law, and policy all support PAS's present and future inadmissibility.") *Palazzolo v. Mire*, 10 So.3d 748, 743 (La. 4 Cir. 2009). Many jurisdictions reject the admissibility of PAS evidence. See, *e.g., Wiederholt v. Fischer,* 169 Wis.2d 524, 485 N.W.2d 442 (App.1992); *Hanson v. Spolnik,* 685 N.E.2d 71, 84 (Ind.App.1997) (Chezem, J., concurring); *People v. Loomis,* 172 Misc.2d 265, 658 N.Y.S.2d 787 (1997). *People v. Fortin,* 184 Misc.2d 10, 14, 706 N.Y.S.2d 611, 613 (2000).

The Defendant claims the only reason PAS testimony was not admitted was because counsel failed to investigate the defense. However, the main reason that this claim must fail is that PAS does not apply. The Defendant is not the victim's parent, and neither is the person he complains about, the victim's "Aunt Lilly."

Counsel was not ineffective, and this claim is wholly without merit.

Claim XX: Failure to object to Prosecutor's argument (Motion, p. 46).

The Defendant claims counsel was ineffective for failing to object to the Prosecutor's closing argument, which he claims asked the jurors to place themselves in the shoes of the victim. (Motion, p.46)(argument reproduced, citing to transcript, p. 637 and 668).

The comments cited by the Defendant do not ask the jury to place themselves in the shoes of the victim, but are comments reasonably supported by the evidence relating to veracity and thus, not objectionable. There is no prejudice. *See Gordon v. State*, 863 So.2d 1215, 1220 (Fla. 2003).

Allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for post-conviction relief. *See Melendez v. State,* 612 So.2d 1366, 1369 (Fla.1992) (holding counsel cannot be deemed ineffective for failing to make meritless argument); *Teffeteller v. Dugger,* 734 So.2d 1009, 1023 (Fla.1999) ("Trial counsel cannot be deemed ineffective for failing to raise meritless claims or claims that had no reasonable probability of affecting the outcome of the proceeding.").

The Defendant has failed to prove either prong of *Strickland* and this claim is without merit and is denied.

Claim XXI: claim of tampering with tapes (Motion, pp.47-51).

The Defendant returns to the subject of the tape recordings and here claims counsel was ineffective for failing to make contemporaneous objections to the State's violation of the Court's suppression orders regarding the spliced "*suppressed*" videotaped evidence. (Motion, p.47). The Defendant claims that the State spliced parts of the videotape *which had been suppressed* together with unsuppressed information in the tape was played for the jury, in such a way as to avoid the Court's order of suppression. (Motion, pp.48-49). The Defendant claims, in this manner, the State intentionally presented suppressed evidence to the jury, that trial counsel failed to timely object and thus failed to put the Court on notice, that suppressed material was being presented.

(Motion, p.49-51).

The Court adopts and has attached the State's Response, items 217-220. The Defendant has failed to show error, and if error, has failed to show prejudice. This claim is without merit.

Claim XXII: Lack of jurisdiction based on hurricane date (Motion, pp.51-54) (*See also* claim XVIII, above)

The Defendant claims that trial counsel was ineffective for failing to timely and adequately challenge the Court's jurisdiction in count II, and claims jurisdiction was fraudulently invoked. (Motion, p.51).

The Defendant claims that the charges regarding count 2 occurred in 1999, during Hurricane Floyd, and that the families did not live in St. Lucie County at that time, but in West Palm Beach, (Motion, p.51), and that the prosecutor knew the family did not live in St. Lucie County on the dates alleged in count II. (Motion, p.52). He claims further that the crime charged in count II, was based on a statute not enacted until after September 14-15, 1999, the date of Hurricane Floyd. (Motion, p.52-53). (See also, claim XVIII)

The Defendant claims that counsel knew the family lived in West Palm Beach, not St. Lucie County during the time of count II, and established same at trial, but did not follow through and move to have the charge dismissed on jurisdiction. (Motion, p.53). He claims that counsel also knew that sect. 800.04(5)(b) Fla. Stat. 1999 was not enacted at the time of the offense, but did not follow through and move to have the charge dismissed. (Motion, p.53).

The Defendant claims counsel was ineffective, and that the State Attorney committed fraud in swearing an Information which he claims she knew was not true, and that but for these errors he could not have been convicted of count II. (Motion, p.54).

The Court adopts its findings in claim XVII, above. The State did not charge the incident occurred during Hurricane Floyd, and alleged only that it occurred *during a*

hurricane. The incident in count 2 did not occur during Hurricane Floyd, but rather during the later hurricane, Irene, at which time the statute under which the Defendant was charged and convicted was effective, and the evidence supports a conviction based on the Information.

Allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for post-conviction relief. *See Melendez v. State*, 612 So.2d 1366, 1369 (Fla.1992) (holding counsel cannot be deemed ineffective for failing to make meritless argument); *Teffeteller v. Dugger*, 734 So.2d 1009, 1023 (Fla.1999) ("Trial counsel cannot be deemed ineffective for failing to raise meritless claims or claims that had no reasonable probability of affecting the outcome of the proceeding.").

The defendant has failed to prove either prong of *Strickland* and this claim is without merit and is denied.

Claim XXIII (Motion, pp.54-55).

The Defendant claims all errors complained of are cumulative and must be considered cumulatively. (Motion, pp.54-55). To the extent there may be errors, it cannot be said they are cumulative to the point of being prejudicial. However, this claim may be addressed after the hearing on the above claims which could not be refuted by the record or were not found meritless.

Upon review of the Motion, Response, and record, the Court finds that issues remain unresolved which require a hearing. Therefore it is ORDERED:

1) That claims I; II; VIII; X; XI; XIII; XIV; XV; XVI-A,B,&C; XVII; XVIII, XIX, XX, XXI, and XXII are DENIED for the reasons stated;

2) That the Defendant's claim III (shackles); and claims IV; V, VI, VII; IX; XII (bolstering witness credibility); and XXIII (cumulative error) remain unresolved, to the extent that a hearing is GRANTED;

3) That the Defendant's motion is set for a status hearing on

May 14, 2010, at 3:15 a.m./p.m in Courtroom "B" of the Saint Lucie Courthouse, 218 South Second Street, Fort Pierce, Florida. (Time reserved: 15 mins);

4) The **Office of the State Attorney** shall contact the defendant's place of incarceration and shall arrange for the defendant to appear telephonically at the time of the status hearing, and shall provide the contact number to the court at the hearing;

5) That the Office of the Public Defender of the Nineteenth Judicial Circuit is temporarily appointed to represent the Defendant on this motion. **Appointment of conflict or alternate counsel will be addressed at the status hearing, if necessary.**

THIS IS A NON-FINAL, NON-APPEALABLE ORDER. The Court will enter a final order after the evidentiary hearing.

DONE AND ORDERED in Chambers in Fort Pierce, St. Lucie County, Florida on April 19, 2010.

WILLIAM L. ROBY
CIRCUIT COURT JUDGE

2010 APR 20 AM 10:58
ST. LUCIE COUNTY
CLERK OF CIRCUIT COURT

696

Certificate of Service

I hereby certify that a true copy of the foregoing order and any attachments have been provided by U.S. Mail or courthouse mail to the following addresses this 20th day of April, 2010.

Robert Lundberg, pro se
DOC# K65107
Mayo Correctional Institution
8784 US Highway 27 West
Mayo, Florida 32066-3458

Bruce Harrison, Esq.
Office of the State Attorney
via Courthouse mail

Office of the Public Defender
Via Courthouse mail

EDWIN M. FRY, JR.
CLERK OF THE COURT

By: Linda G. Deen
Deputy Clerk

Direct File Count 2-Issue Capias
IN THE CIRCUIT COURT for the Nineteenth Judicial Circuit of the State of Florida,
for St. Lucie County

STATE OF FLORIDA	)	
	)	
-VS-	)	
	)	Case No. 02-1597-CF
Robert T. Lundberg	)	
DOB: 12/15/1972	)	
RACE/SEX: White/Male	)	
SSN: 138-70-0275	)	
Defendant	)	

AMENDED INFORMATION

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:
BE IT REMEMBERED that BRUCE H. COLTON, State Attorney for the Nineteenth Judicial Circuit of the State of Florida, prosecuting for the State of Florida, in St. Lucie County, under oath, information makes that in St. Lucie County on or about:

Ct. 1. SEXUAL BATTERY-ON A CHILD UNDER 12 BY PERPETRATOR 18 OR OLDER
Between October 01, 2001 through December 31, 2001, Robert T. Lundberg did unlawfully, being 18 years or older, commit sexual battery upon, or injure the sexual organs of, in an attempt to commit sexual battery upon, V.C., a person less than 12 years of age, in violation of Florida Statute 794.011(2);

Ct. 2. LEWD OR LASCIVIOUS MOLESTATION-OFFENDER OVER 18, VICTIM UNDER 12
Between August 1, 2001 and December 31, 2001, Robert T. Lundberg did, being 18 years of age or older, intentionally touch in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of V.C. a person less than 12 years of age, or did force or entice V.C. to so touch the defendant, in violation of Florida Statute 800.04(5)(b);

contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Florida.

I do hereby state that I am instituting this prosecution in good faith.

Kathryn M. Nelson
Kathryn M. Nelson
Assistant State Attorney for the
Nineteenth Judicial Circuit of
Florida, prosecuting for said State
Fla. Bar No. 402478

FILED IN OPEN COURT
CLERK OF CIRCUIT COURT
ST. LUCIE COUNTY, FLA.
2003 APR 29 AM 11:00

JOANNE HOLMAN
CLERK CIRCUIT COURT
ST. LUCIE COUNTY, FLA.
2003 AUG 1 AM 11:07

STATE OF FLORIDA
County of St. Lucie

Personally appeared before me Kathryn M. Nelson, Assistant State Attorney for the Nineteenth Judicial Circuit of the State of Florida, who being first duly sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to by the material witnesses as true and which, if true, would constitute the offense(es) therein charged.

The foregoing instrument was acknowledged before me on this 1st day of ~~July~~ August, by Kathryn M. Nelson, who is personally known to me and who did take an oath.

Tiauna M Wood
Notary Public Tiauna M. Wood
MY COMMISSION # DD179397 EXPIRES
March 22, 2007
...INSURANCE, INC.

Exh: 1

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

STATE OF FLORIDA	)	Case No. 02-1597-CFA
	)	
-VS-	)	SUPPLEMENTAL ANSWER TO
	)	DEMAND FOR DISCOVERY
Robert T. Lundberg	)	
Defendant	)	

COMES NOW the State of Florida, by and through it's undersigned State Attorney and files this Supplemental Discovery Exhibit pursuant to Fla. R. Crim. P. 3.220(f) :

STATEMENT OF PARTICULARS

As to Count 2- The defendant touched the victims' vaginal area with his finger. The victim previously associated this event with a hurricane (In a statement to Detective Dennis).

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to Jack R. Frizzell, Attorney for the Defendant, on this 23rd day of September, 2003.

RESPECTFULLY SUBMITTED,
BRUCE H. COLTON, State Attorney

BY: Kathryn M. Nelson
Kathryn M. Nelson
Assistant State Attorney
Florida Bar Number 402478
411 S. 2nd. St.
Ft. Pierce, FL 34950
(772) 465-3000

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

STATE OF FLORIDA)
) Case No. 02-1597-CFA
-VS-)
)
Robert T. Lundberg)
Defendant)

JOANNE HOLMAN
CLERK OF CIRCUIT COURT
ST. LUCIE COUNTY, FL
2003 DEC 5 PM 10 21

2000 APR 20 AM 11:00
ST. LUCIE COUNTY
CLERK OF CIRCUIT COURT

EDWIN M. FRY, JR.
CLERK OF CIRCUIT COURT
ST. LUCIE COUNTY, FL.
2003 DEC -3 PM 12:34

V E R D I C T

WE, the Jury, find the Defendant, Robert T. Lundberg, as to Count I:
(select only one)

( ) Guilty of Sexual Battery on a Child Under 12 By Perpetrator 18 or Older, as charged in the Information

(✓) Guilty of Attempted Sexual Battery on a Child Under 12 By Perpetrator 18 or Older, a lesser included offense

( ) Guilty of Battery, a lesser included offense

( ) Guilty of Committing an Unnatural and Lascivious Act, a lesser included offense

( ) Not Guilty

As to Count II:
(select only one)

(✓) Guilty of Lewd or Lascivious Molestation-Offender Over 18, Victim Under 12, as charged in the Information

( ) Guilty of Battery, a lesser included offense

( ) Guilty of Committing an Unnatural and Lascivious Act, a lesser included offense

( ) Not Guilty

FILED IN OPEN COURT THIS THE 10:18 P.M.
5TH DAY OF December, 2003
JoANNE HOLMAN, CLERK
BY: Linda Schuyler D.C.

SO SAY WE ALL.

THIS 5 DAY OF DECEMBER, 2003.

Lesa Kitzmiller
FOREPERSON
Circuit Ct. Mia.

Exhibit 1

RETURN TO FELONY JOANNE HOLMAN, CLERK OF THE CIRCUIT COURT - SAINT LUCIE COUNTY 1
File Number: 2360058 OR BOOK 1910 PAGE 2352
Recorded:03/02/04 14:30

☐ Modified
☐ Resentence
☐ Amended
☐ Corrected
☐ Mitigated

IN THE CIRCUIT COURT,
NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR ST. LUCIE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NUMBER 02-1597 FA

STATE OF FLORIDA

vs.

☐ Sexual Predator
☐ Sex Offender
☐ Minor Victim.

☐ Sentenced In Absentia

Robert T. Lundberg
Defendant

JUDGMENT

The Defendant, Robert T. Lundberg, being personally before this Court represented by Jack Frizzell, the attorney of record, and the State represented by Erin Kirkwood, and having:

☑ been tried and found guilty by ☑ Jury / ☐ Court of the following crimes(s)
☐ entered a plea of guilty to the following crimes(s)
☐ entered a plea of nolo contendere to the following crimes(s)
☐ admitted ☐ found guilty of violation of probation
☐ admitted ☐ found guilty of violation of community control

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	OBTS NUMBER
1.	Attempted Sexual Battery - on a child under 12 by Perpetrator 18 or older (Lesser)	777.04 & 794.011(2)	FL	5601041749
2.	Lewd or Lascivious Molestation - offender over 18, victim under 12	800.04(5)(b)	FL	5601057844

2010 APR 20 AM 11:00
ST. LUCIE COUNTY
CLERK OF CIRCUIT COURT

☑ and no cause being shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

☐ and pursuant to section 943.325, Florida Statutes, having been convicted of attempts or offenses relating to sexual battery (ch. 794) or lewd and lascivious conduct (ch. 800) the Defendant shall be required to submit blood specimens.

☐ and pursuant to Florida Statutes 943.325 - Defendant shall submit blood specimens.

☐ and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

2 x 6 x 2

FORM CIR-FEL 1905-H

OR BOOK 1910 PAGE 2353

The Defendant in open Court was advised of the right to appeal from this Sentence by filing notice of appeal within 30 days from this date with the Clerk of this Court and the Defendant's right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

JUDGE

FINGERPRINTS OF DEFENDANT

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	**7. Left Index**	**8. Left Middle**	**9. Left Ring**	**10. Left Little**
				

Fingerprints taken by: C. Rodgers 962 (Name) D/S SCSO (Title)

I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, Robert T. Lundberg and that they were placed thereon by said Defendant in my presence in open Court this date.

DONE AND ORDERED in Open Court at St. Lucie County, Florida, on February 18th, 2004.

JUDGE

Circuit Ct. Min.

☐ Violation of Probation, Previously Adjudged Guilty

☐ Violation of Community Control, Previously Adjudged Guilty

☐ Resentence

☐ Modified ☐ Mitigated

☒ Amended ☐ Corrected
Per court order

RETURN TO FELONY3

Case Number 56 2002 CF 001597 B

OBTS Number 56004749

Defendant Robert T. Lundberg

SENTENCE

(As to Count 1)

The Defendant, being personally before this Court, accompanied by the Defendant's: ☒ Attorney ☐ Special Public Defender ☐ Asst. Public Defender of record, Jack Frizzell, and having been adjudicated guilty, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the Defendant should not be sentenced as provided by law, and no cause being shown

(Check one if applicable.)

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

☐ and the Court having previously entered a judgment in this case on _____ (date) now resentences the Defendant.

☐ and the Court having placed the Defendant on Probation/Community Control and having subsequently revoked the Defendant's Probation/Community Control.

It Is The Sentence Of The Court that:

☐ The Defendant pay a fine of $ _____, pursuant to section 775.083, Florida Statutes, plus $ _____ as the 5% surcharge required by section 938.04, Florida Statutes.

☒ The Defendant is hereby committed to the custody of the Department of Corrections.

☐ The Defendant is hereby committed to the custody of the Sheriff of ☐ St. Lucie ☐ _____ County, Florida.

☐ The Defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To Be Imprisoned (Check one; unmarked sections are inapplicable.):

☐ For a term of Natural Life.

☐ For a term of Natural Life with a 25 year mandatory minimum.

☒ For a term of Thirty (30) years

EDWIN M. FRY, Jr., CLERK OF THE CIRCUIT COURT
SAINT LUCIE COUNTY
FILE # 3038812 04/10/2007 at 12:38 PM
OR BOOK 2798 PAGE 1030 - 1034 Doc Type: MS

2010 APR 23 AM 11:00
ST. LUCIE COUNTY
CLERK OF CIRCUIT COURT

☐ The SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.

If "split" sentence, complete the appropriate paragraph.

☐ Followed by a period of _____ ☐ month(s) ☐ year(s) on Community Control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order.

☐ Followed by a period of _____ ☐ month(s) ☐ year(s) on ☐ Drug Offender ☐ Sex Offender Probation under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order.

☐ However, after serving a period of _____ imprisonment in _____, the balance of the sentence will be suspended and the Defendant will be on Probation/Community Control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of Probation/Community Control set forth in a separate order.

In the event the Defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the Defendant begins service of the supervison terms.

SPECIAL PROVISIONS

(As to Count \ )

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory/Minimum Provisions:

Firearm ☐ It is further ordered that the _____ minimum imprisonment provisions of section 775.087, Florida Statutes, is hereby imposed for the sentence specified in this count.

Drug Trafficking ☐ It is further ordered that the _____ year minimum imprisonment provisions of section 893.135, Florida Statutes, is hereby imposed for the sentence specified in this count, and that the Defendant pay a fine of $ _____, pursuant to section 893.135, Florida Statutes, plus $ _____ as a 5% surcharge.

Law Enforcement ☐ It is further ordered that the _____ minimum mandatory imprisonment provision of section 784.07, Florida Statutes, is hereby imposed for the sentence specified in this count.

Controlled Substance Within 1,000 Feet of School ☐ It is further order that the 3-year minimum imprisonment provisions of section 893.13(1)(c), Florida Statutes, is hereby imposed for the sentence specified in this count.

Habitual Felony Offender ☐ The Defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Violent Felony Offender ☐ The Defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of _____ year(s) must be served prior to release. The requisite findings of the Court are set forth in a separate order of stated on the record in open court.

Violent Career Criminal ☐ The Defendant is adjudicated a violent career criminal and has been sentenced to an extended term in accordance with the provisions of section 775.084 (4)(d), Florida Statutes. A minimum of _____ year(s) must be served prior to release. The requisite findings of the Court are set forth in a separate order or stated on the record in open court. (For crimes committed on or after May 24, 1997.)

Capital Offense ☐ It is further ordered that the Defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes. (For first degree murder committed prior to May 25, 1994, and for any other capital felony committed prior to October 1, 1995.)

Prison Releasee Reoffender ☐ Defendant is adjudged a prison releasee reoffender in accordance with the provision of section 775.082(9), Florida Statutes.

Sexual Predator ☒ Defendant adjudged a sexual predator in accordance with provision of section 775.21, Florida Statutes.

Other Provisions:

Jail Credit ☒ It is further ordered that the Defendant shall be allowed a total of 659 days as credit for time incarcerated before imposition of this sentence. ☐ Plus all DOC time.

Credit for Time Served In Resentencing After Violation of Probation or Community Control ☐ It is further ordered that the Defendant be allowed _____ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served and unforfeited gain time previously awarded on case/count _____. (Offenses committed before October, 1, 1989)

☐ It is further ordered that the Defendant be allowed _____ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served on case/count _____. (Offenses committed between October 1, 1989, and December 31, 1993)

☐ The Court deems the unforfeited gain time previously awarded on the above case/count forfeited under section 948.06(6), Florida Statutes.
☐ The Court allows unforfeited gain time previously awarded on the above case/count. (Gain time may be subject to forfeiture by the Department of Corrections under section 944.28(1)), Florida Statutes.

☐ It is further ordered that the Defendant be allowed _____ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served only pursuant to section 921.0017, Florida Statutes, on case/count _____. (Offenses committed on or after January 1, 1994)

Consecutive/ Concurrent As To Other Counts ☐ It is further ordered that the sentence imposed for this count shall run ☐ consecutive to _____ ☐ concurrent with the sentence set forth in count _____ of this case.

☐ Violation of Probation, Previously Adjudged Guilty

☐ Violation of Community Control, Previously Adjudged Guilty

☐ Resentence

☐ Modified ☐ Mitigated

☒ Amended ☐ Corrected
Per court order

3

Case Number 56 2008 CF 001597 A

OBTS Number 560104749

Defendant Robert T. Lundberg

SENTENCE

(As to Count 2)

The Defendant, being personally before this Court, accompanied by the Defendant's: ☒ Attorney ☐ Special Public Defender ☐ Asst. Public Defender of record, Jack Frizzell, and having been adjudicated guilty, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the Defendant should not be sentenced as provided by law, and no cause being shown .

(Check one if applicable.)

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

☐ and the Court having previously entered a judgment in this case on _____ (date) now resentences the Defendant.

☐ and the Court having placed the Defendant on Probation/Community Control and having subsequently revoked the Defendant's Probation/Community Control.

It Is The Sentence Of The Court that:

☐ The Defendant pay a fine of $ _____, pursuant to section 775.083, Florida Statutes, plus $ _____ as the 5% surcharge required by section 938.04, Florida Statutes.

☒ The Defendant is hereby committed to the custody of the Department of Corrections.

☐ The Defendant is hereby committed to the custody of the Sheriff of ☐ St. Lucie ☐ _____ County, Florida.

☐ The Defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To Be Imprisoned (Check one; unmarked sections are inapplicable.):

☐ For a term of Natural Life.

☐ For a term of Natural Life with a 25 year mandatory minimum.

☒ For a term of fifteen (15) years

☐ The SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.

If "split" sentence, complete the appropriate paragraph.

☐ Followed by a period of _____ ☐ month(s) ☐ year(s) on Community Control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order.

☐ Followed by a period of _____ ☐ month(s) ☐ year(s) on ☐ Drug Offender ☐ Sex Offender Probation under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order.

☐ However, after serving a period of _____ imprisonment in _____, the balance of the sentence will be suspended and the Defendant will be on Probation/Community Control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of Probation/Community Control set forth in a separate order.

In the event the Defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the Defendant begins service of the supervison terms.

SPECIAL PROVISIONS

(As to Count 2)

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory/Minimum Provisions:

Firearm ☐ It is further ordered that the _____ minimum imprisonment provisions of section 775.087, Florida Statutes, is hereby imposed for the sentence specified in this count.

Drug Trafficking ☐ It is further ordered that the _____ year minimum imprisonment provisions of section 893.135, Florida Statutes, is hereby imposed for the sentence specified in this count, and that the Defendant pay a fine of $_____, pursuant to section 893.135, Florida Statutes, plus $_____ as a 5% surcharge.

Law Enforcement ☐ It is further ordered that the _____minimum mandatory imprisonment provision of section 784.07, Florida Statutes, is hereby imposed for the sentence specified in this count.

Controlled Substance Within 1,000 Feet of School ☐ It is further order that the 3-year minimum imprisonment provisions of section 893.13(1)(c), Florida Statutes, is hereby imposed for the sentence specified in this count.

Habitual Felony Offender ☐ The Defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

Habitual Violent Felony Offender ☐ The Defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of _____ year(s) must be served prior to release. The requisite findings of the Court are set forth in a separate order of stated on the record in open court.

Violent Career Criminal ☐ The Defendant is adjudicated a violent career criminal and has been sentenced to an extended term in accordance with the provisions of section 775.084 (4)(d), Florida Statutes. A minimum of _____ year(s) must be served prior to release. The requisite findings of the Court are set forth in a separate order or stated on the record in open court. (For crimes committed on or after May 24, 1997.)

Capital Offense ☐ It is further ordered that the Defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes. (For first degree murder committed prior to May 25, 1994, and for any other capital felony committed prior to October 1, 1995.)

Prison Releasee Reoffender ☐ Defendant is adjudged a prison releasee reoffender in accordance with the provision of section 775.082(9), Florida Statutes.

Sexual Predator ☐ Defendant adjudged a sexual predator in accordance with provision of section 775.21, Florida Statutes.

Other Provisions:

Jail Credit ☒ It is further ordered that the Defendant shall be allowed a total of 259 days as credit for time incarcerated before imposition of this sentence. ☐ Plus all DOC time.

Credit for Time Served In Resentencing After Violation of Probation or Community Control ☐ It is further ordered that the Defendant be allowed _____ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served and unforfeited gain time previously awarded on case/count _____. (Offenses committed before October, 1, 1989)

☐ It is further ordered that the Defendant be allowed _____ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served on case/count_____ _____. (Offenses committed between October 1, 1989, and December 31, 1993)

☐ The Court deems the unforfeited gain time previously awarded on the above case/count forfeited under section 948.06(6), Florida Statutes.
☐ The Court allows unforfeited gain time previously awarded on the above case/count. (Gain time may be subject to forfeiture by the Department of Corrections under section 944.28(1)), Florida Statutes.

☐ It is further ordered that the Defendant be allowed _____ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served only pursuant to section 921.0017, Florida Statutes, on case/count _____. (Offenses committed on or after January 1, 1994)

Consecutive/ Concurrent As To Other Counts ☒ It is further ordered that the sentence imposed for this count shall run ☒ consecutive to 1 ☐ concurrent with the sentence set forth in count _____ of this case.

706

5

Defendant Robert T. Lundberg Case Number 56-2002-CF-001597-A

Other Provisions, continued:

Consecutive/Concurrent To Other Convictions ☐ It is further ordered that the composite term of all sentences imposed for the counts specified in this order will run
(check one) ☐ consecutive to ☐ concurrent with the following:

(check one)
☐ any active sentence being served.

☐ specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of ☒ St. Lucie ☐ _____ County, Florida, is hereby ordered and directed to deliver the Defendant to the Department of Corrections at the facility designated by the department together with a copy of this Judgment and Sentence and any other documents specified by Florida Statute.

The Defendant in open court was advised of the right to appeal from this Sentence by filing notice of appeal within 30 days from this date with the Clerk of this Court and the Defendant's right to the assistance of counsel in taking the appeal at the expense of the State upon a showing of indigency.

In imposing the above sentence, the Court further ~~recommends~~ / orders no fine imposed.

DONE AND ORDERED in Open Court at St. Lucie County, Florida, on March 30, 2007.

☒ Nunc Pro Tunc To:

2.18.2004

James W. McCann
JUDGE

James W. McCann

FORM CIR-FEL 1906-H v-1-2-04

RULE 3.992(a) CRIMINAL PUNISHMENT CODE SCORESHEET

1. DATE OF SENTENCE	2. PREPARER'S NAME	3. COUNTY	4. SENTENCING JUDGE	
2/18/04	Kirkwood ☑ SAO ☐ DC	ST. LUCIE	Dwight L. Geiger	
5. DEFENDANT (LAST, FIRST, M.I.) Lundberg, Robert	6. DOB 12/15/1972	8. RACE WHITE	10. PRIMARY OFF. DATE 10/01/2001	12. ☐ PLEA ☑ TRIAL
	7. DC # K65107	9. GENDER Male	11. PRIMARY DOCKET # 02-1597-cf	

I. PRIMARY OFFENSE: Qualifier: ATTEMPT

FELONY DEGREE	F.S.#	DESCRIPTION	OFFENSE LEVEL	POINTS
1	794.011	Attempted Sexual Battery on Person under 12 by Person over 18	9	

(Level - Points: 1=4, 2=10, 3=18, 4=22, 5=28, 6=36, 7=56, 8=74, 9=92, 10=116)

Prior capital felony triples Primary Offense points ☐

I. 92

II. ADDITIONAL OFFENSE(S):

DOCKET #	FEL/MM DEGREE	F.S.#	OFFENSE LEVEL	QUALIFY	COUNTS	POINTS	TOTAL
02-1597-cf	2 1	800.04(5)(b)	9		1	46	46

DESCRIPTION: Lewd of Lascivious Molestation, Offender over 18, Victim under 12

DESCRIPTION:

DESCRIPTION:

(Level - Points: M=0.2, 1=0.7, 2=1.2, 3=2.4, 4=3.6, 5=5.4, 6=18, 7=28, 8=37, 9=46, 10=58)

Prior capital felony triples Additional Offense points ☐

II. 46

III. VICTIM INJURY:

		Number	Total			Number	Total
2nd Degree Murder	240 X		= 0	Slight	4 X		= 0
Death	120 X		= 0	Sex Penetration	80 X		= 0
Severe	40 X		= 0	Sex Contact	40 X	1	= 40
Moderate	18 X		= 0				

III. 40

IV. PRIOR RECORD:

FEL/MM DEGREE	F.S.#	OFFENSE LEVEL	QUALIFY	NUMBER	POINTS	TOTAL
M	316.193	M		1	0.2	0.2
DESCRIPTION: DUI						
M	784.02	M		1	0.2	0.2
DESCRIPTION: Battery						
M	800.03	M		1	0.2	0.2
DESCRIPTION: Exposure Sexual Organs						

(Level - Points: M=0.2, 1=0.5, 2=0.8, 3=1.6, 4=2.4, 5=3.8, 6=9, 7=14, 8=19, 9=23, 10=29)

IV. 0.6

V. Legal Status Violation = 4 Points — V. ____

VI. Community Sanction violation before the court for sentencing 6 points x each successive violation OR
New felony conviction = 12 points x each successive violation. — VI. ____

VII. Firearm/Semi-Automatic or Machine Gun = 18 or 25 points — VII. ____

VIII. *Prior Serious Felony = 30 points* — VIII. ____

Subtotal Sentence Points 178.6

IX. Enhancements (only if the primary offense qualifies for enhancement)

Law Enforcement Protection	Drug Trafficking	Grand Theft Motor Vehicle	Street Gang (offenses commited on or after 10-1-98)	Domestic Violence (offenses commited on or after 10-1-98)
☐ x 1.5 ☐ x 2.0 ☐ x 2.5	☐ x 1.5	☐ x 1.5	☐ x 1.5	☐ x 1.5

Enhanced Subtotal Sentence Points IX. 0

TOTAL SENTENCE POINTS 178.6

SENTENCE COMPUTATION

If total sentence points are less than or equal to 44, the lowest permissible sentence is any non-state prison sanction.

If total sentence points are greater than 44:

178.6 (total sentence points) minus 28 = 151 x .75 = 112.95 (lowest permissible prison sentence in months)

The maximum sentence is up to the statutory maximum for the primary and any additional offenses as provided in s.775.082, F.S., unless the lowest permissible sentence under the code, exceeds the statutory maximum. Such sentences may be imposed concurrently or consecutively. If the total sentence points are greater than or equal to 363, a life sentence may be imposed.

60 ~~45~~ (maximum sentence in years)

TOTAL SENTENCE IMPOSED

		Years	Months	Days
☒ State Prison	☐ Life	45		
☐ County Jail	☐ Time Served			
☐ Community Control				
☐ Probation				

Please check if sentenced as ☐ habitual offender, ☐ habitual violent offender, ☐ violent career offender, ☐ prison releasee reoffender, or a ☐ mandatory minimum applies.

624 Days C.T.S.

☐ *Mitigated Departure* ☐ *Plea Bargain* Sexual Predator

Other Reason ____

JUDGE'S SIGNATURE [signature]

Circuit Ct. Min.

JOANNE HOLMAN CLERK OF CIRCUIT COURT ST. LUCIE COUNTY, FL FILED FEB 25 PM 4 32

Reasons for Departure - Mitigating Circumstances

(reasons may be checked here or written on the scoresheet)

- ☐ Legitimate, uncoerced plea bargain.
- ☐ The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct.
- ☐ The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired.
- ☐ The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction, or for a physical disability, and the defendant is amenable to treatment.
- ☐ The need for payment of restitution to the victim outweighs the need for a prison sentence.
- ☐ The victim was an initiator, willing participant, aggressor, or provoker of the incident.
- ☐ The defendant acted under extreme duress or under the domination of another person.
- ☐ Before the identity of the defendant was determined, the victim was substantially compensated.
- ☐ The defendant cooperated with the State to resolve the current offense or any other offense.
- ☐ The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.
- ☐ At the time of the offense the defendant was too young to appreciate the consequences of the offense.
- ☐ The defendant is to be sentenced as a youthful offender.

Pursuant to 921.0026(3) the defendant's substance abuse or addiction does not justify a downward departure from the lowest permissible sentence.

Circuit Ct. Min.

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

ROBERT T. LUNDBERG

Defendant/Appellant,

vs.

STATE OF FLORIDA

Plaintiff/Appellee.

CASE NO. 02-1597-CF

2003 MAR 3 PM 3 00

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the Defendant/Appellant, Robert T. Lundberg, appeals to the District Court of Appeal, Fourth District of Florida, the Judgment of Conviction and Sentence of the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, rendered by the Honorable Judge Dwight L. Geiger on February 18, 2004.

The Defendant/Appellant was sentenced to forty-five years imprisonment with the Department of Corrections. The Appellant is in custody.

I HEREBY CERTIFY that a copy hereof has been furnished by hand delivery to the Office of the State Attorney, 411 South Second Street, Fort. Pierce, Florida 34950 and to the Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401-2299 this 3 day of March, 2004.

Respectfully submitted,

LAW OFFICE OF JACK R. FRIZZELL, P.A.
200 South Indian River Drive, Suite 206
Fort Pierce, Florida 34950
(772) 460-3600

BY: _____
JACK R. FRIZZELL
Florida Bar No. 0108960

2003 APR 20 AM 11:00
CLERK OF CIRCUIT COURT

2003 DEC -3 PM 12:35
EDWIN M. FRY, JR.
CLERK OF CIRCUIT COURT
ST. LUCIE COUNTY, FL.

Composite
Exhibit 3

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

ROBERT T. LUNDBERG
Defendant/Appellant,

CASE NO. 02-1597-CF

vs.

STATE OF FLORIDA
Plaintiff/Appellee.

STATEMENT OF JUDICIAL ACTS TO BE REVIEWED

COMES NOW the Defendant/Appellant, by and through undersigned counsel, and respectfully states the Judicial Acts to be reviewed:

1. The Court erred in not granting the Defendant's Motion to Sever Offenses.
2. That the verdict of the jury is contrary to the law.
3. That the verdict of the jury was contrary to the weight of the evidence.
4. The Court erred in not granting the Defendant's Motion for Judgment of Acquittal.
5. That the Court erred in sentencing the Defendant.

I HEREBY CERTIFY that a copy hereof has been furnished by hand deliverey to the Office of the State Attorney, 411 South Second Street, Fort Pierce, Florida 34950 and the Office of the Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401-2299, by mail this 3 day of March, 2004.

Respectfully submitted,

LAW OFFICE OF JACK R. FRIZZELL, P.A.
200 South Indian River Drive, Suite 206
Fort Pierce, Florida 34950
(772) 460-3800

BY: _____
JACK R. FRIZZELL
Florida Bar No. 0108960

A-4

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR ST. LUCIE COUNTY, FLORIDA

CASE NO.: 562002CF001597A

ROBERT LUNDBERG,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.
/

(VOLUME I)

TRANSCRIPT OF RECORDED PROCEEDINGS

This Cause came on for hearing before the Hon. Roby, Judge of the above Court, at the St. Lucie County Courthouse, Fort Pierce, Florida, beginning at 3:00 p.m. on July 14, 2010.

The appearances at said time and place were as follows:

FOR THE PLAINTIFF:
OFFICE OF THE STATE ATTORNEY
411 South Second Street
Fort Pierce, Florida 34950
BY: LINDA BALDREE, A.S.A.

FOR THE DEFENDANT:
OFFICE OF CRIMINAL CONFLICT AND CIVIL REGIONAL COUNSEL, FOURTH DISTRICT
107 North 2nd Street
Fort Pierce, Florida 34950
BY: THOMAS BURNS, ESQ.

INDEX

EXHIBITS

PAGE

(July 14, 2010 - 5:04 p.m.)

THE CLERK: Robert Lundberg, 20021597.

THE COURT: Can we move that TV outta here or at least move it out of the way. Thank you.

Okay. Are you ready to proceed?

MR. BURNS: Your Honor, before we begin, there's a lot of papers and a lot of materials that both Mr. Lundberg and I will need to be going through. Would it be possible for his hands to be free to help him while we do that?

THE BAILIFF: We usually (unintelligible) unhandcuff or unshackle (unintelligible).

THE COURT: Let me look at some things first.

Well, what papers do you have -- he's got paper in front of him; right?

ROBERT LUNDBERG: Yes, sir. I have motions and just some -- some notes that I've made for myself that I think would be imperative for me to just go over. If I hear something, I need to discuss something with my attorney, I'd like to have access to those

papers, sir. It's very -- my legs are shackled, sir, I'm not gonna run anywhere.

THE COURT: Okay. I'll let him remove your handcuffs during the course of the hearing. Anytime we take any break during the hearing, the handcuff's back on. Are you clear on that?

ROBERT LUNDBERG: Yes, sir. Thank you, sir.

THE COURT: All right. If you would, remove at this point in time, just the handcuffs only. Are you able to do that, just the handcuffs only and not the shackles?

THE BAILIFF: I'm gonna have to take one of the leg shackles off to remove the thing. It's gonna take me just a couple minutes to do that.

THE COURT: Well, do we wanna -- you be doing that with your handgun in your pocket and your --

THE BAILIFF: I do it all the time, Judge.

THE COURT: All right. Go for it. Thank you. Be off the record for the time being.

(Off the record)

THE COURT: Back on the record. We have opening statements or you wanna waive them or?

MR. BURNS: Waive, Judge.

THE COURT: State waives as well?

MS. BALDREE: Yes, sir.

THE COURT: All right. Thanks. Whenever you're ready.

MR. BURNS: I would call Mr. Lundberg to the stand, Your Honor.

THE COURT: All right. He can testify from there. Raise your right hand, sir, I'll swear you in, please. Stand up. Stand up. Thank you.

THEREUPON,

ROBERT LUNDBERG,

HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE WITNESS: Yes, sir.

THE COURT: Thank you, sir, you can have a seat.

MR. BURNS: All right. It's my intention, Mr. Lundberg, and Your Honor and State, to just proceed through the motions

that have survived through the grounds that have survived and just address them one at a time.

DIRECT EXAMINATION

BY MR. BURNS:

Q The first issue from your motion that survives is your issue Number 3 in which you allege that counsel was ineffective for failing to object or request any type of relief regarding to your wearing leg irons, which may have been heard or seen by the jury. You and I discussed that issue earlier. What is your intention and wish regarding that issue?

A I would -- I would like to strike that issue. I feel that I have other issues that are -- that are less minor and I'd like to focus on them.

THE COURT: Any objection by the State?

MS. BALDREE: No, sir.

THE COURT: Okay. I'll consider that to be dismissed.

BY MR. BURNS:

Q All right. We'll move ahead to the next ground that survived, is Defendant's Ground 4. And I think the next few issues are sort of intertwined, they all deal with -- with what I would characterize as improper bolstering of state witnesses.

In Issue 4, you are contending that -- what was the name of the victim in your case?

A The girl's name was Vanessa.

Q And what is your contention regarding her testimony and it being self-serving or her credibility being improperly bolstered, what is your intention there?

A Well, I mean, with it being self-serving, I mean, basically it was elicited that she basically bolstered her own credibility during direct examination of the State prosecutor.

Q And you're referring to -- draw some specifics from out of your motion. When the victim, Vanessa, how old was she when she testified?

A She was 11 years old.

Q She was asked on direct examination about her Aunt Lilly and if she told -- and if she -- Aunt Lilly was sure that this had happened, and she -- and the girl responded yes; correct?

A That's correct.

Q So your contention is that is -- that's improper because what -- whether Vanessa told her aunt, if it was true or not is -- is not relevant, is not proper?

A Yes, sir.

Q Your next contention on that issue is that the prosecutor elicited from this child witness something about her father continuing to ask her whether these allegations were true; is that right?

A That's correct. She kept saying -- she kept saying that I swear it was true, based on her own credibility.

Q Did the witness, Vanessa, herself make reference to her father asking her?

A Um --

Q My dad kept asking me if it was really true?

A Right.

Q Do you recall her testifying that way?

A Yes, sir. Yes, sir.

Q And her answer was that she was repeatedly responding that, yes, I'm swearing, daddy, it's true?

A (inaudible) it's true, yes, sir.

Q Your contention is that was not proper testimony?

A That's not proper testimony. She's bolstering her own credibility.

Q Did your trial attorney object to that?

A No, sir.

THE COURT: Who was your trial attorney?

ROBERT LUNDBERG: Mr. Jack Frizzell,

sir.

THE COURT: Who?

ROBERT LUNDBERG: Jack Frizzell.

THE COURT: Okay. Thanks.

ROBERT LUNDBERG: Mr. Frizzell.

THE COURT: This might be sitting -- I thought -- I didn't -- I thought you said Grazell. I know Mr. Frizzell, but not -- okay. Thanks.

ROBERT LUNDBERG: I'm kinda cold.

THE COURT: That's all right.

MR. BURNS: You need some isometrics there.

BY MR. BURNS:

Q So additionally, along the same line, the young victim, Vanessa was asked about her conversations with her mother also?

A Yes, sir.

Q So she was asked about her conversations that she had with her Aunt Lilly?

A Right, yes, sir.

Q And she was asked about her conversations that she had with her father?

A Yes, sir.

Q And now she's asked about conversations that

she had with her mother, Tanya?

A Yes, sir.

Q And that were -- not the gist, at least part of the State's questioning of the witness regarding those relatives was, did you keep telling him that it was the truth?

A Right, correct.

Q And the girl kept saying yes?

A Kept saying yes. Again, she was bolstering her own credibility.

Q Did Mr. Frizzell voice any objections?

A No, sir.

Q During the Aunt Lilly questioning?

A No, sir.

Q During the questioning of Vanessa regarding her father?

A No, sir.

Q During the questioning of Vanessa regarding her mother?

A No, sir.

Q And I'm referring only to those portions of the testimony in which it was asked of the girl, did you keep -- were you asked was it true and she -- the girl said, yes, I told my mommy it was true, my daddy it was true, my aunt it was true?

A Correct, yes, sir.

Q Do you recall, did the prosecutor ask Vanessa any specific questions regarding --

A Yes, sir. The prosecutor asked, she said, during that time did they say, referring to the mother and the father, I guess the witnesses that she had made the statements to, did they say anything to you or were they saying, now, Vanessa, is this really true, did this -- and Vanessa responded, she says yes. They kept saying, is this really true and the prosecutor responded, and did you keep saying yes, I swear. And she says, yes, her response was yes.

Q That's from the trial transcript at Page 241?

A Yes, sir.

Q So it's your contention that the young girl didn't just volunteer this information apropos of no particular question, but that the State was asking her expressly, did you tell everybody that you were telling the truth?

A Yes, these were elicited by the State.

Q Is there any other examples or anything else on that issue that you would like to lay before the Court?

A There were no -- no, no other examples on that specific issue.

Q If Mr. Frizzell had objected, what would the effect have been, do you believe?

A Um, I believe that he -- he should have objected. I mean, really, the only real direct evidence in this case was the testimony of the accuser, the girl. Therefore, her credibility was pretty much the pivotal issue in my case. And even though the statements -- I'm sorry, let me back up.

Because the credibility was a -- was a (unintelligible) issue at trial, my attorney should have objected or either moved for a mistrial based on the cumulative statement of the State witnesses, including the (inaudible) vouching for the credibility, which the State capitalized on in closing arguments, again, bolstering the credibility of the alleged victim in closing arguments.

Q Relative to this issue, to Vanessa issuing self-serving statements or bolstering her own credibility by insisting she told the truth to everyone --

A Yes, sir.

Q -- what mention of that was made by the prosecutor in closing argument?

A The prosecutor in closing argument, I have (inaudible). The prosecutor in closing argument, she

stressed the significance of the testimony. She says -- she stated on Page 667 in the trial transcript, she says, "And you know what, when Vanessa's parents were told about this, when Lillian was told about this, you know what they all said, they said, are you sure you know what it is. And that child was insistent and she has been consistent, no, mommy, no, daddy, I swear this happened. And it wasn't that they didn't believe her, this was a friend of the family and it's so hard -- it's so hard to imagine that this would happen to any child. It's so hard to truly think that there were people that do this to children. The evidence is what the witnesses said, the evidence is what Vanessa said and what her mother said and what her father said."

Q What was your defense in this case?

A Basically my defense is that the crime didn't occur at all and that it was -- you know, that (unintelligible) have a hand in the matter. Therefore, credibility was the (unintelligible) in my case (unintelligible) to decide.

Q It was your contention and your defense that the young victim was fabricating the story?

A Yes, sir. And that -- also that the detective during her interview, she pretty much, and

she testified for this at trial as well, that she pretty much suggested the child say that -- that I had penetrated her. So basically, due to suggestions from the detective, the aunt having a hand in the matter, that was pretty much my defense. And when I took the stand, I testified in my defense that this crime did not occur at all.

Q Okay. Moving to Ground 5 from your motion, related, this ground seems to speak to the victim's father, Vanessa's father, George Kasad (phonetics), who testified for the State. And he also, is it your contention, was asked what his opinion was with regard to truthfulness?

A Yes, sir.

Q Expand on that.

A Okay. Mr. Kasad testified for the State on direct examination, he said that Vanessa told him that -- that I had hugged her under her clothing. And the prosecution had asked him, she says, what did you say to (unintelligible), Mr. Kasad. And Mr. Kasad answered, he says, "I asked her, are you sure this happened? She says, I swear it happened, it really happened. I asked her, Are you sure? This is a serious thing, you know, Robert can get into a lot of trouble if you're lying. She says, no, daddy, I'm not

lying, it happened, it really happened. I asked her like three times if it really happened. I could see my daughter's eyes, I could see her telling me that, you know, you know, she's not lying. And it was really -- and it was really scary."

Q That's on Page 312 of the transcript?

A Yes, sir.

Q Did that testimony or that answer elicit an objection from your trial attorney?

A No, sir.

Q Okay. Did you yourself at the time you were listening to this testimony recognize that it was in any way improper or objectionable?

A No -- at that time of my trial, I had no experience of the law whatsoever. But just from feeling the whole gist of the trial, I mean, I felt -- I felt that it was prejudicial to me. However, I really didn't -- I didn't know the laws (unintelligible) and I kind of expected my -- I'll tell you, if there was any kind of a -- a violation or anything (unintelligible) that my attorney would have objected to it. I really wasn't sure if it was admissible or not, just based on my, you know, lack of knowledge of the law.

Q The prosecution in your case called Vanessa,

the victim's mother; is that correct?

A Yes, sir.

Q What's the mother's name?

A The mother's name is Tanya.

Q And did Tanya Kasad, was she asked or did she offer any testimony in which she also vouched for the credibility and truthfulness of her daughter?

A Yes, sir, she did.

Q Tell us about that.

A (unintelligible) Kasad on Page, trial transcript, 314, she says, what was her (unintelligible) -- this is from the State prosecutor. The prosecutor says, "Was there more of that (unintelligible) with your daughter. Now, are you sure, this is serious, this is important. And the response was, yes. What was Vanessa's response? She says that she swears, she said, I swear it's the truth, it's the truth."

And then the prosecutor -- oh, I'm sorry. Let me back it up. That was partial testimony -- that was the last partial testimony of George Kasad right there on Page 314, which went with Page 312 as well.

On Page 336, prosecution then calls Vanessa's mother, Tanya Kasad to testify. And on direct examination, the prosecutor elicited from her that

Vanessa stated to her, she says, "Mommy, I swear it happened, it happened, I swear." That was on trial transcript 336. "She kept looking at me, she kept saying, mom, I swear I'm not lying, it's true, he did it." That was on trial transcript 338.

Q Did Mr. Frizzell object to any portion of Tanya Kasad's testimony on this issue?

A No, sir.

Q Is it your contention that objections should have been raised contemporaneously when both -- when the father was testifying and then when the mother was testifying?

A I believe that any instances of these statements were brought up or that any of this testimony was elicited, that they should have been objected to and addressed by the Court.

Q And is it your contention that these self-serving statements or these failures to object to improper bolstering had an effect on your case?

A Yes, I believe so. Like I said before, credibility was the single biggest issue in my case for the jury to decide. You know, the self-serving hearsay statements of Vanessa that she's saying that she was telling the truth about being sexually abused by me, it evaded the province of the jury and (unintelligible)

bolstered Vanessa's own inconsistent testimony that she was sexually abused by me and (unintelligible) allegations.

Q Do you believe that the testimony of the mother, George -- of the mother Tanya and the father George, and the testimony of the girl herself, the self-serving improper bolstering testimony cumulatively worked against you?

A Yes. Yes, sir.

Q For the same reason?

A For the same reason, yes, sir, invaded the province of the jury and brought legitimacy to her allegations.

Q What do you mean by invading the province of the jury with regards to this issue?

A Okay. Well, the jurors, basically they're supposed to be the sole arbiter of the witness' testimony -- of the witness' credibility. Therefore, by having these hearsay statements brought against and bolstering -- presented to them, bolstering the victim's credibility, it invaded the province of the jury.

Q You're not quarreling that these parents or the girl herself could testify as to the -- as to just the straight content of what happened or didn't happen?

A Right, correct.

Q But as far as opining as to whether anyone was telling the truth, that is what you think is objectionable?

A Yes, sir.

Q And harmful to you?

A Yes, sir.

Q Is it your contention that a different result might have obtained if this self-serving bolstering testimony did not come before the jury?

A I believe that a different result would have occurred, based upon credibility being the biggest issue, you know, the biggest issue that I was putting (unintelligible) at trial, between her and myself.

Q So that was the crux of your defense is that the girl was telling false --

A Yes, sir.

Q Moving to Issue 6 from your motion, this is involving around testimony given by the victim's father, George Kasad, about a counselor or somebody that he consulted; is that correct?

A Yes, sir.

Q What was your understanding of the purpose of Mr. Kasad's mentioning this counselor at all?

A I believe the only purpose was, was to

bolster -- bolster the girl's credibility. You know, apparently the family had gone to a counselor for family issues. And I guess Mr. Kasad wanted to -- wanted their family counselor to hear a story. Not -- you know, he didn't bring the girl there for counseling, whatsoever, but just basically to hear her story and to advise them what he thought about -- about what she -- about the allegations.

Q Well, it was George Kasad's testimony that, quote, we wanted to be totally sure?

A Right.

Q And that this fella that they had worked with before, Larry, he was basically used -- is it your contention he was used as a truth detector?

A Yes. Yes, sir.

Q His testimony or the testimony about his advice wasn't that he offered any advice or counseling --

A No.

Q -- but that his -- that the parents took the victim to him to see if she was telling the truth?

A Yes, sir.

Q This person, Larry, do you know, is he a counselor, a psychologist, do you know anything about his --

A I don't know.

Q -- his curriculum vitae or his -- his credentials at all?

A No, I know nothing about that. I mean, he could have been Mickey Mouse for all I knew. I mean, honestly, I didn't even -- I never heard of him and I don't know the man.

Q Was the person, Larry, listed as a state witness?

A No, sir.

Q Did the person Larry create any sort of a report like a psychologist or a counselor might do?

A No, there was nothing in the State's case files that represented anything like that.

Q Did George Kasad testify, and I quote, about this fella Larry, and Larry said without a doubt that he believes her?

A Yes, sir.

Q Was that objected to by Mr. Frizzell?

A No, sir.

Q In a -- in a related issue, which is Issue 7, it's the same issue, it's -- basically your contention is in Ground 6, that Mr. Frizzell was deficient for not objecting to it when he heard this testimony in court?

A Yes, sir.

Q And in Ground 7, it's your contention that your trial attorney was deficient for not trying to exclude this testimony pretrial?

A That's right. He should have held a motion in limine or moved to exclude those statements from coming in.

Q Okay. Let's stop you right there.

A Okay.

Q If -- if this fella, Larry was not listed as a state witness, how is it that Mr. Frizzell should have known that he would be offering testimony or that any testimony about him might be coming in?

A There was -- during depositions that were taken of the detective, I forget exactly what page it was on, I'm not sure if it's in here or not, but during depositions of the detective, it was -- it was brought up, she was asked, how did -- how did -- how did she come to find out or how did the family come to find out about it. And she says it was through a counselor that the family had brought the girl to see. So it was -- I mean, it was brought -- it was in -- it was in depositions of the detective that the girl was seen by a counselor. And that was what brought the girl and the family to the police department, because they were -- they were apparently referred by the family

counselor to bring the girl to see the detective.

Q Is it your contention that any mention by the family of the girl being taken to a counselor at all would have been objectionable and prejudicial?

A Could you repeat that again? I'm sorry.

Q Is it your contention that any mention by the girl or by her family that she had been to a counselor at all would be prejudicial against you and unfair?

A Yes, I believe it would be prejudicial. I mean under the Sixth Amendment, I have a right to confront or cross examine any -- any witnesses, you know, especially in this case where we're dealing with the credibility of the victim. I think it would be imperative that, you know, we would -- I would be able to cross examine her and confront this person who didn't testify, you know, to, you know, just to see whether these -- basically where -- whether these statements were truthful or credible or not.

Q You cite to or you directly quote George Kasad's testimony. A portion of it was, and you tell me whether this was actually spoken to the jury by the witness, the girl's father --

A Yes, sir.

Q -- quote, the counselor told us that he had no reason not to believe Vanessa and that if we didn't

contact the authorities, his responsibility was to contact the authorities?

A Yes, sir.

Q That was spoken to the jury?

A Yes, sir.

Q By Mr. Kasad?

A Yes, sir.

Q About a person Larry?

A Yes, sir.

Q Who the jury never saw?

A That's right, that's correct.

Q And that was not objected to?

A That was not objected to.

Q What affect do you think that had on your case?

A Well, I mean, that's -- that pretty much -- it undermined my whole defense of the crime not occurring at all. I mean, it -- it led to a conclusion that, you know, without a doubt that she was telling the truth, especially with this testimony coming from a psychologist and a -- and the great weight afford a psychologist, you know, testimony. You know, in this case psychologist didn't even testify, so I -- I feel it was very damaging to my case.

Q Moving onto the next surviving issue, which I

believe is Issue 9 from your motion. In there you are contending that Mr. Frizzell acted ineffectively in not objecting to Detective Dennis testifying about the victim's truthfulness; is that correct?

A Yes, sir, that's correct.

Q So this is another example of another witness, a non-family witness, a detective improperly bolstering the credibility of the victim?

A Yes, sir.

Q That's your contention?

A Yes, sir.

Q And what is it that Detective Dennis testified to which you find objectionable and which you contend Mr. Frizzell should have objected to?

A Basically during -- during the trial the State and the detective tried to create some kind of a (unintelligible) for the jury. On direct examination the prosecution elicited testimony from Detective Dennis that Vanessa made two allegations that her uncle -- her uncle, myself, had sexually abused her on two -- on two occasions. She also testified that I -- the detective also testified that I stressed extreme importance to telling the truth, and I made sure several times during the interview that she -- asked her again, is she telling the truth because I wanted to

look for her responses as to how -- as to how she reacts to me and her body language and look for things that if she's being deceptive in any way, I wanna see it.

Now the prosecutor asked, how did she react when she was speaking. The detective responded perfectly. You know, basically making it appear that, you know, that -- that Vanessa, the accuser, was basically telling the truth, based upon her reactions during questions.

Q So it's your contention from the record that the detective was not just testifying as to the straight up content of what the girl was saying, but the detective was amplifying improperly by saying, look, I make extra sure that these children are telling me the truth, that sort of thing, I look to see reactions to body language, that sort of thing; right?

A That's correct, sir.

Q And then the State after that comment said, and how did she react?

A Yes, and she --

Q Okay. So the State had directly elicited testimony from the detective as to did the girl behave in a truthful manner or not?

A Yes, sir.

Q And again, you tie that into this being -- undermining your defense?

A Yes, sir.

Q By permitting improper bolstering of the witness' credibility?

A Yes, sir.

Q The witness' credibility being the entire issue for you?

A Yes, sir.

Q Your contention being that she had no credibility?

A Absolutely.

Q Was Detective Dennis' testimony objected to by trial counsel?

A No, sir.

Q The final ground which survives from your motion is Ground the 12th. In that ground you're alleging that defense counsel was ineffective for failing to move in limine or pretrial to suppress recorded statements of the detective; is that correct?

A Yes, sir.

Q These statements were played for the jury?

A Yes, sir.

Q And what content of those recordings that the jury heard do you believe is objectionable and should

have been objected to by your trial attorney?

A Well, there was -- the issues that were played for the jury was -- was the detective's personal belief in my guilt, which vouched for or bolstered the credibility of the alleged victim.

Q Now, this -- this tape that the jury heard was a recording of an interview between Detective Dennis and you?

A Yes, sir.

Q And you're alleging that Detective Dennis made improper commentary in that interview with you that should have been suppressed?

A Yes, sir.

Q What are you talking about there?

A Okay. The jurors saw and heard the detective tell me that, "Vanessa's memory is pretty good, she's only nine, that she can tell me details about what you did and that makes her more believable that she's telling the truth, that she's very detailed, that she didn't think Vanessa's Aunt Lilly had anything to do with Vanessa's allegations, that Vanessa is very compelling to talk to, that Vanessa wasn't lying and wasn't influenced, that she was going to make sure that allegations are proved and I could prove them to the best of my ability, that she interviewed a lot of kids

and that Vanessa is really really detailed and that there was no confusion on Vanessa's part and I think you have a potential for a problem because at an early stage when people are starting to show things, what I'm seeing in your background and her allegations (unintelligible) some help."

Q The jury heard all that?

A Yes, sir. Yes, they did.

Q In the interview with you, the jury heard the detective indicate that the victim's memory was good?

A Yes, sir.

Q That the victim's memory was very detailed?

A Uh-huh.

Q That the victim was compelling to talk to?

A Yes, sir.

Q That the Defendant (sic) was going to make sure that the victim's allegations were true?

A Yes, sir.

Q And then that the Defendant was going to prove them to the best of her ability -- or the detective?

A Yes, sir.

Q And then the detective opined about you, that you, Mr. Lundberg, have a potential for a problem because of things she sees in your background and

indicates that maybe you need some help?

A Yes, sir.

Q Did she specify what kind of help she thought you needed?

A Well, I pretty much -- I took it upon the -- you know, based upon the accusations and the allegations that were brought against me, maybe help for a sexual problem or the -- or the --

Q Do you believe that the jury drew that conclusion?

A I would -- yes, sir.

Q Do you believe that any of that testimony is relevant?

A No, sir.

Q Do you believe it ought to have been objected to?

A Yes, sir.

Q If it had been objected to and omitted, not placed in front of the jury, do you believe a different result might have obtained for you?

A Yes, I do, sir.

Q Why so?

A Because, again, like I said, no -- the cred -- excuse me, the credibility was a determinative issue for the jurors to rely upon at my trial, you

know. And again it -- it undermined my defense, because, you know, that basically was my defense was that the crime didn't occur at all, you know. And by bolstering the girl's credibility, and these statements showing up on the videotape, all -- all it did was it just cumulatively added to the, you know, to the other vouching of credibility that was adduced at trial by the other witnesses.

Q So do you believe it would have been possible to edit the videos that the jury saw to exclude those comments by the detective?

A Sure. The State edited other things out of the videotape that could have been edited as well, yes, sir.

Q Did that exhaust the issues individually? Is there anything that you would like to lay before the Court that we haven't gone over regarding any one of those issues individually or how they affected your situation cumulatively?

A Um, cumulatively, like I said, it's on the record that pretty much, you know, my -- the credibility of a girl was the single biggest issue for the jury to decide at my trial. You know, by the mother and the father, the aunt, the detective, vouching for her credibility, I mean, it completely

undermined my defense, you know. And I know -- I know that there's cases stating that, you know, you know, credibility is a -- a vouching for the credibility, that the jury's the sole arbiter of the credibility of the witnesses. And especially the detective vouching for the credibility of another witness, that's -- that's highly -- you know, I know it's highly -- it's illegal and it's prejudicial, based upon the great weight afforded a police officer's testimony.

Q And you're talking about Detective Dennis' comments about how she takes special care to make sure that Vanessa was being truthful with her?

A Yes, sir. Yes, sir.

MR. BURNS: That's all we have, Your Honor, as far as direct testimony.

THE COURT: Cross examination.

MS. BALDREE: Yes.

CROSS EXAMINATION

BY MS. BALDREE:

Q Mr. Lundberg, in addition to that evidence, they also had your statement to your girlfriend; is that correct?

A Yes, ma'am, that is correct.

Q And your statement to your girlfriend was, and I'll quote you, even of the bad language, okay, you

start with, "I'm going to jail for sexual battery. I don't know --" is her name Zaimora (phonetics)?

A Zaimora.

Q -- "Zaimora. I was drinking that night, I was drunk, I really don't remember a lot of what happened. You know, if she says that I touched her, I could have and I gotta pay the price of what I do." And she says, "So what did you do?" And you say, "I kind of -- I kind of remember touching her. I don't --" And she says, "Why didn't you tell me?" And you say, "I was so embarrassed about it because I'm so fuckin' -- all the shit I've been through in the past, that I disappointed this whole family and myself and everybody and I don't -- I am so sorry, I am so fuckin' sorry, man, fuckin' alcohol. All I picture is Tommy fuckin' -- you're going to fuckin' jail again. I am so sorry. Can you call my mother and tell her what's going on. Call my job, tell them I'm probably not going to be there tomorrow unless I can get bonded out tonight somehow. I don't know if I can bond out, but I violate my probation again, I go to jail again until a hearing or whatever comes up. I'm pretty much fouled up. She told me that, you know, that the State's attorney is probably going to talk to Tanya and George and see what they want to do because they'll never want

to see me in jail because jail's never going to settle anything. But I don't know, I just need help for drinking."

And then you go on and on, "You know, it's all on the tape. You know, I admitted to drinking that night and then when I drink, I do stupid stuff, man, you know, sexual stuff and I don't know why I do it, I don't understand why I do it, you know. I don't do it sober, it's just when I get drunk I just do stupid shit, you know, I don't know what to tell Tommy, you know. She said that I touched her another time on Tiffany during the hurricane." And she says, "We were there, we were there." And you say, "Didn't I -- I spoke with you that night in Vanessa's room." Right, this is you?

A Yes, ma'am.

Q Okay. And this was -- this came in to -- at the -- at the trial?

A Yes, but they -- they showed --

Q So all the evidence against you wasn't just her words; correct?

A Yes, ma'am, but those statements should have been suppressed by the trial.

THE COURT: Didn't the Fourth District Court of Appeal say that wasn't the

situation?

ROBERT LUNDBERG: No, Your Honor. The -- the issue that was raised on direct appeal was that the statements that were made to my girlfriend from the interview room at the police station should have been suppressed based upon the Fruit of the Poisonous Tree Doctrine. On direct appeal my appellant attorney intertwined an expectation of privacy issue in with that Fruit of the Poisonous Tree Doctrine. The State responded that the expectation of privacy was not argued at trial and therefore was not preserved for appeal.

THE COURT: Yep, I read that. I read the Fourth DCA opinion. Thanks.

All right. Next question.

BY MS. BALDREE:

Q And your attorney spoke to you about your trial strategy, did he?

A Yes. Yes, ma'am.

Q And your trial strategy was that you were going to discredit the victim by showing that her family didn't believe her when she told them; correct?

A I'm not -- I'm not sure if that was exactly

explained that way. I mean, you know, how else would I be able to defend myself when there was no physical or medical evidence or any -- and everything was inconclusive, all medical exams are inconclusive or any kind of sexual abuse?

Q And your trial strategy was to discredit the victim by proving that when she told her family, they did not believe her; correct?

A Yes, sir -- yes, ma'am. What other defense --

Q Would that not be a good trial strategy?

A Well, there really was no other defense.

Q Would it also not be a good trial strategy to show the inconsistent statements throughout the different statements that she's given to people?

A Yes, ma'am, that was my --

Q That was a good trial strategy?

A Well, it was -- yes, it was trial strategy. But, I mean, for the State eliciting these other, you know, this testimony bolstering her credibility, I mean, it kind of -- it kind of undermined my defense.

Q Are you familiar with the Child Hearsay Rule?

A 90.803, yes, ma'am.

Q Okay. And how did you expect to get around that?

A My attorney never objected to it.

Q Your attorney -- how was your attorney supposed to get around that Child Hearsay Rule?

A I'm not -- I'm not really sure who you're -- how was he supposed to get around that rule?

Q Yes, how was he supposed to get around that rule that allows her statements to other people to come in for the very purpose of bolstering her?

A Well, I'm not quite sure how to answer that. I mean, a hearing was never -- a hearing was never held. I remember speaking to Mr. Frizzell prior to trial and discussing that, you know, about the child hearsay statements and that, you know, I felt we had reasons to challenge it. But it wasn't really -- we never really addressed it again and I really wasn't -- I wasn't aware of the importance of it, to be honest.

Q Tell me what legal reasons you had to attack that rule and that rule would not apply to you? Tell me.

A I believe that there were -- well, not that I believe. There was certain statements that were made to -- that were made to the witnesses that weren't proved, that, you know, she made certain allegations that I had picked them up and I had -- I had -- I picked them up from the grandmother's house, I went

back to the Ale House and I came back again. And those -- those things never occurred.

Q It's proof, the Defense to the child hearsay rule?

A Pardon me?

Q It's proof, is that a defense to the Child Hearsay Rule?

A Yeah, it was basically the whole crux of it. Challenging the Child Hearsay Rule is basically challenging the credibility of the girl.

Q Explain that again.

MR. BURNS: Judge, I'm gonna object at this point. Counsel is asking for legal conclusions from a lay person.

THE COURT: And your response to that would be?

MS. BALDREE: My response to that would be that he's -- he's saying that this stuff isn't allowed in, when legally -- legally this -- all of this information is coming in and he's saying that this should have been objected to, when it's clear trial strategy and also he needs to address how legally he's gonna keep this out.

THE COURT: Okay. The objection is

overruled. He specifically testified he understood 90.803, the Child Hearsay Rule. He said it on the record, so the objection is overruled.

THE WITNESS: Can I get a minute, please, Your Honor?

THE COURT: Okay.

THE WITNESS: In Paragraph 50 of the State's response, it says, Bruce Harrison responded, he said, "Defendant's counsel was put on written notice that the State intends to offer child hearsay statements, pursuant to Florida statute 90.803(23)." He says, "Yeah, he did have a request of ruling and did not object at trial."

Then in Paragraph 59, Mr. Harrison, the State representative, comes back and says, "Although at first blush, one could say that these were a prior inconsistent statement and were objectionable, from defense counsel perception, it was clear evidence that the victim's own mother and father felt the victim's allegations/credibility and that no steps were taken to protect the victim or confront the suspect. This is very good

opinion testimony that would not have been introduced at trial, had counsel objected."

Paragraph 69, Mr. Harrison, a representative of the State says, "Based upon the foregoing and circumstances, the victim's revelation (unintelligible) suspect at best."

Paragraph 73, Mr. Harrison, the State representative says, "The impact of the trusted aunt being confided in by the victim that she had been sexually abused was not questioned to the victim's truthfulness. This was good opinion evidence regarding the credibility of the victim's statement that would not have come out, had counsel objected."

So -- so --

BY MS. BALDREE:

Q Okay --

A Ma'am, let me finish. So, in --

THE COURT: Well, sir, you're not being responsive, so, you're not gonna finish.

Next question.

MS. BALDREE: I have no further questions.

THE COURT: Okay. Now your attorney can

redirect with regard to what you want to tell me.

ROBERT LUNDBERG: Thank you, sir.

THE COURT: There has to be a pending question.

REDIRECT EXAMINATION

BY MR. BURNS:

Q When you indicate -- what was it, 90.803?

A (unintelligible).

Q Does that mean that you know that that's the Child Hearsay Statute or does that indicate that you have a full understanding of the Child Hearsay Rule and its functioning?

A That just tell -- I just -- I recognize the statute from reading it. As far as legally being able to argue to a legal litigation, no, I really -- I can't do that. I'm not prepared to do that.

Q If the Child Hearsay Rule permitted other witnesses to testify that the girl shared her allegations with them, and she stopped there, or those witnesses stopped there, you would not have a problem with that testimony, would you?

A That would be -- no, that would be fine.

Q Your problem with the witness' testimony is they're going beyond just a mere recitation that the

girl told the facts, but that they went out of their way to appease the attorney for themselves that the girl would be truthful with them?

A Yes, sir.

Q And likewise, with the girl's own testimony that she was asked many times would she tell the truth --

MS. BALDREE: I'm gonna object to leading.

THE COURT: Yeah, you can't testify on behalf of the witness. It's -- it's a good try though.

BY MR. BURNS:

Q All right. So what is -- what is your contention then regarding the child hearsay?

A You know, I believe, as far as, you know, any statements that she had made to them, that would be fine, you know, but as far as them going out of their way to bolster the -- bolster the girl's credibility, I feel that that was, you know, that weighed heavily against my defense.

Q Regarding the issue that -- that the State began with the, the recording that was permitted into evidence of a conversation you had with your girlfriend --

A Yes, sir.

Q -- that conversation occurred where?

A That occurred in the police -- in the interview room at the police station.

Q Now, your contention is that that issue was not properly argued or was not able to be properly brought before the appeals court?

A Yes, sir, because the (unintelligible) the issue not being argued at trial and therefore wasn't preserved. Unless the appellant court can (unintelligible) preserved for appeals.

Q Did the officer who permitted you to speak to your girlfriend say anything to you that would lead you to believe the conversation --

(Phone rings)

THE COURT: Hold on. Hello. Yeah, I'm trying to print something for the trial testimony and I can't seem to stop the printer, so. Okay. Thanks. Bye. The mic -- the microphones on the tables need to be turned on. There you go. Thanks.

THE WITNESS: (unintelligible).

MR. BURNS: Maybe. But if there was any problem hearing, we would have gotten a call earlier.

MS. BALDREE: I'm going to object to that question, Judge. It's not an issue --

THE COURT: What question was that? I'm sorry.

MS. BALDREE: It's not an issue in this 3.850. He's objecting to the -- the statement that was brought in where he was speaking to his girlfriend. I don't think that's one of the issues for this hearing.

MR. BURNS: It's -- it was brought up on direct examination. Why can I not cross on it?

THE COURT: The objection is overruled.

BY MR. BURNS:

Q Did the officer say anything to you to indicate that you would have privacy?

A Yes, sir. I'd like to explain a little bit. When I -- I spoke to the detective, there was a --

THE COURT: Let me stop you here for just a minute. I know they talked about -- the State talked about it. They talked about it in the context of what was said at that -- at that -- at that -- inside the interrogation room.

MR. BURNS: Yes.

THE COURT: But as to whether or not that's the fruit of the poisonous tree or as to whether or not that was -- hasn't the Fourth District -- didn't the Fourth District rule that it wasn't the fruit of the poisonous tree and that they affirmed the -- they affirmed the judgment on appeal; right?

MR. BURNS: The judgment was affirmed. They did not really, or at least according to Mr. -- Mr. Lundberg's interpretation, the Fourth District Court of Appeal did not address the issue squarely on whether it was -- it was --

THE COURT: Because it wasn't raised on appeal or wasn't raised --

MR. BURNS: Yeah, well, there was no contemporaneous objections of preserving.

THE COURT: Okay.

MR. BURNS: Now it's true that Your Honor has already denied that ground.

THE COURT: Right.

MR. BURNS: It was raised in the -- in the post conviction motion. But because there may be some lack of clarity as to exactly what is the ground that Mr. Lundberg

wants to argue and because the State brought the issue up, I just wanna ask him two questions about it.

THE COURT: Okay. I'll give you limited ability -- limited questioning. Because otherwise we're going much further astray than what -- on the issues.

MR. BURNS: Understand.

THE COURT: Thanks.

BY MR. BURNS:

Q Don't give us a whole explanation of the whole thing, just answer the question. Did the officer say anything to you to give you a heightened sense or feeling of privacy about that interview?

A Yes, sir, at the end of -- at the end of the interview when she brought my girlfriend into the interview room, she asked my girlfriend to take a seat and my girlfriend sat down in front of me and before leaving the room, she says, I'm going to give you-all -- I'm going to give you-all privacy, okay. And my girlfriend turned around and acknowledged, thank you.

Q And did the officer do anything, take an action to indicate that you were gonna have some privacy?

A Yes. When our interview was done, there was a tape recorder on top of the table and she shut that tape recorder off and she had taken the audio tape out of it and then she left the room and apparently she secretly recorded our conversation that she offered -- that she promised was gonna be private.

Q So even if a person in an interview room has no expectation of privacy, your contention is that those additional factors gave you an expectation of privacy; is that right?

A Yes, because it was a detective for (unintelligible) extended, extended arm of the government, she -- she verbally -- and it was recorded that she offered -- she personally offered us privacy to both of us.

Q So to address the State's point, your contention is that that evidence that the State just cited to, should never have come before the jury either?

A That's correct. (unintelligible) expectation of privacy.

THE COURT: And you're saying this was never argued in front of trial court?

THE WITNESS: No, sir, this was never argued.

BY MR. BURNS:

Q Did Mr. Frizzell make any motion contemporaneously or pretrial to suppress the recorded conversation between you and your girlfriend?

A Based on the expectation of privacy, no sir.

Q Did you ever discuss that issue with Mr. Frizzell?

A I did. We discussed it and he told me that I -- he said that I didn't have an expectation of privacy in the interview room. And I explained to him that it was the detective herself that, she offered privacy to both me and my girlfriend. And then she left. And I really wasn't aware that there was a videotape of the conversation between my girlfriend and I until it was brought to my attention. This was months after my arrest. And I was kinda surprised because I remember the detective saying that it was gonna be a private conversation.

THE COURT: Isn't there case law that says there's no expectation of privacy in a police interrogation room?

MR. BURNS: What?

THE COURT: I'm almost positive there's case law.

MR. BURNS: There is, Judge. But

there's also case law that indicates that if the officers do anything to heighten that expectation of privacy, then that's -- that's -- in other words, that's a rebuttable presumption more or less.

THE WITNESS: I have cases supporting --

THE COURT: Okay.

THE WITNESS: I have cases supporting my contention, Your Honor.

THE COURT: Okay.

THE WITNESS: Calhoun vs. State. I even have a case, Johnson vs. State. It was where the Defendant and his wife -- the Court ruled that the Defendant and his wife did not have an expectation of privacy in their conversation in the police interview room. The police officer's secret taping of the conversation did not violate Fourth Amendment prohibition.

The reasons for denial in this Johnson, Johnson vs. State case, is at 730 So.2d 368, it's a Florida Fifth case, Fifth DCA, 1999. The reason for the Court's denial is that the police stated that he recalled one of the parties stating they were taped -- that they

were being taped. However, this wasn't recorded. And in response to defense counsel's question to the wife, she said that she believed that it was a private conversation, but I didn't know. She said, you know, you never know with it being a vent in the ceiling. And there was overwhelming evidence to convict.

THE COURT: Okay. Thanks.

Does -- can the State point me out to the portion of trial transcript where they start talking about what was said before the -- before the -- Mr. Lundberg and his girlfriend started talking? Isn't there -- wasn't there a transcript that was read to the jury or was there -- was the tape played?

MS. BALDREE: I think Page 91, Judge.

THE COURT: Page 91 of the transcript?

MS. BALDREE: Um --

THE COURT: Because I'm on Page 493 of the transcript. And there's some -- right before that there was some talk about the --

MS. BALDREE: I'm --

THE COURT: That's what you're reading from, that, that I was trying to print and my

printer went haywire.

THE WITNESS: Her -- Your Honor, her statements were on Page 96 of my videotape -- videotape transcript.

THE COURT: Is that part of the trial transcript?

THE WITNESS: Um --

THE COURT: I'm asking the State.

MS. BALDREE: Yeah, this is --

THE WITNESS: Okay. I'm sorry.

MS. BALDREE: Yeah, this is of the -- this is of the interview of Mr. Lundberg so I'm trying to find where it's also --

THE COURT: It says on Page 454 of the transcript, the Court, "Ladies and gentlemen, we're going to hand out copies of a transcript that Detective Dennis has just identified. This is to assist you in being able to hear what is on the tape." And I believe it's the conversation that the State just -- yeah. Yes, it is.

The Defendant, "I was -- I was talking about -- I was drunk, I really don't remember a lot of what happened, you know. She said I touched her, I could have. I have to pay the

price of what I did."

Do we know where the -- what -- what transcript there is of what was said before that to the girlfriend?

Was the full -- was the full discussion between the police or, I can't remember if it was police or deputies, and Mr. Lundberg and his girlfriend presented to the jury?

MS. BALDREE: No, Judge. I don't believe it was -- I don't believe all of that was presented to the jury. But I do have -- I do have his statement. I'm trying -- we don't have a full copy of the trial transcript because it's so long.

THE COURT: I got one in the court file. That's what I'm looking at. And that's -- I was trying to print some parts of it and that's when my printer decided to go haywire.

MS. BALDREE: I can -- I can read you from this. It's not that many pages.

THE COURT: Okay. That will be great.

MS. BALDREE: No, I take it back. Because I'm missing Pages 92 and 3.

THE COURT: Of the trial transcript?

MS. BALDREE: No, of his statement.

MR. BURNS: Right, looks like just the transcript of his statement is what I have also.

THE COURT: Do you have that portion of his statement where he says I wanna talk to my girlfriend and then they -- she comes in, or right before she comes in?

MR. BURNS: Yes, on Page -- on Page 91 of that transcript of that interview, on Line 13, the Defendant says, "I would -- I'd like to see my girlfriend before I left." On Line 20 he says, "Can I -- can I talk to her?"

Answer, "That's possible." "Okay. I'll try to do that."

"She's down there?"

"No, I'm not gonna let you walk out of there, you're gonna be in handcuffs."

"Well, can you bring her in here so I can talk to her before she --" I'm not sure what that means, leaves probably. Answer by detective, "Fair enough."

MS. BALDREE: That's all -- see, that skips to Page 94, doesn't it, Tom?

MR. BURNS: I'm sorry, yeah. I'm on Page 94 now. Yeah, I'm sorry. Was there a skipped page there? Yes, I'm sorry, I'm missing 92, 93 also.

MS. BALDREE: I don't know if that's just a mis-numbering or --

MR. BURNS: It may be. I don't know, but it's missing the last -- on the bottom of Page 91, 25, there should be another word there at least. And it doesn't seem --

MS. BALDREE: It seems to flow, like as if maybe it's mis-numbered, but --

MR. BURNS: Right, that's what I think. Because -- just because Page 94 kinda starts far down on the page.

THE WITNESS: Can I explain why it does that?

MR. BURNS: Not yet.

THE COURT: Go ahead.

MR. BURNS: Fair enough says the detective. Yeah, please, on Page 94, Line 2, says the Defendant, "(unintelligible) okay, all right."

"I'm going to end the tape, okay. Is there anything else, anything at all?"

"No."

"What do you want me to say when I go down there?"

"Just tell her I wanna talk to her, that's all."

"Okay. Sit tight."

They go into a little bit of discussion about his charges and does he have bond money.

On Page 96, the detective says, "Look, whatever you tell her is your choice, okay, just hold on."

Interviewer left the room.

Female entered the room.

On Line 5 of Page 96, detective then says, "You can have a chair, I'm going to give you-all privacy."

"Okay."

That's really the portions that Mr. Lundberg is referring to.

THE COURT: Okay.

MR. BURNS: Coupled with the action of not just saying that she's gonna stop the tape, but turning off the only available tape recorder that Mr. Lundberg saw.

THE COURT: Mr. Lundberg, was this a room with -- with a big mirror in it?

ROBERT LUNDBERG: Pardon me, sir?

THE COURT: Was this an interrogation room with a great big mirror in it?

ROBERT LUNDBERG: No, sir, it was an enclosed room with only -- there was -- it was -- there was no windows or mirrors or nothing. It was just like a -- like a small enclosed room. There was an entrance, exit door and there was another door to the left of me, which there was no knob on it. It was basically an enclosed room. When I walked in there was an -- there was an audio tape recorder on top of the table. When she began her interview she started it. She stopped and started it throughout the interview and then at the end of -- after the end of the interrogation when she was done, she ended the tape in front of me. This was before I speak to my girlfriend. And at that time, I didn't think anything else was being recorded.

THE COURT: Okay. Thanks.

Any other questions by the State?

MS. BALDREE: I did find the other pages -- I could read that, Judge. I did find Pages 92 and 3.

THE COURT: Okay.

MS. BALDREE: Okay. So, "Okay. Understand? All right. Have you got any questions for me?"

Defendant, "I would have liked to see my girlfriend --"

Question, "Is there --"

Defendant, "-- before I left."

Defendant, "You told her to leave?"

And the officer, "No, I did not talk to her. She does not know. She's probably sitting down there waiting."

Then he says, "Can I -- can I talk to her?"

Officer, "That's possible. Okay. I'll try to do that."

And he says, "She's right there, I can't talk to her?"

And it's a, "Oh, she's down there? No, I'm not going to let you walk out of there. You're going to be in handcuffs."

Then he says, "Well, can you bring her

in here so I could talk to her before she sees this?"

"Would you like that?"

And he says, "Yeah, please."

"Okay. Stand up, turn around."

"You can't bring her --"

"Turn around."

"-- here without handcuffing me?"

He says, "Turn around, pushing in a second. Unlock your hands. What is she going to say?"

"I don't know what she's going to say. I just wanna talk to her."

Then the officer says, "Sit down. You don't have any money; right?"

Defendant says, "No, that's my wallet."

"What's that, what is that?"

And he says, "It's a piece of paper. You know, I'm not some kind of a --"

"Look, look, look, I gotta make sure that you don't have anything on you."

"You know, you're sitting here and you tell me that you trust me --" this is Defendant. "You know, you're sitting here and you tell me that you trust me and you

believe me and now you're acting like I'm, you know."

The officer says, "No, no, no. Just had to make sure, okay. I'm more concerned about you hurting yourself than you are than hurting me, to be quite honest with you."

"How much time I gotta spend in jail for this?"

The officer, "Sit down, sit down, sit down in that chair."

And he says, "Why are you being like this?"

The officer says, "I'm not, sit down."

He says, "You're acting like you're somebody that I could trust and then --"

The question is, "Rob --"

"No, I'm not. No, I'm not. I just don't -- when those cuffs go on, I'm very used to sometimes people flipping out on me, okay. It's all about my safety. It's all about my safety and your safety, but I think I've been more than fair to you. I think I've been very fair to you, okay. I'm not an asshole, okay, I want you to be able to talk to your girlfriend, okay. But I know you're

going to jail and I can't let you sit here without being in handcuffs right now."

And he says, "Uh-huh."

"Because I'm pretty much done. I don't want you to sit there all night, okay. If I would have come right in here and threw the cuffs on you right away, I don't think that you're going to harm me, okay. However, I just -- it's all about officer safety."

He says "Okay."

Officer, "Okay. I don't want her to see you in handcuffs, but --"

And he says, "I wanna see her, I don't care."

The officer says, "But I -- I have only one option, one, an option to let you walk out there and talk to her; I can't. So I can bring her in here, I can try that."

He says, "Okay."

"Fair enough?"

Says, "Yeah, please."

"Okay. All right. I'm going to end the tape, okay. Is there anything else, anything at all?"

He says, "No, hut-uh."

"Okay. The time is 8:20 p.m. What do you want me to say to her when I go down there?"

"Just tell her that I wanna talk to her, that's all."

Says, "Okay. Sit tight and I will."

Defendant, "I might have -- am I going to be able to get bonded out for this or no?"

He says -- the officer says, "Probably. And have you got --" then he asks, "Have you got any money?"

"How much, how much is the bond?"

Officer says, "I have -- I have no -- jail people will tell you. You've gone through this before."

He says, "Yeah, but I just --"

And the officer says, "You know."

"What I'm going -- what am I going to be charged with?"

"What are you gonna be charged with? Two sexual batteries."

"That's a what, a felony?"

And the officer says, "A felony? That's a felony."

"Okay. Do I have to do time for that?"

The officer says, "That's all up to the attorneys. That's where I told you it all comes into play. When everybody starts talking to them and then they, you know, see what the options are and that's what they'll do. I mean, I'm not a lawyer but, you know, in my experience, that's the thing they do. They take a lot of things into consideration."

He says, "Uh-huh."

"And you know, that's where all this stuff comes into play. This is just like -- the arrest is just, you know, a formality, it's a crime, it was committed, you know what I'm saying, but all the other stuff comes after. I don't mean that right now you gotta go to jail and you sit there and you stay there, you know that."

"Uh-huh."

"Okay. You get a bond, you get out, you're innocent."

"Yeah, but then --" and then he gets cut off. "Yeah, but then I'm going to get arrested again for violation of probation."

"Well, I forgot about that. I forgot

about your probation."

Defendant says something inaudible.

Officer says, "All right. I'll be back."

Then officer comes in, "Hi, you need to stand up, I've gotta double lock that so you won't -- so they won't hurt you. Are they comfortable right now?"

He says, "No."

He says, "Are you okay?"

He says, "Yeah, I'm okay."

"I'll send somebody to get your girlfriend, all right. Now, I'm not going to tell her anything, okay."

And he says, "Uh-huh."

"Because I'm just not. Whatever you tell her is your choice, okay. Just hold on."

And then the female enters the room and says, "You can just have a chair. I'm gonna give you-all some privacy. Okay."

She says, "Thank you."

And he says, "Just don't -- just be cool. That's all I ask. That's all."

Then -- then his conversation that we

did before starts where, "I'm going to jail for sexual battery."

THE COURT: Okay. So Mr., Mr. Lundberg, when they put you in handcuffs in an interrogation room, you thought you had an expectation of privacy?

ROBERT LUNDBERG: Yes, sir, based upon a detective offering the expectation of privacy. Those were expressed words.

THE COURT: Okay. Thanks.

Any other cross examine examination?

MS. BALDREE: Yes. I'm sorry again.

RECROSS EXAMINATION

BY MS. BALDREE:

Q Now, you -- you, Mr. Lundberg, think that it would have been helpful to your case for the girl to testify as to what -- for her statements to the other people to come in, without their reaction to those statements, you felt that would be helpful to you?

A Well, seeing that the jury is supposed to be the sole arbiter as to -- as to the credibility of the witnesses, I mean, yeah, it -- it was -- I guess what I'm trying to say, ma'am, is that by -- by all these state witnesses bolstering the girl's credibility, it invaded the province of the jury because the jurors are

supposed to be -- they're the ones that are supposed to find whether the -- whether the witnesses are credible or not.

Q So you think three statements, one to Lilly, one to her mother, one to her father --

A There was more than three statements.

Q All of these -- all of these statements coming in, saying that you molested her, that would have helped your case? Those statements alone would have helped your case?

A I'm not saying that they -- that they would have -- I'm not saying that they would have helped my case, but by them bolstering her credibility, that harmed my case.

MS. BALDREE: No further questions.

THE WITNESS: I mean, credibility, it was the single biggest issue for my jury to -- to rely upon at trial.

MS. BALDREE: No further questions.

THE COURT: Okay. Thanks. Any redirect?

MR. BURNS: No, Your Honor.

THE COURT: All right. Thank you. Any other witnesses?

MR. BURNS: No, sir.

THE COURT: Okay.

Okay. State's witnesses.

MS. BALDREE: We could call Jack Frizzell.

THE COURT: I take it the Defense rests then?

MR. BURNS: Yes, Judge.

THE COURT: All right. Mr. Frizzell, you can testify from there.

If you'll raise your right hand, I'll swear you in.

THEREUPON,

JACK FRIZZELL, ESQ.,

HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE WITNESS: Yes, Your Honor.

THE COURT: Thank you, sir. You can have a seat. State your name for the record, please, sir, and spell it.

THE WITNESS: Jack Frizzell, F-R-I-Z-Z-E-L-L.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MS. BALDREE:

Q And, Mr. Frizzell, how long have you been an

attorney?

A Since 1997.

Q And how long have you worked in the area of criminal law?

A I've done criminal law the entire time. That's all I do.

Q Did you have occasion to represent Robert Lundberg?

A Yes, ma'am.

Q And did you review the State's discovery in that case?

A Yes, ma'am.

Q And did you formulate a strategy, a trial strategy for that case?

A Yes, ma'am.

Q And what -- okay. What was your trial strategy?

A All right. Any time you've got a case, particularly a case of this nature, you've got to consider what -- what the State's evidence is and how to counteract or formulate some sort of a plausible defense to that. In this particular case we had -- we had two things going against us. And number one was, we were able to get his confession to law enforcement suppressed, however, we could not get the statements he

made to his girlfriend suppressed. So those statements were coming in, so I had to formulate a defense knowing that the jury was going to hear certain statements that he made. And then on the other hand we had -- there was no eye witness, there were no -- there was no physical evidence, so it was basically, you know, the testimony of the young girl, Vanessa. So the strategy was basically to try and -- you know, any time you have a trial your defense could be reasonable doubt, it could be it didn't happen or something happened but not what they said happened or you got the wrong guy.

In this particular case, what we were trying to do is discredit the victim to show where, you know, it had not occurred because there were various statements that she had made to law enforcement, various statements she'd made to family, her Aunt Lilly. And so what we were trying to do is, you know, bring out these statements to show that the -- there were inconsistencies in what she's telling one person and what she's telling somebody else in an attempt to show that, you know, her testimony cannot be relied upon. Unfortunately, we had to do that in the context of statements he himself had made to his girlfriend, so we had -- you know, that's what we were working with.

Q And when you -- was another -- was there a

strategy regarding her family believing her?

A Absolutely. You know, the mere -- I mean, normally, you know, when a law enforcement officer conducts an investigation, normally they talk with the victim, then they'll talk to other people. In this particular case, they had only talked with Vanessa, who was the young girl, the victim in the case. However, Vanessa herself had talked to family members, had talked to mom, dad, Aunt Lilly. You know, we knew that there was animosity between Mr. Lundberg and Aunt Lilly, so what we were trying to do is show that there was some manipulation going on, you know, perhaps the officer had suggested. Because if you think of it in terms of what he was charged with, he was charged with capital sexual battery, which by its nature requires penetration. Well, we were trying to show that on one occasion she said, no, he just touched me and that on other occasions when talking with a law enforcement officer it came out that he actually penetrated her. So we was trying to show that, you know, she was manipulated by law enforcement, she was manipulated by her aunt, you know, and then, you know, by time it got to mom and dad, you know, the story, you know, could have been misinterpreted along that chain or along that route. And so we were trying to show that she was not

a credible witness.

Q Okay. And is it unusual for the parents of the child not believe the child?

A Absolutely. I mean, generally, you know, when a child comes to mom or dad and says, this happened, I mean, they're the first ones on the phone calling law enforcement, you know, saying, you know, my child has been molested. But for the parents to have heard it on prior occasions, then subsequently, and to go to the lengths and go to the extremes that they went, questioning the integrity or the truthfulness of their daughter, well, I certainly wanted that to be presented to the jury because now it's not just, you know, the, you know, the credibility of the witness as far as the Defense position is concerned, but we're also injecting into that picture that the victim's own family was questioning her integrity and we wanted that to be presented to the jury as part of our strategy, as part -- as a tactical consideration.

Q And was there also -- did you also wanna bring out the animosity between Lilly Kasad, which is the aunt, and the Defendant?

A Absolutely. Because I mean, that was clear that there was -- and that was brought out that, you know, there was no love loss between the two of them

because of work-related and other things that were going on between the two of them. So we wanted to bring that out. And then she was actually the one that first, you know, reported the incident. It was reported to her by Vanessa and then she reported it to others. So you know, we were trying to bring out the fact that, you know, this is one way that Lilly could get back at Mr. Lundberg, you know, by making these accusations, you know, and, you know, basically, you know, manipulating the child, you know, to further those interests.

Q Now, did you -- did -- are you familiar with the Child Hearsay Rule?

A Yes, I am.

Q And are you familiar with anything that would have prevented those statements from coming in?

A No, there was no way they could prevent those statements from coming in.

Q Also, did you review the tape for the statement that he made to his girlfriend?

A I reviewed -- I reviewed everything. I reviewed the -- the entire interrogation up until the detective left the room and the girlfriend entered the room and then the subsequent conversation that ensued.

THE COURT: When you said the Child

Hearsay Rule would not keep -- would not keep the statements from coming in, what statements were those again? Of the parents?

MS. BALDREE: Of the parents and Lilly Kasad.

THE COURT: Of the parents and Lilly; is that right?

MS. BALDREE: Yes, sir. They're -- they're allowed to testify --

THE COURT: I need to hear him tell me that because he's the witness.

MS. BALDREE: Oh, sorry.

THE WITNESS: The statements that she made to these folks would be admissible under the Child Hearsay.

THE COURT: Right, 90.80 -- whatever it was, yeah. 90.803, right. Okay. Thanks.

BY MS. BALDREE:

Q Now, did you also review the statement that he made to his girlfriend?

A Yes, I did.

Q And did you find any basis for suppressing that statement?

A I did everything I could to suppress the entire statements that were made. However, I knew that

any time you're in an interrogation room, any time you're in a police cruiser, there's no expectation of privacy. I think it's well founded in the case law that you don't have a reasonable expectation of privacy under those conditions. You're in an interrogation room, you're in handcuffs, you're in a police cruiser in handcuffs. You know, many times when I've been in interrogation rooms with clients, I'll tell them, don't say anything, you know, we're being tape recorded. So I'll talk about the weather or whatever.

Q Okay. And she used -- she is a girlfriend, not a wife; correct?

A That's correct, at the time, yes. She may have been an ex-wife.

ROBERT LUNDBERG: Ex-wife.

THE WITNESS: Yeah, she was his ex-wife.

BY MS. BALDREE:

Q Now, also he complained about the statement that was given to Detective Dennis, I think it was?

A Yes.

Q And in that, Detective Dennis tells him certain things about her, well, she was straightforward. Is that part of interrogation tactics?

A Of course.

Q Okay. Is there any basis for redacting that if it takes everything out of context?

A No. In fact, generally, my experience with law enforcement as it relates to those types cases and children is one of the first things they'll ask them, particularly when they're young is, you know, do you know the difference between a lie and telling the truth. And they want to establish that, you know, the first and foremost thing in their mind is these are serious accusations, we have to be able to establish, you know, that, you know, this child is credible and not making something up. So yeah, they'd go to great lengths to establish that.

Q Okay. Did you intentionally allow testimony to Detective Dennis because of the inconsistency in the touch versus penetration?

A Absolutely. In any -- in any trial situation, you know, there are tactical, there are strategic considerations. There are instances where even though something said may be objectionable, however you may want to allow it to come in any way because it may further, you know, your defense. It may actually, you know, add to, you know, your defense as far as, you know, what you're trying to get across to the jury. So, you know, when you're in that situation,

you have to make decisions as it appear -- as, you know, as they appear and often times it's not in your client's best interest to object to something, especially if by objecting you prevent something from coming in that may very well serve the interest of showing that somebody is less than credible. It may serve to impeach the witness' credibility.

MS. BALDREE: I have no further questions, Your Honor.

THE COURT: Cross examination.

MR. BURNS: Thank you, Judge.

CROSS EXAMINATION

BY MR. BURNS:

Q Let's go -- let's do the same thing, Mr. Frizzell. If you have in front of you maybe you can follow along. We'll go issue by issue.

A Okay.

Q On the -- the bolstering and the self-serving statements, is it your contention that the Child Hearsay Rule permits the statement of the child to come into evidence in total, there's nothing that can be done to alter or redact any portion of the statements?

A Any -- any statements that the child would have made to another party, whether it be the mother, the father, is admissible. However, you know, like I

said earlier, you can object to certain portions or you can allow it in. And you have to make those tactical considerations as it presents itself. In this particular case, you know, these statements that she's making to the detective, the statements she's making to the mother and the father, to Aunt Lilly, I felt were, were advantageous to our defense.

Q Why so?

A Because it showed that not only had she made different statements on different occasions to the detective as it relates to the penetration as opposed to the mere touching, but there were all these folks that she had talked to who are actually questioning her integrity or her truthfulness. And so I wanted that to come out. I wanted that to come out in the mix to show that this child was less than credible. Because, you know, we had to be able to show somehow that because of the statements, you know, that she had made to others were in contradict to statements she made on other occasions and statements she made to family members who generally would have believed her without bating an eye were questioning her. And I wanted that question mark to be put before the jury because what we were trying to create is, you know, a reasonable doubt.

Q And merely exposing the inconsistencies in

the child's statement would not have done that, you believe it was advantageous to Mr. Lundberg for the fact that this -- that the family was questioning the girl at all, that should come in too?

A I believe it -- yes. I believe it further our -- our position that the child was less than credible. Because, like I said before, you know, if the parent of the child are questioning their own child, I think that's important for the jury to hear. Because the jury might think, well, you know, if mom and dad are questioning the child, well, you know, maybe, maybe there's something to this.

Q But the result of mom and dad's questioning of the child was that they concluded and told the jury that they believed the girl was telling the truth, so that's not advantageous to Mr. Lundberg, is it? In other words, you wanna get the process before the jury but the result of the process was disastrous; right?

A Well, we could still argue, you know, we can still argue that in the end, okay. Naturally -- I mean the charges wouldn't have been brought to begin with -- had law enforcement not been convinced that a crime occurred, okay. And we had to first deal with the statements of Mr. Lundberg himself, okay. We had to deal with those. Then we had to deal with the

statements the child made. And under the Child Hearsay Rule, any statements she made to people. Now, you can argue, you know, after the fact that, well, you know, maybe, you know, letting some things in and some thing out was more advantageous, but, you know, at the time the big picture was that we're trying to present to the jury, you know, that everybody is questioning, A, everybody, including family members is questioning the child's integrity or truthfulness. B, that the law enforcement officer herself only questioned the child, didn't question anybody else, didn't question mom, didn't question dad or anything else, all right. So I wanted to get out all of information, you know, to show to the jury that child, you know, is not telling the truth. The child said on one occasion to the detective one thing, on another occasion, something else, you know, she said something to, you know, one party, meaning Aunt Lilly who has animosity and dislikes Mr. Lundberg and yet, that's, you know, that's where the genesis began as far as the catalyst, as far as, you know, the -- the subsequent conversations the child had with other family members.

Q Well is it your testimony that you wanted all the efforts to parents made to determine the girl's truthfulness to be brought to the jury?

A I believe -- I believe, you know, in my heart I believed that that was advantageous. Because, you know, if the parent had simply said I don't believe you, that's one thing. If, you know -- but by -- by going in depth, by going one step further, they could have taken the position, I believe you Vanessa, and we have to do something about it. Or they could say, well are you sure, okay, all right, then we'll go. But they went even further than anyone would imagine. They went so far as to consult with, you know, a psychologist because they weren't convinced that their daughter was telling the truth. And I thought that was advantageous to bring out and bring before the jury that the parent had gone to these extreme lengths, you know, just to satisfy in their own mind that the child was telling the truth, and then, you know, my job then was to try and convince them that, well, you know, maybe the child ultimately like so many adults, that ultimately convince themselves I didn't do anything wrong.

Well, the flip side is also true. A child could ultimately conclude that, hey, I've been telling this over and over again, now I'm believing it. All right. And ultimately, you know, the parents could come to the conclusion that they believe her. But I wanted to show the jury to what extent, to what lengths

this family went to, you know, to believe their own child, which I found to be, you know, pretty incredulous.

Q But the result of every single extra effort that they made was that they believed the girl's testimony, and that's the conclusion that they told the jury; right?

A That's correct.

Q And it's your contention that the mere fact that they had an initial question, even if it was resolved in their daughter's favor, was something that the jury should hear about?

A I still believed that it was important they hear it.

Q Including the whole story of them taking the girl to this person Larry. Would you agree with me that entire testimony from the girl's father and the counselor Larry, the entire purpose of that was to show that Larry vouched for the girl's credibility; right?

A No, it wasn't -- it wasn't so much him vouching for her credibility but to show that the family -- I mean, there's two sides of the coin. Yeah, you can say on the one hand he's vouching for her credibility. But on the other hand, you know, the family had, you know, gone so far as to consult with a

professional. I mean you've gotta weigh -- you've gotta weigh, you know, the tactical considerations, you know. Do I object to this or do I let it in simply because it may actually benefit us in the long run. You know, and those are tactical considerations you're confronted with in any trial situation. Do I -- I do object to this or I do let it in. And, you know, all defense attorneys have to decide for themselves at that point in time, do I stand up and object to this or I do let it in. Do we achieve any tactical advantage at all by letting it in. And I -- my belief was yes, that we would, because it would show the lengths the family went to questioning their on child's integrity.

Q And you didn't feel that that would be immediately counteracted and indeed outweigh by the fact that the conclusion of each of those people -- this jury heard from the mother, the father and the aunt, that they all believed the girl was telling the truth. Would you agree with me that in general it is not proper to have one witness testify as to the truthfulness of another witness?

A As a general rule, yes, I would agree with you.

Q But you're saying in this case there was such benefit to your case that you figured it should be

permitted?

A I did, because when you -- when you look at what he was charged with, again, capital sexual battery, which involves penetration, okay, she's telling one person, you know, the detective after questioning that there was penetration involved, which is why he was charged with capital sexual battery, but on the other hand, his own words out of his own mouth was, yeah, I may have touched her. Well, what was the actual ultimate verdict? The ultimate verdict was attempted sexual battery, meaning that they did not believe that there was actual sexual penetration, even though the child had stated that there was.

Q Well, that's fine. I wouldn't quarrel with your ability to bring out factual inconsistencies in the girl's statement, but would you agree with me that the Child Hearsay Rule doesn't permit every single aspect of the child's statement to come in, only that she told other people of the allegations surrounding the crime; right?

A Absolutely.

Q If she talked about her favorite ice cream or she hates her math teacher, that's not relevant, that shouldn't come before a jury; right?

A That wouldn't come in.

Q So likewise, if she's saying, I told my dad I told the truth, I told my mommy I told the truth, you could have gotten out the inconsistencies factually without that testimony from her; right?

A Not necessarily, because if you think about it, all right, if I had limited it to that, if I had limited it solely to I told mommy this, I told daddy this, I told Aunt Lilly this, okay, all right, well, all right, the end product is the same as you suggest. The end product was that ultimately the jury would have concluded that they believe their child. And that's why he was prosecuted, okay.

Now, the only other individual involved in that equation that could have cast a different slant to it was Aunt Lilly. And she had -- she had a reason, you know, she had a reason in my opinion to, you know, to go against Mr. Lundberg in that she did not like him, all right.

Q Yes, there was -- there was prior employment issues and other sources of confrontation between them.

A Right. Whatever the reasons, they did not like each other. All right. So if all I brought out is that she had told her mom, she had told her dad, you know, and Aunt Lilly, if I had left it at that, then the jury could have concluded that, well, she told her

mom, she told her dad and here we are and he's being charged. And then you couple that with his own statements, and we're in trouble. But, if you go further, in my opinion, you know, in the cross scenario, in my opinion, by going further with it and showing the lengths to which, even though the child told mom and dad, if I would have left it at that, end of story. And the jury's concluding that mom and dad believed her. However, by going further to show that they didn't necessarily believe her when they told her, in fact they went to such extremes to actually involve a psychologist because they didn't believe their child, I thought that was advantageous to bring that out.

Q Did any of the witnesses say, I didn't believe Vanessa, that's why I asked her further or could it just have been the enormity of the accusation that resulted in them questioning her further as to whether she was being truthful?

A You could -- you could characterize it that way. You could characterize it, the enormity of the accusation. But my experience, this want my first capital sexual battery case I tried, okay. So you have to -- you know, you have to -- you to have gauge what's being said and to whom and what's -- you know, you know, how far are they going with this. All right, how

far are they going with this. And, you know, they, you know, went to the extremes in my opinion.

Q Now, you indicated in your testimony that you wanted the efforts the parents made to determine the girl's truthfulness to be brought out. Does that same argument apply to the comments detective Dennis made in the interview with the Defendant in which she is telling the Defendant this girl was -- was (unintelligible) herself fine, I had no problem, I made sure she was telling the truth, her body language was good? What was the purpose of permitting the jury to hear that?

A Because that's all part, you know, that again, that again is, you know, a detective basically doing their job. Like I said before, you always want to know, are you -- do you know the difference between the truth and a lie, you know. That's just standard police procedure. That's standard police procedures, you know to determine whether or not, you know, a child is telling the truth. I mean the detective also said other things too, you know. And that's where the accusation he involved that there was penetration, the interview between the detective and the child. That's where the -- the actual accusation he involved from that led to the capital sexual battery charge.

Q And -- and the jury hearing the Detective Dennis indicate that I stress the extreme importance of telling the truth and I asked her several times, how is that helpful to Mr. Lundberg? Because the detective's responses are always, every testy gave this girl she passed, she was totally truthful. That's Detective Dennis vouching for the credibility of the victim; right?

A Well, you know, if you take that in the context of other statements she's made, all right, the accusation capital sexual battery. She also stated that she told her there was penetration involved, all right. But she told other people that he just touched me. So, you know, that's just one other way of trying to, you know, attack the credibility of another witness, in this case the law enforcement officer. The law enforcement officer is going to great lengths, you know, to testify or -- to testify that, you know, I went to all these lengths to see if the child is telling the truth, but at the same time, you know the child told me that there was actual penetration, but yet the child told other people that he just touched me. So that's just another -- another way of attacking another witness' credibility.

Q But couldn't you have gotten that out while

asking the Court to suppress that -- those comments from Detective Dennis that related to the girl's credibility?

A Yeah, you could, but at the same time, the big picture was we're trying to show that the child was less than credible. And that a lot of people, including the detective, including moms, dads, everybody were going to great lengths because they didn't necessarily believe her, especially the family. The law enforcement officer is always going to believe the child.

Q Regarding the girlfriend/Defendant videotaped statement. If I understood your testimony correctly on direct, you did not believe, based on your understanding of the law and the facts that there was a basis for you to suppress that statement?

A I tried to keep all of the statements out. However, when it came to that portion, when it came to that portion where the detective exited the room and Mr. Lundberg began his conversation with the -- his girlfriend, at that point in time the judge would not suppress that portion of the tape. He would not suppress those statements. And my experience and my familiarity with the case law is that when you're in an interrogation room, you do not have any more than if

you're in a police cruiser an expectation of privacy. I think it's well settled in the case law that do you not have an expectation of privacy.

Q Was the -- the girlfriend/Defendant's statement the express subject of a motion to suppress?

A The entire -- his entire -- anything he said was the subject of the motion to suppress. However, the judge determined that he was only going to suppress in part the conversation that ensued between Mr. Lundberg and Detective Dennis, but that any statements that were made to a non-law enforcement individual would not be suppressed.

Q So you did move expressly to suppress this portion of the statement, the Defendant talking to his girlfriend?

A I'm sorry I didn't mean to interrupt.

Q That's good.

A I was trying to suppress everything he said, but the only problem that I had was that -- and I talked to Mr. Lundberg and I says, you know, the judge is suppressing your confession, however he's not going to suppress any statements you made to non-law enforcement and I cannot get that suppressed.

Q Was that a result of the judge's order?

A Well, that was the judge's order, however,

you know that, was part of my motion to suppress, to suppress everything he had said. We went into everything, however, the judge would not suppress the portion when the detective left the room.

Q Did you argue to the judge that the statement and action of the police officer, specifically saying I will leave you and I'll give you some privacy now and turning off the only visible recorder did not --

MS. BALDREE: I'm gonna object, Judge, since this isn't one of issues for this hearing.

MR. BURNS: Well, it's -- it's --

THE COURT: What's your response to that?

MR. BURNS: The testimony from the Defense is, we have to take this all in light of the fact that the jury was gonna hear this statement. Our contention is that the jury should not have heard this statement and that -- and that if the Defense is formulating it's theory of the defense based on this coming in, that might be wrongful theory to begin with.

MS. BALDREE: And the State would argue that this -- that motion was heard on

August 4th, 2003. It was -- that portion was denied by Judge Geiger.

THE COURT: I read that part of the transcript.

MS. BALDREE: (inaudible).

THE COURT: I read that part of transcript.

MS. BALDREE: It went on appeal and, you know, now we're just rearguing something that's not an issue for today.

MR. BURNS: Well, but again --

THE COURT: Where was that raised in the motion, the motion for ineffective assistance of counsel?

MR. BURNS: Do you have what Ground that was?

ROBERT LUNDBERG: That was Ground 14, Your Honor.

MR. BURNS: But in any case, Judge, I'm trying to determine was that actual portion, we have testimony that the -- all statements ever given were attempted to be suppressed. I just wanna flush that out a little bit and find out, was this particular statement that's subject of testimony or argument at

the motion to suppress -- because our contention is that this -- this particular issue was never presented in the proper legal frame, which is an expectation of privacy issue and that even in ordinary circumstances where a Defendant might not have an expectation of privacy, in these particular circumstances, with the turning off of the recorder and the detective saying, I'm gonna leave you in privacy now, I want in know whether those grounds were actually ever argued.

THE COURT: The objection is sustained. I made it very clear in my order on Pages 16, 17, 18 and 19 how we addressed those issues, so that objection is sustained.

MR. BURNS: But it's -- it's still the subject of -- of the -- of Mr. Frizzell's testimony, so I'm foreclosed from cross-examining on it?

THE COURT: He testified that -- you were asked -- you were asking him to do what as to what was your specific question?

MR. BURNS: Well, I wanna know was this specific portion of the Defendant's

statements sought to be suppressed and on -- and on what grounds. Because this didn't -- this didn't get anywhere because it was not preserved properly initially by tying it to the correct legal rationale. And that Mr. Frizzell's testimony is that knowing that this test -- that this statement was going to come in formed a big part of his decisions regarding everything else.

Now, on Ground 14, the Defendant is asserting that there was this matter -- this conversation was not the subject of a pretrial motion to suppress. Mr. Frizzell said it was, everything was sought to be suppressed.

THE COURT: I previously found on Page 19, the Defendant's allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for post-conviction relief, see Malendez vs. State. "Holding Counsel cannot be deemed ineffective for failing to make meritless arguments. Further, trial counsel cannot be deemed ineffective for failing to raise meritless claims or claims

that no reasonable probability of effecting the outcome of the proceedings."

I'll let you do a limited cross examination just in case I'm wrong as to Ground 14. I'm pretty confident that the case law that I cited, doing the research that I did, is correct. But I'll give you limited amount of -- limited amount of room on that.

MR. BURNS: Thank you, Your Honor. Just a couple questions. And this is my last topic.

THE COURT: Okay.

BY MR. BURNS:

Q Okay. So Mr. Frizzell, this particular portion of the -- all the Defendant's statements, I'm referring to the video, audio recorded statement of the Defendant and his girlfriend, that was the subject of a motion to suppress?

A The motion to suppress was to suppress any incriminating statements. It was a blanket suppression motion to suppress any statements that he may have made that were incriminative in nature.

Q And was this particular portion of those statements addressed in testimony or in argument or in

the judge's order?

A I would have to -- I would have to go back and actually --

THE COURT: I'm looking at it. Order granting Defendant's motion to suppress confession. Ordered and adjudged that the Defendant's motion is granted as to any statement made after being told by Detective Dennis that the penalty for capital sexual battery is death. Handwritten in what appears to be Judge Geiger's own handwriting is to Detective -- it says, to Detective Dennis. Any statements made on tape to any non-law enforcement officer is not suppressed. That's order granting Defendant's motion to suppress dated August 4th, 2003. And I'm bringing this to everybody's attention in an effort to get this case wrapped up.

MR. BURNS: I understand, Judge. I'm just gonna cite the one case. It was mentioned by the Defendant earlier, State v. Calhoun, 479 So.2d 241. It's a Fourth DCA case. And we're contending that the police deliberately, by turning off the tape

recorder and saying, I'm gonna leave you in privacy created the implication of privacy separate from a person being in an interview room, not having an expectation of privacy ordinarily, absent those facts. That's our contention.

THE COURT: Okay. And on Page 18 of my order, I address that specifically. "State v. Calhoun, 479 So.2d 241, Florida Fourth DCA, 1995, mentioned in Lundberg and relied upon by the Defendant is not applicable to the facts of this case. The Defendant in Calhoun had invoked his Miranda Rights and was speaking with his codefendant after police deliberately fostered an expectancy of privacy in inmate's conversations. The Defendant in this case had waived his Miranda Rights and was speaking with his girlfriend/wife. The Defendant's girlfriend was not a codefendant and was not speaking to him on request of law enforcement. She was not placed with him to induce a confession, but was there solely at the Defendant's request. Even if the Defendant had not voluntarily relinquished his Right to Remain

Silent, that fact alone need not lead to a conclusion that he had a reasonable expectation of privacy.

"In Lazelere, L-A-Z-E-L-E-R-E vs. State, 676 So.2d 394, Florida, 1996, the Defendant had invoked a Right to Remain Silent and right to counsel. Nonetheless, the Supreme Court held that the police recording of her jailhouse conversation with her son was not improper because the police had not fostered a reasonable expectation of privacy. See State vs. McAdams, et cetera."

And I understand the objection you're raising here and you're making for the record, and I appreciate that. I said, "Here, even though the defective -- even though the detective mentioned giving Defendant, quote, privacy, closed quote, the Defendant was well aware that his previous conversations in the interview room had been recorded, thus his expectation -- expectancy of privacy was not reasonable. Furthermore, in this case, as in Allen, the surreptitious taping of the conversation was not employed to circumvent the exercise of the Defendant's

Right to Remain Silent, which he had voluntarily relinquished during the interview with the Detective. I cite Boyer. This case meets -- this case meets the two-prong test enunciated in Smith, as the Defendant clearly had no subjective expectation of privacy, nor would the law afford him as arrestee an expectation of privacy as to conversations in the interview room where he had just confessed, knowing the interview was being tape recorded and where the police had done nothing improper to induce such expectations." I cite Allen again.

An finally, "the Defendant's allegation that counsel was ineffective for not pursuing meritless arguments --" I previously ordered that or cited that.

Then I understand Mr. Burn's purpose for raising that and it's in the record for appellant purposes, okay. So the objection is sustained. You need to move on.

Next question.

MR. BURNS: That's all I have, Judge.

THE COURT: Okay.

State rest?

MS. BALDREE: Yes.

THE COURT: Closing arguments. Mr. Burns.

MR. BURNS: Yes. Your Honor, the contention from the state here seems to be that it's an okay decision to let the entire process in front of the jury, even if the conclusion are gonna blowup in the Defendant's face. I'm contending that's not a valid tactical conclusion.

Number one --

THE COURT: Well, isn't it two sides of a coin though? It could be good or bad?

MR. BURNS: How can it be good? In the first place, there's no --

THE COURT: Well, my question -- my response to that would be, obviously it did some good because the verdict came back attempted sexual battery and not -- not actual sexual battery. So they -- obviously the jury didn't believe --

MR. BURNS: We don't know why the your did that, judge, especially as there was no evidence whatsoever that this was only an attempted act.

THE COURT: That's a lesser included offense; right?

ROBERT LUNDBERG: It was a Category 2 lessor(unintelligible).

THE COURT: It's a lessor included offense.

ROBERT LUNDBERG: Category 2, lessor (unintelligible). The only way the judge could instruct on that is if -- may I speak?

THE COURT: No.

MR. BURNS: Mr. Lundberg is correct. Category 1 lessors have to be included if they're asked by either side. Category 2 are permissive with the Court and there's plenty of case law Mr. Lundberg cited in his motions that say, even if it's asked for, a Court is instructed not -- to expressly to avoid confusion the jury, not to instruct the jury on lessors for which there is no evidence. There's no evidence of anything but a completed act here.

But in my case, my contention is, the parent, the people who this girl is talking to are not saying, and they're not telling the jury, I don't believe you and this is why

I'm gonna take a further step to see if they're telling the truth. Mr. Frizzell acknowledged it may have been in fact that they -- not that they had any qualms about her credibility, but that they might have been amazed by the enormity of the accusation. And that's why they said, are you sure you're telling me the truth.

But what is the purpose, what the beneficial purpose of putting in front of a jury that people said, are you sure you're telling me the truth and every single answer is gonna come back in the affirmative, which works against Mr. Lundberg. Every single answer is working to affirm and increase the credibility of this girl, not that -- not that gee, I had a question, therefore she must be incredible, but that I asked her, are you sure and every answer comes back yes. Every answer is another nail in Mr. Lundberg's coffin. Every answer is another notch of increase in the victim's credibility. Especially is this so regarding the testimony from the father about taking the girl a counselor for no other purpose

than to see, I wanna be really sure is she telling the truth, and by gosh, this counselor that we trusted, told me, she sure is, and if you don't report this to the police, I'm gonna do it right now.

How is that beneficial testimony to Mr. Lundberg? That is testimony that a defense counsel should have been on rocket jets out of this seat to say, wait a minute, this witness is talking about take the girl to another expert who is not even named, who hasn't done a report, we don't know who it is and now this witness is gonna say the expert said the girl is telling the truth. That's not testimony that should have been permitted, even under an opposite side of the coin type of analysis.

So it's our contention that the -- this is -- this is not a valid tactical decision, that the inconsistencies of the girl's statements could have been attacked all by themselves by just allowing those inconsistencies to come in. That would have been proper under Child Hearsay. Child Hearsay doesn't say anything the child says

to anyone comes in. Child Hearsay is intended, as Ms. Baldree says, to bolster the credibility of the witness by demonstrate that the child witness told the fact of the allegations to other people. Not that she -- that those other people then come in and say, and I found her to be truthful and I found her to be truthful and I found her to be truthful and the detective found her to be truthful and the expert who we don't know who he is found her to be truthful. That's what this jury is hearing. They're hearing one witness after another after another comment on the veracity of the accuser. That's obviously prejudicial. That's obviously wrong, obviously objectionable. And it ought to have been objected to.

Thank you.

THE COURT: Thank you, sir.

State.

MS. BALDREE: Judge, I see it completely different. And first off, I would argue that the strategy was ultimately successful because what they ended up convicting him of is what he said he did. So ultimately, they

did not believe the little girl.

Second off, that if you're -- if a person's parents don't believe them to the extent that -- this wasn't reported until she was taken to an expert that had a -- that had a mandatory reporting requirement. That's when it gets reported. Absolutely that helps the Defense case to say the parents don't believe them. The parents, saying, are you sure you just don't want attention. They even tell it to a person who can't stand the sight of this Defendant and she doesn't -- she doesn't report it. She also does the same -- you know, does the same thing, questions her, are you sure that what you're saying is true. And this is a person who can't stand him.

THE COURT: Excuse me one second. Mr. Lundberg, you can't talk at the same time that the State's making their argument because I -- it wouldn't create a good transcript.

ROBERT LUNDBERG: I'm sorry.

THE COURT: You can turn your microphone off and -- and that would be more helpful.

ROBERT LUNDBERG: Excuse me, Your Honor.

THE COURT: And you can still speak quietly to your client -- or to your attorney. I'm not trying to stop you from talking, it's just not --

ROBERT LUNDBERG: No, I understand.

THE COURT: -- so it doesn't get picked up on the microphone.

ROBERT LUNDBERG: Excuse me.

THE COURT: All right. Go ahead. I'm sorry.

MS. BALDREE: That the parents come into court and say, yes, now that we've been through this entire process, I believe my daughter doesn't, is not particularly helpful. When she's telling them, when she's reporting to the -- to the people that she's closest to that she's told to report to, those same people don't believe her. And it certainly is unusual for the parents not to completely fly off the handle and give the State absolutely no leeway because they believe every word their child said because their child would have no reason to makeup something so ludicrous as this. So it's

absolutely -- it's a very good trial strategy and one that the State would argue actually was successful. And what sunk the case was the Defendant's own statements.

THE COURT: Okay. And you need to turn your mic back on if you wanna do a reply.

MR. BURNS: Thank you, Judge.

THE COURT: Thank you. Any reply to that, State's argument? I mean, you've adequately covered it, but I --

MR. BURNS: No. No. That's it, Judge. I think you got -- you got the gist of it.

THE COURT: Okay. All right. Well, I can't tell you -- I'm not gonna rule right now. I can tell you preliminarily, I'm -- I am leaning towards finding the motion to be denied, but I'm -- I need to go back and look at some documentation and review my previous order, I've read it a couple times, and then read it in light of the testimony here today and in the light of Mr. Frizzell's testimony and in light of Crawford -- not Crawford, but in light of the Fourth DCA's ruling and in light of Strickland. Especially in light of Strickland, the second prong. So I'll take a

look at that.

Thank you very much. And Mr. Lundberg is returning to the custody of the Department of Corrections.

MR. BURNS: Judge, if I could just indulge Mr. Lundberg for one second. If Your Honor could make clear on the expectation of privacy issue. He's making not just a Fourth Amendment claim, but a claim on (unintelligible) Florida Constitution.

THE COURT: Okay.

MR. BURNS: Regarding his expectation of privacy.

Thank you, Judge.

THE COURT: Thanks.

MS. BALDREE: And I'll just put on the record, Judge, that we were -- we're not prepared to argue that because I didn't know it was an issue.

THE COURT: It's not an issue in this case at this time.

MS. BALDREE: Thank you.

MR. BURNS: Judge, are you able to give a time frame when we might expect your order? I just wanna know, should Mr. Lundberg go

back to DOC?

THE COURT: Oh, yeah, I ordered him to be remanded to the custody of the Department of Corrections.

MR. BURNS: Thank you, Judge.

THE COURT: I don't know. I've got five or six thing pending and --

MR. BURNS: No, I'm not looking to hurry. I just wanna know --

THE COURT: That's fine. And I need to get it done, but I got five other cases I'm dealing with, not just in the criminal context, but in extensive civil cases I'm entering 17, 18 page orders.

Thanks.

MR. BURNS: Thank you, Your Honor.

THE COURT: We're off the record.

(Proceedings concluded at 5:00 p.m.)

* * * * * *

STATE OF FLORIDA)

ST. LUCIE COUNTY)

CERTIFICATE OF REPORTER

I, NANCY M. CHIVARI, Court Reporter, certify that I was authorized to and did TRANSCRIBE the foregoing RECORDED Hearing and that the transcript is a true record of the Hearing, to the best of my ability.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 18th Day of November, 2010.

Nancy M. Chivari

Nancy M. Chivari

NANCY M. CHIVARI
MY COMMISSION # DD 687985
EXPIRES: June 24, 2011
Bonded Thru Notary Public Underwriters