IN THE SUPREME COURT OF FLORIDA

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JOHN EARL BUSH, Appellant,	)	
v.	)	CASE NO. 68,619
STATE OF FLORIDA, Appellee.	)	

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

In this Brief, JOHN EARL BUSH will be referred to as "Appellant", and the STATE OF FLORIDA, as "Appellee".

This case arises as an appeal from the ruling of the Circuit Court, of the Nineteenth Judicial Circuit, in and for Martin County, Floirda, denying Appellant's post-conviction motion to vacate a judgment of first degree murder, and death sentence, imposed by said court.

"R" will refer to the Record of Appellant's trial and sentencing proceedings; "T" will refer to the transcript of post-conviction proceedings held before the trial court on April 21, 1986; and "ea" means emphasis added. References to Appellant's post-conviction motion will be denoted by "Motion", and to the Appendix accompanying the motion, by Exhibit letter and corresponding page numbers (e.g., "Exh. A, at 1").

STATEMENT OF THE CASE

Appellee presents its own Statement, as follows:

On May 20, 1982, Appellant was charged, by indictment, with having committed the first-degree murder of Frances Julia Slater, robbery with a firearm, and kidnapping with intent to facilitate or commit armed robbery, on April 27, 1982 (R 1360-1361). After a number of pre-trial motions, and a change of venue as granted by the Circuit Court in and for Martin County, Florida, to Lee County, Florida (R 1544-45), the cause proceeded to jury trial. The jury found Appellant guilty on all three counts, as charged, on November 19, 1982 (R 1640-1642). At the conclusion of the sentencing hearing, the jury's advisory sentence was a 7-5 recommendation, for the imposition of the death penalty (R 1295-1298). The trial court followed the jury's advisory sentence, and sentenced Appellant to death, on November 22, 1982 (R 1300-1308).

Appellant filed an appeal, of his conviction and sentence, with the Florida Supreme Court, filing his initial brief and reply brief on May 23 and September 29, 1983, respectively. The State's Answer Brief was filed on August 25, 1983. Following oral argument in the cause, the Florida Supreme Court affirmed Appellant's judgment and sentence, on November 29, 1984. _Bush v. State_, 461 So.2d 936 (Fla. 1984). The Court's mandate issued March 22, 1985.

On April 1, 1985, Appellant filed for certiorari review, in the United States Supreme Court. After the State filed

its response, in opposition, to the granting of certiorari review or relief, the Court issued an order denying certiorari, on February 24, 1986.

On March 20, 1986, Governor Bob Graham of Florida signed a first death warrant for Appellant, providing for Appellant's execution to be carried out between noon, April 16, 1986, and noon, April 23, 1986. Appellant's execution was set for 7 AM, Tuesday, April 22, 1986.

On April 21, 1986, at approximately 11 AM, Appellant filed a motion for post-conviction relief, seeking to vacate his judgment and death sentence, in the Circuit Court in and for Martin County, Florida. Appellant also sought a stay of execution. After argument by the parties, the Court denied Appellant's post-conviction motion without an evidentiary hearing, denied a stay of execution.

This Court granted a stay of execution on April 21, 1986, after Appellant initiated an appeal from the trial court's order denying relief. These appellate proceedings follow.

STATEMENT OF THE FACTS

Appellee files its own Statement of Facts, as follows:

A. TRIAL AND DIRECT APPEAL

At the outset of voir dire, Appellant and Appellee were each given ten (10) peremptory challanges (R 5). During voir dire, prospective juror Reid, when asked about her attitudes towards the death penalty, and the possible effect of her feelings on her ability to sit as an impartial juror, stated she did not think she could handle the responsibility of "condeming" an individual to death, or to the electric chair (R 51). When questioned further, Reid explained that her feelings about the death penalty made her "uneasy" about weighing evidence at the guilt/innocence phase of the trial, and that it would be a "problem for her to do so (R 51,52). Reid felt her feelings and attitudes would be an overriding influence upon her as a juror (R 53). When questioned further by defense counsel, Reid clearly indicated that she could not put her feelings, or feelings of sympathy out of her mind, or the subject; could not live with the thought of subjecting someone to the electric chair; and could not ignore feelings of sympathy, and follow the law (R 56,57). Reid told defense counsel that she could not set aside sympathy, and base her decision, as to Appellant's guilt or innocence, on the law and the evidence as presented (R 51-56). Without objection, the State's challenge of Mrs. Reid, for cause, was sustained by the trial court (R 57).

The State challenged one other prospective juror, Mr. Thompson, for cause, subsequent to Reid's excusal (R 255). This challenge, which was unobjected to by Appellant and sustained by the trial court (R 255), was based on Thompson's unequivocal statements that he flatly could not consider the death penalty, as an alternative; that a life should not be taken; and that based on his beliefs, he could not find Appellant guilty of murder, if the death penalty was a possible sentence (R 251-252). Thompson further indicated that he "had bills to pay", and that jury service would be a "hardship" for him (R 255). A third juror, Gregg, who stated "Yes", when asked if he had an ethical or moral conviction or belief that would prohibit him from recommending a death advisory sentence, was not challenged, and was ultimately a juror in the case (R 275).

Nancy Anderson was the State's first witness, in its case-in-chief (R 336). She testified that she was working at the Lil General Store, on U.S. 1 in Stuart, Floirda, on April 26, 1982, on the 3-11 PM shift, and was relieved at the end of her shift, by Frances Slater (R 336,337). Anderson left the store money in Slater's possession, when she left (R 338). Johnny Johnson, a Stuart police officer, stated he looked in the store, on his way to Jensen Beach, and saw Ms. Slater, whom he knew from before, in the Lil General Store (R 342-343). Johnson testified that his observation of Slater in the store, occurred at around 2^{46} AM, or between 2^{30} - 3 AM (R 342,345).

Danielle Symons, who was delivering the Palm Beach Post newspapers on the morning of the murder, April 27, 1982, passed by the Lil General Store between 2^{30} and 3 AM (R 358-359), and observed three black men in the store, and one other black male outside, in a car (R 348-349). She stated that two of the men were in front of the store's cash register, and one of those two men was looking outside, facing Symons (R 349). Symons identified Appellant's car, from a photo lineup, as the one outside the store (R 350), and identified Appellant, both in-court, and at a prior lineup, as one of the men she saw inside the store (R 348-351). Symons also testified that, at the time of the lineup, she noted that Appellant's hair had been cut, and looked different, from the night she had observed him (R 351). Detective Miles Heckendorn, of Martin County, confirmed in his testimony, that Symons had identified Appellant from a live lineup of 6 black males on May 12, 1982, as one of the men inside the store, and wrote down at that time, "hair length [of Appellant] different" (R 363,365,366,368). Heckendorn also testified that he saw a difference in the length of Appellant's facial hair between the time of Appellant's arrest, and the time of the live lineup (R 369).

Margaret Schwartz, a local police officer, testified that she responded to a call by Mark Hall, from the Lil General Store, which Hall stated had no one on duty, at approximately 3^{08} AM (R 391,392). When she arrived, the cash drawer was open, and the money was missing, except for some small change (R 392).

Schwartz knew, from her prior patrols of the area, that the car outside the store, when she got there, was Slater's car (R 392). Slater's driver's license and purse, had been left inside the store (R 393). Karen Agati, the manager of the Lil General Store, testified that she had checked on Ms. Slater, at the store, between shortly before 2 AM, and 2^{20} AM (R 419). She testified that, when called to the scene after Slater was discovered missing, Agati discovered that there was $134.00 and change, missing from the store (R 420). Agati further stated that Frances Slater was the custodian of all monies of the store, and had never before left the store unattended (R 421, 422).

Slater's body was initially discovered by Jerry McDonald, on his way from work on April 27, 1982, at approximately 4^{30} PM, on State Road 76 (R 424). Slater was clad in white dungarees and a brown jacket with yellow and orange stripes, and a Lil General nameplate, with a gray, "Mickey Mouse" tee shirt (R 424, 432,433). There was no pulse felt by Officer James King, when he arrived at the scene, at 4^{52} PM (R 432,433).

The State sought to introduce autopsy photographs of the victim's wounds (R 463). Dr. Ronald Wright, the medical examiner who performed the authopsy on Frances Slater, stated that the photos would assist him, in explaining to the jury what he had observed in his external examination (R 463). Defense counsel objected, on relevancy and materiality grounds, and argued that admission of the photos might be outweighed by prejudice to Appellant (R 463-464). The State maintained that the photo

would aid in illustrating for the jury, what Dr. Wright observed, and the type and area, of and around the head wounds (R 464). The trial court admitted said photos, as Exhibit 20 and 21, and gave a limiting instruction to the jury, that the photos were to be used only for consideration as to the facts of the case, and not for purposes of upsetting or inflaming the jury (R 464).

Dr. Wright testified that he performed the Slater autopsy on April 28, 1982 (R 458). Slater sustained a gunshot wound to the back of the head, that went straight through the brain (R 462,465); a stab wound to the abdomen, that was two (2) inches deep and caused bleeding and bruising of the intestine and bowels, and superficial scraping of the skin above the wound (R 462,465); and a cut on the fingernail of Slater's left hand ring finger (R 452). Wright stated that the knife wounds resulted from the knife being dragged along the surface of the skin, in an upward motion, after penetrating the abdomen (R 466). The medical examiner testified that this was consistent with the victim "taking evasive action", and trying to get away, when so stabbed (R 466,467,474). The fingernail wound was also found to be consistent with defensive action being taken at the time by the victim (R 470). Wright further testified that the gunshot wound was the cause of death, and that the victim's bladder was released, consistent with the victim having been in fear (R 470-471). The bullet fragments found were consistent with a .38 caliber gun (R 469).

Charlotte Grey testified that she was employed as a cashier, on the 3-11 PM shift, at the Little Saints Store, two miles from Stuart (R 481-483). At around 10^{40} PM, on April 26, 1982, she stated that two black males entered the store, and paid for some potato chips, and that one of them looked over into the cash register, as she was ringing up the sale, to see the amount of money in it (R 484-485). The men then drove towards Stuart (R 486). While Grey could not identify either of the men, from a live lineup, she did identify a photograph, from 20 photographs shown to her by Officer John Forte (R 491,493). Grey further testified that neither of these men appeared to be drunk, while in the store (R 492). Officer Heckendorn confirmed that the "identa-kit" photo she identified, as resembling the men in the store, included a photo of Appellant (R 487,500).

Officer Forte, in his testimony, noted that when he showed Ms. Grey a series of 20 photos, on May 12, 1982, the only one she picked out, was Appellant's photo (R 507C,507D,507G,507L). The photos were shown to Grey, because Appellant's hair cut, and shaving of his beard, made his appearance in the live lineup, different from what it was, on the night Grey observed the two black men in her store (R 507B,D,G,L). On cross-examination, Forte admitted that he had said, in a July 22, 1982 deposition, that Grey had not picked out Appellant, and he had no information that the men who were in the Lil Saint Store, were the same men, as those charged in the Slater homicide (R 507J). On redirect,

Forte explained that he was not asked, at the deposition, the number of photos shown to Grey, or whether Grey had pointed to any (R 5070). Defense counsel moved for mistrial, and to strike Forte's testimony, on the grounds that Appellant had been "misled" by Forte's deposition testimony, where no indication of an identification by Grey was made (R 508). Claiming "surprise", and a lack of probative value, defense counsel reiterated its request for mistrial, or striking of Forte's testimony (R 508-509). The State argued that defense counsel had taken Ms. Grey's deposition, at which she did state she had pointed to one person, in the photo lineup; that this fact was consistent with her trial testimony; that Grey was not told she had chosen a photo of Appellant, and did not know any of the photos were of the defendant in the Slater homicide; and that Appellant's challenge to Forte's testimony was a question of impeachment, and not mistrial grounds (R 509). The trial court denied Appellant's motion, specifically stating that it was for the jury to decide whether there were inconsistencies in Forte's testimony, and that Grey had testified that she had picked out a photo (R 510).

Officer Tom Madigan, a crime scene investigator, testified that Slater's body was found 13 miles from the Lil General Store in Stuart, and that the body was 17 feet away from the edge of SR 76 (R 576,578).

Defense counsel requested a proffer of the four taped statements given by Appellant to various police officers, to allow the trial court to rule on their admissiblity, on the issue

of voluntariness (R 595-596). The trial court conducted such a proffer (R 612-667).

After such proffers, the trial court specifically concluded that Appellant's first statement, given on May 4, 1982, at 8^{40} AM, in the Martin County Sheriff's office, was freely and voluntarily given by Appellant, after being properly advised of his rights, and admitted same (R 627). The court concluded that Appellant's *second* statement, given May 4, 1982, at 7^{35} PM, in West Palm Beach, was freely and voluntarily given after proper *Miranda* warnings; that Appellant's rights were read and re-read to him; and that Appellant was asked if his rights had been read, and whether he understood them (R 641-642). Said statement was admitted, as with the first, over defense objections (R 640,642). Appellant's *third* statement, given May 4, 1982, at approximately 9^{18} PM, in the Martin County Sheriff's office, was found to have been freely and voluntarily made, after proper advisement of rights, and admitted (R 649). His *fourth* statement, given on May 7, 1982, was determined to have been made freely and voluntarily, after proper *Miranda* advisements, and also admitted into evidence (R 667).

As to his first statement, Officer Lloyd Jones and Bob Crowder testified, before the jury, that Appellant came to the Martin County Sheriff's Office, asking about his car, which had been impounded after a search of it, authorized by warrant (R 678). Appellant volunteered to speak with the police officers

Present, and was advised of his rights (R 678-679). Appellant was not under arrest, and was free to leave (R 679). He was read, and himself read the rights waiver form, and signed it (R 679-681). A tape of the statement was played for the jury, initially indicating that, on tape, Appellant was advised of his rights and himself read them, and admitted to having come to the Sheriff's Office voluntarily (R 687-689). In his taped statement, Appellant claimed that he went to West Palm Beach on the night/morning of the Slater murder, to see his "step-father", Robert Wilson, about a job (R 690). Wilson told him that the job was filled, when he got there, and after visiting with Wilson for awhile, Appellant headed back to Ft. Pierce (R 690-691). On his way, Appellant stopped to give some "dudes" a ride, and when stopped by St. Lucie County sheriffs, claimed he did not know the other three men in his car (R 691). He further denied knowing them by name (R 700). Appellant continued to say that the three were not with him, until he was headed back to Ft. Pierce from West Palm Beach, and picked them up (R 705). To prove to the officers taking the statement, that he had gone to West Palm Beach, Appellant offered to go there (R 707,708,728,729). He denied involvement in Slater's murder, denied knowing who killed her, denied being in the Lil General Store on the night in question (R 712,722-724).

Appellant's second statement was made, after he voluntarily took Officers McClain and Charles Jones to West Palm Beach,

to verify the alibi he had given in his first statement (R 738). The two officers and Appellant waited outside the address Appellant gave for Wilson, who did not show up there (R 739). Finally, Appellant stated that there was no need to continue to wait for Wilson, because Appellant did not want to get him into trouble, and Wilson did not know anything (R 739). Appellant admitted his involvement, with the others (R 739). Appellant was asked if his statement was being given freely and voluntarily, and whether he had been given his right and understood them, to which Appellant responded "Yes" (R 743). These advisements and and responses were corroborated, on the beginning of the second statement, on tape (R 769). On his taped statement, Appellant admitted going into the Lil General Store, to get cigarettes, when Pig Parker, Alphonso Cave, and Terry Johnson came in behind him, wherein Cave ordered Slater, at gunpoint, to get the money (R 749-750). Appellant maintained that "they" were putting Slater into the car, when he came back out (R 751). He admitted taking the money from the store to the car, but denied knowing who ultimately stabbed Ms. Slater (R 752,754). Appellant recalled that Slater, while in the car, said she would "cooperate" (R 753). Appellant denied knowing who thought of shooting Ms. Slater (R 754). He further claimed that, at the scene of the murder, everyone got out of the car, and that "someone" had said, on the way, that Slater had "seen the car, and would turn us in" (R 754-755). Appellant claimed he never saw a knife (R 755). He flatly and

unequivocally states, on tape, that all four men, including himself, started out from Ft. Pierce that evening, intending to "come to Palm Beach to rob" (R 755)(e.a.). After initially admitting that his statement was a free and voluntary one, Appellant reiterated again, twice, that he had not been threatened to speak to the police, and that his statement was voluntary, during the statement, and at its conslusion (R 752,757).

Appellant's third statement was made later in the evening on May 4, 1982, upon his return with the police officers to Martin County, from West Palm Beach (R 760). Appellant was advised of his rights; indicated he understood them; signed a rights waiver form; acknowledged that his statement (to come) was being made voluntarily; and acknowledged that no promises had been made to him; in return for such statement (R 761-763, 767). Appellant admitted he was the driver, with Parker, Cave and Johnson also in the car (R 767-768). While indicating that he and the others had been drinking, Appellant, twice on tape, clearly acknowledged that "I knew what I was doing" during the incident (R 769,774). He denied stabbing the victim, or seeing her stabbed (R 768). Appellant did admit that the murder gun was his and that he disposed of it the following day, by throwing it in a waterfall in Ft. Pierce, after retrieving it from his brother, with whom he had originally left the gun several hours earlier (R 771-773). Appellant stated it was his idea to dispose of the gun, and that he retrieved it for this purpose, from his brother, because he was afraid that one of the others would "tell" on him (R 780-781). He admitted receiving

about thirty (30) dollars, out of the proceeds of the robbery, which were split up between the four men in the car, after the murder (R 779). He also admitted he had bought the gun, had fired it previously, and that it was "sitting on the seat" of the car, when he got out at the Lil General Store (R 775-777). At the conclusion of the statement, Appellant again acknowledged the voluntary nature of his statement and acknowledged that he was not drinking as much as the others, during the evening (R 784, 785). There was additional testimony that a diving team tried to find the gun, in the area of water where Appellant claimed to have thrown it, but were unsuccessful in finding it (R 788-789).

Appellant's fourth statement, was made on April 17, 1982, after he sent a note, from jail, that he wanted to see the sheriff (R 794-796,798). When Sheriff Holt came over, Appellant said he wanted to see the sheriff, and started discussing the case, claiming he wanted to "get it straight" (R 797). Holt stopped him, indicating he had to contact Appellant's attorney, to which Appellant responded, "Notify him, I want to tell my side" (R 797). After Appellant, and Sheriff Holt, spoke to Appellant's attorney, Appellant's statement was taken (R 797,798, 801). Appellant was advised, asked to read and sign the rights waiver form, if he wished to speak, and Appellant did so (R 801-803,810-812). In the substance of his fourth statement, Appellant admitted stabbing the victim, and admitted that he had previously denied it (R 812,813). Although claiming he "panicked" he did admit taking the money from the store to the car (R 819).

Appellant claimed he was handed the knife at the scene, and was "faking" at the victim with it, and stabbed her, resulting in her falling to the ground (R 820,822). Appellant stated that Parker followed the stabbing, by standing over the victim, and shooting her (R 820). Appellant further admitted he had denied knowing the other men in the car, when stopped by police on the night of the murder, in Indiantown (R 826). Appellant got the murder gun back from Parker, left it with his brother, then retrieved it and threw it in a waterfall, the next morning (R 828, 829). Appellant claimed that the robbery money was split up amoung the four men at Cave's house, after Appellant left the gun off at his brother's house (R 830). Appellant did not complain or object to receiving a share (R 833). Appellant further admitted that the knife he used was disposed of, soon after the four men left the scene (R 834,835,837,838). Furthermore, Appellant admitted being in another convenience store earlier in the evening, and buying some potato chips, thereby corroborating Charlotte Grey's testimony on this point (R 845,846).

Lloyd Jones testified that the Lil General Store was about 1 mile south of the area where Appellant's girlfriend, Georgeann Williams, lived (R 885).

Appellant then stipulated that Ms. Slater was lying on the carpet, in her home watching T.V., wearing the white slacks she was later found in, and that the slacks came into contact with the carpet (R 895-896). Forensic chemist Dan Nippes testified that the carpet fibers on her pants, and those of the

carpet at the Slater home, were identical to those fibers found in Appellant's car (R 918-920). Nippes further stated that one of Ms. Slater's head hairs, was found in the right rear of Appellant's car and had been forcibly removed from the scalp; that the head hairs matched those head hairs found in the car, and that such evidence was consistent with Ms. Slater having been in Appellant's car (R 920-921).

Defense counsel presented no evidence (R 925). During the charge conference, the trial court rejected Appellant's request for a third-degree murder instruction, based on the lack of evidence to support it (R 934-935).

The jury returned a verdict of guilty on all 3 counts (R 1026), and the court proceeded to sentencing (R 1128). At sentencing, the State presented evidence of Appellant's 1974 rape and robbery convictions and sentences (R 1139,1142). Appellant was the only witness, on his own behalf, at sentencing (R 1174-1262). Subsequently, defense counsel, in open court for the record stated that he had recommended to Appellant that he not testify, and that Appellant's testimony at sentencing, was against his wishes (R 1282).

By a 7-5 vote, the jury recommended imposition of the death sentence (R 1295), and the trial court imposed same (R 1300-1308). The trial court found the existence of three aggravating circumstances (prior violent felony; commission of the murder while committing, facilitating or escaping from robbery and/or kidnapping, and that the murder was cold, calculated and pre-

mediated), and no mitigating circumstances (R 1300-1308).

In affirming Appellant's conviction and death sentence, this Court rejected Appellant's challange to the jury instruction given to the jury, during sentencing, advising them of the vote requirements and consequences, in part based on Appellant's failure to preserve such claim, by objecting or challenging such instruction before the trial court. Bush v. State, 461 So.2d 936,941 (Fla. 1984). On Appellant's challenges to his conviction, the Court ruled that his statements were admissible, and were not coerced or involuntarily taken by police officers, Bush, supra, at 938-939; that the alleged differences in a police officer's testimony, from deposition to trial, was not a discovery violation, Bush, at 937-938; that photos of the victim were properly admitted as relevant, to aid the medical examiner in testifying about the nature and manner of the victim's wounds, Bush, at 939, that the exclusion of juror Reid, for cause, based on her attitude towards the death penalty and the admitted effect of same on her impartiality, was proper, Bush, at 939-940; that the State could properly proceed, under the indictment, under alternate theories of murder, Bush, at 940; and that there was insufficient evidence to support the giving of a jury instruction on third-degree murder, and/or that the failure to so instruct, was harmless error. Bush, at 940-941.

In reviewing the remaining challenges to his sentence, this Court ruled that the trial court had corrected any errors in the vote requirement and consequences, with its instructions as to a "six or more" result, and the jury was not confused by

the instruction, at 940-941. Further, the Court specifically and directly found that Petitioner's active participation in the murder and robbery, under the facts of the case, did not support an instruction or conclusion that Appellant did not intend or contemplate the death of the victim, as in Enmund v. Florida, 458 U.S. 782 (1982). Bush, at 941. Finally, the Court noted that prosecutional comments during sentencing, to the effect of the impact of the murder on the victim's family, was not a clear abuse of discretion, and did not render the proceedings fundamentally unfair. Bush, at 942.

In his petition for certiorari, filed with and denied by the U.S. Supreme Court Appellant challenged said rulings by the Florida Supreme Court, on the Enmund instruction, and prosecutional comment issues.

B. STATE COLLATERAL PROCEEDINGS

In his Motion for post-conviction relief, Appellant challenged the failure of counsel to conduct a psychiatric evaluation, upon appointment of a court expert, allegedly resulting in a trial where Appellant was incompetent. Motion, at 4. He next challanged his competence to stand trial. Motion, at 24. Appellant asserted several grounds, in support of his claim that trial counsel was ineffective. Motion, at 26-55. Additional challenges were made concerning misleading and prejudical prosecutional statements and comments, Motion, at 56-67; the propriety of penalty phase instructions, Motion,

at 68; and the allegedly racially discriminatory imposition of the death penalty, upon Appellant, Motion, at 69.

After presentations by Appellant, Appellee argued, _interalia_, that certain of Appellant's claims were not cognicable on a post-conviction motion, and that those properly before the Court, concerning ineffective assistance of counsel, were conclusively rebutted by the Record, and did not meet the appropriate standards for relief, obviating the necessity for an evidentiary hearing. (T 34-69,82-84).

The trial court denied the post-conviction motion, specifically concluding that four claims, dealing with prosecutional comments and allegedly misleading statements, penalty phase instructions, and the allegedly racially improper imposition of the death penalty (Claims 4-7) were barred, because they could or should have been brought on direct appeal. (T 85-86). The trial court concluded that, on the Record, it appeared that defense counsel had tactically and appropriately determined, after meeting with the court-appointed psychiatrist, not to proceed with such an examination. (T 86). Furthermore, the Court concluded that Appellant's proffer did not indicate that Appellant was incompetent to stand trial. (T 86).

As to Appellant's claim of ineffective assistance of counsel, the trial court specifically concluded that none of grounds relied on, or the proffer allegedly supporting same, met the requisite standards for measuring such a claim. (T 86-89).

Any and all other relevant facts, not specifically referred to in this Statement, will be referred to and discussed in the Argument portion of this brief.

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT APPROPRIATELY DENIED APPELLANT'S MOTION FOR POST-CONVICTION RELIEF, WITHOUT THE NECESSITY OF AN EVIDENTIARY HEARING, SINCE RECORD DEMONSTRATED CONCLUSIVELY THAT APPELLANT WAS NOT ENTITLED TO RELIEF ON ANY CLAIM?

POINT II

WHETHER THE TRIAL COURT APPROPRIATELY DENIED APPELLANT'S MOTION TO VACATE JUDGMENT AND SENTENCE, SINCE ALL OF SAID CLAIMS WERE CONCLUSIVELY REBUTTED BY THE RECORD, AND ENTITLED APPELLANT TO NO RELIEF?

SUMMARY OF ARGUMENT

The trial court's denial of Appellant's post-conviction motion, without an evidentiary hearing, was proper and appropriate. Appellant's claims IV-VII, relating to alleged improper misleading statements and comments by the prosecution; penalty phase jury instructions, and the alleged racially improper imposition of the death penalty, was properly denied as non-cognizable on a motion for post-conviction relief. Each claim that Appellant maintains required an evidentiary hearing, was conclusively rebutted by the Record, and Appellant's motion, when examined in the context of the Record, entitled Appellant to no relief, under the facts and the law. This finding clearly applied to Appellant's several grounds, maintaining ineffective assistance of trial counsel, each of which failed to establish the necessary and requisite showing required by Strickland v. Washington, __US__, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984), when examined in light of the Motion, proffer, and Record of Appellant's trial and sentencing.

Furthermore, each of Appellant's seven (7) claims were appropriately denied by the trial court, since each one was conclusively rebutted by the Record, were without merit, and did not warrant post-conviction relief in any respect.

ARGUMENT

POINT I

TRIAL COURT APPROPRIATELY DENIED APPELLANT'S MOTION FOR POST-CONVICTION RELIEF, WITHOUT THE NECESSITY OF AN EVIDENTIARY HEARING, SINCE RECORD DEMONSTRATED CONCLUSIVELY THAT APPELLANT WAS NOT ENTITLED TO RELIEF ON ANY CLAIM.

Appellant has initially maintained that the trial court erred, in denying five of his seven claims in his post-conviction relief motion, without an evidentiary hearing. It is clear from the nature of such claims, and the Record of Appellant's trial and sentencing proceedings, that said claims were both inappropriately brought on a collateral basis, and were conclusively rebutted by the Record so as to mandate affirmance of the trial court's denial of relief.

This Court has consistently held that in a capital case, where both the motion and Record conclusively demonstrate no entitlement to relief, a capital defendant is not entitled to an evidentiary hearing. Harich v. State, 11 FLW 119 (Fla., March 18, 1986); Mann v. State, 482 So.2d 1360, 1361-1362 (Fla. 1986); Troedel v. State, 479 So.2d 736, 737-738 (Fla. 1985); Porter v. State, 478 So.2d 33 (Fla. 1985); Middleton v. State, 465 So.2d 1218 (Fla. 1985). Appellant's motion, when viewed in light of a Record that he selectively ignores in his brief, clearly demonstrates that the trial court correctly determined that all claims could be denied, without resort to an evidentiary hearing. Harich, supra; Porter, supra; Middleton, supra.

It should initially be noted that the trial court correctly and appropriately determined that several of Appellant's claims were improvi-

dently raised on a motion for collateral relief. Specifically, the trial court's conclusions that Appellant's claim IV (the alleged misrepresentation of evidence by the prosecution to the jury); V (allegedly improper and inflammatory prosecutorial arguments); VI (the alleged impropriety of penalty phase jury instructions); and VII (the allegedly discriminatory imposition of the death penalty based on improper racial influences), (T, 85-86), was appropriately based on the fact that such claims were, should or could have been raised by objection at trial, and direct appeal. Stone, supra; Troedel, supra; Sireci v. State, 469 So.2d 119 (Fla. 1985); Middleton, supra; O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984); Meeks v. State, 382 So.2d 673 (Fla. 1980). Because this Court has consistently held such claims to be non-cognizable on a motion for post-conviction relief, Appellant's arguments to the contrary are totally without merit. Id.

Appellant has additionally maintained that his claim of an absence of a competent mental evaluation of Appellant, and the allegedly resulting deprivation of effective psychiatric assistance, is cognizable on a post-conviction motion. Appellant supports this statement by relying on the decision in Ake v. Oklahoma, 470 U.S.___, 105 S.Ct 1087, 84 L.Ed.2d 55 (1985), as having amounted to a "fundamental change in the law." Appellant's Initial Brief, at 17. By such citation and argument, Appellant thus concedes that this issue was not appropriately brought, but for the alleged benefit of Ake, supra, which would purportedly permit the raising of this claim, as the result of a fundamental change in the law, for the first time on collateral review. Witt v. State, 387 So.2d

922 (Fla. 1981), cert. denied, 449 U.S. 1067 (1980). An examination of relevant case law demonstrates that the Ake decision did not provide the type of Witt "change in the law," that would enable Appellant to properly bring such a claim, for the first time, collaterally.

In Witt, supra, this Court determined that a claim would not be cognizable under Rule 3.850, for the first time, unless it was the result of a "change in the law" or "jurisprudential upheaval" that either placed an individual beyond the State's power to punish, or was of such magnitude as to require retroactive application. Witt, supra, at 979. The Ake decision cannot be characterized as such an upheaval or radical alteration of the law. At most, the decision represents the application of established rules of law that provide that a defendant is entitled to present certain defenses and defensive matters, such as insanity at the time of the offense, and to a fair and reliable determination of guilt or sentence, to certain factual circumstances involving insanity during the offense as a significant factor. Ake, 83 L.Ed.2d, supra, at 58, 60, 62, 66. The Ake decision did not alter in any way, the legal standards for determining issues such as incompetency to stand trial. Ake, supra; Bowden v. Kemp, 757 F.2d 761, 763, n. 3 (11th Cir. 1985). Significantly, at least one Federal District Court, within the Eleventh Circuit, has held Ake to be non-retroactive, in the context of collateral relief. Magwood v. Smith, 608 F.Supp. 218,221 (D.C. Ala 1985); also, see Solem v. Stumes, ___U.S.___, ___S.Ct___, 79 L.Ed.2d 579 (1984)(Powell, J, concurring opinion). Thus, the Ake decision merely effectuates the right of an indigent defendant to raise certain defensive matters, which cannot

constitute ground-breaking precedent or a "clean break with the past," a la Miranda, so as to qualify under the Witt exception. Witt, at 929. It should also be noted that the very enunciation of the principle that a capital defendant had a right to a fair and reliable sentencing determination (which is, at least in part, an underlying premise in Ake), by this Court, was not viewed as a sufficiently significant change in the law to be a Witt exception situation. State v. Washington, 453 So.2d 389, 392 (Fla. 1984). In view of the lack of recognition of one of the rights involved in Ake, as cognizable for the first time collaterally under Witt, the particularized circumstance in which said right was applied in Ake cannot be said to allow Appellant to bring this claim for the first time, in the present proceeding. Stone; Troedel; Middleton; Witt.

Appellant nevertheless maintains that the Record fails to show he was not entitled to relief. It is initially significant that the Ake decision is limited to the issue of providing access to a capital defendant, to psychiatric assistance, provided that such a defendant establishes, that his sanity during the offense, as a threshold issue, is likely to be a significant factor during guilt or sentencing. Ake, supra, at 60, 66-68; Bowden, supra. There was clearly no such defense, or likelihood of such a defense raised, as firmly established by the Record. The object of Appellant's defense was to demonstrate to the jury that Appellant was not a willing or voluntary part of the criminal episodes of the robbery, kidnapping or murder, and did not commit or participate in the firing of the fatal shots into the victim. (R, 333-335, 712, 722-724, 754-755, 784, 812, 820, 824, 828, 945-971, 999-1003, 1181, 1282-1286). To this end, it is

clear that such a defense, which held as its integral part the denial of the murder, or participation in it, would be wholly inconsistent with any claim of insanity, a defense which would concede the physical act but maintain that the performance of the act was the result of mental defect. Middleton, supra, at 1224; Funchess v. Wainwright, 772 F.2d 683, 689-690 (11th Cir. 1985). This is substantiated by the fact of Appellant's testimony at trial (R, 1174-1262), see Buford v. State, 403 So.2d 943, 953 (Fla. 1981), as well as his apparent comprehension of his rights from the police, on all four occasions when he gave statements, all within ten days of the offense (R, 684-735; 749-757; 767-786; 808-848), and the nature of these statements. Furthermore, the State did not rely on psychiatric evidence at sentencing, thus making any of Appellant's rights under Ake at sentencing inapposite to Appellant's case.

More significantly, Appellant's reliance on Dr. Tingle's notes of his conversation with defense counsel, clearly afford him no relief on this ground. As indicated therein, (Appellant's Appendix to Motion to Vacate, Exhibit Q), there is nothing in Dr. Tingle's recollection that mental state at the time of the offense or at trial was to be a significant aspect of Appellant's defense.[1] (Exhibit Q). Additionally, there is nothing in the motion that indicates any kind of likelihood that sanity during the offense, or at trial, would have been a material issue or defense, had Dr. Tingle examined Appellant. Appellant is thus left with speculative, conclusory allegations, which clearly did not warrant an evidentiary determination.

[1] As to the implications and reasons for this, suggested by such material, regarding defense counsel's competence, these will be discussed in the "ineffective assistance of counsel" claim, infra.

Middleton; Bowden, at 765, n. 7.

In essence, Appellant's allegations on this point, would mandate a certain degree of particularized, thorough, and favorable psychiatric evaluations to be conducted, in all circumstances. This conclusion has been entirely rejected, even in the Ake decision itself. Ake, at 66; Martin v. Wainwright, 770 F.2d 918, 934-935 (11th Cir. 1985); Finney v. Zant, 709 F.2d 643, 645 (11th Cir. 1983). Appellant's argument that an evidentiary hearing should have been held on this claim, is really no more than a "bootstrap" of his claim that defense counsel was ineffective, for not having his client evaluated by Dr. Tingle. On its own independent merits, Appellant's Ake claim had no factual or legal basis, and would thus be properly rejected without a hearing by the trial court.

Appellant has also urged that, based on Dr. D'Amato's report and evaluation of Appellant, an evidentiary hearing on the issue of Appellant's competence to stand trial was mandated. Once again contrary to Appellant's conclusory assertions, the Record does conclusively show a lack of entitlement to relief on this ground.

Under Federal and Florida case precedent, a defendant's competence to stand trial is measured by whether he has sufficient present ability to consult with counsel, with a reasonable degree of understanding, and whether he has a rational and factual comprehension of the proceedings against him. Pate v. Robinson, 383 U.S. 375 (1966); Dusky v. United States, 362 U.S. 402 (1960); Scott v. State, 420 So.2d 595, 597 (Fla. 1982). Rule 3.211(a)(1), Fla.R.Crim.P., delineates a non-exhaustive list of factors relevant to this legal criteria, including a defendant's ability

to appreciate the criminal charges and possible penalties against him, the adversarial nature of the trial process, ability to disclose relevant facts with counsel, assist in his defense, and testify relevantly. Rule 3.211(a)(1) et seq, supra. Appellant was not shown to have acted in any non-rational manner, at his trial, according to the Record. His statements to police, admitted at trial, demonstrate an ability to understand the charges of robbery, kidnapping and murder that were involved; a comprehension of his rights, and of the specific advisements that any statements could later be used against him; the adversarial nature of the criminal process, and a very strong ability to relate relevant facts and circumstances of the murder, including his own involvement, in great detail. (R, 686-735; 749-757; 767-786; 809-848). His testimony at sentencing (R, 1174-1262), definitely reflects an ability to rationally relate and comprehend crucial and relevant facts about the murder, and the nature of the adversarial process against him. Quite clearly, the mere fact of such testimony, and the fact that the propriety of it was discussed between Appellant and counsel (R, 1292), demonstrates rather precise ability to rationally consult with counsel. In sum, the Record absolutely and conclusively rebuts a claim of incompetency to stand trial. Pate; Dusky; Scott; Rule 3.211(a)(1), supra.

This conclusion is substantiated by the Motion itself, quoting certain of Dr. D'Amato's conclusions, upon his 1986 examination of Appellant. Appellant's Initial Brief, at 24-25. While there are certain conclusions and observations made as to the "possibility of impairment," "possible brain damage," impairment of judgment, an inability to think in the

abstract, and difficulty controlling his impulses, none of these observations offer anything, with regard to an inability in 1982 to understand the trial proceedings, and to consult with defense counsel with a rational and reasonable degree of understanding. Pate; Dusky; Scott; Middleton, at 1224. The factors counsel suggested were impairments in Appellant at the time of his trial, Appellant's Initial Brief, at 25-26, have no factual support, are conclusively rebutted by the Record, Harich; Troedel; Middleton, and do not in any way approach the facts and circumstances, which this Court decided did warrant an evidentiary hearing, in Hill v. Florida, 473 So.2d 1253 (Fla. 1985). The trial court's conclusion that the proffer was inadequate to support such a claim (T, 86), is supported by the Record. Id.

Appellant has next argued that his various claims, alleging ineffectiveness of trial counsel, required an evidentiary hearing. This claim cannot be appropriately analyzed, without specific and careful reference to the standard and relevant criteria, as set forth by the United States Supreme Court, in Strickland v. Washington, ___ U.S. ___, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). In Strickland, said Court announced the appropriate two-part test to be met by a defendant claiming that trial counsel was ineffective:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's er-

> rors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 80 L.Ed.2d, supra, at 693; Porter, supra, at 35; Downs v. State, 453 So.2d 1102 (Fla. 1984).

The Supreme Court emphasized that, regarding the first prong of the Strickland test, a standard of reasonableness is to be applied to defense counsel's performance, viewed in light of all surrounding circumstances. Strickland, at 694-695. The Court further stressed that there was a strong presumption to be indulged by a reviewing court, that counsel's performance was reasonable and effective, and that his actions were within "the wide range of professionally competent assistance" and judgment. Id.

In defining and outlining the necessary requisite of demonstrating prejudice, as a result of defective performance, the Supreme Court emphasized that speculative suggestions in hindsight, and mere allegations of potential prejudice, would not suffice, in order to establish entitlement to relief on such a claim:

> Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act

> or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.
>
> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.
>
> ...
>
> The 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Bucherie, 468 So.2d 229, 231 (Fla. 1985), quoting Strickland, supra, at 697, 698 (emphasis added); Harich, supra; Downs, supra. The Court established that a reviewing court could determine an absence of prejudice under this standard, and need not then determine the issue of counsel's competence in performance. Strickland, at 699. In further refining the relevant inquiry to be made by a reviewing court, on the issue of prejudice, the Strickland decision specified the appropriate question to be answered, regarding challenges to a conviction and death sentence, respectively.

> ...
>
> ... When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.
>
> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether

> there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Strickland, at 698.

Appellee is not unmindful of this Court's stated position that, where warranted, an evidentiary hearing on a post-conviction motion which attacks trial counsel's performance is favored. Jones v. State, 446 So. 2d 1059 (Fla. 1984). However, as initially noted at the outset of this brief, this Court has not hesitated, in several recent decisions involving such claims (including those where last-minute pleadings were filed, and executions were extremely imminent), to affirm a trial court's denial of relief, without evidentiary hearing, when the Record and motions therein supported such rulings. Harich; Mann: Troedel; Stone v. State, 481 So.2d 478 (Fla. 1985); Porter; Middleton. The Record herein, similarly supports the trial court's ruling, and conclusively demonstrates that Appellant's varied claims of ineffectiveness of trial counsel, afford no relief to Appellant.

1) FAILURE TO USE APPOINTED PSYCHIATRIST/COMPETENCE TO STAND TRIAL

Appellant's claim that counsel was ineffective, for failing to use an appointed psychiatrist, so as to develop Appellant's incompetency to stand trial, is conclusively rebutted by the Record. Appellant's proffer in this claim, purports to maintain Dr. Tingle's statements, that issues of incompetency to stand trial, and of possible mitigation, were not "at issue." Exhibit Q. These statements do not demonstrate a factual

misrepresentation of the doctor's role by counsel, but rather indicate that based on discussions with defense counsel, such possible defenses were determined by counsel to be inapplicable to his client, and thus useless as far as psychiatric pursuit was concerned. (Exhibit Q.) In Appellant's view, trial counsel was deficient in deciding nevertheless not to proceed with a psychiatric examination of his client. Counsel was not deficient, merely by determining not to pursue the "path" of psychiatric assistance, until it "bore fruit." Lowett v. Florida, 627 F.2d 706 (5th Cir. 1980).

It is crucial to note that psychiatric assistance, even under Ake, is not automatic in every case; a threshold showing that insanity will likely be a significant factor at trial or sentencing, is a prerequisite to entitlement to such assistance. Ake, supra; Bowden, supra. This rule obviously encompasses prior consideration by counsel, based on circumstances facing him, of factors likely to be useful in defense, prior to considerations of psychiatric assistance. The Record, however, shows no reason for defense counsel to have believed that his client was incompetent to stand trial. The pre-trial statements Appellant made to police, demonstrate no indication that Appellant had an inability to reasonably appreciate or comprehend the nature of the proceedings against him, or assist counsel in the preparation of a defense, including recounting details of his involvement in the crime. (R, 684-735; 747-757; 767-786; 809-848). There evidently were discussions, as to whether Appellant should testify at sentencing, (R, 1292), and Appellant's testimony at the hearing (R, 1174-1262), unqualifiedly indicate the presence of an ability

to comprehend the proceedings, and assist in his defense. Pate; Dusky, supra; Buford, supra. Furthermore, such a defense was wholly inconsistent, with the consistent defense at trial and sentencing that Appellant did not actually commit the murder, and was compelled, against his intentions, to be present during the robbery, kidnapping and murder. In sum, the Record demonstrates that counsel had no reason or obligation to pursue possible defenses, through Dr. Tingle, that he felt were non-existent, and that were inconsistent with his defense theories. Funchess v. Wainwright, 770 F.2d, supra, at 689 (11th Cir. 1985); Straight v. Wainwright, 772 F.2d 674, 678 (11th Cir. 1985); Harkins v. Wyrich, 552 F.2d 1308, 1313 (8th Cir. 1977); Middleton, 465 So.2d, supra, at 1224.

Furthermore, Appellant's position clearly appears to be that he was prejudiced, by virtue of the "fact" that he was incompetent to stand trial. Dr. Tingle's notes, recollecting his meeting with defense counsel, as proffered, certainly and absolutely do not indicate that, had Dr. Tingle examined Appellant, his finding would likely have been one of incompetency to stand trial. (Exhibit Q). Dr. D'Amato's findings also do not demonstrate any support for this notion, and do no more than speculate as to the "possibility" of impairment and brain damage, and the recommendation that more complete neurological examination of Appellant be conducted, so as to determine whether or not his conduct can be "correlated" to his possible organic impairment. Appellant's Motion to Vacate, at 18, 19. Since there is clearly no evidence in Appellant's proffer that he was incompetent or likely incompetent to stand trial, there can be no question that Appellant failed to show any effect on the outcome of trial or sentencing,

let alone a prejudicial one. Strickland; Middleton. These circumstances, when further coupled with counsel's knowledge, from the trial court's order appointing Dr. Tingle that the State would be entitled to such information, if used by defense counsel by documentary or testimonial means (R, 1526), demonstrate that no evidentiary hearing was required, on this claim.

Appellant further suggested that such an examination, if used, would have provided the development of mitigation or evidence rebutting Appellant's specific intent, is similarly rebutted on the Record. Dr. Tingle's notes do not suggest in any way what an evaluation would have shown, and Dr. D'Amato's conclusion that Appellant may have suffered from some organic brain disorder, and may have been a certain personality type, would not have altered the outcome. Strickland. Furthermore, there was considerable denial by Appellant of specific intent to kill, in his testimony and statements to police, and defense counsel concentrated on such denial, in his arguments to the jury. (R, 333-335; 945-971; 999-1003; 1282-1286). Thus, such proffered evidence, if any, would have to be deemed cumulative. Stone, supra, at 479; Middleton; Porter, supra.

Appellant's reliance on his proffer of evidence that he was a "follower," so as to conclude that a psychiatric examination would have produced evidence of his domination by other co-defendants, is completely rebutted by the Record. It is interesting to note that this Court, in its review of this case on direct appeal, concluded that the evidence demonstrated that Appellant was a "major, active participant in the convenience store robbery and his direct actions contributed to the death of the victim." Bush v. State, 461 So.2d 936, 941 (Fla. 1984). Appellant's ad-

missions established, conclusively, that he stabbed the victim, which facilitated the shooting of the victim immediately thereafter (R, 812, 813, 820, 822); that he disposed of the murder weapon, which he owned, and that this was his idea (R, 771-773, 780-781, 828, 829); that he accepted the proceeds of the robbery money, after leaving the lone gun at his brother's house for safekeeping (R, 779, 830, 833); that he removed the money from the store, and drove his car from the store to the scene of the robbery, some thirteen miles away (R, 350, 540, 548-550, 576, 578, 749-752, 754, 767-778, 819); and that it was his intention, along with all other co-defendants, to "rob," when they initially left Fort Pierce, on the night of the murder. (R, 755). On the strength of this evidence in the Record of active involvement, the aforementioned proffer is insufficient to demonstrate deficient performance or prejudice. Strickland.

2) ABSENSE FROM DEPOSITIONS

Appellant has additionally maintained that defense counsel's absence from certain pre-trial depositions, caused him to be unaware of important impeachment information, and that the alleged lack of knowledge or use of such information, deprived Appellant of effective assistance. Initially, Appellant maintained that Georgeann Williams' admission, at her deposition, that Parker had told her he had fired the fatal shots (Exhibit SS, at 28), was never used by defense counsel, in any way, at trial. This contention is unequivocally rebutted on the Record. Appellant denied firing the gun at the victim, and stated both to police and in his testimony at sentencing that Parker was the one who actually shot the victim. (R, 712, 722-724, 754-755, 784, 812, 820, 824, 828, 1181).

Defense counsel reiterated to the jury that Appellant's statements showed that Parker actually committed the homicide, not Appellant. (R, 968-970, 1283). Defense counsel further stressed that Appellant's admitted stabbing of the victim were not fatal, but that the gunshot wounds to the head were. (R, 963-964, 970). Counsel also recounted for the jury that the victim was taken from the store by Parker and Cave, not Appellant, and that an eyewitness, Danielle Symons, identified the man in the store (Bush), as having no gun, stressing this was consistent with his version of events. (R, 968-970). Thus, any suggestion that defense counsel either did not know or did not use this information, is specious.

Furthermore, Georgeann Williams also indicated at her deposition, that Parker also told her that,"'with John already havin' a past record of bein' involved in somethin' similar to this, it wouldn't, you know, everything will be pointed at him'." (Exhibit SS, at 28 (e.a.)). The proffer further indicates that, upon learning of this from Williams, Appellant told her to keep such information to herself. Id. (e.a.). The proffer of this deposition clearly demonstrates that defense counsel, if he sought to admit this statement of a co-defendant as Appellant suggests, would have been faced with possible admission of Parker's statement and Appellant's reaction to it, that would have supplied damaging evidence of Appellant's intent and motive to kill the victim, and would have accentuated information about Appellant's prior conviction, which defense counsel vigorously sought to minimize and/or keep out, at sentencing. (R, 1139, 1158-1162, 1165-1191). These circumstances certainly demonstrate the reasonableness, competence and lack of prejudice of defense counsel's per-

formance in this area, and was properly rejected, without hearing. Strickland.

Appellant has also maintained that Tom Madigan's testimony that the bullet removed from the skull was of 32 calibre, was not brought out at trial, and was not known by defense counsel. Once again, this is not borne out by the Record. Upon the conclusion of medical examiner, Dr. Ronald Wright, that the bullet fragments removed from the victim were "consistent with" 38 calibre, defense counsel objected to the lack of a predicate for such conclusion. (R, 469-470). On cross-examination of Wright, defense counsel established that the bullet fragments removed "could have been a 32," and that because some of the bullet fragments were lost, and the bullet was so flattened, it was not possible to positively identify the calibre bullet, from the subject fragments. (R, 472-473). Thus, far from not knowing or ignoring such information, it is obvious from the use of such information, for impeachment purposes, that counsel was fully aware of the existence of such testimony. Tom Madigan could not be cross-examined at trial on this information, because he did not testify about the calibre of bullets, bullet fragments, or any information connected to the bullets. This testimony by Wright, was evidently sought by defense counsel to minimize Appellant's admission of ownership of a 38 calibre gun, and the location of a 38 calibre bullet from the car. (R, 775, 776, 914). Again, Appellant's claim is factually rebutted by the Record, clearly entitling the trial court to deny it without hearing. Strickland.

As to Appellant's complaint, regarding a lack of knowledge or use

of Madigan's purported deposition testimony that the photopack of Appellant's car may have been suggestive, the identification of the subject vehicle as Appellant's car, was established by other evidence, including Appellant's admission (R, 693, 767-768, 1175) and by in-court identification of Appellant's vehicle registration. (R, 548-550). It was also established that Appellant came to the Martin County Sheriff's Office, to ask about his car, on May 4, 1982. (R, 630). Assuming arguendo there was any possibility of a potential suppression issue, created by Madigan's depo statements, the identification of the car involved as belonging to Appellant, was otherwise properly established, again supporting the rejection of Appellant's ineffective assistance claim on this ground, without a hearing. Strickland.

Appellant further complained of trial counsel's alleged deficient performance, in failing to seek exclusion of the testimony of Danielle Symons, that may have been hypothetically produced. Incredibly, Appellant thus asserts that counsel was ineffective in 1982, for failing to anticipate this Court's decision in Bundy v. State, 471 So.2d 9 (Fla. 1985), which prospectively held such testimony to be per se inadmissible. Bundy, supra, at 18, 19. It is clear that Appellant's cause was not on trial, or direct appeal, at or after May 9, 1985, the date of the Bundy decision. Counsel cannot be considered ineffective, for failing to anticipate novel changes in the law, some three years after trial. Thomas v. State, 421 So.2d 160 (Fla. 1982); Knight v. State, 396 So.2d 997 (Fla. 1981).

3) FAILURE TO SEEK SUPPRESSION OF STATEMENTS/LINEUP

Appellant has also alleged that defense counsel's conduct, regarding the seeking of suppression of Appellant's statements, constituted ineffective assistance, resulting in the prejudicial and erroneous admission of such statement. His initial contention is that counsel's decision to seek to suppress such statements, and challenge their voluntariness, during trial rather than pre-trial, was deficient. Appellant's undue emphasis upon form over substance, affords him no relief on this ground. Counsel did in fact challenge the admissibility of such statements, and did object to a finding that each statement had been freely and voluntarily given. (R, 627, 640, 649, 665). It should be additionally noted that counsel vigorously objected to the admission and/or use of transcripts of Appellant's statements by the jury, as they listened to the taped confessions, resulting in the giving of limiting instructions by the Court. (R, 599-610, 673-676). As the trial court specifically concluded, the decision by counsel to challenge the statements mid-trial, prior to their admission, rather than by pre-trial motion, did not affect the court's rulings on said statements. (T, 88-89).

As detailed in the Statement of Facts, each of Appellant's four statements was found by the trial court to have been freely and voluntarily given, and not the product of coercion or undue influence. (R, 627, 641-642, 649, 665). Prior to the first, third and fourth statements, Appellant was clearly and properly advised of his rights, and acknowledged, during each of the four statements, that he understood and waived such rights, and was giving each statement freely and voluntarily. (R, 620-622, 627,

630, 633, 636, 641, 643-645, 649, 660-664, 687-689, 743, 749, 757, 761-763, 767, 784-785, 802-804, 810-812). Although not advised specifically prior to his second statement, given at 7:35 PM in Palm Beach, on May 4, 1982, Appellant acknowledged prior advisements earlier in the day, and stated he understood those rights, and was speaking freely and voluntarily. (R, 633, 743, 749). There was no evidence of undue coercion or influence. In sum, the nature and circumstances surrounding each statement, indicate no grounds for successful suppression, even though counsel sought such suppression. Strickland. The Record demonstrates, as this Court found on direct appeal, that the officers appropriately tried to gain as much information as possible, without violating his rights. Bush, 461 So.2d, supra, at 939.

Appellant has attempted to resurrect the claim, made on direct appeal, that an absence of Miranda warnings prior to his second statement, and suggestions that Appellant would benefit by confessing, under the guise of a claim that counsel was ineffective for not obtaining suppression, on these grounds. This Court concluded, on direct appeal, that these contentions were without merit, and did not render any of Appellant's statements inadmissible. Bush, at 939. It was thus clearly appropriate, based on this finding, and the Record support for it, to deny this claim, without an evidentiary hearing.

Appellant has further suggested that appropriate investigation and presentation by counsel, of material Dr. D'Amato proffered, regarding Appellant's alleged psychological status as a follower and passive personality, would have turned up certain additional circumstances surrounding Ap-

pellant's statement, resulting in their suppression. Such suggested circumstances that Appellant, as a passive follower was somehow unduly led to make his statements, is absolutely contradicted by the Record. As earlier stated, Appellant freely and voluntarily spoke with police on each occasion, acknowledged this fact, and appeared to fully comprehend and understand his rights. More particularly, Appellant initiated the contact that resulted in each of his four statements. Prior to his first statement, he came to the Martin County Sheriff's Office, on his own, to ask about his car. (R, 630). Prior to his second statement, Appellant and two police officers had gone to West Palm Beach, at Appellant's wishes, to verify an alibi. (R, 631, 632, 639-640, 738-740). Prior to his third statement, Appellant indicated he was at the Martin County Sheriff's Office voluntarily, and understood and waived his rights. (R, 643-647). Prior to his fourth statement, Appellant asked to speak to Sheriff Holt, and after Holt informed him that he would have to first speak with counsel, and counsel specifically advised Appellant not to talk, Appellant proceeded to make his most inculpatory statement to police. (R, 650-655, 803-804, 810-812).

These circumstances demonstrate anything but the result of a passive, follower-type personality. Furthermore, the nature of Appellant's recall of specific details of the crimes, and his involvement in same, specifically rebutted any claim that the statements were produced from a passive person, susceptible as a "follower" to (non-existent) undue influences. It is further crucial to note that this Court, in reviewing the evidence in this case, including Appellant's statements, found Appellant to be a "major, active participant" (e.a.) in the murder, and the event

facilitating it. Bush, 461 So.2d, supra, at 941. Dr. D'Amato's report indicates that Appellant had no indication of memory impairment, which would be consistent with the recall he exhibited when he gave each statement. (Exhibit P. at 7). Furthermore, as earlier argued, Dr. D'Amato's proffer offers no conclusions, or statements of any kind other than speculation, that would demonstrate a connection between possible brain damage, and his behavior. (Exhibit P, at 8, 9). Therefore, the psychological proffer of Dr. D'Amato would not have altered the outcome of the trial court's statement suppression rulings in any way, and the absence of such information did not render defense counsel deficient. Strickland; Bucherie; Middleton, at 1224, 1225.

Appellant again places form over substance, in arguing that counsel was deficient for failing to seek suppression of a photographed live lineup, pre-trial, rather than at the point in trial when the State sought admission of it. It is clear that counsel did object to the admission of the lineup, on the precise grounds that representation by, or waiver of counsel was a necessary predicate. (R, 364). An "evidentiary forum" was clearly provided, since the trial court and the parties then sought to determine whether the lineup preceded or succeeded Appellant's indictment. (R, 364-365). The trial court's conclusion that no such right had attached to a May 12, 1982 lineup, which preceded the indictment of May 20, 1982 (R, 365, 1360), was an accurate and correct reflection of the law then existing in November, 1982, in Florida and Federal courts. Kirby v. Illinois, 406 U.S. 682, 689-690 (1972); Anderson v. State, 420 So.2d 574, 576 (Fla. 1982); State v. Gaitor, 388 So.2d 570, 571 (Fla. 3rd DCA

1980); Robinson v. State, 351 So.2d 1100, 1101 (Fla. 3rd DCA 1977), cert. denied, 435 U.S. 975 (1978); Chaney v. State, 267 So.2d 65, 68-69 (Fla. 1972); Perkins v. State, 228 So.2d 382, 390 (Fla. 1969).

Appellant attempts to suggest that suppression of the identification made during said lineup, was fully supported by United States v. Wade, 388 U.S. 218 (1967). However, both the Wade decision, as well as Kirby, supra, and Florida cases since Perkins, supra, specifically held that the attachment of the right to counsel, occurs at or after the imposition of adversary judicial proceedings, which is the formal bringing of charges (indictment). Wade, supra, at 219-220; Kirby, supra, at 689-690; Anderson, at 576; Gaitor, at 571; Perkins, at 390; Robinson, at 1101. The limitation of Kirby to post-indictment lineups has been reaffirmed, by the reiteration and reliance on this aspect of Kirby in more recent cases. Michigan v. Jackson, 39 Cr L Rptr 3001, 3003 (U.S. Supreme Court, April 1, 1986); Moran v. Burbine, 38 Cr L Rptr 3182, 3186-3187 (U.S. Supreme Court, March 10, 1986); United States v. Gouveia, 467 U.S. 180, 104 S.Ct ___, 81 L.Ed.2d 146, 153-155 (1984).

This case law demonstrates that the trial court ruled on an appropriate challenge to the admission of the lineup, prior to its admission. While Appellee is not unmindful that one intermediate appellate court in Florida has recently extended the Sixth Amendment right to counsel, to include pre-indictment lineups, Sobczak v. State, 462 So.2d 1172 (Fla. 4th DCA 1984), this decision is an anomaly, and this Court is not bound by such a decision. This Court has consistently held to the contrary of Appellant's position, following Federal case law, and more significantly, so

held at the time of Appellant's trial. Anderson, supra. Thus, assuming arguendo that there is merit to Sobczak, supra (which Appellee believes was wrongly decided), this was not the law of any Florida court at the time of Appellant's trial, and defense counsel cannot be held to be deficient for failing to anticipate such a decision, or seeking suppression, without prevailing, under then-existing law. Thomas, supra; Knight, supra.

It is even more clear that Appellant has not alleged or demonstrated any prejudice occasioned by the Symons lineup identification, assuming arguendo counsel was deficient on this point. Appellant admitted his presence in the store twice on the night of the murder, in his statements and testimony at sentencing. (R, 749-750, 769, 777, 815-816, 1178). Appellant's car was identified by Symons, as being parked in front of the store, and in the area of the store. (R, 350, 529-530, 540). Appellant admitted ownership and control of the subject car, throughout the criminal episode. Supra. Furthermore, identification was clearly not at issue, and if so, was collateral to evidence, including Appellant's statements, proving his guilt. O'Callaghan, supra. Finally, Appellant does not argue, nor was any claim made, that Symons' in-court identification was at all tainted by the lineup procedure, by suggestiveness or otherwise. The trial court clearly and properly rejected such a claim of ineffectiveness or prejudice, without an evidentiary hearing. Strickland; Middleton.

Appellant's claims, with regard to the photopack identification of his car, and of Symons' purported hypnotism, have been fully discussed, supra. Appellant's claims, as to possible suppression of the items ob-

tained from the search of his car are merely conclusory and speculative, and in any event, could not possibly have affected the outcome of his trial or sentencing. Strickland; Bucherie.

Appellant has argued that counsel failed to adequately prepare for cross-examination of the State's medical examiner and criminologist. Initially, Appellant has maintained that counsel was deficient in not conducting cross-examination of Dr. Wright, on the nature of the stab wound, so as to establish (by proffer of Dr. Stivers, Exhibit II), certain matters consistent with Appellant's version of the stabbing. As with prior claims of ineffectiveness, this is contradicted by the Record.

4) PREPARATION/CONDUCT OF CROSS-EXAMINATION OF WITNESSES

The decision as to whether and how to elicit particular testimony, through cross-examination of witnesses, has been viewed as a strategic and tactical decision by counsel. Magill v. State, 457 So.2d 1367 (Fla. 1984); Dobbert v. State, 456 So.2d 424 (Fla. 1984); Washington v. State, 397 So.2d 285 (Fla. 1981). Contrary to Appellant's claim, defense counsel did conduct cross-examination of Dr. Wright, on the issue of the stab wound, and initially elicited reiteration of direct testimony by Wright that the stab wounds would not have been fatal, without the gunshot wounds. (R, 471). Muschott further elicited testimony that the external part of the wound was only 7/8", and two inches deep, and that the upward-moving wound was "so superficial" (e.a.) that Wright could not measure its depth, beyond stating it was "slightly less than a sixteenth of an inch." (R, 473). Muschott further succeeded in establishing, on cross-examination, that by definition, the length of this superficial up-

ward wound was superficial. (R, 474). This questioning was clearly sufficient to induce the State to seek to re-establish Dr. Wright's opinion regarding the victim taking evasive action, and as being consistent with the nature of the wound. (R, 474). It should further be noted that Muschott effectively used this testimony in argument to the jury at the guilt phase, by stating that the victim's stab wound was not fatal (R, 963-964, 970), and that Appellant could not have intended to kill the victim, by inflicting a two inch wound with a _six_ inch blade. (R, 969). Counsel argued that this fact was _consistent_ with Appellant's statement that he stabbed at the victim hoping merely to hurt her, but not kill her. (R, 824, 969, 1181).

Against this backdrop of counsel's cross-examination and its results, Appellant's proffer purports to suggest that the victim's evasive action should have been argued as one possible explanation for the stab wound. Certainly, Muschott's cross-examination, and Appellant's statements and testimony, elicited that the stab wound could be explained in a manner, other than the State's suggested "evasive action" theory. The proffer would not have _eliminated_ the "evasive action" theory as a possible cause, and may well have resulted in reiterating the State's theory as the most credible cause of the stab wound. _Magill_, _supra_; _Dobbert_, _supra_; _Middleton_. The argument that Stivers' proffer would have helped establish testimony consistent with Appellant's explanation of the stab wound, would have been, at most, cumulative. _Stone_; _Middleton_. Thus, defense counsel's cross-examination of Wright, on this issue, cannot be classified as deficient. _Strickland_. Moreover, the overwhelming evidence

of guilt would have been unaffected by such a proffer. Id.

Appellant maintains that, since counsel for Appellant's co-defendants, in separate trials, sought to establish that the victim's emptying of her bladder may have been caused by reasons other than fear, counsel for Appellant was deficient for not doing so. Other counsels' actions and decisions, for other defendants with differing degrees of involvement in the murder, in other trials, with obviously differing strategies and tactics, have no relevance to an examination of counsel's actions for Appellant, under the circumstances of this case. Strickland; Downs, supra. Assuming arguendo such a proffer had been made by Muschott, the possible cause of fear, as to the victim's empty bladder, would not be eliminated, and would have in fact been reiterated and re-emphasized by the State on re-direct examination (as, in part, was the "evasive action" theory, regarding the stab wound, supra). Magill; Dobbert; Middleton. Surely, counsel could not be considered deficient, so as to have prejudiced Appellant, by not seeking cross-examination as to such emotionally "charged" collateral evidence. Magill; Dobbert; Washington, supra.

The same reasoning applies to Appellant's argument, as to Mr. Nippes' testimony that the victim's hair, found in Appellant's car, was forcibly removed from her head. Id. Additionally, the issue involved, namely the victim's presence in Appellant's car, was established by Appellant's admissions and statements, and by carpet fiber evidence. (R, 750-755, 816-824, 918).

5) INVESTIGATION/PRESENTATION OF BACKGROUND INFORMATION, AS MITIGATION AT SENTENCING

Appellant has further challenged the failure to hold an evidentiary hearing, concerning his claims that counsel was ineffective for failing to investigate, obtain and/or present certain proffered psychological and background information, as mitigating factors at his sentencing hearing. However, Appellant's proffer, when viewed in the context of the Record, conclusively demonstrates that counsel was not deficient in this area, due to the absence of any need for counsel to so investigate, the rebuttal of substantial parts of the proffer by the Record and evidence, the nature of the proffer's inconsistencies with Appellant's defenses, the cumulative nature of such information, and the prejudicial effect such information would likely have had on the sentence.

Appellant originally maintains that counsel was defective for failing to investigate and uncover various possible mental and psychological mitigating factors, which Dr. D'Amato, in his April 18, 1986 report, alleges was available and in existence. The nature of this argument, taken to its logical conclusion, requires that counsel should conduct an investigation of the possible existence of such mental or psychological factors, regardless of whether or not counsel has been given any concrete reason or suggestion that such an investigation would be beneficial. In sum, Appellant would require that defense counsel, in a capital case, assume that this particular line of inquiry will inevitably produce favorable results, even if there is no suggestion or hint of the existence of psychological or mental problems. However, as argued earlier, counsel is not required to pursue every conceivable line of inquiry, until it bears

fruit, in order to be considered effective. Lowett, supra.

As demonstrated by the Record, counsel was given no reason to suspect that Appellant suffered from mental or psychological defects, to such an extent that such "defects" would be fruitful areas of inquiry, for sentencing mitigation purposes. The nature of his pre-trial statements to police, including his evident comprehension of questions, the purpose of those questions, the rational nature of his answers to questions, and his recall of specific details of his whereabouts and involvement in the crime, and the involvement of others, do not in any way suggest a need for potentially successful inquiry into psychological or mental background information. Buford, 403 So.2d, supra, at 953.[2] The nature of his testimony, at sentencing, exhibiting these same traits, of the fact that counsel and Appellant obviously discussed the relative merits of testifying, indicate no reason to question or investigate the possible existence of such information. The nature of his denials of active involvement in the murder, and his defense at trial and sentencing along these lines, further mitigated against investigation or presentation of information which, as Dr. D'Amato's proffer clearly shows, would serve to admit commission of the act, but seek to explain such commission by the existence of certain mental or psychological defects. Middleton, at 1224; Funchess, 772 F.2d, supra, at 689; Straight, 772 F.2d, supra, at 678. There is no indication in the Record that Appellant did not understand the nature of the charges or criminal proceedings against him, and his statements show he was aware of the Slater murder investigation, and its purpose, from the time he first spoke with police on the morning of May 4, 1982, concerning it. (R, 686, 689).

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[2] In fact, Dr. D'Amato's report is consistent in this regard, relating and corroborating Appellant's lack of impairment of recent memory function, and orientation to "time, place and person." (Exhibit P, at 7).

Given these circumstances, it was clearly not incumbent on counsel to proceed to investigate such possible mental or psychological background information. It is literally inconceivable that effective counsel would be required to do so, without even a threshold indication of the existence of such information, or that such information would be beneficial. Funchess, supra, at 689; Harkins v. Wyrich, 552 F.2d, supra, at 1313. In an analogous context, it is apparent that a capital defendant is not even entitled to court-appointed psychiatric assistance, without a substantial threshold showing that aspects of his mental state would likely be significant factors at trial or sentencing. Ake; Bowden. Thus, the law does not encourage or mandate automatic consultation with psychiatric expertise, for sentencing mitigation or other similar investigative purposes, without some concrete indications from the circumstances that a defendant's mental status was defective, so as to have possibly affected his conduct in ways that would provide relevant factors of mitigation. Thus, the decision not to investigate or present the information contained in Dr. D'Amato's proffer, under the circumstances, cannot be considered anything but tactical, strategic and reasonable professional legal assistance. Strickland; Harich, supra; Magill; Armstrong v. State, 429 So.2d 287 (Fla. 1983); Ruffin v. State, 420 So.2d 591 (Fla. 1982); Songer v. State, 419 So.2d 1044 (Fla. 1982); Fuller v. State, 238 So.2d 65 (Fla. 1970).

This becomes even more apparent, in examining Dr. D'Amato's report. It is crucial to initially note that Dr. D'Amato's conclusions are merely speculative and conclusory, regarding Appellant's "possible" brain damage and/or "possible" impairment. (Exhibit P, at 8). Of even more ex-

treme significance, is Dr. D'Amato's ultimate conclusion in his report, concerning these possibilities that a "complete neuropsychological evaluation" be administered to Appellant, by someone "competent in this area," so as "to determine if the current organicity in some way is correlated with his behavior." Thus, the proffered report, upon which Appellant so heavily relied, makes no conclusions or findings at all, concerning whether Appellant's possible organic brain damage, in 1986, had any effect or connection upon his behavior in 1982. This conclusion absolutely confirms the lack of any merit to Appellant's claim that an evidentiary hearing was necessary, to demonstrate alleged ineffectiveness in failing to bring forth this information. Appellant's proffer is thus reduced to speculative conjecture as to possible present brain damage, and an admitted absence of any information or conclusions, concerning any possible "cause and effect" of such damage on Appellant's actions at the time of the offense. Habeas corpus relief could not have in any way been grounded on such hypothetical and irrelevant data and conclusions. Strickland; Bucherie.

Additionally, Dr. D'Amato's report reflects considerable reliance on his characterization of Appellant as a "follower." It is clear that a mere allegation that Appellant may have been of such a personality type, does not meet the Strickland test. Middleton, at 1223-1224. More significantly, however, the evidence and facts in the Record rebut, and are wholly inconsistent with, such a characterization. It is absolutely clear, from both Appellant's direct and cross-examination testimony, that the cornerstone of his defense, was denial of involvement or intent in

the actual murder, and coerced participation in the robbery or kidnapping. (R, 1174-1262). It would have been ultimate inconsistency, to have supplemented such testimony, with data and conclusions that essentially would amount to an admission of voluntary involvement in the murder, because of a tendency to merely follow what his co-defendants were doing. Middleton; Funchess, supra. Moreover, the evidence of Appellant's involvement, as the individual amongst the four men who owned the car and murder weapon, drove the car to and from the robbery, kidnapping and murder of Ms. Slater, physically removed the money from the store, and stabbed the victim, facilitating the fatal shooting, would have further served to rebut any designation of a "follower"-type personality. Bush, 461 So.2d, supra, at 941.

It is also apparent that D'Amato relied, in large part, on a version of events from Appellant, that is substantially rebutted by, and inconsistent with, the evidence of Appellant's involvement at trial, which was recognized by this Court, on direct appeal. Bush, at 941. (Exhibit P, at 4-5). Specifically, the verson of events Appellant gave, was rebutted by the overwhelming evidence of his major and active participation in the murder, and both the jury and trial court did not believe his version of events. (R, 1026, 1300-1308). Furthermore, Appellant's statements about the crime, to D'Amato, were cumulative of his pre-trial statements and sentencing testimony. Middleton; Stone, supra, at 479. Furthermore, D'Amato's conclusion and suggestion that Appellant could not have foreseen the likelihood of the use of violence during the crime, (Exhibit P, at 11), is clearly rebutted by the Record, and by this Court's

rejection of Appellant's Enmund claim on direct appeal. Bush, at 941. The additional conclusion that Appellant had difficulty recalling specific details of remote memories, is contradicted by Appellant's relation of the events of the crime, four years after this testimony and pre-trial statements. (Exhibit P, at 4-5, 7).

In addition to these circumstances, there are several statements and conclusions concerning proffered background information, that can hardly be credibly offered as providing support for mitigation at sentencing. References to allegedly heavy alcohol and drug use, from the age of seven or twenty-one, (Exhibit P, at 6), could not be said to have anything but speculative effect at sentencing, and could likely have swayed both judge and jury against mitigation. Porter, supra, at 35. The remoteness of such usage would additionally have hampered any potential positive effect on sentencing, and the mere knowledge by the judge and jury of such usage, without some connection to the crime and Appellant's state of mind at the time, support the clear conclusion that such information was not likely to be helpful, much less affect the balance of the weighing process of aggravating circumstances and mitigating circumstances in any meaningful way. Strickland; Harich; Troedel; Porter. Significantly, Appellant's pre-trial statements, and trial testimony, to the effect that he was aware of what he was doing, and was not so drunk as to not know what he was doing (R, 768, 769, 774, 785, 1189-1190), not only would have rebutted any possible mitigating value of this fact, but would have rendered it completely irrelevant to the judge and jury's sentencing consideration. Furthermore, as aforementioned, the usefulness of such a

proffer, to explain or justify Appellant's subsequent conduct in the murder, would have been at considerable odds with his defenses of denial of voluntary involvement or intent, and coercion. Middleton; Funchess.

It is also apparent that Dr. D'Amato relied on two psychological evaluations, by Dr. Tugender and Dr. Jackson, (Exhibit P, at 6), that would have indicated to the judge and jury that Appellant was "free from psychopathology" in 1974, and that he was immature, angry and an anti-social personality in 1979. When coupled with other aspects of D'Amato's findings that Appellant was "chronically hostile and resentful," "self-centered," was impulsive, and was of "average" intelligence, (Exhibit P, at 7-9),it can hardly be said that this would have supplied and provided findings by the court of any mitigating circumstances. Informing the jury and judge, of a prior psychological finding that Appellant was sociopathic, particularly after the jury had just found him guilty of the ultimate crime against society, can hardly be said to have benefitted Appellant in any meaningful way. Strickland; Bucherie.

Thus, Appellant's proffer of allegedly mental mitigation factors and circumstances clearly do not show ineffective performance by counsel in failing to present or investigate such information. More significantly, it is evident that the presentation of such information, due to the circumstances argued herein, did not even remotely approach providing a "reasonable possibility" that the trial court, or this Court, would have concluded that the balance of aggravating or mitigating circumstances did not warrant death. Strickland, at 699; Harich, at 120.

Appellant additionally maintained that affidavits from family

and friends, who claim they would have testified to his unfortunate childhood, reaction to his parents' separation and mother's death, impoverished upbringing and abuse, should have been presented, and would have altered the outcome. Initially, the remoteness of these events, and their lack of any meaningful correlation to the conduct of Appellant and the events of the Slater homicide, draw into serious question any effect, other than speculative conjecture, that such information would have had on the outcome. Middleton. Moreover, the mere fact or existence of such a background, without more, could not be said to have anything but speculative effect on the outcome of Appellant's sentencing proceeding. Harich; Stone; Porter; Middleton. Additionally, such information, as an attempt to justify or explain the cause of Appellant's conduct during the murder, would have been as inconsistent with Appellant's defense, as the proffer of mental and psychological circumstances was. Middleton; Funchess. Thus, assuming arguendo that such family and friends' testimony would be consistent with their proffered affidavits, the trial court correctly concluded that the proffer, in the context of the Record, conclusively entitled Appellant to no relief. Harich; Porter; Stone.

Appellant has also argued that the failure to investigate or present the dehumanizing effects of Appellant's imprisonment, at the age of 16, with adults, rendered counsel ineffective. In view of the Record, and nature of such proffer, this is an absolutely ridiculous claim. Reference to such imprisonment would have assuredly reinforced the negative circumstances for which Appellant was imprisoned, and accentuated the fact and circumstances of Appellant's prior violent felony of rape

and robbery in 1974, which the trial court relied on as one of three aggravating circumstances supporting imposition of the death penalty. (R, 1142; 1300-1308). The nature of such 1974 crimes, committed when Appellant was 16, particularly when given the involvement of a robbery in the Slater murder, would have been likely to be very damaging to Appellant, and defense counsel did what he could to limit the State's references to the particulars of the 1974 crime, during sentencing. (R, 1166-1170, 1188). Furthermore, reminding the jury that Appellant had been previously sentenced to prison, can hardly be said to have been helpful to Appellant. Furthermore, it would have been logically inconsistent, and extremely damaging to Appellant, to have informed the jury of the harms and prejudicial effects of prison life, when the only alternative sentence before judge and jury, besides imprisonment, was the death penalty. Along these lines, such argument would have been inconsistent with defense counsel's argument that Appellant would be aged when he was released from prison for this crime, which has been held to be reasonable, strategic argument. Griffin v. Wainwright, 760 F.2d, supra, at 1514 (11th Cir. 1985); Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983).

In sum, applying the Strickland test to the entirety of Appellant's proffer on this point, and the Record, reveals a complete failure by Appellant to demonstrate that, but for counsel's failure to investigate or present such evidence, there is a reasonable probability that the trial court, or this Court on independent review, would have determined that the factors presented did not warrant the death penalty. Strickland, at 699. The establishment of the aggravating circumstances of a prior

violent felony conviction, the commission of kidnapping and/or flight from robbery during the murder, and the cold, calculated and premeditated manner of the murder, were by overwhelming evidence, much of it elicited from Appellant's own statements. (R, 1304-1305). The proffered testimony and information would in no way have altered the circumstances supporting such aggravating circumstances, and may very well have reinforced them. Further, the proffer cannot be said to have a reasonable probability of altering the stated reason for rejecting certain mitigating circumstances, and may have reinforced certain of said reasons, with respect to "duress/substantial domination," age, and degree of participation. (R, 1304-1307). As the Statement of Facts and the Record clearly show, the evidence of Appellant's guilt was overwhelming. Finally, although counsel recommended against it, an examination of Appellant's testimony at sentencing shows that none of Appellant's proffers, in the Motion, could have outweighed or overcome the nature and effect of such testimony. Thus, the trial court's ruling was appropriate, and demonstrates a lack of entitlement to relief. Harich; Mann; Troedel; Stone; Porter; Middleton.

(6) ALLEGED DISRUPTIVE PRESENCE OF VICTIM'S FAMILY IN COURTROOM

Appellant's proffer of affadavits from his own family members (Exhibit A,C,F), in support of his claim that the victim's family caused disruptive outbursts in court, during trial, and that counsel was deficient for not objecting to same, is absolutely not borne out by his Record citation. (R 1026,1295). Those references, made outside the jury's presence, reflect a standard cautionary edict by the trial court, prior to renditions of verdict and sentence recommendation, and do not in any way demonstrate a reaction to specific emotional outbursts by the victim's family, that can in any way substantiate this claim. The Record completely rebutts this self-serving and conclusory claim by Appellant, and his family members, and their allegations of racial prejudice are simply non-existent therein.

There is absolutely nothing but the rankest speculation, offered to demonstrate that such conduct existed, or that it intimidated the jury. In fact, Appellant's counsel effectively sought to minimize any surviving family inpact, by stipulating to fiber testimony, and objecting to such testimony from the victim's twin sister, Kathy Slater, rather than risking the potential emotional impact of such testimony. (R 891-894). Thus, Appellant's claim here entitled him to no relief.

(7) PROSECUTORIAL COMMENTS

Appellant has initially attempted to re-invite the attention of this Court, to the prosecutional comment that was addressed by this Court on direct appeal, Bush, supra,

at 941, as well as other purportedly improper comments, by "bootstrapping" his prior claim of courtroom disruption, supra. Specifically, Appellant maintains that, in reconsideration of the propriety of the comments, this Court should have been invited by effective counsel to consider the "climate in the courtroom", which was supposedly tainted by disruptions from the victim's family. Initial Brief, at 72-73; Motion, at 41-43. Since this ground has already been shown to have been without merit, on the issue of effective assistance of counsel, it is obvious that the same analysis employed by this Court on direct appeal, can be applied to the complained-of comments allegedly seeking sympathy for the victim. (R 1280); Bush, at 941. Since this Court has already rejected the notion that such comment deprived Appellant of fundamental fairness, or constituted clear prosecutional abuse, Bush, at 941-942, Appellant clearly could not credibly maintain that counsel was deficient on this point. Factually, defense counsel did in fact object to the comment addressed by this Court, Bush, at 941-942, (R 1280-81), so that a claim of ineffective performance or prejudice, by failure to object, Motion, at 43, is completely belied by the Record.

A close examination of Appellant's Motion and Brief, Brief, at 72-77; Motion, at 62-68, indicated that the only other prosecutional comment complained of, consists of argument to the jury, during sentencing, that the concept of sympathy had been previously discussed during the guilt phase. (R 1279).

This comment was an apparent reference to the State's attempts on voir dire, to insure that prospective jurors would not base their verdict on sympathy for the victim's family, (R 32,53,59, 65-66); Motion, at 63-65. These voir dire statements additionally urged that the verdict had to be based solely on the evidence and applicable law, and not "who the victim is or who she's related to." (R 32-33); Motion, at 65. Appellant now asserts that these voir dire statements, as referred to during closing argument at sentencing (R 1279), represented an invidious attempt by the State to urge the jury to rely upon and consider sympathy for the victim, as "evidence" in the case. Motion, at 63-65; Initial Brief, at 73.

Aside from the fact that such allegations were clearly self-serving and conclusory, the Record citations by Appellant reflect appropriate attempts by the State to insure, during voir dire, that prospective jurors would follow their oaths, and decide the case on the evidence, and law as given. Wainwright v. Witt, 469 U.S. __, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Adams v. Texas, 448 U.S. 38 (1980); Cave v. State, 476 So.2d 180,183-185,n.2 (Fla. 1985). Counsel could hardly be faulted for not objecting to attempts to prevent sympathy for the victim or her family from being considered as a factor in deliberation of verdict or sentencing recommendation. Strickland.

It is therefore obvious that none of the allegedly improper voir dire or sentencing argument "comments", constituted

clear prosecutional abuse, or a denial of fundamental fairness that counsel was somehow remiss in not objecting to, that prejudiced Appellant. Bush, at 941-942; Teffeteller v. State, 439 So.2d 840,845 (Fla. 1983); Ferguson v. State, 417 So.2d 639 (Fla. 1982); also, see Bowen v. Kemp, 769 F.2d 672, 681-682 (INL Cir. 1985); Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985); Brooks v. Kemp, 762 F.2d 1383, 1413-1415 (11th Cir. 1985) (en banc); Strickland, supra.

Appellant's analysis of the effect of Caldwell v. Mississippi, 472 U.S. __, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), since not apparently made under the guise of an ineffective assistance claim, will be dealt with separately, in Point II of this Brief, supra.

Appellant has also suggested that counsel was ineffective, for failing to object to the State's alleged misstatements of fact, to the effect that Appellant shot and killed Frances Slater (although this does not appear to have been specifically raised in the Motion, at 43, as a ground for ineffective assistance of counsel, as it is in the Brief, Initial Brief, at 49-51). Specifically, Appellant claims that counsel ineffectively failed to raise and use those statements of Georgeann Williams (Exhibit SS), and Tom Madigan (Exhibit TT), at trial, to rebut the inference that Appellant participated in the shooting.

This claim can be rejected, for similar reasons to those in ground four (4), dealing with preparation and cross-

examination of certain State witnesses. It is clear that counsel vigorously opposed introduction of "Pig" Parker's statements concerning Appellant's involvement and intent, at sentencing. (R 1166-1169). Furthermore, when Williams' deposition, as partially proffered, is thoroughly examined, it is even more clear that introduction of such a statement would have greatly jeopardized Appellant's defense. It would not have been advantageous, for the jury and judge to be informed that, according to Parker, "'with John [Appellant] already havin' a past record of bein' involved in somethin' similar to this, it wouldn't, you know, everything will be pointed at him.'" Exhibit 55, at 28. Further, the jury and court would have discovered that when Appellant was told of Parker's statement by Williams, he urged her to keep it quiet. Id. Counsel can hardly be considered incompetent, for appropriately choosing not to place Georgeann Williams in a position where such testimony would have been elicited. Strickland. Furthermore, assuming arguendo he had sought for such testimony to be introduced, it would appear that such evidence of a non-testifying co-defendant's statement, against Appellant, would have been deemed inadmissible. (R 1166-1169); Bruton v. United States, 391 U.S. 123 (1968); Nelson v. State, 11 FLW 203 (Fla. May 1, 1986); Hall v. State, 381 S.2d 683 (Fla. 1978). This is particularly substantiated by counsel's actual efforts to rebut the inference that Appellant was the shooter, by consistently urging the jury that the

evidence, including Appellant's statement, revealed that Parker shot and killed the victim, not the Appellant, and eliciting, in cross-examining Dr. Wright, that the stab wounds (Appellant had confessed to) were not fatal. (R 812,822-824,839,963-964, 968-970,1003,1181,1282).

As noted in Appellee's prior argument on the competence of Appellant's cross-examination of State witnesses on the issue of the presence of a 32 caliber bullet, defense counsel elicited such an admission, of such a possibility, from Dr. Wright. (R 472-473). As noted, this effectively served to minimize Appellant's ownership of a 38 caliber gun, and the location of such a bullet from the car, (R 775,776,914), and evidently was effective enough to compel the State to re-inquire of Dr. Wright, on re-direct examination, about the caliber of bullet involved. (R 475). In addition to the fact that the Record bears out that counsel was aware of, and did make use of this information (T 87), it is clear that, due to other evidence indicating Appellant was not the shooter, the question of eliciting information about the caliber of bullet was considered and/or cumulative. Strickland.

As to the substantive charge that the State's cited references constitutes intentionally misleading use of perjured testimony, this issue will be addressed in Point II.

(8) JURY INSTRUCTIONS, INTOXICATION/COERCION

Appellant has challenged counsel's effectiveness, for failing to request particular jury instructions on intoxication

and/or coercion. It is evident that, while there was evidence of drinking being done by Appellant, on the day of the murder, Appellant openly admitted that he knew what he was doing, that he did not drink as much as the others, and was not so drunk as to be unaware of what was happening (R 768,769,774,785,1188-1190). Given the nature of this testimony, and Appellant's concession that he had made such statements when he tried to retract from them during his sentencing testimony, (R 1188-1190), counsel could not be considered deficient, so as to require an evidentiary hearing, for not requesting an instruction was supported by the evidence. Palmes v. State, 397 So.2d 648 (Fla. 1980), cert. denied, 454 U.S. 882 (1981). Additionally, such an instruction would have essentially admitted involvement in the actual commission of all three crimes, including the murder, but sought to negate specific intent, which would have arguably been inconsistent with Appellant's defense. Middleton, supra; Straight, 772 F.2d, supra, at 684 (11th Cir. 1985). The evidence given the jury verdict, and this Court's conclusion, based on the evidence (on direct appeal), that Appellant possessed the requisite mental "intent and contemplation" necessary to permit imposition of the death penalty without violating Eighth Amendment rights, Bush, at 941, clearly established no entitlement to relief, based on lack of prejudice under Strickland. Harich, 11 FLW, supra, at 120.

Similarly, the evidence in the case did not necessarily support a separate instruction on coercion. The evidence demonstrated Appellant's ownership, control of the car, and the murder

weapon. Appellant participated in receiving the proceeds of the robbery, after leaving the gun at his brother's house. (R 830). Appellant physically, brought the money from the store to the car, after the victim was taken from the store to the car, at gunpoint. (R 751,816,819,1211-1212). He further admitted that it was his idea to dispose of the murder weapon, and he did so. (R 771-773,780). Appellant further admitted that a discussion occurred in the car, that Ms. Slater could identify her attackers, because she had seen Appellant's car and that as a result, she could at least identify Appellant, as the car owner. (R 754,755, 1212,1217-1219). The jury's finding of guilt of first-degree murder, was a necessary rejection of Appellant's statements that he was coerced. Defense counsel did ask the jury to consider that Appellant's version that he was coerced into driving the car, and into robbing the store. (R 968-970,1003).

The evidence and the jury's finding of guilt, when coupled with the trial court's rejection of Appellant's coercion/ domination argument regarding sentencing mitigating circumstances (R 1306), and this Court's Enmund analysis, supra, demonstrated an absence of prejudice under Strickland, assuming arguendo that the failure by counsel to request a coercion instruction was deficient. Strickland, Bucherie.

(9) OBJECTIONS TO PENALTY PHASE INSTRUCTIONS

Appellant alleges that the penalty phase instructions, coupled with the trial court's and prosecution's voir dire comments, improperly diluted the jury's sense of responsibility

at sentencing, and that trial counsel ineffectively failed to object to such instructions. In view of the fact that such instructions appropriately stated the correct law in Florida, regarding the role of judge and jury in capital sentencing, the trial court's ruling denying this claim without a hearing was correct. The standard jury instructions given by the trial court, at sentencing (R 1287-1290), _see_ Penalty Proceedings--Capital Cases, _Florida Standard Jury Instructions in Criminal Cases_ (2nd Ed. 1975), at 75-81, reflected the actual statutory roles, assigned to the judge and jury, by statute. §921.141(2)(b), _Fla. Stat._ (1972). This statutory scheme, which directs that the jury recommend an advisory sentence, and that the judge has the ultimate decision in imposing sentence, has been consistently upheld and approved against constitutional challenges. _Proffitt v. Wainwright_, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); _Thompson v. State_, 456 So.2d 444 (Fla. 1984); _Brooker v. State_, 397 So.2d 910 (Fla. 1981); _Spinkellink v. Wainwright_, 578 F.2d 582 (5th Cir. 1978), _cert. denied_, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); _State v. Dixon_, 283 So.2d 1 (Fla. 1973); _Dobbert v. Strickland_, 532 F.Supp. 545 (M.D. Fla. 1982), _affirmed_, 718 F.2d 1518 (11th Cir. 1983).

Pursuant to this valid scheme, the instructions given to the jury accurately portrayed the jurors' role in sentencing as advisory, and in no way inferred that said role was meaningless or superfluous, as Appellant contends. Said instructions informed the jury of their duty, to advise the court as to the

nature of the appropriate punishment (R 1287); stated that the majority finding requirement should not be an invitation to "act hastily or without due regard to the gravity of these proceedings" (R 1290), and further impressed upon the jury the relevence and significance of their deliberations and decisions, in accordance with standard jury instructions, by advising that "Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your better judgment" upon the issue of whether to recommend death or life imprisonment (R 1290) (emphasis added).

Appellant's obvious reliance on Caldwell v. Mississippi, __U.S.__, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), does not alter the conclusion that counsel was not deficient in objecting to alleged "jury dilution" penalty phase instructions. It should initially be noted that s significant distinction between Mississippi and Florida is that Florida makes the trial judge the "sentencer", as opposed to the jury. Funchess v. Wainwright, Case No. 86-281-Civ-J-12 (MD Fla., April 21, 1986), slip op., at 14; Thomas v. Wainwright, Case No. 86-435-Civ-T-10 (MD FLa., April 14, 1986) slip op., at 5. There is no indication that the trial judge diminished his responsibility in sentencing. Furthermore, such instructions cannot be compared or equated, in any way, with the Caldwell prosecutor's argument and comments, that was held to amount to "state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."

Caldwell, 86 L.Ed.2d, supra, at 240.

Appellant has attempted to equate express pronouncements by a State prosecutor (agreed to by the judge as correct, see Caldwell, supra, to a jury that it should not regard itself as bearing responsibility for capital sentencing, with the giving of standard jury instructions which accurately define the respective statutory responsibilities of judge and jury. Informing a jury that their sentence is advisory in nature is not tantamount to urging upon the jury an ultimate lack of responsibility in capital sentencing. Thus, counsel was not ineffective, nor was there prejudice, for any failure to object to statements correctly reflecting jurors' and judges' responsibilities in Florida capital sentencing.

(10) OBJECTION TO DEATH-QUALIFICATION OF JURORS/EXCUSAL OF JURORS REID AND THOMPSON

Appellant's claim that counsel was infeffective, for failing to object to or raise the "death qualification" of jurors on voir dire, must be rejected, on the basis of the United States Supreme Court's decision in Lockhart v. McCree, 39 CrLRptr 3085(US Supreme Court, May 7, 1986), which has rejected the underlying substantive contention that death qualification of jurors violates a capital defendant's Sixth Amendment rights. This Court had consistently rejected this position, prior to Lockhart, both recently. See, e.g., Thomas v. Wainwright, 11 FLW 154 (Fla., April 7, 1986); James v. Wainwright, 11 FLW 111 (Fla., March 14, 1986); Harich v. Wainwright, (Fla., March 17, 1986), and

around the time of Appellant's trial and sentencing in November, 1982. Maggard v. State, 399 So.2d 973 (Fla. 1981); Riley v. State, 366 So.2d 19 (Fla. 1978).

Appellant challenges counsel's actions concerning the exclusion of jurors Reid, and Thompson on voir dire, for cause, based upon stated attitudes towards the death penalty, and their effect upon the ability of each to properly discharge obligations as a juror. A review of the Record leaves little doubt that the excusal by the trial court was appropriate, and that counsel was therefore not ineffective for failing to challenge the excuses, since there was no factual basis for same.

The United States Supreme Court has recently stated that exclusion of a juror for cause, based on attitudes about the death penalty, is appropriate, if such views would "prevent or substantially impair" the potential juror from impartially discharging the duties as a juror, based on the law, the court's instructions and oath. Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Adams v. Texas, supra; Cave v. State, supra. The colloquy involving juror Reid, see Statement of Facts, supra, and this Court's disposition of the issue on direct appeal, Bush, supra, at 940, mandate affirmance of denial of relief on this point. The Record demonstrates that juror Thompson flatly could not consider the death penalty as an alternative, and with the possibility of the death penalty, could not find the Appellant guilty, regardless of the evidence. (R 252). Thompson also stated he had to pay certain bills, and that jury

service would be a hardship upon him. (R 255). Clearly, his excusal under Witt was absolutely proper, for the same reasons as the excusal of Reid.

(11) PRESERVATION OF RACIALLY DISCRIMINATORY IMPOSITION OF DEATH PENALTY IN FLORIDA

The merits of this issue, raised in reliance on the Gross and Mauro studies, has been previously rejected by this Court, the U.S. Supreme Court, and the Eleventh Circuit. See State v. Washington, 453 So.2d 389 (Fla. 1984); Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Adams v. State, 449 So.2d 819 (Fla. 1984); Sullivan v. State, 441 So.2d 609 (Fla. 1983); McClesky v. Kemp, 753 F.2d 877 (11th Cir. 1985)(enbanc); Thomas v. Wainwright, 767 F.2d 738, 747-748 (11th Cir. 1985); Washington v. Wainwright, 737 F.2d 922 (11th Cir. 1984); Wainwright v. Ford, ___U.S.___, 104 S.Ct. 3498 (1984); Wainwright v. Adams, ___U.S.___ 104 S.Ct. 2183 (1984); Sullivan v. Wainwright, ___U.S. ___, 104 S.Ct. 450 (1983). Since this claim, and the statistical basis for it relied on by Appellant has been so rejected, counsel can hardly be deemed ineffective for failing to raise it.

Appellant's further claim that this issue required an evidentiary hearing, because the relevant studies were not available during Appellant's 1982 trial, is certainly not appropriate in a post-conviction relief proceeding (assuming arguendo it is truly "new" evidence). O'Callaghan, 461 So.2d, supra, at 1356; Hallman v. State, 371 So.2nd (Fla. 1979). Further, his reliance on McClesky, supra, to support his request for an evidentiary hearing, was totally unfounded. McClesky, supra, at 895-899.

The Motion and proffer, when examined in light of the Record, conclusively demonstrates that more of Appellant's claims entitled him to relief, thereby mandating affirmance of the trial court's denial of the Motion, without an evidentiary hearing. As stated in Mann, supra, particularly regarding Appellant's claim of ineffective assistance, none of those challenges would have "affected the truth-seeking process, the evaluation of the evidence, the proper application of the law, or the outcome of the case", both guilt and penalty phase, under Strickland. Mann, supra, at 1361-1362. This Court should thus reject Appellant's claim that an evidentiary hearing should have been conducted on his claims.

POINT II

TRIAL COURT APPROPRIATELY DENIED APPELLANT'S MOTION TO VACATE JUDGMENT AND SENTENCE, SINCE ALL OF SAID CLAIMS WERE CONCLUSIVELY REBUTTED BY THE RECORD, AND EMITLED APPELLANT TO NO RELIEF.

Because the claims raised in this Point by Appellant, and Appellee's responses thereto, are repititious of Appellee's argument in Point I, urging affirmance of the trial court's denial of relief without an evidentiary hearing, Appellee relies on those arguments and citations in Point I, as it fully set forth herein in Point II, regarding Claims I,II,III,VI, and VII in Appellant's Motion to Vacate. In this Point, Appellee will address those arguments, with regard to Claims IV and V, not fully addressed in Point I.

IV. ALLEGEDLY MISLEADING STATEMENTS, PROSECUTORIAL ARGUMENT

Appellant maintains that prosecutional arguments, stating and/or implying that Appellant was the "triggerman" in the murder, constituted knowing use of perjured testimony which mislead the jury, in violation of Giglio v. United States, 405 U.S. 150 (1972). Appellant's attempt to "bootstrap" comments on the evidence, and inferences therefrom, as well as comments arguably based on a lack of evidence, does not even approach a prejudicial Giglio violation, and has no merit at all.

The first comment Appellant refers to, was the prosecutor's statement that a 38 caliber bullet was recovered from the front seat, on the driver's side, from where Appellant was sitting and driving throughout the criminal episode. (R 980). The content of this statement, demonstrates the State's efforts to rebut Appellant's claim that he was "forced" to participate in the robbery, kidnapping and stabbing, and the obtaining, providing and disposal of the murder weapon. (R 981). The context of his statement further reflects the State's emphasis on Appellant's increasing admission of involvement and participation, with each suceeding statement he made to the police. (R 980). The nature of his statements, Statement of Facts, supra, and the retrieval of the 38 caliber bullet from the driver's seat in Appellant's car, (R 914), was established by the evidence. Prosecutional comments on the evidence, and reasonable inferences therefore, are not inappropriate in any way. White v. State, 377 So.2d 1149 (Fla. 1979), cert. denied, 449 U.S. 845 (1980); Whitney v. State, 132 So.2d 599 (Fla. 1961). The suggestion that such permissible comments, are tantamount to the use of perjured testimony, is completely unavailing, and in no way meets the Giglio threshold.

The comment that stated or suggested that Appellant fired the bullet that killed Frances Slater (R 992-993), occurred in the context of arguing and emphasizing to the jury that Appellant controlled the events of the murder, by his ownership of the gun, ownership of the car, and physical

taking of the money from the store, as rebuttal to defense arguments that the other defendant's were involved to a much greater and active degree than Appellant. (R 991-992). While there was no evidence necessarily linking Appellant, as having fired the fatal bullet, the prosecution itself undercut this statement, by otherwise arguing to the jury that the extent of Appellant's involvement included the stabbing and disposal of the gun, but not the shooting of the victim. (R 981,982,989-994,997-998,1274-1275). Moreover, assuming the comment to be unsupported by the evidence, such impropriety does not rise to the level of knowingly relying a false evidence or testimony, such that a jury was deprived of truthful information, or facts behind a motive for a particular witness' testimony. Brown v. Wainwright, 785 F.2d 1457,1463,1465 (11th Cir. 1986); Giglio, supra. It should be noted that all other defense and prosecutional references to Appellant's involvement, did not purport to identify Appellant as the shooter.

Assuming arguendo that the latter comment amounted to reliance on knowing false information which did approach a Giglio-type violation, the Record clearly demonstrates that such information could not, "in any reasonable likelihood have affected the judgment of the jury", in its rendition of a verdict at the guilt phase. Brown, supra, at 1463; McClesky v. Kemp, 753 F.2d, supra, at 884-885; Giglio, 405 U.S., supra, at 154. As noted, both State and defense arguments otherwise emphasized that Appellant did not shoot the victim, supra. Appellant's

own statements, while admitting substantial involvement and culpability, including the stabbing, denied the shooting. Unlike cases such as Brown, supra, the prosecution and conviction of Appellant for robbery, kidnapping and first-degree murder was in no way solely contingent on the allegedly offending reference to Appellant's actual firing of the fatal bullet. Brown at 1466. Appellant's guilt, as argued by the State, was proven by evidence of the true nature of his involvement, absent status as the shooter, which satisfied the alternatives and elements of premeditated murder, felony-murder, and guilt on an "aiding and abetting" basis. (R 989-998); Statement of Facts, supra; Bush, 461 So.2d, supra, at 940. Thus, given the fact that such alleged false evidence was not the "keystone" of the State's case, or the sole basis for a finding of guilt, and that other substantial evidence supplied overwhelming evidence of Appellant's guilt of murder, Appellant's claim has wholly failed to establish "materiality", or a "reasonable likelihood", that the jury's guilt phase verdict could have been improperly affected. Brown, at 1466; McClesk y, at 884-885; Giglio, at 154; Williams v. Griswald, 743 F.2d 1533, 1542-1543 (11th Cir. 1984).

Thus, since the conclusion from the Record is that Appellant's due process rights were plainly not violated by intentional and perjurious conduct by the State, the trial court's denial of relief should be affirmed on this ground.

V. PROPRIETY OF PROSECUTORIAL CLOSING ARGUMENTS

Appellant has maintained that the comments made by the prosecution, must be re-examined by this Court, in light of Caldwell v. Mississippi, supra, in which, it is alleged by Appellant, there was a "fundamental charge in the law" regarding examination by a reviewing court of the propriety of prosecutional comments.

It should initially be noted that the Caldwell decision does not constitute a fundamental change in the law, as applied to prosecutional comment, to enable Appellant to have brought this claim, as cognicable, for the first time in his post-conviction motion. Witt v. State, supra; Also, see Reed v. Ross, 468 U.S.___, 104 S.Ct. ___, 82 L.Ed.2d 1, 15-16(1984). At most, the decision represented the application of a rule of law existing well before Caldwell[3]--Eighth Amendment concerns and requirements for fairness, reliability and individualized determinations in capital proceedings---to a certain set of factual circumstances. Caldwell, at 239-246. Such a decision does not meet the Witt criteria.

Additionally, the suggestion that the Caldwell decision altered the standard, or burden of proof, regarding appropriateness of prosecutorial closing arguments, has absolutely no merit. The Eleventh Circuit has rejected the contention that the Caldwell criteria is in any way inconsistant or incompatible with its decisions adopting and applying the Strickland analysis to

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3) Woodson v. North Carolina, 428 (1976)(plurality opinion); Eddings v. Oklahoma, 455 U.S. 104(1982); Lochett v. Ohio, 438 US 586(1978)(plurality opinion), See Caldwell, 86 L.Ed.2d, supra, at 239,246.

prosecutional comments. Bowen v. Kemp, 776 F.2d 1486 (11th Cir. 1985); Brooks v. Kemp, 762 F.2d 1448 (11th Cir. (on reh. en banc) 1985)./ Furthermore, a reading of the Caldwell decision, indicates no diversion from the standard relied on in the Brooks case, in adopting Strickland, in Donnelly v. DeChristoforo, 416 US 639 (1974). It is clear that in Caldwell, the US Supreme Court distinguished the case factually from that of Donnelly, but nevertheless relied on the same criteria of fundamental fairness in assuring a fair sentencing determination, that was the underlying premise of Donnelly, and the Eleventh Circuit's current prosecutional comment analysis in Brooks, supra. Caldwell, supra, at 245, 246; Brooks, at 1400,1402,1404,1406,n.28. This concept of fundamental fairness in sentencing, formed the basis for this Court's analysis of prosecutorial closing argument, on direct appeal in this case, as well as in other cases on the subject. Bush, 461 So.2d, supra, 941-942; Teffeteller, supra; Ferguson, supra, Maggard, supra.

Moreover, the Caldwell analysis held that prosecutorial arguments therein, amounted to "state-induced suggestions that the sentencing jury may shift its sense of reponsibility to an appellate court". Caldwell, at 240. The Court's primary concern, and basis for overturning the defendant's conviction therein, was

the prosecutor's statements (agreed with by the trial judge) that the jury's decision was "automatically reviewable" by the State Supreme Court, and that this deprived the defendant of a determination of the appropriateness of his death sentence. Id.

Such pronouncements can hardly be equated with the nature of the comment reviewed by this Court, on direct appeal.[4] Considering this Court's determination on direct appeal that the complained-of comment was "of minor impact", and did not "rise to the magnitude of a denial of fundamental fairness, Bush, supra, at 942, Appellant has failed to demonstrate that the Caldwell decision would in any way affect this result. This is particularly true, in view of the entirely distinct capital sentencing scheme in Mississippi, making the jury the ultimate sentencer, Caldwell, at 241,247, from that in Florida.

Finally, the mere fact of record of the cases of Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985), remanded .38 CrLRptr 4105 (US Supreme Court, December 2, 1985), and Rogers v. Ohio, 17 Ohio St3d 174 (1985), remanded 38 CrLRptr 4105 (US Surpeme Court, December 2, 1985), does not ipso facto require this Court to revisit this issue in light of Caldwell, and rule in Appellant's favor, e.g. Darden v. Wainwright, 767 F.2d 752 (11th Cir. 1985)(on remand from US Supreme Court, in light of intervening decision in Wainwright v. Witt, supra; Bowden v. Kemp, supra, /the State, prevailed, on remand, on Ake claim). The "jury dilution" arguments by the prosecutor in Tucker, supra, at 1485, cannot be equated with the nature of the comments here.

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[4] The nature of this comment is akin to one found proper in Brooks, supra, as a "compelling statement" regarding the victim's death, and its significance in terms of the legitimate interest of retribution in capital sentencing. Brooks, at 1410.

Thus, the trial court's denial of relief, on this ground, was entirely appropriate, in view of these arguments and circumstances.

CONCLUSION

Based on the Record, and the foregoing arguments and authorities, Appellee respectfully requests that this Court AFFIRM the trial court's denial of post-conviction relief, in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished by United States Mail to: STEVEN MALONE, ESQUIRE and SONDRA GOLDENFARB, ESQUIRE, Office of Capital Collateral Representative, University of South Florida -- Bayboro, 140 7th Avenue, South, Room COQ-216, St. Petersburg, Florida 33701 on this 16th day of May, 1986.

OF COUNSEL