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IN THE SUPREME COURT OF FLORIDA

BARRY HOFFMAN,

Appellant,

v.

CASE NO. 73,757
74740

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On October 28, 1981, Barry Hoffman was charged by indictment with the first degree murders of Frank Ihlenfeld and Linda Sue Parrish. Due to a conflict of interest, the Public Defender's Office for the Fourth Judicial Circuit did not handle Hoffman's case rather, Richard D. Nichols was appointed. Pretrial motions were filed on November 3, 1981, by the State to compel the taking of blood samples and hair specimens. Speedy trial was waived by Hoffman on March 22, 1982, and on June 25, 1982, Hoffman's counsel filed a motion to suppress all confessions and/or admissions made by him. On that same date, Hoffman filed a pro se motion to dismiss counsel. Following a hearing on both motions, both were denied. Pretrial, Hoffman, and his counsel, pursued plea negotiations with the State and on June 28, 1982, Hoffman withdrew his guilty plea and entered a plea of guilty to two counts of first degree murder. The plea negotiations provided that Hoffman would receive two concurrent life sentences in exchange for Hoffman's truthful testimony in the State's case against codefendant Leonard Mazzara. The factual basis for the plea revealed that on September 7, 1980, in Jacksonville Beach, Florida, Hoffman and James White, a codefendant, murdered Frank Ihlenfeld and Linda Sue Parrish. Hoffman stabbed and then cut the throat of Mr. Ihlenfeld and aided in the murder of Linda Sue Parrish. Hoffman agreed to the plea and agreed to testify truthfully at Mazzara's trial.

On September 15, 1982, Barry Hoffman was called as a witness in the Mazzara trial and at such time, testified contrary

to his plea negotiation that he "never talked with either man (Rocco Marshall or Leonard Mazzara) about doing any job for them." He testified he did not conspire with Marshall or Mazzara to kill Parrish or Ihlenfeld, that neither of them hired him. He testified that he did not kill anyone.

Hoffman was made a court witness during the Mazzara trial and at that time the State fully explored in its questioning of Hoffman, whether he appreciated that his testimony that day violated the plea agreement. On the record Hoffman testified that he understood that his testimony violated the plea agreement; that the plea agreement was off; and that the State would be seeking the death penalty. Moreover, Hoffman testified that his lawyer advised him to accept the plea because Hoffman's fingerprints were found in the room near Ihlenfeld's body and that that evidence would be used against him at trial.

On September 17, 1982, Hoffman filed a pro *se* motion to withdraw his guilty plea. On September 24, 1982, a hearing was held at which time defense counsel Nichols stated that he was advised of the events regarding the Mazzara trial and he had spoken with Hoffman. Nichols then ore tenus moved to withdraw from the case. Said motion was granted and Nichols was allowed to withdraw as counsel. The court also accepted Hoffman's motion to withdraw his guilty plea and he entered a plea of not guilty.

On October 1, 1982, Jack C. Harris was appointed to represent Barry Hoffman. Harris filed a plethora of pretrial motions seeking to have the death penalty declared unconstitutional, seeking a motion for individually sequestered

voir dire, a motion in limine, a motion to declare the death penalty not a possible penalty, a motion to produce photographs, a demand for discovery of penalty phase evidence, a motion for additional peremptory challenges, a renewed motion to suppress, and a motion for change of venue.

The trial occurred on January 10-14, 1983, and, at the conclusion of said proceedings, Hoffman was found guilty of first degree capital murder for the death of Frank Ihlenfeld and second degree murder of Linda Sue Parrish. He was also found guilty of conspiracy to commit first degree murder. The penalty phase was held on January 20, 1983. No additional evidence was presented by the State and the defense presented the sworn remarks of Barry Hoffman. Following closing arguments, the jury was sent to deliberate and as a result thereof, returned a death recommendation as to the murder of Frank Ihlenfeld. On February 11, 1983, Judge Haddock concurred with the jury's recommendation of death and imposed the death penalty, finding four statutory aggravating factors and two mitigating factors. An appeal followed and this Court, in **Hoffman** v. **State**, 474 So.2d 1178 (Fla. 1985), affirmed the convictions and imposition of the death penalty.

On October 2, 1987, Hoffman filed his Rule 3.850 motion. On October 7, 1987, the trial court entered an order denying said motion. Rehearing was filed on October 22, 1987, and on January 17, 1989, an order was entered denying the motion for rehearing.

The facts of the case are set out in this Court's opinion in **Hoffman** v. **State, supra,** specifically they are:

On September 7, 1980, the bodies of Frank Ihlenfeld and Linda Sue Parrish were found in a motel room in Jacksonville Beach. Both had died by stabbing, having received numerous stabbing and slashing wounds.

State's witness George Marshall testified that he had recruited Appellant Barry Hoffman and his codefendant James White to perform collections work for a Leonard Mazzara. Ultimately Hoffman and White were assigned by Mazzara to kill Ihlenfeld. Marshall testified that on September 7, 1980, he and Mazzara accompanied Hoffman to the airport and that during the trip to the airport Hoffman said he had carried out the assignment by killing Ihlenfeld by stabbing and cutting his throat.

Three special agents of the FBI testified as to their participation in the arrest of Appellant on October 21, 1981, in Jackson, Michigan. Appellant was taken to a state police station there and interrogated. According to the testimony, Appellant was advised of his Fifth and Sixth Amendment rights and signed an acknowledgment of that fact. The acknowledgment was admitted into evidence. The FBI agents who interviewed Appellant testified that he admitted to committing the murders.

A detective of the Jacksonville Beach police testified that he went to Michigan to interview Hoffman. The officer testified that Appellant was advised of his rights, that he acknowledged his understanding thereof in writing, and that he confessed to receiving five thousand dollars in payment for his service in carrying out the killings.

There was testimony that a cigarette package was found at the scene of the murders. There was expert testimony that a fingerprint found on the package matched a known print made with the left thumb of Appellant Hoffman.

Appellant testified in his defense. He denied committing the murders. He presented the testimony of his girlfriend to the effect that he was at her home on the day the murders occurred and was there when she left to go out that morning. Hoffman himself testified that he departed the area by

> airplane early in the afternoon of that day. In rebuttal, the State presented the testimony of a detective concerning a prior statement of Appellant's girlfriend. The testimony was that in that statement the girlfriend told the officer that Hoffman and White spent the night prior to the murders at her home but left together in the morning.
>
> The jury returned verdicts finding Appellant guilty of first degree murder for the death of Ihlenfeld, second degree murder for that of Parrish, and conspiracy to commit murder in the first degree.
>
> At the sentencing phase, the State presented no additional evidence. The State and defense stipulated that the statutory mitigating factor of lack of a significant history of criminal activity existed. Section 921.141(6)(a), Fla.Stat. (1979). They stipulated further to the fact that both Mazzara and White had received consecutive life sentences on their conviction for the murders. Hoffman testified at the sentencing phase, denying his guilt of the crimes. The jury recommended a sentence of death.

Hoffman v. State, 474 So.2d at 1180.

SUMMARY OF ARGUMENT

I.

The trial court did not err in summarily denying Hoffman's **Rule 3.850 motion in that the claims raised are either** insufficient on their face or are specifically refuted by the record and as such, properly denied pursuant to **Kennedy** v. **State, 547** So.2d **912** (Fla. **1989).**

II.

Hoffman's assertion that he was denied counsel at critical stages is without merit. The failure of counsel to attend a codefendants trial wherein Hoffman was a witness for the State pursuant to a plea bargain does not constitute a critical stage. Moreover, Hoffman's willful reneging on the plea negotiation and his **pro** se motion to withdraw his guilty plea was of his own making and does not constitute a basis for relief.

III.

Hoffman's contention that the failure of the State to comply with his public records request pursuant to Chapter 119, Florida Statutes, does not mandate reversal nor does it constitute a violation of **Brady** v. **Maryland, 373 U.S. 83 (1963).**

IV.

Hoffman's assertion that he did not make a knowing and intelligent waiver of his Miranda rights with regard to his admissions to police is procedurally barred in that this claim was raised on direct appeal and decided adversely to him. Trial counsel did not render ineffective assistance of counsel in not securing a mental health expert to explain in more detail whether Hoffman knowingly waived said rights.

V.

Trial counsels Nichols and Harris rendered effective assistance of counsel both at trial and at the penalty phases of Hoffman's case. There representation satisfied the standards of **Strickland** v. **Washington, 466 U.S. 668 (1984).**

VI.

The closing arguments of the prosecution at both the guilt-innocence phase and the penalty phase of Hoffman's trial did not infect the results. The comments went unobjected to and constituted fair argument with regard to the facts of the case, statements made by defense counsel and the law applicable to this case.

VII.

Hoffman's **Maynard** v. **Cartwright, 108** S.Ct. **1853 (1988),** argument is totally without merit but more importantly, is procedurally barred from further consideration.

VIII.

Neither the prosecutor nor the trial judge in any way misinformed or misled the jurors with regard to the two stipulated mitigating factors that (a) Hoffman had no significant prior criminal history, and (b) that coconspirators Mazzara and White received life sentences for these murders.

IX.

Hoffman's Caldwell v. **Mississippi, 472 U.S. 320 (1985),** is procedurally barred in that no objections were raised at trial.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN ENTERING A SUMMARY DENIAL OF HOFFMAN'S RULE 3.850 MOTION WITHOUT *AN* EVIDENTIARY HEARING

Rule 3.850, Fla.R.Crim.P., provides that a defendant is entitled to an evidentiary hearing unless the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief. In his first point on appeal, Hoffman, in summary, details why an evidentiary hearing is necessary. Appellee would submit that a majority of the allegations presented, though couched in terms that counsel rendered ineffective assistance of counsel, are merely an effort by Hoffman to assert claims which could have been and should have been raised on direct appeal. And either were resolved on direct appeal adversely to him or were not raised at all. In some instances, the allegations are insufficient on their face to warrant review. With regard to Hoffman's **Brady v. Maryland, 373** U.S. **83 (1963),** issue, this claim is predicated on a Chapter 119, Fla.Stat., request rather than a "bona fide" **Brady** issue.

It is submitted that not all Rule 3.850 motions require further evidentiary development as recognized by the rule itself. **Sub judice,** Hoffman's assertions with regard to the effectiveness of his trial counsel at both trial and at the penalty phase of his 1983 trial, mandates summary denial. Appellee would rely on the arguments tendered in opposition to the heretofollow claims in support of the trial court's denial without evidentiary hearing (in summary fashion) of Hoffman's Rule 3.850 motion.

In **Kennedy** v. **State,** 547 So.2d 912 (Fla. 1989), this Court observed that a Rule 3.850 motion can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that a defendant is entitled to no relief, citing **Agan v. State,** 503 So.2d 1254 (Fla. 1987); **O'Callaghan** v. **State,** 461 So.2d 1354 (Fla. 1984). The Court observed:

> . . . A defendant may not simply file a motion for post conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary 'hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrated deficiency on the part of counsel which is detrimental to the defendant. The test for determining whether counsel has been ineffective was established in **Strickland** v. **Washington,** (cite omitted), and is set forth in our opinion in **Maxwell** v. **Wainwright . . .**

547 So.2d at 913.

Recently, in a similarly circumstanced case, **Correll** v. **State,** ____ **So.** 2d ____ (Fla. 1990), 15 F.L.W. S 147, this Court observed:

> First, he contends that an evidentiary hearing was required on his allegations that his lawyer was ineffective at the penalty phase of his trial. Specifically, Correll asserts that counsel knew or should have known that he had a lifetime history of heavy drug and alcohol usage but failed to introduce such evidence at the penalty phase. He also contends that trial counsel should have introduced available evidence of a deprived childhood.
>
> There is no doubt that counsel was aware of Correll's prior drug and alcohol usage. In fact, Correll testified that he had used alcohol and various kinds of drugs often, though not on a regular basis, throughout his adult life. Correll now submits affidavits

> from friends which recite the frequent use of an assortment of drugs and argues that counsel was ineffective for failing to present these witnesses.
>
> In response, the State points out that there was no evidence of any drug usage or excessive drinking the night of the murders. The State further points out that Correll told Dr. Pollack, the psychiatrist who examined him prior to trial, that he used alcohol several times a week and that he had experienced with various drugs, although not on a regular basis. Dr. Pollack concluded that he was not legally insane, that he did not suffer from brain damage, and that neither of the statutory mental mitigating circumstances was applicable. Thus, the State suggests that it was reasonable for trial counsel not to try to portray Correll as a heavy drug user but rather a person who was good to his mother and brothers and one who had found religion and who was unlikely to be dangerous in the future.
>
> In view of the fact that Correll continued to insist that he was not guilty of the crimes, we can understand why counsel may not have wanted the jury to believe that he was an alcoholic and a drug addict. However, because there was no evidentiary hearing on this issue, we do not pass on whether counsel provided ineffective assistance. Rather, we conclude that Correll has failed to meet the second prong of **Strickland** v. **Washington, 466 U.S. 668 (1984),** which requires a showing that but for such ineffectiveness the outcome probably would have been different.
>
> Assuming that counsel had introduced all of the proffered evidence of drug use and intoxication, we are convinced that neither the jury nor the trial judge would have been persuaded to arrive at a different result. Viewed in light of the heinous nature of these four murders and the abundance of aggravating circumstances, the additional evidence simply would not have made any difference.

15 **F.L.W.** at S **148-S 149.**

Armed with the following assessment, the State would submit that the trial court did not err in summarily denying Hoffman's Rule 3.850 motion.

POINT II

HOFFMAN WAS NOT DENIED HIS RIGHT TO COUNSEL, AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AT CRITICAL STAGES OF THE PROCEEDINGS

Hoffman next points to two occasions which he claims he "stood by himself at critical stages of the proceedings at which he was entitled to counsel, and for which there was no waiver of counsel." (Appellant's Brief, page 13). Hoffman goes on to suggest that he "did things and made statements which placed him in the electric chair. When he appeared with counsel, he was guaranteed a twenty-five year prison sentence. When he appeared without counsel, he set in motion his death sentence." (Appellant's Brief, page 13). The two instances for which Hoffman now suggests he is entitled to relief relate to his testimony at his codefendant's trial. The record reflects that on June 28, 1982, at a motion for change of plea hearing, Hoffman, his counsel and the State entered into a plea agreement at which time in exchange for a plea to first degree murder and two life sentences and a nolle prosse on the conspiracy case, Hoffman agreed to testify truthfully at Leonard Mazzara's trial. At that proceeding, Hoffman was specifically told that if he did not abide by the plea agreement, it would be withdrawn and he would be subject to trial. (TR 77, 81). A plea colloquy followed at which time Hoffman admitted that he killed Mr. Ihlenfeld by cutting his throat and that he aided in the murder

of Linda Sue Parrish. The court accepted the plea (TR 80-81), and passed on sentencing until after Hoffman testified. (TR 81). At the plea colloquy, Hoffman was asked whether he was satisfied with his counsel's representation and he said he was. (TR 82).

On September 15, 1982, Barry Hoffman was called as a witness by the State in the trial against Leonard Mazzara. At that time, he testified that he never talked with either Rocco Marshall or Leonard Mazzara about doing any jobs for them. (TR 93). He further stated that he never conspired with either of the aforementioned persons nor did he kill Parrish or Ihlenfeld. He stated that he was not hired to kill anyone and that he did not kill anyone. (TR 94). When asked why he pled guilty, he testified that he did so because he was told that if he didn't he would get the electric chair. (TR 95). At this point, the State requested Hoffman become a court witness. Hoffman stated that he wanted to withdraw his plea. (TR 96). As a court witness, Hoffman testified that Mazzara never paid him money and although in the past he said he did kill people, he never told either Agent Lukepas or Officer Dorn that he killed anyone. (TR 100-101). He stated that he was told by his lawyer that he was going to be convicted no matter what and the best thing to do was to accept the plea and not get the death penalty. The State informed Hoffman that if he did not testify pursuant to his agreement, that he could get the death penalty. (TR 103). He further testified that because everybody was telling him that he was going to get the electric chair that he decided to enter the plea agreement. (TR 104). Hoffman stated that he had no real

knowledge of the murders and that James Provost told him about them. (TR 107). On recross by the State, Hoffman stated that he understood that his testimony violated the plea agreement, that he understood that the plea agreement was now off, and that he understood that the State would prosecute him for first degree murder and seek the death penalty. (TR 108). Hoffman stated that his lawyer advised him to accept the plea because counsel said the State had fingerprints that were found in the room near Mr. Ihlenfeld's body and that his fingerprints would be used against him. (TR 109-110).

Hoffman thereafter filed a **pro** se motion to withdraw his guilty plea and at a hearing thereafter Judge Haddock accepted same. At that same proceeding, Hoffman's counsel, Mr. Nichols, renewed his motion to withdraw from the case, stating that he had talked with Hoffman about it. (TR 113-115). At that point, Nichols was allowed to withdraw and the State concurred that Hoffman should be allowed to withdraw his guilty plea. (TR 118). Immediately thereafter, Hoffman was assigned a new attorney, Jack C. Harris.

Hoffman has cited no authority which requires counsel to appear with a defendant in a non-related trial wherein the defendant is a witness. Certainly, at the time Hoffman was to testify at the Mazzara trial, all parties believed that he would testify as expected, that Mazzara had hired him to kill Frank Ihlenfeld. Hoffman's testimony came at a time after he had pled guilty and the court had accepted said plea after a factual predicate had been laid for that plea. Hoffman had admitted his

guilt. Counsel was neither required to be present nor was this proceeding a critical stage of Hoffman's trial thus requiring the presence or, for that matter, the waiver of counsel.

Hoffman now asserts that he was placed in jeopardy of receiving the death penalty once he withdrew his plea. That is absolutely correct and in fact the record supports the fact that Hoffman was continually reminded that the failure to testify truthfully at Mazzara's trial per the agreement could result in his going to trial for capital murder and, the death penalty as a possible punishment.

Hoffman contends an evidentiary hearing is needed on this issue. The State submits that no evidentiary hearing is necessary for the record clearly reflects that Hoffman made an agreement, to-wit: plea agreement; he did not testify per the agreement and in fact gave contrary testimony from that of his plea colloquy; he was apprised of the inconsistent statements; he was apprised of the fact that he was now subject to the death penalty; he stated his reasons for entering the plea on the record (that he didn't want to get the electric chair), and as a result of the foregoing he sealed his fate. The presence of Mr. Nichols in the courtroom while Hoffman testified in the Mazzara trial would not have insured any right nor altered the ultimate outcome.

Moreover, Hoffman had every right and indeed exercised his right to withdraw his guilty plea. The record reflects that he spoke with counsel before the proceedings at which time the guilty plea was withdrawn. He could have at that point changed

his mind a second time. Clearly, Hoffman had an agenda and a course of conduct which he followed and to now suggest otherwise belies the record.

Hoffman also asserts that through vindictiveness, the prosecutor sought the death penalty after Hoffman's testimony at the Mazzara trial. The record reflects that throughout the proceedings, the State repeatedly informed Hoffman that he was susceptible to receiving the death penalty should the plea agreement not be satisfied. Hoffman's reliance on Adamson v. **Ricketts, 865** F.2d **1011** (9th Cir. **1988)** (en **banc),** for this proposition is misplaced based on this record.[1]

On direct appeal, Hoffman raised this very issue asserting that the death penalty was improper because the State sought the death penalty for punitive reasons aside from the crime for which he was convicted. He argued the death penalty was sought because Hoffman did not give testimony against a codefendant. This Court, in addressing same, found:

> Hoffman's next argument is that the State improperly sought the death penalty to punish him for not giving testimony against a codefendant. In support of this contention Appellant shows us that before trial, in exchange for a promise of a recommendation of

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[1] On November 15, **1982,** Hoffman filed a motion to declare that death is not a possible penalty. (TR **67-68).** Therein he asserted that because of the plea agreement, the fact that he testified truthfully, "none of the circumstances concerning the actual crimes charged against defendant, whether aggravating or mitigating, have changed, it is patently clear that defendant is being penalized not for commission of the crimes, but for his failure to testify as desired by the State of Florida, and for his exercise of his right to trial by jury.'' Moreover, defense counsel argued same before Judge Haddock on February **11, 1983,** in his argument before sentencing. (TR **1215-1220).**

> life sentences, he agreed to plead guilty to two first degree murder charges and testify against Mazzara. When Appellant later reneged on his agreement to testify, the State withdrew from the bargain and proceeded to prosecute him on the charges. Appellant's argument is without merit.

Hoffman v. State, 474 So.2d at **1182.**

As observed in **Porter** v. **State,** ____ **So.**2d ____ (Fla. **1990), 15** F.L.W. **S 78,** a defendant is procedurally barred from raising an issue which was raised on direct appeal in a Rule **3.850** motion by changing the grounds upon which the issue is presented. Hoffman's attempt now to assert that he was without counsel as opposed to arguing that the prosecution in some way acted vindictively because he did not testify as "the State wanted him to", is a poorly veiled attempt to reraise an issue previously raised.

Based on the foregoing, this claim was properly, summarily dismissed by the trial court and should be summarily dismissed sub **judice.**

POINT III

HOFFMAN'S RIGHTS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND BY **BRADY** v. **MARYLAND, 373** U.S. **83 (1963),** AND ITS PRODIGY, WERE NOT VIOLATED WHEN THE STATE WITHHELD PURPORTEDLY IMPORTANT MATERIAL EXCULPATORY AND IMPEACHMENT EVIDENCE

Hoffman next argues that "there was much more to the Ihlenfeld/Parrish murders than was revealed to the jury at Mr. Hoffman's trial." In this regard, his argument is twofold, first, he asserts that the State violated his Chapter **119,** Fla.Stat., request by not complying with same and second, he

asserts that information concerning the State's "star witness" George Rocco Marshall was withheld from the jury. In order to put this issue in proper perspective, the State elects to address this twofold argument in reverse order. This is so for two reasons. One the record evidence with regard to what the jury knew regarding George Rocco Marshall is readily discernible and defuses most, if not all, of Hoffman's allegations. Two, this Court has consolidated the public records issue and the State has elected to answer that issue in this brief, consolidating the issue into one pleading.

George Rocco Marshall was not the first witness the State called at Hoffman's trial but rather, his testimony came mid-trial. His testimony reflects that he was arrested January 1981, and charged with first degree murder of Frank Ihlenfeld and Linda Sue Parrish. (TR 681). Following his arrest, he gave a statement to police that he employed Hoffman and James White to strong arm and collect for his boss, Leonard Mazzara. Before testifying to any degree, Marshall admitted that his lawyer was present and that as a result of plea negotiations with the State for testifying in the Hoffman trial, he received complete immunity from prosecution. (TR 683). He testified that he procured the services of James White and Hoffman for Mazzara for collections and to kill someone. Marshall testified that his involvement with Mazzara occurred because his wife owed Mazzara ten thousand dollars, a drug debt. (TR 686-687). Mazzara worked for James Provost, a local gangster, and in order to pay back his wife's debt, he made an agreement to work for Mazzara. He was

told that the fifty dollars he was to pay per week on the debt was not enough and as a result thereof, he started selling Quaaludes to help pay off the debt. (TR 689). He stated that he saw Mazzara every day and that he constantly sold drugs for him. (TR 690). One day Mazzara told him that he wanted Marshall to find some more people to work for them. (TR 691). Marshall recalled that he had met Frank Ihlenfeld at Mazzara's apartment in June 1980, when Ihlenfeld brought Mazzara a shipment of Quaaludes. (TR 692).

Marshall found two people to do collections. Mazzara then told Marshall that he wanted Ihlenfeld dead because Ihlenfeld owed money to him. (TR 693). Marshall understood that he was to find somebody to do the job. (TR 694). Marshall located Wayne Merrill and Barry Hoffman. (TR 697). Marshall told Mazzara that Hoffman was the man to do the job and also informed him that Hoffman wanted a backup. (TR 698). James White was selected as the backup and Marshall informed White approximately ten days prior to the murders that he wanted him to get in touch with Barry Hoffman because he needed someone burned. (TR 699). Two days prior to the murders, Hoffman and Marshall got together and Marshall showed Hoffman who the hit was to be. (TR 700). On September 5, 1980, Marshall pointed out Frank Ihlenfeld as the person to be killed. Marshall indicated the reason he did this was because Mazzara told him that if he got the job done his wife's debt would be wiped clean. (TR 701). On Sunday, September 7, 1980, the day of the murders, Marshall received a call from Mazzara who said that he was coming by and that he,

Marshall and Mazzara were going to take Hoffman to the airport. (TR 703). On the way, Barry Hoffman told them that he had gone to Room 205 with White and that while there he hit Ihlenfeld and then started stabbing him and ultimately slashed Ihlenfeld's throat. (TR 706). Marshall said that Hoffman told them Parrish returned to the room at which time he, Hoffman, hit her and knocked her down and slashed her throat. (TR 706-707). Marshall said Hoffman said he killed Parrish because she came back and he wanted no witnesses. (TR 708). While driving to the airport, Hoffman mentioned that he was going to New Orleans. (TR 709). Although he saw both Hoffman and James White after the murders, he testified he never discussed the murders thereafter. (TR 710-711). He testified that he had no prior knowledge that Linda Sue Parrish would be killed. (TR 713).

On cross-examination, Marshall testified that he had studied martial arts and that he routinely carried a buck knife. (TR 714-715). When he was first interviewed by police on September 13, 1980, he denied all knowledge of the murders. On June 11, 1981, he gave another statement at which time he denied knowledge of the murders and then took a polygraph test which he failed. (TR 718). On October 19, 1981, in exchange for immunity, he testified that he told the truth. (TR 719). When asked why he changed his mind, he testified that he became a Christian while in jail and was still afraid for his family's safety. (TR 720). On cross, he again detailed how on September 5, 1980, he met with Hoffman and pointed out the mark. (TR 722). During this time he admitted he was dealing in Quaaludes, cocaine, and that he got

immunity which meant that he was not going to be prosecuted for the murders. (TR 723-727).

He further detailed that Wayne Merrill, the other person he secured became a mule for Provost in Orlando and dealt drugs. (TR 730).

Albeit, George Marshall was a witness against Hoffman and indeed he told of how he hired Hoffman and James White to kill Frank Ihlenfeld, his testimony was not the only testimony connecting Barry Hoffman to the murders. Indeed, there was fingerprint evidence, Hoffman's confessions or statements to police, the circumstances of his whereabouts September 7, 1980, the morning of the murder, and his sudden departure from Jacksonville Beach, Florida, the day of the murder just to name a few pieces of evidence connecting Hoffman to these murders. Certainly, the record before the jury exposed George Marshall for what he was, his involvement in the murders, the fact that he received immunity, the fact that was involved in major drug dealing, and the fact that he had a vested interest in seeing Frank Ihlenfeld dead. To suggest that "there was more to this agreement with the State than was ever heard at Mr. Hoffman's trial", Marshall had additionally agreed to provide the State with "all knowledge of the Provost organization he had prior to and after the homicides" (Appellant's Brief, page 30), is of no moment. The particulars of this "huge drug organization" and the fact that there were wire taps in the investigation of this drug organization has nothing to do with the actual murders sub judice. While there were a number of possible suspects, the

facts remain that (a) Barry Hoffman was involved in drug dealing with Mazzara and Provost; (b) Hoffman testified that he was a personal caretaker and bookkeeper for Provost; (c) that defense counsel, in examining Hoffman on the stand, questioned him about his drug dealings as well as his tie-in with Mazzara and Provost and as such the particulars with regard to Provost's organization had little bearing on the instant murders.

Moreover, in response to Hoffman's first counsel, Mr. Nichols', demand for discovery, the State provided the names of George Marshall, Leon McCumbers and the fact that electronic surveillance was conducted by the Florida Department of Law Enforcement on the premises located at **2969** North A1A, **St.** Johns County, Florida, at which point Barry Hoffman was intercepted pursuant to wire tap evidence. The response also indicates that there was interception of wire communication and that Barry Hoffman was "intercepted by agents of the Drug Enforcement Administration pursuant to a court order authorizing the interception of wire communications in the residence of Jimmy Provost in the vicinity of Raleigh, North Carolina." (TR 14-15). Defense counsel Nichols sought a Motion to Compel Disclosure of Existence and Aubstance of Promises of Immunity Leniency or Preferential Treatment on November 5, **1981,** and sought to suppress Hoffman's confessions or statements as well as demanded a statement of particulars with regard to the crime. The State, throughout this period, continued to respond to Hoffman's counsel's demand for discovery including telephone toll records and notebooks. (TR **36).** With the appointment of Jack Harris to

Hoffman's case, additional motions to produce photographs, a demand for discovery of penalty phase evidence and a demand for additional discovery was made.

Beyond per adventure, defense counsels, to-wit: Harris and Nichols, had knowledge of the involvement and sought information as to other discovery items. At trial, Hoffman took the stand and accused George Marshall as being the murderer. Moreover, a casual review of Barry Hoffman's testimony (TR 936-1005) reflects that Hoffman explained in graphic terms the drug dealings of Mazzara and Provost and the drug organization they possessed.

Hoffman also points to evidence with regard to hair sample evidence. The record reflects that the State sought and received permission to take a sample of Hoffman's hair. This evidence was not introduced at trial although defense counsel knew of its existence. There is no evidence in this record that the hair evidence was significant with regard to whether Hoffman was or was not the murderer.

At best, Hoffman's allegations with regard to the State withholding information under "an alleged **Brady** violation" is cumulative of all the evidence presented at trial with regard to the drug dealings of these individuals and the reason for the murder of Frank Ihlenfeld. As observed in **Duest** v. **State,** 555 So.2d 849 (Fla. 1990), alleged exculpatory evidence must have a reasonable probability that the admission of said evidence would have changed the outcome pursuant to **United States** v. **Bagley,** 473 **U.S. 667** (1985). No such showing can be made **sub judice.** See **Waterhouse v. State,** 522 So.2d 341, 342-343 (Fla. 1988).

Chapter 119, Fla.Stat. Request

On February 8, 1990, Hoffman filed a motion to consolidate his appeals, specifically, the appeal from the denial of his Rule 3.850 motion and the appeal from the circuit court's order denying Hoffman's motion for disclosure pursuant to Chapter 119, Florida Statutes. On February 13, 1990, this court granted said motion.

Purportedly, on September 8, 1987, the Office of the Capital Collateral Representative (CCR) requested, pursuant to Chapter 119, Florida Statutes, inspection of the State Attorney's files relating to this case. That request was denied October 14, 1987. No appeal was taken therefrom. On May 8, 1989, CCR again requested access to the State Attorney's files and said request was refused. On July 3, 1989, CCR filed a motion to compel disclosure of the records which was ultimately summarily denied on August 22, 1989. An appeal followed from said denial.

Hoffman points to two other cases currently pending before this Court and urges that instant case is similar in all respects. Specifically, he points to Provenzano v. State, Case No. 74,101, and State v. Kokal, Case No. 74,439. Hoffman made a broad, unspecific demand pursuant to Florida Public Records Act, Chapter 119, Florida Statutes (1988), for the entire file possessed by the State Attorney's Office. Inclusive therein presumably, a majority of the documents are those matters which were discovered or are discoverable from a number of sources. Such items contained in the State Attorney's records are the public records such as arrest and booking reports, evidence,

technicians' reports, FDLE reports, medical examiners' reports, written statements of witnesses or codefendants and depositions. In its broadest a sense, the term "public records" includes all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, or other material regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. Section **119.011(1),** Florida Statutes **(1988).** Basically, any material prepared in connection with official agency business which is intended to perpetuate, communicate or a formalized knowledge of some type is a public record.

To be contrasted with public records are non-public records not subject to the public records act, such as materials prepared as graphs or notes, which constitute mere precursors of governmental "records" and are not, in themselves, intended as final evidence of the knowledge to be recorded. Matters which obviously would not be public record are graphs, notes to be used in preparing some other documentary materials, and tapes or notes taken by a secretary as dictation. **Shevin v. Byron, Harless, Schaffer, Etc., 379** So.2d **633, 640** (Fla. **1980).**

The state attorney has taken the position that this would include his notes and drafts, evidence lists, tentative order of proof, possible cross-examination questions, opening and closing arguments notes, deposition notes, interoffice or intra-office memorandums, which were never intended to formalize or finalize knowledge but were merely to assist an attorney.

After the fact review of such preparatory materials is regarded by prosecutors as an unwarranted intrusion into their thought processes in developing their litigation. Outlines of evidence or questions to be asked of a witness, proposed trial outlines, handwritten notes from meetings with attorneys and notes regarding the disposition of an anticipated witness have been held not to constitute public records. Orange County v. Florida Land Company, 450 So.2d 341 (Fla. 5th DCA 1984). Such documents simply do not contain the final evidence of knowledge contained and are merely notes from an attorney to himself designed for his own personal use in remembering certain events or circumstances. Such documents would seem to be simply preliminary guides intended to aid an attorney when he later formalizes the knowledge. 450 So.2d at 344.

Attorney's memoranda, such as interoffice and intra-office memorandums, which are intended to perpetuate, communicate or formalize knowledge, are public records pursuant to Coleman v. Austin, 521 So.2d 347 (Fla. 1st DCA 1988). Such materials must be disclosed pursuant to the public records demand if no statutory exemption applies. Pursuant to Section 119.07(3)(o), Florida Statutes (1988), there is, a recently created limited attorney work product exemption under the Public Records Act. This provision has been relied on by prosecutors and its provides that a public records exemption exists until the "conclusion of the litigation or adversary administrative proceedings."

Hoffman argues that the case Tribune Co. v. Public Records, 493 So.2d 480 (Fla. 2nd DCA 1986), holds that litigation

essentially ends with the direct appeal. The State would urge that in criminal litigation, such a holding is not controlling. First, in **Tribune** Co., the file of the Pascoe County Sheriff was sought, not the State Attorney's Office file. Second, the information sought in **Tribune** Co. was specific in nature, such as police reports, lab reports, arrest reports and was not a request for an assistant state attorney's notes, drafts, or work product. Indeed, the demand in **Tribune** Co. was fact specific. In the opinion, the court listed specifically ten items sought to be reviewed. See **Tribune** Co. v. **Public Records,** 493 So.2d at 482. Most of the information sought in the **Tribune** Co. case was discoverable. Third, in **Tribune** Co., the information was sought by defendants who claimed it might exonerate them, a brother and sister of a missing Tennessee woman, who may have been the murder victim, the **Tribune** Co. and a reporter for the St. Petersburg Times. Each party had a recognized and special need for the requested information.

Non-discoverable criminal investigative information constitutes "public records" within the meaning of **Shevin** and Section 119.011(1), Florida Statutes, however, such information would seem to be exempt from disclosure during the pendency of post-conviction litigation, subsequent appeals, or retrial under Section 119.07(3)(d), Florida Statutes (1988). Section 119.07(3)(d) provides that "active criminal intelligence information and active criminal investigative information are exempt from the provisions of subsection (1)." Clearly, under this provision, if the criminal intelligence or investigative

information is "active" it is exempt from the disclosure provisions of the Public Records Act.

Section 119.011(3)(d)(2), Florida Statutes (1988), provides that "criminal intelligence and criminal investigative information will be considered 'active' while such information is directly related to pending prosecutions or appeals."

In Tribune Co., supra, the Second District Court of Appeals held that actions for post-conviction relief were not "appeals" within the meaning of Section **119.011(3)(d)(2),** Florida Statutes, and, thus, during the pendency of post-conviction litigation, criminal intelligence and investigative information is not exempt from disclosure under the Public Records Act. Such a determination rests upon strained statutory construction.

First, the Second District Court of Appeals has inserted the word "first appeal of right" or "direct appeal" into the statute. The statute does not limit appeals to "a first appeal of right" or a "direct appeal". In death penalty litigation, there are numerous appeals, only the first of which is a direct appeal or a first appeal of right.

Second, the court changed the plural "appeals" in the statute to the singular "first appeal" or "direct appeal". While the statutory language of the Public Records Act clearly anticipated more than one appeal, the Second District, in its opinion, limited the public records exemption to the first, direct appeal.

Third, by limiting "appeals" to a first appeal of right, the Second District excluded federal appeals from the statute. The

statute itself contains no such limitation. The statute simply states that the criminal intelligence and investigative information is active during the pendency of "prosecutions or appeals", without regard to whether the appeal is in a state or federal court or direct appeal or post-conviction litigation and prosecution.

The result of limiting "appeals" to a "first appeal of right" is totally inconsistent with the legislative intent, that the Public Records Act **not be used** to'expand discovery. Section **119.07(6),** Florida Statutes **(1987)** provides that:

> The provisions of this section are not intended to expand or limit the provisions of Rule **3.220,** Florida Rules of Criminal Procedure, regarding the right and extent of discovery by the State or by a defendant in a criminal prosecution.

Contrary to CCR's suggestion, post-conviction proceedings are a critical step in the criminal prosecution of capital litigation. Not only are there special appellate rules for the processing of capital cases but there are specific provisions with regard to Rule **3.850** and Rule **3.851** as to how post-convictions motions and appeals will be handled. Under the suggested rule announced in **Tribune** Co., **supra,** once the first appeal or right; to-wit: the direct appeal, is concluded in a death penalty case, all non-discoverable documents must be turned over to the defendant under a Public Records Act request. The defendant may then use the non-discoverable documents in his next appeal, in the **3.850** motion attacking his conviction and sentence, and in his retrial or resentencing if one results. Such a result is inconsistent with the legislative intent, the

statutory language of the Public Records Act **specifically,** and contrary to all common sense.

Second, the result of limiting "appeals" to a direct appeal or "first appeal of right" is inconsistent with the legislative purpose in having an exemption in the first place. The Legislature intended that criminal intelligence and investigative information not be disclosed "pending prosecutions or appeals" for a purpose. That purpose is that the Legislature did not want disclosure of this information until there was **finality** in the prosecutions *so* that law enforcement and prosecution efforts would not be undermined or compromised. To suggest that a prosecution is over, and, thus, not compromised, after a "first appeal of right" in a death penalty case, ignores the reality of death penalty litigation in Florida. The prosecution and appellate process is far from over after the "first appeal of right" in capital litigation.

In interpreting the meaning of the exemption codified in Section 119.07(3)(d), Florida Statutes, and the meaning of "pending prosecutions or appeals" as used in Section 119.011(3)(d)(2), the court must look to legislative intent. State v. Webb, 398 So.2d 820 (Fla. 1981). If the Legislature had intended to limit nondisclosure of non-discoverable criminal intelligence and investigative information until the completion of the "first appeal of right", the Legislature could have plainly said *so.* It must be remembered that exemptions to the Public Records Act are far and few. Therefore, to provide such a limited exemption is of no purpose. Nothing would be

accomplished by requiring nondisclosure during the first appeal of right and requiring disclosure immediately thereafter. In fact, the Legislature provided that the exemption would exist pending prosecutions or appeals which clearly evidenced an intent that the prosecution, whether at the trial stage or post-trial stage, be completed prior to the disclosure of non-discoverable criminal intelligence and investigative information.

While the State concurs with CCR that their is no legitimate state interest or public purpose in allowing an unfair conviction to remain, the Public Records Act is not the vehicle nor was it designed to be the vehicle for capital litigants to obtain non-discoverable information. Nor was the Public Records Act to be utilized as a back-door means to obtain access to information not otherwise obtainable. A state attorney has real and legitimate concerns that the Public Records Act in the guise of a **Brady v. Maryland,** 373 **U.S.** 83 (1963) violation, is an attempt to circumvent the legislative intent of the statute. A prosecutor is not required to make his files available to a defendant for an open-ended fishing expedition for possible **Brady** violations. **United States** v. **Davis,** 752 F.2d 963 (5th Cir. 1985); **United States v. Andrus,** 775 F.2d 825 (7th Cir. 1985). This is even more important in the post-conviction context where there is a presumption of finality, especially where there is a continuing duty of disclosure on the part of the prosecution, **Mooney v. Holohan,** 294 **U.S.** 103, 108 (1935), and the State accords the defendant broad discovery rights in the first place.

In the instant case, Hoffman has made a general public records request. Hoffman, as well as all other capital defendants, can suggest that they need to see everything in order that they might know and find out that one critical piece of evidence that will change or bring into question the validity of a conviction which obtained. In the instant case, the information sought and the speculation made is neither related to the case and constitutes a true "fishing expedition". As previously argued with regard to the "Brady" issue posited by Hoffman, Hoffman himself, in testifying at trial, presented the facts and circumstances of the drug dealings of his cohorts. The specifics with regard to "who was muling for who" and "who had it in for one another", bears little relationship nor relevance to the convictions which obtained sub judice.

Based on the foregoing, the State would urge this Court to deny all relief with regard to this claim.

POINT IV

WHETHER THERE WAS A KNOWING AND INTELLIGENT WAIVER OF MIRANDA RIGHTS IN MR. HOFFMAN'S CASE: HIS MENTAL IMPAIRMENTS PRECLUDED HIM FROM COMPREHENDING, AND VALIDLY WAIVING, THOSE RIGHTS, DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN LITIGATING THIS ISSUE, AND THE LOWER COURT ERRONEOUSLY DENIED HIS CLAIM WITHOUT AN EVIDENTIARY HEARING

Hoffman next attempts to reargue a claim that was raised on direct appeal and decided adversely to him. In his brief on direct appeal, Issue I and II specifically addressed whether the trial court erred in denying his motion to suppress his confessions and admissions and, secondly, the trial court erred

in failing to find that Hoffman's confessions were not voluntarily made. In this next issue, once again Hoffman argues "his state of mental impairment made it impossible for him to understand the 'rights' to which he was entitled under the Constitution, or to in any way knowingly, intelligently, and voluntarily waive what he did not comprehend." (Appellant's Brief, page 35). He now bottoms this assault on a claim already decided adversely to him on the acquisition of a medical report from Dr. Fox who indicated that based on Hoffman's lifelong drug dependency it was impossible for him to have formulated and knowingly waive his Miranda rights prior to the admission of his statements.

This Court, in Hoffman v. State, supra, held:

> Hoffman's first point on appeal is that the trial court erred in denying his motion to suppress his confessions. He argues that his statements were not freely and voluntarily made since they were given after he had requested permission to make some telephone calls to seek assistance in obtaining a lawyer. The State notes that Hoffman's motion to suppress did not state this particular ground. The State also responds that even if Hoffman had made a request for an attorney, he knowingly and intelligently waived his right to have an attorney present by executing a written waiver before confessing. We find that, whatever intention Hoffman may have had about exerting his right to remain silent, his rights were knowingly and intelligently waived when he executed the written waiver and that his confessions were therefore properly admitted. Cannady v. State, 427 So.2d 723 (Fla. 1983); Witt v. State, 342 So.2d 497 (Fla. 1977), cert. denied, 434 U.S. 935 (1977).
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> Hoffman next argues that the trial judge erred in failing to specifically find on the record that the confessions were voluntarily made and that the record does not satisfy the

> "unmistakable clarity'' test mandated in Sims v. **Georgia,** 385 **U.S.** 538 (1967), and **McDole** v. **State,** 283 So.2d 553 (Fla. 1973). We have held that a trial judge need not recite a finding of voluntariness if his having made such a finding is apparent from the record. **Peterson** v. **State,** 382 So.2d 701 (Fla. 1980). In this case, evidence was presented to show that the confessions were voluntarily given and the issue was argued by the parties. The judge ruled the testimony about the confessions admissible. We therefore find that the record shows with sufficient clarity that the trial judge made a finding that the confessions were voluntary.

Hoffman v. State, 474 So.2d at 1180-1181.

It is now axiomatic that a Rule 3.850 motion cannot and will not stand as a substitute for a direct appeal. Moreover, claims raised on direct appeal are not cognizable in a Rule 3.850 unless a defendant can demonstrate how he falls into one of the exceptions. No such exception exists in the instant case. See **Eutzy v. State,** 536 So.2d 1014 (Fla. 1989).

Hoffman also argues that although his lawyer raised this claim and the claim was also raised on direct appeal, counsel failed his client when he failed to develop and present evidence that would have established that Hoffman's waiver was not voluntary, rational or intelligent. What Hoffman is now complaining about is that neither Nichols nor Harris found Dr. Fox. The record reflects however, that at the motion to suppress hearing and at trial, Hoffman took the stand and testified that after the murders, he started taking and doing drugs heavily and on the day that he was arrested in Jackson, Michigan, October 12-13, 1981, he had ingested Quaaludes, smoked marijuana and presumably ingested some cocaine while he was in custody. At the

"two" motion to suppress hearings, he testified that he was lucid at some times and not lucid at others. The trial court evaluated this evidence based on Hoffman's testimony as well as the officers taking his statements and ruled against Hoffman. Here, just as in **Jackson** v. **Dugger,** 547 So.2d 1197 (Fla. 1989), counsel cannot be found to be ineffective for failing to raise every aspect or go the uncharted mile in upearthing evidence whether it be mental health evidence or evidence with regard to voluntary drug intoxication. This issue is totally without merit and is refuted by the record. The trial court was imminently correct in summarily denying relief.

POINT V

HOFFMAN WAS NOT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT-INNOCENCE AND THE PENALTY PHASES OF HIS CAPITAL TRIAL

Hoffman alleged in his Rule 3.850 motion that his lawyer rendered ineffective assistance of counsel at the guilt-innocence and penalty phases of his trial. Before addressing his specific issues, it should be noted that as to some of the allegations regarding pretrial "omissions", Hoffman is presumably assailing the effectiveness of Mr. Nichols' representation. At other times, with regard to pretrial and trial and penalty phase complaints, Hoffman is asserting the ineffectiveness of Mr. Harris' representation. The record reflects that, with regard to Mr. Nichols, Hoffman and Nichols apparently did not get along and did not agree on what trial strategy should take place. Nichols represented Hoffman up until the time he was allowed to withdraw following the aborted plea agreement when Hoffman failed to

uphold his end of the bargain with regard to his testimony at the Mazzara trial. Harris took over the case after that point. The record reflects that, at the first motion to withdraw filed by Nichols which was subsequently denied by the trial court, an exchange occurred as to what Nichols did and did not do. At that proceeding, Hoffman testified that there was a different as to how the case should be handled. (TR **42).** He stated that he believed another attorney would be better because they were "talking about his life." His example of how his lawyer had not done what he wanted was that he had asked counsel to take some statements from people that he thought important. Hoffman testified that his lawyer did not believe the statements Hoffman wanted were important. Hoffman wanted a change of venue and his lawyer did not think that wise. Hoffman specifically said that there was a conflict between the two and that they did not get along. (TR **43).** Nichols said the things that Hoffman wanted him to do would be beneficial to Hoffman's case. Nichols testified that he spoke with the prosecution, he talked with witnesses in the case and that he had attended the prosecution of another codefendant. (TR **45-46).** The court determined at that point that Hoffman had demonstrated no basis upon which to allow Nichols to wi.hdraw. Apparently Hoffman and Nichols discussed whether Hoffman should enter into a plea negotiation thus avoiding the death penalty. Nichols filed a number of pretrial motions seeking to suppress Hoffman's admissions to the FBI and the Jacksonville Beach police.

When Harris took over the case, he renewed Hoffman's motion to suppress the confessions or admissions, he filed a plethora of pretrial motions with regard to striking the death penalty and sought additional discovery as well as filing a motion for change of venue.

(A) Trial Phase

Hoffman has asserted that pretrial, his lawyers (a) failed to investigate matters concerning the suppression of his statements, and failed to get expert witnesses regarding long term addiction; (b) failed to shift the burden to others with regard to who committed the murders; (c) failed to get evidence to impeach the State's key witness, George Marshall, and (d) failed to show up at the Mazzara trial to help Hoffman who was a witness. As to each, the State would submit that the record refutes or explains that counsel did not render ineffective assistance pretrial. With regard to the failure to investigate the facts surrounding the possible suppression of the statements, an attempt was made as evidenced in the State's response in Point IV that defense counsel attempted to show as a basis for the motion to suppress that because of Hoffman's ingestion of drugs contemporaneous to his arrest, he could not possibly have made a knowing and intelligent waiver of his Miranda rights. Pursuant to **Glock** v. **State,** 537 So.2d 99, 101 (Fla. 1989); **Bertolotti** v. **State,** 534 So.2d 386 (Fla. 1988); **Lambrix** v. **State,** 534 So.2d 1152 (Fla. 1988); **White** v. **State,** ____ **So.** 2d ____ (Fla. 1990), 15 F.L.W. S 151, and **Correll** v. **State,** ____ **So.** 2d ____ (Fla. 1990), 15 F.L.W. S 147, the record specifically refutes counsel rendered ineffective assistance as to this claim.

Hoffman took the stand and testified that he did not commit the murders. He testified that George Marshall probably was the murderer and that he was only hired to go to the Ramada Inn that day to watch and see if Frank Ihlenfeld and Parrish left the premises. Evidence was presented on this record that others had motives for killing Frank Ihlenfeld. Specifically, that Leonard Mazzara was owed fifteen thousand dollars from this man. Counsel will not be found to be ineffective when he attempts to do that which is now complained of. The trial court was correct in summarily denying an evidentiary hearing as to this particular issue.

Hoffman also argues that defense counsel should have secured evidence to impeach George Marshall. The record reflects that Hoffman's defense at trial was that he did not commit the murders. Counsel's responsibility at trial was to present a defense not prove who else might have committed the crime. This claim is specious. Hoffman also asserts that counsel should have been present at Mazzara's trial to help Hoffman during the course of his testimony. As previously discussed, while it may have been preferable for defense counsel to be present with Hoffman when he testified at the Mazzara trial, there was no constitutional right to have counsel present. This omission does not fall below the standard set forth **in Strickland** v. **Washington, 466 U.S. 668 (1984),** nor does it constitute a basis upon which further evidentiary development is necessary.

With regard to trial failures, Hoffman argues that (a) trial counsel failed to properly cross-examine George Marshall because

he did not fully explore all the benefits Marshall was receiving in exchange for his testimony and immunity; (b) trial counsel failed to investigate "Bubba" Jackson as a possible suspect, and (c) trial counsel failed to present hair analysis evidence which showed that the hairs found were inconsistent with Hoffman's hairs. As to each of these issues, the State would submit the record may be silent with regard to some but the errors, if errors, did not result in prejudice to Hoffman. As previously detailed, defense counsel carefully and meticulously cross-examined George Marshall with regard to the immunity he received and the basis for the immunity. While there was not extensive inquiry with regard to Marshall's involvement in the drug organization of James Provost, inquiry was made of Marshall with regard to scope of his immunity and the reasons why he decided to testify against Hoffman. Counsel cannot be faulted for not going further. In **White** v. **State,** ____ **So.** 2d ____ (Fla. **1990),** 15 F.L.W. **S** 151, regarding ineffectiveness, this Court observed, "it is almost always possible to imagine a more thorough job being done than was actually done." That is not the standard. Based on the foregoing, trial counsel did not render ineffective assistance for failing to cross-examine George Marshall more "thoroughly". See **Maxwell** v. **Wainwright, 490 So.2d 927** (Fla. **1986).**

With regard to the failure to investigate "Bubba" Jackson as a possible suspect, it is curious to note that Hoffman devotes all of two sentences to this particular deficiency. The record reflects that while it may be important to point jurors to the

motives of others in discerning a defense that Hoffman was innocent, the record reflects that Hoffman, as well as his counsel, decided to blame the murders on George Marshall. That was a choice made on this record. Counsel can not be found to be wanting for making such a choice, but selecting the wrong "name" to blame. Terminally, with regard to the hair analysis, neither the State nor the defense raised the hair analysis evidence. Hoffman is guessing at best whether his lawyer would have ever used such evidence. Guessing is not the basis upon which either an evidentiary hearing is generated or counsel is found to be wanting. See Tompkins v. State, 549 So.2d 1370 (Fla. 1989).

(B) Penalty Phase

Hoffman also argues that his lawyer rendered ineffective assistance of counsel at the penalty phase of his trial. Specifically, he argues (a) trial counsel failed to investigate all avenues of mitigation; (b) counsel failed to obt in a mental health expert to demonstrate that Hoffman's lifelong drug involvement meant that he was a drug abuser and that his mental faculties were impaired, and (c) counsel failed to use information that he had in his files that Hoffman was dominated by Leonard Mazzara and that he committed these murders because he was afraid of Provost and Mazzara.

With regard to each of the penalty deficiencies, the State would submit the record either explains or sufficiently supports trial counsel's actions and, if not supported by the record, the allegations do not raise a sufficient basis upon which this court or any court would conclude Hoffman was prejudice by the

"omissions". The allegations found in the 3.850 motion as well as the brief before this Court reflect that the other avenues of mitigation are not specific rather, they are obtuse and generic. Perhaps the most explicit omission Hoffman can point to is the fact that he was a lifelong drug abuser and as such that evidence should have been presented to the jury. It was. Hoffman tendered no further evidence at the penalty phase except to take the stand and provide a narrative "sworn" statement that he did not commit the murders and up until a month after the murders, he was a regular working person trying to make a living. He admitted that he sold drugs to supplement his income but vehemently stated that he was not capable of doing this kind of crime. While he admitted that he did not have a lot of character witnesses, most didn't want to get involved. He stated that the few who did come and testify in his behalf at the trial, the jury didn't believe. (TR 1180). He re-emphasized that he did not commit the murders and that he was not capable of doing such a thing. (TR 1181).

At trial, however, he admitted that he had been using drugs on and off since he was eighteen years old. (TR 955). He used marijuana, Quaaludes and early in his life when he was eighteen or nineteen, used heroine. (TR 956). He testified in the summer 1980, he was not addicted to drugs although he occasionally used cocaine, marijuana and ingested Quaaludes. He testified that he started selling drugs to supplement his income (TR 941), and that after the murders, he started working for Provost personally and started doing Provost's book work. (TR 954-956). Between

September 1980 and September 1981, after the murders, he worked for Provost, taking care of Provost, Provost's house, his children, setting up drug deals and received money from Provost whenever he needed it. (TR 957). He testified that during this period of time he had a bad drug habit and was ingesting Dilaudid #4, an opiate, used cocaine orally and took Quaaludes. (TR 962-963).

To suggest that family members were necessary to explain to the jury that Hoffman was a long term drug abuser and user is ludicrous. The fact that Hoffman's mental faculties may have been impaired because of this use, did not require a mental expert. Hoffman testified that at the time just preceding his arrest and the admissions or statements to the police, he had ingested drugs, to-wit: cocaine, marijuana and Quaaludes. He recalled that while he remembered what was going on, he would "fade in and out" when he spoke with police regarding these murders. Certainly, a mental health expert was not necessary to testify before the jury that which the jury was told from Hoffman's own lips. The record is replete with evidence that Hoffman used drugs and "what" impact it had on his ability to function. Counsel did not render ineffective assistance for not going even further. See **Jackson v. Dugger,** 547 So.2d 1197 (Fla. 1989); **White v. State,** ____ So.2d ____ (Fla. 1990), 15 F.L.W. S 151; **Correll v. State,** ____ So.2d ____ (Fla. 1990), 15 F.L.W. S 147, wherein this Court observed:

> First, he contends that an evidentiary hearing was required on his allegations that is lawyer was ineffective at the penalty phase of his trial. Specifically, Correll

asserts that counsel knew or should have known that he had a lifetime history of heavy drug and alcohol usage but failed to introduce such evidence at the penalty phase. He also contends that trial counsel should have introduced available evidence of a deprived childhood.

There is no doubt that counsel was aware of Correll's prior drug and alcohol usage. In fact, Correll testified that he had used alcohol and various kinds of drugs often, though not on a regular basis, throughout his adult life. Correll now submits affidavits from friends which recite the frequent use of an assortment of drugs and argues that counsel was ineffective for failing to present these witnesses.

In response, the State points out that there was no evidence of any drug usage or excessive drinking the night of the murders. The State further points out that Correll told Dr. Pollack, the psychiatrist who examined him prior to trial, that he used alcohol several times a week and that he had experienced with various drugs, though not on a regular basis. Dr. Pollack concluded that he was not legally insane, that he did not suffer from brain damage, and that neither of the statutory mitigating circumstances was applicable. Thus, the State's suggests that it was reasonable for trial counsel not to try to portray Correll as a heavy drug user but rather as a person who was good to his mother and brothers and one who had found religion and who was unlikely to be dangerous in the future.

In view of the fact that Correll continued to insist that he was not guilty of the crimes, we can understand why counsel may not have wanted the jury to believe that he was an alcoholic and a drug addict. However, because there was no evidentiary hearing on this issue, we do not pass on whether counsel provided ineffective assistance. Rather, we conclude that Correll has failed to meet the second prong of **Strickland** v. **Washington, 466 U.S. 668 (1984),** which requires a showing that but for such ineffectiveness, the outcome probably would have been different.

> Assuming that counsel had introduced all of the proffered evidence of drug use and intoxication, we are convinced that neither the jury nor the trial judge would have been persuaded to arrive at a different result. . . . .

Correll v. State, 15 **F.L.W.** at S 148-S 149. See also **Tompkins v. State,** 549 So.2d 1370, 1372 (Fla. 1989); **Atkins** v. **State,** 541 So.2d 1165 (Fla. 1989); **Bertolotti** v. **State,** 534 So.2d 386 (Fla. 1988), and **Cave** v. **State,** 529 So.2d 293 (Fla. 1988), wherein this Court held the burden is on the defendant to prove his counsel rendered ineffective assistance.

Terminally, Hoffman points to the fact that trial counsel had in his files evidence which he could have used in mitigation. Specifically, he points to the fact that Hoffman was dominated by Leonard Mazzara and that Hoffman performed these murders because he was afraid of Provost and Mazzara. Each of these allegations are completely refuted by the record and contrary to Hoffman's own testimony. Hoffman maintained that he was not afraid of Provost and Mazzara rather, he became a close confidante of Provost and agreed to work with Mazzara in exchange for five hundred dollars (to observe at the Ramada Inn whether and when Frank Ihlenfeld and Linda Sue Parrish left the Ramada Inn). Hoffman and his defense counsel had a course of conduct and a story they intended to present which did not include a domination theory. Note: **Gore** v. **Dugger,** 532 So.2d 1048 (Fla. 1988), and Hill v. **State,** 515 So.2d 176 (Fla. 1987). At the penalty phase, Hoffman, in a sworn narrative, maintained his innocence and said that he was incapable of committing such crimes. He chose to portray himself as a regular person who dealt drugs on the side

to supplement his income. Having "chosen" that which he desired to present, he cannot fault counsel for failing to "present" theories inconsistent with the aforenoted. See **White** v. **State, supra,** wherein this Court held, "trial counsel will not be found to be ineffective where he had to "fashion a defense compatible with defendant's testimony which did not include raising the intoxication (domination or other contrary) defense."

Based on the foregoing, the State would urge the trial court was absolutely correct in summarily denying relief herein. The record reflects the course of conduct undertaken by Hoffman and his counsel and nothing suggested in the allegations challenging the effectiveness of counsel supports a finding that counsel rendered ineffective assistance as set forth in **Strickland** v. **Washington, supra.** Moreover, no evidentiary hearing was necessary.

POINT VI

THE PROSECUTOR'S CLOSING ARGUMENTS DID NOT INFECT THE PROCEEDINGS WITH UNFAIRNESS AS TO RENDER THE RESULTING DEATH SENTENCE FUNDAMENTALLY UNRELIABLE AND UNFAIR

Hoffman complains that the prosecution, during his closing arguments at the guilt-innocence and penalty phases, intentionally misstated facts, testified, manipulated evidence and bolstered the veracity of the State's witnesses. None of the complained of actions were objected to at trial and although a portion of the instant complaint was raised on direct appeal, this Court found said claim to be barred because of no objection at trial. **Hoffman** v. **State, 474** So.2d at 1181. In an effort to

reach this claim, Hoffman points to the fact that "defense counsel failed to do anything about any of this. He idly sat by and allowed this presentation to go unchecked, interposing no objections.'' (Appellant's Brief, page **67).** A casual review of the objectionable comments made by the prosecutor at the guilt-innocence and penalty phases of Hoffman's trial reflects that said comments were not error, did not prejudice the defendant, were fair statements of the evidence, were in rebuttal to defense comments and did not evidence in sufficient performance by Hoffman's trial counsel in his lack of objections. Synthesizing this claim, Hoffman points to two issues: (a) the impermissible reference to Linda Sue Parrish's murder, and (b) the prosecution's explanation as to why Hoffman deserved death and White did not. The jury returned a verdict of second degree murder for Hoffman's role in the murder of Linda Sue Parrish. Evidence presented at trial reveals that when Ms. Parrish returned to the hotel room, Hoffman hit her and then he told James White that "this one is yours." The State postulated, as well as the trial court, that it didn't matter whether Hoffman killed her or aided in her death, in that he was a principle in her murder and as such her death constituted a valid basis to assign an aggravating factor to support the death penalty. In explaining why Hoffman should get the death penalty over his codefendant, James White, the prosecution argued and the trial court found that the codefendants were not equal. Indeed, this Court, in its opinion in **Hoffman v. State, 474** So.2d at **1181-** 1182, held:

> The judge's finding that Hoffman had previously been convicted of a violent felony was based upon Hoffman's conviction for the second degree murder of Ms. Parrish. Hoffman argues this finding is in error because the evidence showed that James White, and not he, committed the murder of Ms. Parrish. This argument ignores the fact that as Mr. White's accomplice, Hoffman was a principle to the murder of Ms. Parrish. His conviction of second degree murder, standing alone is sufficient to show the existence of this aggravating circumstance.
>
> Hoffman next complains that the trial court erred in considering the manner of Ms. Parrish's death in making his findings. The judge did not consider the manner of Ms. Parrish's death as a separate aggravating circumstance, but rather, considered it in support of his findings that Hoffman had previously been convicted of a violent felony. Although this evidence was not necessary to support the judge's findings, since a conviction for second degree murder inherently involves violence to another person, we find no error in the judge's having considered it.

With regard to whether there was any harm in the explanation of White's role in the murder, the Court observed:

> Finally, Appellant argues that the sentence of death here violates his right to equal protection of law on view of the fact that Mazzara, who procured the murders, and White, who was Appellant's accomplice in carrying them out, each received consecutive sentences of life imprisonment for their roles in the crimes. State's witness Marshall received immunity from prosecution. Appellant relies on **Slater** v. State, **316** So.2d **539** (Fla. **1975),** but his case is not like **Slater.** The decisions **of** this Court make clear that it is permissible to impose different sentences on capital codefendants whose various degrees of participation and culpability are different from one another. (cite omitted). Moreover, the exercise of prosecutorial discretion in granting immunity to a less culpable accomplice, coconspirators, or aiders and

> abetters, does not render invalid imposition of a otherwise appropriate death sentence. (cite omitted).

Hoffman v. State, 474 So.2d at **1182.**

Based on the foregoing, no relief should be forthcoming as to this claim.

POINT VII

WHETHER THE AGGRAVATING FACTOR OF COLD, CALCULATED AND PREMEDITATED MURDER WAS PROPERLY APPLIED TO HOFFMAN'S CASE

The record reflects that Hoffman's **Maynard** v. **Cartwright, 108** S.Ct. **1853 (1988),** issue was not specifically raised on direct appeal. Rather, counsel raised the correctness of the trial court's finding that the murder was heinous, atrocious and cruel. Therefore, this issue is procedurally barred whether it was or was not raised because it was a claim that could have been and should have been raised.

Hoffman's argument that **Rogers** v. **State, 511** So.2d **526** (Fla. **1987),** would change the applicability of this aggravating factor is faulty in that the **Rogers** decision spoke to the heightened premeditation that must be present to support this aggravating factor. Herein, the murder was well planned as documented by the record but more importantly it was also an execution type murder, a murder for hire. As recognized in **Eutzy** v. **State, 541** So.2d **1143** (Fla. **1989), Rogers** does not constitute a significant change of law nor did it change the applicability of this aggravating factor to execution type/paid for hire killings. This issue is procedurally barred and the trial court did not err in summarily denying it as such. **Atkins** v. **State, 541** So.2d **1165** (Fla. **1989);**

Jones v. Dugger, 533 So.2d 290 (Fla. 1988); **Daugherty** v. **State, 533** So.2d 287 (Fla. 1988); **Porter** v. **State,** ____ **So.** 2d ____ (Fla. 1990), 15 F.L.W. S 78.

POINT VIII

HOFFMAN'S TRIAL COUNSEL WAS NOT INEFFECTIVE DURING THE PENALTY PHASE PROCEEDING FOR FAILING TO OBJECT TO THE JUDGE'S IMPROPER INSTRUCTION CONCERNING THE PRETRIAL STIPULATIONS OF DEFENSE COUNSEL AND THE PROSECUTOR; THE JUDGE'S IMPROPERLY EXHIBITING BIAS CONCERNING THE MITIGATING FACTORS APPLICABLE TO MR. HOFFMAN AND THE PROSECUTOR'S FAILURE TO HONOR THE TWO STIPULATIONS HE ENTERED INTO IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The record reflects that the State agreed to stipulate to two mitigating circumstances, that Hoffman had no significant criminal record and that Hoffman's coconspirators, Leonard Mazzara and James Robert White, had been sentenced to consecutive life sentences. Hoffman now argues that presumably because the State attempted to diminish the weight to be given these two mitigating factors, the State somehow reneged on its agreement. Moreover, he asserts that the trial judge in some way diminished the force of these mitigating factors. The complained of statements went unobjected to at trial and at the penalty phase. Without citing any authority for the proposition that the trial court must give great weight to stipulated mitigating factors or that the prosecution cannot discuss the weight to be given these mitigating factors, Hoffman in some way divines that he was cheated of the full weight to be given said factors. The State would disagree.

With regard to the prosecutor's comments, the State agreed to stipulate to these mitigating factors. The State did not agree to the weight to be given same. That was specifically what the trial judge and the prosecution observed about the these mitigating factors. The trial court correctly noted that although the State was agreeing to stipulate that Hoffman had no significant prior history, the jury heard evidence that Hoffman repeatedly testified he sold and dealt and used drugs to supplement his income and to feed his habit. As to the life sentences received by his codefendants, the stipulation was merely that the jury was to be instructed that they may consider the codefendant's sentences in mitigation. That is exactly what both the prosecutor and the trial judge stated in their respective comments. This issue is totally wanting. Moreover, it is procedurally barred in that as to the diminished weight to no significant criminal history, said issue could have been raised on direct appeal. It was not. As to the equality of sentencing with regard to coconspirators, Hoffman unsuccessfully raised this point on direct appeal in a slightly different context, but nonetheless he raised it on direct appeal. See 474 So.2d at 1182. Hoffman is entitled to no relief.

POINT IX

WHETHER HOFFMAN'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO **CALDWELL** v. **MISSISSIPPI, 105** S.Ct. 2633 (1985), AND **MANN** v. **DUGGER,** 844 F.2d 1446 (11th Cir. 1988) (EN **BANC**), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

This Court has repeatedly held that **Caldwell** v. **Mississippi,** 105 S.Ct. 2633 (1985), is not a valid claim and certainly, without objection, is procedurally barred in Florida. Note: **Dugger** v. **Adams,** ____ U.S. ____**,** 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989); see, **Atkins** v. **State,** 541 So.2d 1165 (Fla. 1989); **King** v. **State,** 555 So.2d 355 (Fla. 1990); **Combs** v. **State,** 525 So.2d 853 (Fla. 1988); **Grossman** v. **State,** 525 So.2d 833 (Fla. 1988); **Demps** v. **State,** 515 So.2d 196 (Fla. 1987), and **Daugherty** v. **State,** 533 So.2d 287 (Fla. 1988). The trial court did not err in summarily denying this claim.

CONCLUSION

Based on the foregoing, the State would urge this Court to affirm the trial court's summary denial of Hoffman's Rule 3.850 motion.

Respectfully submitted,

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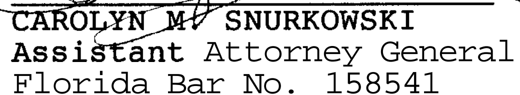
ATTORNEY GENERAL



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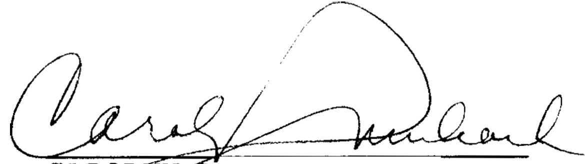
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Billy H. Nolas, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 2nd day of April, 1990.



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