IN THE SUPREME COURT OF FLORIDA

PEDRO MEDINA,

Appellant,

v. CASE NO. 73,856

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On the evening of April 3 or the early morning hours of April 4, 1982, Ms. Dorothy James was murdered in her apartment. She was gagged and stabbed ten times, then left to bleed to death. She may have lived ten to thirty minutes (R 405-507). She sustained defensive wounds to her left wrist (R 411). Sometime between 10:30 p.m. and midnight, she was talking to Barbara Andrews on the phone when someone knocked on the door, and the conversation ended shortly thereafter (R 175). The medical examiner testified she could have died anytime between 8:00 p.m. and 2:00 a.m. (R 410).

When Ms. James' daughter was unable to contact her on April 4, she went to her mother's apartment. She noticed her mother's automobile, a 1973 Cadillac, was gone. She found her mother near the bed. There was no sign of forced entry. (R 139-142). Investigators found a beige sports cap near the bed (R 285).

At around 10:30 - 11:00 p.m., Medina was visiting with Reinaldo Dorta in the apartment complex where Ms. James lived (R 368-69). Medina had lived in the apartment complex next door to Ms. James, and they were friends (R 143).

On April 4, Donald Porter saw Medina in Tampa (R 429). Medina was removing the license tag from the Cadillac and putting a cardboard "lost tag" sign on it (R 431). He told Mr. Porter he owned the car, and tried to sell it to him for $1500 (R 430-32). Margaret Moore also saw Medina driving Ms. James Cadillac in Tampa (R 423). There was a "for sale" sign on the car (R 425). Medina told her he was selling the car for a company (R 426).

Medina also offered to sell Ms. James' car to Michael White (R **643**). After two days of negotiation, they agreed on a price. (R **644**). When White went to give him the money on April **6**, Medina stabbed him and left with his money (R **647**).

On April **6**, Medina checked into a motel in Ocala (R **572**). On April **7**, he received a traffic ticket in Ocala for expired/no tag (R **577**). On April **8**, a highway patrolman saw Medina in a rest stop on 1-10 near Lake City at **12:11** a.m. (R **321**). Medina was asleep behind the wheel with the car running (R **322**). The officer called in the tag number and was advised the vehicle had possibly been used in a homicide (R **322**). He and another officer approached the car, woke Medina up, told him to unlock the door, and ultimately arrested him for grand theft and resisting arrest (R **325-327**). They found a buck knife under a hubcap on the back floor (R **337**). The knife tested presumptive for blood, but there was an insufficient amount of substance to obtain a conclusive test (R **584**).

Orange County Sheriff detective Nazarchuk visited Medina in Lake City on April **9** (R **511**). Medina first told him the highway patrolmen threw him in the Cadillac, then told him he had been hitchhiking from Tampa and fell asleep in the car after two men left (R **533**). He also told Nazarchuk he had not seen the victim since November or December, **1981**, when he left Orlando to live in Tampa, and that he had not been in Orlando since that time (R **536**) When Medina was being transported from Lake City to Orange County, he tried to escape (R **613-618**).

Medina testified at trial. He said he went to visit Dorta on April 3, at around 9:30 p.m., then went to visit Ms. James (R 670, 676). It was he who knocked on the door when Ms. James was talking on the phone (R 707). They watched TV and talked about their relationship (R 670-72). He borrowed her car to visit some friends and returned around 10:20 p.m. (R 672). When he returned, she had been stabbed but there was no gag in her mouth (R 672). He tried to pick her up to take her to the doctor and was going to call for help, but he got scared and went to Tampa in her car (R 674). He then tried to get to New Jersey to talk to his godmother about the situation (R 695). There had been men looking for him that wanted to kill him because he was involved in a large marijuana transaction (R 684). When they did not find him at Ms. James' apartment, they killed her instead (R 684). Medina left his beige hat on the sofa (R 679).

After a jury trial March 15-18, 1983, the jury convicted Medina of first degree murder and grand theft auto (R 1034, 1850). The penalty phase for the murder conviction was on April 1, 1983. The state presented testimony from Detective Nazarchuk that the birthdate Medina gave was October 4, 1957. Except for that testimony, the state relied on the evidence adduced at trial. The defense presented testimony from Margaret Madden, Medina's sponsor, that he came to her as a refugee from Arkansas and lived with her six months (R 969). He called her "mother" and they were very close (R 969). He was not a problem, but had a macho image. He was anxious to get into the American way of life and wanted a car very badly (R 971). At times he was loud

and boisterous, but that was his normal way. He did not have a violent character (R **970).** Medina was under tremendous emotional stress in Florida. He could not find a job and was upset (R **972).** Ms. Madden felt that with proper counseling, he could get along well in society and be rehabilitated **(R 973).** He seemed very affectionate and loves God **(R 974).** He had been recommended to her by the people in Fort Chaffee where Medina was placed when he got off the boat from Cuba (R **975).** Medina told her about his background, but she was not sure if it was true (R **975).**

The defense also presented testimony from Ruben Garcia who was involved in prison ministry. He first met Medina in July **1982** (R **980).** Medina was confused and suspicious of people (R **982).** Garcia felt Medina was not a violent person, but was confused. Garcia felt Medina had an emotional disturbance, but with counseling could be rehabilitated (R **982).**

Medina also testified at the penalty phase that he was twenty one years old and had lied about his age to get a drivers license (R **988).** He left Cuba because he had problems with the police who killed his cousin (R **990).** His father was a commander and now lived in South Africa (R **990).** He talked **about** Cuba being a poor country which had troubles. He said that only Cubans could understand that if the police say you are dangerous, they can put you in jail without asking for proof (R **990).** Just walking on the street could be a crime. He said that when he came to the United States he felt like a one-year old boy, did not know anything about the country, and had to start over (R **991).** He was scared of the police because of what had happened

with his family. He loved his country and family **(R 991).** He was confused about the legal system in this country and had problems with the language *(R 992).* His sponsor (whom he called "mother") helped him out and took him to school to learn the American language (R **992).** He said he was a healthy person and was willing to work. When he lived in New Jersey he worked to buy a car with his own money **(R 996).** When he lived in Tampa he also bought a car with his own money. He needed a car to get to work (R **996).**

The state argued that the murder was done for pecuniary gain and was heinous, atrocious, or cruel (R **1009-1014).** The defense argued that the crime was not committed for pecuniary gain, since Medina only took the car to get away, and the crime was not heinous as required by the legislature since there was no torture or perversion (R **1016-1018).** Defense counsel argued that the mitigating factors were **1)** no prior criminal activity and 2) extreme mental and emotional disturbance (R **1019).** She argued that Medina did not have a mental infirmity nor was he insane, but that he was under the influence of extreme emotional disturbance as defined by the legislature. She noted that Mrs. Madden and Mr. Garcia testified about Medina's fear of society, confusion, stress, and paranoia; and that he could not cope with the extreme change because he came from a radically different background where young people were incarcerated (R 1020). Defense counsel asked the jury if they remembered the defendant's behavior at the beginning of trial which may have made them think he was crazy. She observed that there was definitely some sort

of disturbance which common sense established (R **1020).** She also asked the jury to consider Medina's young age and that he was twenty at the time of the murder (R **1021).** He could be rehabilitated, as indicated by the witnesses (R **1022).** Ms. Madden said that even though he was loud and boisterous sometimes, he was never a problem (R **1022).** Defense counsel also pointed out the testimony regarding extreme emotional disturbance: stress, anxiety, confusion, paranoia, inability to understand what was going on around him, failure to find a job, racial prejudice against Cubans and blacks, prejudice against poor people, his desire to get a foothold and being pushed down (R **1022).** Mr. Garcia also found Medina to be under a lot of emotional stress and mental disturbance, but not violent (R **1023).** She argued that Medina was confused, anxious, angry, suspicious and under a lot of stress (R **1023).**

The judge instructed on the aggravating circumstances of pecuniary gain and heinous, atrocious or cruel (R **1025).** He instructed on mitigating circumstances of no significant prior criminal activity, extreme mental or emotional disturbance, age, and any other aspect of the defendant's character or record (R **1026).** The jury returned an advisory sentence of death by a vote of **10-2** (R **1030).**

The conviction and sentence were affirmed on direct appeal. Medina v. State, **466** So.2d **1046** (Fla. **1985).** Mandate issued June **5, 1985.** Medina filed a motion to vacate judgment and sentence with leave to amend on June **5, 1987** (H **906-955).** The trial court granted the motion to amend, allowing sixty days from June 6 to

file the amended motion (H 1120). Medina filed an amended motion to vacate on August 6, 1987 (H 1121-1223). On August 24, 1987, Medina filed a motion to supplement the record with a copy of a signed and verified affidavit of Angela Marquez (H 1414). An unsigned and unverified affidavit had been included in the appendix to the amended motion to vacate. The state filed a response to the motion to vacate (H 1418-1425). On September 24, 1987, the trial judge, Judge Powell, entered an order finding Claims 1 through VII, IX through XII and XIV without merit because they were, or could have been, raised on direct appeal. He also scheduled a pre-hearing conference for October 16, 1987, and reserved two hearing days: December 22, 1987 and January 22, 1988 (H 1426). On October 6, 1987, Medina filed a motion to continue both the pre-trial hearing and the evidentiary hearing (H 1426-1431). A pre-trial hearing was then set for March 4, 1988 (H 1432). On March 11, 1988, the trial judge entered an order scheduling the evidentiary hearing for October 6 and 7, 1988, on Claims VIII and XIII (H 1436-37). The state filed a motion to dismiss the motion on the basis of laches insofar as it alleged incompetence of defense counsel Warren Edward, who died on March 14, 1987, (H 1438-39).

The evidentiary hearing was held October 6-7 and November 21-23, 1988. At the beginning of the hearing, the state reasserted it's motion to dismiss, and the trial court suggested they wait to see how the evidence unfolded (H 6). The motion was

never ruled on.[1] At the evidentiary hearing, the defense presented the testimony of Ruben Garcia, a prison minister; Dr. Joyce Carbonell, Associate Professor of clinical psychology at Florida State University; Austin Maslanik, a public defender; William Sharpe, the state attorney who tried the case; Dr. Dorita Marina, a psychologist; Trooper Hull, the arresting officer; Gail Andrews, Billy Andrews' sister; Teddy Key, custodian of records at Florida State Prison; Robin Dukes, custodian of medical records at Florida State Prison; Ana Rodriguez, defense counsel; Pam Cavender, Orange County Sheriff's Department; Vicky Nicholson, Tampa Police Department; Carrie Johnson, Clerk of Hillsborough Circuit Court; Alvin Edlin, Florida Highway Patrol; Hercules Maxwell, custodian of records for Columbia County Jail; Barbara Pizarro, investigator for the public defender's office; Robert Wilson, arresting officer; Dr. Gore, medical examiner; David Allen, a public defender who represented Medina prior to withdrawing for a conflict of interest; Dr. Stephen Teich, a forensic psychiatrist; and Terri Murray, FBI investigator. The

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[1] Although the trial court did not rule on the state's motion to dismiss, the state continues to assert it's position that all claims of ineffective assistance of counsel are barred by laches (H 1438-39). Medina was sentenced on April 11, 1983. The mandate affirming the convictions issued June 5, 1985. Mr. Edwards died on March 14, 1987. Mr. Edwards would have been a material witness since he was lead trial counsel. Motions filed under Fla. R. Crim. Proc. 3.850 are civil collateral actions based on criminal action and are subject to the common law rule of laches. Tolar v. State, 196 So.2d.l (Fla. 4th DCA 1967). The doctrine of laches requires a finding of two elements: inordinant delay on the part of the person seeking relief and prejudice to the state. Despres v. State, 427 So.2d 257 (Fla. 5th DCA 1983). Mr. Edwards was the only person who could directly respond to the allegations. Remp v. State, 248 So.2d 677 (Fla. 1st DCA 1970).

trial court denied the motion to vacate and motion for rehearing thereon (R 2286-2295, 2349-2398, 2399). This appeal follows.

ARGUMENT

I

THE STATE DID NOT WITHHOLD EVIDENCE IN VIOLATION OF BRADY V. MARYLAND AND DEFENSE COUNSEL DID NOT FAIL TO INVESTIGATE MATERIAL EXCULPATORY AND IMPEACHMENT EVIDENCE.

Medina argues that the state failed to disclose certain material evidence or, in the alternative, that defense counsel was ineffective for failing to discover such evidence. The two items of evidence at issue are a second, serrated knife which was taken to the medical examiner, and that Michael White was on probation and possessed marijuana when Medina stabbed him. This issue was one of the two issues addressed at the evidentiary hearing.

A. Second knife

Medina contends that the state had a weak case and the knife found in the car was central to the state's presentation. During post-conviction investigation, it was discovered that a second knife had been taken to Dr. Gore who then made a photographic slide of the knife. The state attorney who tried the case, William Sharpe, testified that he did not know about the second knife, was not certain the slide of the knife related to this case, and had found no mention of the knife in the medical examiner's report or the sheriff's report (H 315). Dr. Gore stated that there was nothing in his reports about receiving the knife in evidence (H 733). He also said that when evidence

comes in, he may take the slides or a technician under his supervision might take them (H 735). As far as he knew, Mr. Edwards, lead defense counsel, was shown all the slides in his file (H 743). He did not remember who brought the knife in or why it was brought in. There was no indication that the knife was used in the case (H 743).

In his order, the trial judge discussed the evidence presented and observed that no evidence was presented by the defendant as to when the second knife was found, where it was found, by whom it was found, who presented it to the medical examiner, or whether it had any connection with a suspect other than Medina (H 2288). He found that it was not shown that the second knife would have been admissible at trial or whether Mr. Edwards was aware of the existence of the knife since he was now deceased. Consequently, the judge found that Medina had not shown the evidence was favorable to him and that, even if it had been disclosed, it would not have made a difference in the outcome (H 2289).

Since the prosecutor did not know about the existence of the knife, there is no way he could have disclosed it. Since the knife was not discussed in any reports, it is doubtful Mr. Edwards found out about it. Even if Mr. Edwards had known about the knife, there was no showing it was relevant or admissible. Even if it were admissible, there was no showing the outcome of the trial would be different.

Brady v. Maryland, 373 U.S. 83 (1963) requires that the prosecution disclose all evidence that is favorable to the

accused. In order to establish a Brady violation, the defendant must demonstrate that 1) the prosecution suppressed evidence that was 2) favorable to the accused or exculpatory and 3) was material to the issues at trial. U.S. v. Burrouqhs, 830 F.2d 1574, 1577 (11th Cir. 1987). The test for measuring the effect of a failure to disclose exculpatory evidence, regardless of whether such failure constitutes a discovery violation, is whether there is a reasonable probability that "had the evidence been disclosed to the defense, the result of the proceeding would have been different". Duest v. State, 15 FLW S41 (Fla. January 18, 1990), quoting United States v. Baqley, 473 U.S. 667 (1985). The mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not establish "materiality" in the constitutional sense. United States v. Agurs, 427 U.S. 97, 106-107 (1976); Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988). Information which was of little or no use to the defendant does not establish a "reasonable probability" that the outcome of the trial would have been different. Waterhouse v. State, 522 So.2d 341, 343 (Fla. 1988). In the present case, the evidence was not material or exculpatory, nor did the prosecutor have the ability to disclose the evidence since he was unaware of it. Even if it had been disclosed, it would not have changed the outcome.

In order to show ineffective assistance of counsel, a defendant must establish that 1) counsel's performance fell below an objective standard of reasonableness, and 2) that there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). Under the performance prong of Strickland, counsel is "strongly presumed" to have rendered adequate assistance, and strategic decisions made after thorough investigation of law and facts are "virtually unchallengeable". Strickland, 466 U.S. at 690. Under the prejudice prong, it is not enough for the defendant to show that an error had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. The defendant must show that, but for the errors, the outcome would be different. Strickland, 466 U.S. at 693-94. In the present case, if defense counsel did not discover the evidence, it was no fault of his own since its existence was not apparent from any report. If he did discover the existence of the knife, he may have made a tactical decision not to pursue the issue. In any case there was no showing the evidence was admissible or relevant. Even the defense expert on effective assistance of counsel, Mr. Maslanik, said that unless the knife could be tied to the case, it was not relevant (H 5 95). The defendant has not met the burden of showing deficient performance of counsel or prejudice.

B. Impeachment evidence on Michael White

Medina contends that the state did not disclose impeachment evidence that Michael White was not prosecuted for his own offenses: possession of marijuana and violation of probation. Mr. White supposedly had five baggies of marijuana on him when

Medina stabbed him. The defense presented records from the Tampa police department and crimes compensation records showing White made a victim claim (Exhibits **14, L1**). Exhibit L1 was admitted for the limited purpose that they existed, but not for the truth of the matter (H **887-89**). The prosecutor, Mr. Sharpe, testified at the evidentiary hearing that he was not aware Mr. White was on probation or the details surrounding the stabbing (H **318-320, 336**). He did not know White had applied for victim's compensation (H **323**). Defense counsel conducted a deposition of Mr. White (R **1491-1509**). The state did not make any deals with Mr. White to get him to testify, and he received no benefit in return for his testimony (H **336**).

The trial court found that the defense did not present any evidence that Mr. White was ever charged with possession of marijuana, and the records in the state file showed White was on probation but did not show a violation of probation. The judge was unable to find that Mr. White had ever been charged with possession of marijuana at the time of the stabbing April **6, 1982**, or that there was any agreement he would not be prosecuted for possession of marijuana or violation of probation if he testified. Neither did the state withhold information (H **2289**)

Medina has failed to show a Brady violation. He has failed to show the Orange County prosecutor was aware of Mr. White's Hillsborough County activities so that information could be disclosed. He has failed to show the impeachment value of whatever was subsequently discovered. There was no agreement for White to testify. Any impeachment value which may have existed

in the Hillsborough records would not have changed the outcome of the trial. Medina has failed to meet the requirements of Baqley and Duest, supra.

Medina has failed to show ineffective assistance of counsel for failure to discover impeachment evidence. Even if counsel had discovered White's background, the impeachment value would not have changed the outcome of the trial. There was no possibility of showing bias since there was no deal made. Although Medina argues White's testimony was crucial to his conviction, he fails to recognize that there were two other witnesses who saw him trying to sell the Cadillac, and the knife was seized by the trooper. That portion of White's testimony was cumulative. Although the defense takes issue with White's testimony that Medina stabbed him, this testimony was admissible. Medina v. State, 466 So.2d 1046, 1049 (Fla. 1985). By discovering the Tampa records, the defense has now substantiated the stabbing (Exhibit 16). The Tampa police report of April 12, 1982, also shows that White was not charged for possession of contraband at the time of the stabbing (Exhibit 16, p. 4). Therefore, The Orange County prosecutor had no leverage on a non-existent offense and White's probation may never have been revoked.

Medina has not shown deficient performance or prejudice as required by Strickland. The trial court found that the defendant failed to establish at the hearing that this impeaching evidence existed (H 2290). The judge also found that due to Mr. Edward's untimely death, it was unknown what efforts he had made to find

evidence with which to impeach White. Even assuming such evidence existed and that Edwards had impeached White with it, the judge found that there was no reasonable probability that the outcome of the trial would have been different. White's testimony about the car and knife was cumulative to that of the Florida Highway Patrol trooper (H 2290).

Furthermore, Medina has failed to show how any reference to White's offenses was admissible. Mr. Maslanik, the defense witness who testified at the evidentiary hearing, stated that there was nothing in the files which indicated the state attorney or police were aware of White's marijuana possession or probation status, there was nothing to indicate the cases were not prosecuted as a result of his testimony against Medina, so there was no nexus between that and Medina, making the evidence inadmissible (H 592).

II

COUNSEL DID NOT FAIL TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE.

Medina argues that trial counsel failed to discover substantial mitigation regarding his background, such as mental and physical abuse, and mental health difficulties. He also argues that counsel did not consider substantial mitigating evidence that could have been presented by the victim's daughters, did not discuss mitigating factors with the mental health experts who evaluated Medina, and did not investigate Medina's background or contact his family. This issue was addressed at the evidentiary hearing.

A. Victim's daughters

At the evidentiary hearing, Lindi James testified that she had played chess with Medina at her mother's apartment (H **373**). He had never been violent and was nice to her (R **374**). She was surprised to find out he had been arrested for killing her mother (H **374**). At the time of sentencing, she was angry and wanted justice, but now she could not justify executing someone when there may be doubt (H **379**). She would have been willing to say that to the jury (H **380**). Medina seemed mentally fine to her and did not display any type of irrational behavior (H **382**). She felt someone else committed the murder (H **386**). She would have testified that Medina was not psychotic at the time of the murder and there was nothing wrong with him psychologically as far as she could tell (H **388**). She would have testified about her mother's kindness to Medina (H **390**).

The affidavit of Arnita James was offered into evidence but not admitted (H **894**). The affidavit of Lindi James was not admitted since it was not offered at the time of her testimony (H **895**).

Arnita and Lindi James testified for the state at trial (R **137-153, 249-261**). The court had to recess at one point when Arnita began sobbing during the testimony (R **140**).

The trial court found that Lindi James' testimony that she and Arnita thought Billy Andrews killed their mother and Medina did not, was "lingering" or "residual" doubt evidence which is not admissible. King v. State, **514** So.2d **354** (Fla. **1987**); White v. Duqqer, 523 So.2d **40** (Fla. **1988**); Tafero v. Duqqer, **520** So.2d

287 (Fla. 1988). The trial judge also found that testimony by the victim's family member that he/she would prefer that the defendant not be sentenced to death was not admissible, citing Jackson v. State, 498 So.2d 406 (Fla. 1985); and Booth v. Maryland, 482 U.S. 96 (1987) (by implication) (H 2291). He also stated that counsel cannot be deemed to be ineffective for failing to offer inadmissible evidence. The remainder of Arnita James' testimony would have carried little or no weight with the jury or with him as the sentencing judge. To the contrary, the testimony supported that states' theory at trial that since there were no signs of forced entry, the murderer had to be a person like Medina who was known to and trusted by the victim. Consequently, the judge found there was no reasonable probability that this testimony would have affected the outcome of the penalty phase or sentencing (H 2291). Medina failed to establish deficient performance or prejudice under Strickland. Medina argues that since Ms. Rodriguez had never conducted a penalty phase and did not begin investigation until the end of the guilt phase, she was ineffective. He ignores the fact that Mr. Edwards supervised her and that having one attorney conduct the trial and another attorney conduct the penalty phase was a strategic decision. Ms. Rodriguez testified that she assumed the daughter's testimony would be detrimental because of the allegations (Initial brief at 31). Her assumption was correct, as indicated by Arnita James' emotional response during questioning at trial. Defense counsel could hardly be expected to present testimony from a sobbing daughter. The testimony that

the daughters did not believe Medina killed their mother is inappropriate, as the trial court recognized. See Robinson v. Maynard, 829 F.2d 1501, 1503 (10th Cir. 1987). Even Mr. Maslanik, the defense witness at the evidentiary hearing, said residual doubt should not be relied on since it is not recognized as a mitigating factor (H 191). He also said that there was nothing in the file showing the daughters would give favorable testimony, and he would not interview a family member unless there were some such indication (H 604). He said that testimony from the victim's family should be restricted whenever possible because it humanized the victim. As a general rule, an attorney does everything he can to keep the victim's personal facts away from the jury. Evidence of the victim's relatives could have opened the door to the state attorney cross examining about what a good person Ms. James was (H 607-609). Ms. Rodriguez had notes about talking to the daughters but did not consider calling them in the penalty phase. She did not talk to them about their feelings about the death penalty, but Mr. Edwards may have (H 528). She made a tactical decision which should not be second-guessed in hindsight. Downs v. State, 453 So.2d 1102 (Fla. 1984).

B. Backqround evidence

Medina argues that counsel was ineffective for failing to contact Medina's mother in Cuba. He alleges that post-conviction counsel contacted his mother and obtained an affidavit which related abuse, head injury and mental illness. The court did not admit the affidavit from the mother (H 889-92). The trial court

found that there was no information as to how the affidavit purporting to be from Medina's mother was obtained. The judge observed that Ms. Rodriguez testified that her husband was an attorney from Cuba and she had relatives in Cuba. Although it was possible to write letters, it was impossible to get witnesses out of Cuba. She wanted to deemphasize or avoid the fact that Medina had come from Cuba in the Mariel Boat Lift. The judge found that counsel did not act unreasonably or ineffectively (H 2292).

The trial court further found that even if the proffered affidavit had been presented at the penalty phase or at sentencing, there is no reasonable probability it would have made a difference in the outcome given the derogatory aspects of Medina's childhood and arrival in this country, and the 10 to 2 vote of the jury. See, Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987) (H 2292).

Although Medina contended that counsel was ineffective for failing to obtain the testimony of other persons, such as a sister in Tampa, Ms. Rodriguez testified that she was unable to locate any family members. The judge found that no evidence was introduced to show there were other persons available to trial counsel other than Mrs. Madden and Rueben Garcia who were called in the penalty phase (H 2292). The court cited Francis v. State, 529 So.2d 670 (Fla. 1988); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); and Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986); to support his findings.

Counsel is not ineffective for failing to investigate and present what would amount to inadmissible hearsay. Combs v. State, 525 So.2d 853, 855 (Fla. 1988). Ms. Rodriguez knew she could not produce the live testimony of Medina's mother (H 562). Any affidavit would be inadmissible hearsay since the state could not cross-examine the witness. Furthermore, Ms. Rodriguez' strategy was to present the defendant's good side and focus on positive mitigating evidence (H 530, 535). She wanted to downplay his Cuban background and the Mariel boat lift since there was anti-Cuban sentiment in 1983 and Marielitos had a bad connotation (H 573). Although Medina now claims she was inexperienced, she consulted with Mr. Edwards and received lots of help from him (H 516, 524). Mr. Edwards was the lead attorney and did things Ms. Rodriguez did not know about (H 555). Mr. Edwards was aware of Medina's background and talked about it during closing argument (R 753-54).

C. Mental health evidence

Medina contends that counsel was ineffective in failing to request 1) a confidential psychiatric evaluation and 2) that the existing experts address nonstatutory mental health mitigating circumstances. He contends that Ms. Rodriguez never talked to the two existing mental health experts who evaluated him. He also contends that mental health mitigation was available but not discovered for lack of investigation. Medina argues that counsel never provided the experts with copies of his jail records which described him as suicidal and schizoid. Three mental health witnesses testified at the evidentiary hearing. The defense also

presented testimony from a former public defender, public defender investigator, prison minister, and state trooper, regarding their observations. Medina contends that the newly discovered mental health evidence would have explained his courtroom behavior and provided substantial mitigation on which the jury could base a recommendation of life. He argues that Ms. Rodriguez' assessment of the damaging effect of adverse mental health testimony was unreasonable.

The order denying **3.850** relief discusses the testimony of Ms. Rodriguez that the defense wanted to present Medina's mental health in the most favorable light. That is why they called Ms. Madden and Mr. Garcia to humanize the defendant. Ms. Rodriquez stated that they did not pursue the appointment of mental health experts for the penalty phase because the reports of Dr. Wilder and Dr. Gonzales were unfavorable, and because she and Mr. Edwards had talked to Dr. Cassady, the jail psychologist, who felt that Medina was psychotic but opined that he would commit other violent crimes again. The judge found this was a reasonable exercise of professional judgment, citing Cave v. State, **529** So.2d **293** (Fla. **1988)** (H **2293).**

Two experts were appointed to determine competency to stand trial and sanity at the time of the offense. Their report shows that Medina was in a psychiatric hospital in Havana because he was very depressed following his rejection by a school he wanted to attend. He spent about six months in Massara hospital during which time he would go out during the day and return to the hospital at night. He received medication. Medina learned

construction and received a certificate which he considered made him an architect. He boarded a boat at Mariel in 1980 and was sent to Fort Chaffee, Arkansas, when he landed. He went to New Jersey to live with his sponsor, and worked there. In the summer of 1981 he came to Orlando and stayed with a sister until she left and he went to Tampa. Medina described his version of the offense to the experts in some detail, much as he recounted at trial (R 1751, 669-695). Medina told them about his family history. The trial experts concluded that his fund of information was moderately impaired, but that it was a product of his education and background rather than any mental illness (R 1751). Medina talked to the experts about God sitting next to him on the bunk, which the experts concluded was more of a religious or pseudo-religious experience in time of trouble than a hallucination or delusion (R 1 751).

The trial experts concluded that he was able to stand trial, enumerating the statutory criteria. The experts also concluded that since Medina would not give an account of himself during the hour he claimed to have been absent while Ms. James was killed, they were unable to comment with any degree of certainty about the stress which he might have been under. He had recently been in jail, his girlfriend had been put in jail in Tampa, and he was having financial difficulties. In the trial experts' opinion, none of these would be considered such severe stress as to impair him to the extent that he would not have the ability to know that to do those things would be wrong and illegal, or to be mitigating factors, if he did commit the crime

(R 1752) (emphasis added). The order appointing the experts directed them to include findings as to the defendant's mental condition at the time of the offense (R 1698-99).

A full competency hearing was conducted on March 14, 1983, at which time Mr. Edwards stated he did not agree with the conclusions reached by Dr. Wilder and Dr. Gonzalez (R 944). Mr. Edwards presented the Orange County Jail medical records indicating Medina had been on medication (R 944). Mr. Edwards also called Medina to testify about prior mental problems.

Medina testified that when he was five years old he had been sleepwalking (R 946). After they turned him down for college, he became very mad and got sick. He would not talk to his mother or get out of bed for three to four days (R 947). He would not go to a doctor because he didn't regard himself as sick, but his mother took him to a mental health hospital (R 948). He took medicine and did some testing with round and square papers (R 948). The first time he stayed about six months and went home. About a year later, he fainted in the bus and went to a doctor who said he had something wrong with his head (R 949). The second time he went to the mental hospital, he would stay during the day and go home at night (R 949). When he was at Fort Chaffee, he was taking medication (R 950). When he was at Orange County jail he talked to Dr. Cassady who gave him medicine (R 951).

Defense counsel had previously moved to have an additional psychiatrist appointed, and renewed his motion at the competency hearing (R 955, 1800). The motion was denied. This denial was

raised on appeal, but this court found the trial court did not abuse its discretion. Medina v. State, 466 So.2d 1046, 1048 n.2(2) (Fla. 1985). The trial court reviewed the jail records and found the defendant competent to stand trial (R 957). Mr. Edwards also moved for an additional psychiatric exam twice during the trial (R 231, 951). Defense counsel had the opinion of two experts and was denied the appointment of an additional expert. Surely he cannot be faulted for failure to investigate. The experts appointed did not find any incompetency, and specifically noted the lack of mitigating evidence. They were aware of Medina's background, as was counsel and the judge since he testified at the competency hearing. The jail records were available, and the judge pointed to instances showing Medina was competent (R 956-957). This court was aware of Medina's behavioral problems, that he had been hospitalized in Cuba, and his actions were impulsive at times. Medina v. State, 466 So.2d 1046, 1050 (Fla. 1985). This court affirmed the sentence, noting that the trial judge found the nonstatutory mitigation was entitled to little weight. Further evidence would not change the outcome. Medina has failed to establish prejudice under Strickland. See Francis v. State, 529 So.2d 670, 673 (Fla. 1988) where this court observed that "the Judge who heard the motion presided at trial and was the best person to determine whether failure to introduce mitigation prejudiced the defendant sufficiently to meet the Strickland test." Post-conviction relief motions are not abstract exercises to be conducted in a vacuum and the trial court findings are entitled to considerable weight. Francis, 529 So.2d 673 n.9.

In his order denying 3.850 relief, the judge found that even if counsel had been ineffective in not requesting appointment of mental health experts, the testimony of the experts at the evidentiary hearing showed that Medina was psychotic, had organic brain damage, was diagnosed to be paranoid schizophrenic or had a major depressive disorder, and was potentially dangerous. Only the psychiatrist testified that Medina could be rehabilitated and then only if stabilized by proper medication and therapy. The court found all this testimony to be derogatory and would have, if anything, an adverse affect on the jury (H 2293).

Ms. Rodriguez had spoken to Dr. Cassady who testified, like the experts at the evidentiary hearing, that he felt Medina was psychotic and a danger to society (H 510-515). She felt Medina had some sort of psychological problem, and argued he was under extreme emotional distress at the penalty phase (R 1019). She presented the testimony of emotional disturbance through Ms. Madden and Ruben Garcia in an attempt to humanize Medina. Medina maintained his innocence throughout the trial, at the penalty phase, at sentencing, and on direct appeal. His theory of defense was that someone else committed the murder. Medina v. State, 466 So.2d 1046 (Fla. 1985). As the trial court observed, the expert who testified at the evidentiary hearing succeeded in providing the motive for the murder which had not been apparent before (H 804).

Counsel was aware of the adverse mental health testimony, but tried to rehabilitate Medina and humanize him to the jury by

presenting favorable testimony. This is a tactical decision which should not be second-guessed in hindsight. Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1988); Maqill v. State, 457 So.2d 1367 (Fla. 1984). Furthermore, presenting mental health problems would be inconsistent with Medina's maintaining a position of innocence. Jones v. State, 528 So.2d 1171 (Fla. 1988). Counsel's failure to introduce evidence of mental impairment is not deficient where a defendant insists on an alibi defense and such evidence would undercut this defense. Lowenfield v. Phelps, 817 F.2d 285 (5th Cir. 1987). Neither did hearing counsel demonstrate that Medina would have allowed counsel to present detrimental mental health testimony. See Eutzy v. State, 536 So.2d 1014, 1016 (Fla. 1988); Henderson v. State, 522 So.2d 835, 838 (Fla. 1988). Every indication is that Medina wanted trial counsel to argue he was not crazy (R 1019). He told the court at sentencing he was not crazy and he told his attorney how to handle his case (R 1051-54). There is no reasonable probability a mental evaluation conducted six years after the trial is relevant to Medina's condition at the time of trial or at the time of the murder. See, Adams v. State, 456 So.2d 888 (Fla. 1984). Even if more allegedly mitigating evidence had been presented, there is no reasonable probability the omitted evidence would have changed the outcome. See, Harris v. State, 528 So.2d 361 (Fla. 1988); Bertolotti v. State, 534 So.2d 386 (Fla. 1988); Provenzano v. Duqqer, 15 F.L.W. S260 (Fla. April 26, 1990).

The trial court also found that if Medina had presented the mental health testimony at the penalty phase, it would have opened the door for the state to cross examine the experts as to the information and records upon which their opinions were based. See James v. State, 489 So.2d 737 (Fla. 1986). This would have allowed the state to bring out that Medina was released from a mental institution in Cuba and came to the United States on the Mariel Boat Lift. There were numerous incidents of Medina resisting guards and fighting with other inmates in jail which would have shown his violent tendencies (H 2294). If the evidence had been admitted, it would have more likely strengthened the jury's resolve to recommend a sentence of death. Given the circumstances that the victim was a middle-aged school teacher who had befriended Medina; that he violated her trust and confidence to gain entry and steal her automobile; and his violent method of inflicting death by multiple stab wounds, the judge found that there is absolutely no reasonable probability that this type of evidence would have changed the jury's vote or caused him to impose a life sentence (H 2294). The mere fact that Medina has now secured an expert who might have offered more favorable testimony is an insufficient basis for relief. Provenzano, supra; Stano v. State, 520 So.2d 278 (Fla. 1988).

To demonstrate prejudice in connection with a death sentence a defendant must show that there was a reasonable probability that, absent the deficient performance, the outcome at sentencing would have been different. Strickland v. Washington, 466 U.S. 668, 695 (1984); Bertolotti v. State, 534

So.2d 386, 389-390 (Fla. 1988); "[W]hen a defendant challenges a death sentence...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, 466 U.S. at 695. A court need not determine whether counsel's performance was deficient before examining whether the alleged deficiency was prejudicial. Harris v. State, 528 So.2d 361, 363 (Fla. 1988).

In Strickland v. Washington, 466 U.S. 668 (1984). The claim of ineffectiveness presented in Strickland asserted that counsel was deficient in failing to investigate and present character witnesses and obtain a psychiatric report for the defendant. The evidence that allegedly should have been presented in Strickland would have shown that numerous people thought the defendant was generally a good person and that a psychiatrist and psychologist believed he was under considerable emotional stress. The United States Supreme Court rejected this claim, noting that the evidence would not have sufficiently altered the sentencing profile and, because of the aggravating factors, there was no reasonable probability that the omitted evidence would have changed the conclusion.

In Correll v. State, 15 F.L.W. S147 (Fla. March 16, 1990), the appellant asserted 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.

Counsel was aware of Correll's prior drug and alcohol usage. Correll testified that he had used alcohol and various kinds of drugs often, though not on a regular basis, throughout his adult life. There was no evidence of any drug usage or excessive drinking the night of the murder. Correll told the psychiatrist who examined him prior to trial, that he used alcohol several times a week and that he had experimented with various drugs, though not on a regular basis. The psychiatrist 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. In view of this trial counsel did not 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. Correll continued to insist that he was not guilty of the crimes and may not have wanted the jury to believe that he was an alcoholic and a drug addict. The Florida Supreme Court held that "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. S149.

In Harris v. State, 528 So.2d 361 (Fla. 1988), there was no reasonable probability the omitted mitigating evidence (from relatives and friends that the defendant was a kind, decent man

dedicated to his family, a warm and loving parent, a good provider, a timid person and not the kind who would ever harm anyone, a regular church-goer, a dependable and trustworthy employee, and a loyal and valued friend and from school and military records that while in the Army he was commended for assisting the Red Cross in a blood drive on one day) would have affected the jury's recommendation or the sentence imposed by the trial judge as the state could have responded that when Harris committed this murder, he was burglarizing the home of the grandmother of the woman who had befriended him and given him a place to stay, also, military records showed that he was undesirably discharged and had been absent without leave on several occasions and that he had been convicted of two prior burglaries and a robbery in which he broke an elderly woman's arm while snatching her purse. These circumstances, coupled with the statutory aggravating circumstances, overwhelmingly outweigh the suggested mitigating evidence.

In Spaziano v. State, 545 So.2d 843 (Fla. 1989), failing to introduce evidence of a mental condition at resentencing and in the first motion for post conviction relief was not ineffective assistance of counsel where such evidence was merely cumulative - the PSI contained evidence of the mental condition and such mental condition was before the Supreme Court of Florida on direct appeal and on the first motion for post conviction relief.

In Buenoano v. State, 15 F.L.W. S196 (Fla. April 15, 1990), the appellant argued that counsel was ineffective for failing to investigate her family background and emotional history and

present this information as mitigation at the penalty phase of her trial. Buenoano contended that had counsel investigated these matters, he would have discovered significant information regarding her impoverished upbringing and dysfunctional psychological state. For example, counsel would have discovered that as a child Buenoano was separated from her family at a young age following the death of her mother. She was frequently removed from one family, foster home or orphanage and placed in another. There were reports of sexual abuse. When she was eventually examined by mental health experts following her incarceration, the reports revealed evidence of psychological problems. Additionally, she asserted that at her sentencing proceeding, a mental health expert would testify that she was emotionally disturbed and lacked the ability to conform her conduct to the requirements of law. The Supreme Court of Florida found that had such mitigating evidence been presented to the jury it would in no way have been sufficient to overcome the overwhelming evidence presented against her at trial. The court concluded that in light of the facts presented in the guilt and penalty phases, the jury would not have weighed the evidence any differently even if the omitted mitigation evidence had been presented.

III

THE TRIAL COURT DID NOT DENY MEDINA'S RIGHT TO A FULL AND FAIR EVIDENTIARY HEARING.

Medina contends that the trial judge erred in finding twelve claims were procedurally barred and that Medina was not

entitled to an evidentiary hearing on those claims. Medina also contends that the trial judge so severely limited the presentation of evidence on the two claims which were heard, that the hearing was not full and fair. Medina points to several examples of the judge's overbearing, including: not allowing hearing counsel to re-argue his rulings; having counsel make statements for the record during recesses in order to save time; causing counsel to withdraw a witness when counsel, not the witness, tried to assert the psychiatrist/patient privilege; advising counsel not to re-argue his rulings; interrupting counsel to ask the witness questions so that the proceedings did not get bogged down; trying to direct counsel in the direction he preferred the evidence be presented; advising counsel if he didn't refrain from re-arguing his ruling he could revoke his right to practice in his courtroom; sustaining objections; asking counsel to keep the testimony moving; raising objections sua sponte; and rephrasing questions for counsel.

A trial court is not required to conduct an evidentiary hearing on claims which were raised, or could have been raised, on direct appeal even though they are raised under the guise of ineffective assistance of counsel. Sireci v. State, 469 So.2d 119 (Fla. 1985). Although Medina argues that the ineffective assistance claims demand an evidentiary hearing, this court has upheld summary denials involving ineffective assistance claims. In Hill v. State, 15 F.L.W. S265 (Fla. Jan. 26, 1990), claims that counsel and mental health experts were ineffective were summarily denied and this court affirmed. This court also found

that additional family affidavits were cumulative and testimony of two new mental health experts was unsupported except by Hill's own trial testimony, thus making the testimony cumulative. In Provenzano v. State, 15 F.L.W S260 (Fla. April 26, 1990), this court affirmed a summary denial of ineffectiveness claims including failure to renew a motion for change of venue, failure to object to the sanity instruction, failure to challenge alleged victim impact evidence, failing to raise a Caldwell argument, cross examination, failure to call additional witnesses in mitigation as to mental condition and family background, and inadequate mental health experts. In Smith v. State, 15 F.L.W. S81 (Fla. Feb. 15, 1990), this court affirmed a partial summary denial which included various ineffectiveness claims such as failing to obtain expert testimony, failing to present evidence of a deprived childhood, and failing to develop claims of mental incompetency. In Correll v. State, 15 F.L.W. S147 (Fla. March 16, 1990), this court affirmed the rejection of an ineffectiveness claim without an evidentiary hearing at the trial level, based upon the failure to present penalty phase testimony of alcohol and drug abuse and a deprived childhood. This court specifically found it unnecessary to pass on the ineffectiveness issue because the defendant made no showing of prejudice under Strickland.

The claims which were not afforded an evidentiary hearing are raised in this appeal, and, as discussed herein, the record and files conclusively show that Medina is not entitled to relief. Fla. R. Crim. Proc. 3.850; Adams v. State, 456 So.2d 888

(Fla. 1984); Kennedy v. State, 547 So.2d 912 (Fla. 1989). Rule 3.850 requires that a copy of the files and records need to be attached to the order denying relief only when the denial is not predicated upon the legal insufficiency of the motion on its face. In the present case, the trial judge found the claims procedurally barred (H 1426). The claims are legally insufficient to require an evidentiary hearing. See Provenzano v. Dugger, 15 FLW S260 (Fla. April 26, 1990).

The trial judge did not violate any constitutional right of Medina by trying to control his courtroom. He had to continuously warn hearing counsel to respect his rulings and not to re-argue them. He had to admonish counsel constantly to keep moving along. The judge allocated two days for hearing and had to add two more days in November. He tried to keep counsel focused on the issues and to keep him moving in the right direction. The conduct of a trial or hearing should be left to the discretion of the trial court. A trial judge has very broad discretion in the procedural conduct of trial. Feeney v. State, 359 So.2d 569 (Fla. 1st DCA 1978). The judge has wide latitude in regulating the conduct of his court in order that the administration of justice be speedily and fairly achieved in an orderly, dignified manner, befitting the gravity of the business. Thomas v. State, 456 So.2d 454 (Fla. 1984); Hahn v. State, 58 So.2d 188 (Fla. 1952). A trial judge has broad discretion in the exercise of his trial authority. Only conduct which would result in an abuse of discretion warrants an appellate court directing the trial judge as to the manner of conducting his courtroom.

Stager v. Florida E.C.R. Co. 163 So.2d 14 (Fla. 3rd DCA 1964); U.S. v. Hilliard, 752 F.2d 578 (11th Cir. 1985); Hansen v. Commissioner, 820 F.2d 1464 (9th Cir. 1987).

IV

MEDINA WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE EVIDENCE ABOUT BILLY ANDREWS WAS NOT INVESTIGATED AND/OR THE STATE FAILED TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE ABOUT BILLY ANDREWS.

Medina argues that the trial court erred in denying this claim without an evidentiary hearing and disallowing the testimony of Gayle Andrews and Ernest Arnold. Their testimony was proffered at the evidentiary hearing (H 464-68, 1377-79, 1390-95). Medina argues that trial counsel did not reasonably investigate whether Billy Andrews may have committed the crime, even though he also argues that counsel tried to defend Medina by arguing Andrews was the true culprit and was precluded by the court. Finally, Medina argues that the state failed to disclose material information, but does not specify what information.

The trial court did not err in denying an evidentiary hearing on this claim which is a disguised attempt to raise a direct appeal issue as ineffective assistance of counsel. Sireci v. State, 469 So.2d 119 (Fla. 1985). The 3.850 motion shows that trial counsel attempted to bring evidence of Andrew's culpability before the jury but was limited by the court (Initial brief at 61). If the trial court wrongfully restricted cross-examination, the issue should have been raised on direct appeal. Medina cannot now raise the claim as ineffective assistance of counsel

where counsel tried to present the evidence, by Medina's own admission. See Quince v. State, 477 So.2d 535 (Fla. 1986); Clark v. State, 460 So.2d 886 (Fla. 1984); Correll v. State, 15 FLW S147 (Fla. March 16, 1990); Buenoano v. State, 15 FLW S196 (Fla. April 13, 1990). Counsel presented evidence that Billy Andrews used to date Ms. James and gave her a black eye one time, that Arnita James informed detectives that Billy Andrews was a suspect and may have had a key to the apartment. Counsel also presented testimony that Andrews may have been near the apartment one to two weeks before the murder (R 147-150). The victim thought Andrews may have been watching her shortly before her death (R 164). The victim had discussed changing the locks because Andrews had a key (R 252). Lindi James told the detectives that Andrews fought with her mother and wore a hat with a visor (R 255). Counsel argued in closing that Billy Andrews was the true perpetrator and pointed to testimony regarding prior fighting, Andrews was right-handed, and the victim did not want Andrews to know of her relationship with Medina, inferring she was afraid of him (R 755-56). He also pointed out that Andrews had a key, and the victim was worried about him (R 759). The evidence about Billy Andrews was presented to the jury, but it was rejected.

The issue whether the state failed to disclose information is insufficient on its face. The trial court did not err in denying an evidentiary hearing where the defendant only made conclusory allegations and the record shows he is not entitled to relief. Agan v. State, 503 So.2d 1254 (Fla. 1987); O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984); Lightbourne v. State, 471

So.2d 27 (Fla. 1985); Stano v. State, 520 So.2d 278, 280 (Fla. 1988).

V

MEDINA WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHT TO A COMPETENT MENTAL EXAM AND HIS ATTORNEY DID NOT FAIL TO INVESTIGATE AND SEEK COMPETENT MENTAL HEALTH ASSISTANCE.

Medina was examined by two experts who determined he was competent to stand trial, not insane at the time of the offense, and demonstrated no mental deficiencies which would serve as mitigation. Trial counsel moved for additional psychiatric examinations at several stages during the trial. This court found that the trial court did not abuse its discretion in denying counsel's motion to appoint a third psychiatrist after two experts had already found Medina competent. Medina v. State, 466 So.2d 1046 (Fla. 1985). Medina now alleges that the mental examinations were grossly deficient, and counsel was ineffective in failing to seek competent mental evaluations.

The issue whether the mental examinations were incompetent is procedurally barred for failure to raise it on direct appeal. Smith v. State, 15 FLW S81 (Fla. February 15, 1990); Bundy v. State, 538 So.2d 445 (Fla. 1989). The ineffectiveness of counsel claim is a disguised attempt to relitigate an issue which is barred. Sireci v. State, 469 So.2d 119 (Fla. 1985); Quince v. State, 477 So.2d 535 (Fla. 1986); Clark v. State, 460 So.2d 886 (Fla. 1984). See also, Buenoano v. State, 15 FLW S196 (Fla. April 13, 1990). Correll v. State, 15 FLW S147 (Fla. March 16, 1990).

Furthermore, the incompetent mental exam issue has no merit. In Correll, this court rejected an ineffectiveness claim based on an allegedly incompetent mental exam. This court noted that the mere presentation of three new expert opinions questioning the defendant's mental capacity did not require a new penalty proceeding. In Provenzano v. State, 15 F.L.W. S260 (Fla. April 26, 1990), a claim of inadequate mental health experts was rejected. This court stated that "the mere fact that Provenzano has now secured an expert who might have offered more favorable testimony is an insufficient basis for relief." In Stano v. State, 520 So.2d 278, 281 (Fla. 1988), this court also observed that whether the appellant had now found experts whose opinions may be more favorable to him was of no consequence. As discussed in Point II, counsel was aware of Medina's background but made a tactical decision not to present negative testimony at the penalty phase. An attorney is not ineffective for failing to pursue every possible defense based on a particular mental condition. Blanco v. Wainwright, 507 So.2d 1377, 1383 (Fla. 1987). The possibility of brain damage does not necessarily mean one is incompetent or that he may engage in violent, dangerous behavior and not be held accountable. James v. State, 489 So.2d 737 (Fla. 1986).

Although Medina now challenges the effectiveness of self-report, the experts at the evidentiary hearing based their analysis in part on self-report. They also used an affidavit allegedly from Medina's mother which was not admitted into evidence because, as the trial court observed, there was no proof

that the affidavit was authentic. The information about Medina's background was available to the trial experts, who found it unconvincing. The trial judge reviewed the jail records at the competency hearing and found them unconvincing. Counsel informed the court of his disagreement with the experts, but was denied a third expert. He twice asked for another evaluation during trial when Medina was acting up. Counsel argued his mental problems and this court recognized those problems in Medina v. State, 466 So.2d 1046 (Fla. 1985).

Medina also takes issue with the trial court limiting the testimony of Dr. Marina regarding competency. The issue of competency is procedurally barred for failure to raise it on direct appeal and is without merit. (See Point VI herein). Counsel did all he could to raise competency, and the issue went to a full hearing (R 940-960). Medina faults counsel for not being familiar with mental health law and not seeking a confidential evaluation. Counsel sought the advice of two experts to determine competency and sanity because of Medina's obvious mental infirmity and history of mental problems (R 1668). Medina was claiming innocence, and the insanity defense is inconsistent with innocence. Jones v. State, 528 So.2d 1171 (Fla. 1988); Lowenfield v. Phelps, 817 F.2d 285 (5th Cir. 1987). Counsel had no reason to pursue the appointment of a confidential expert under Fla.R.Crim.P. 3.216(a) since he was not pursuing the insanity defense.

VI

MEDINA WAS COMPETENT TO STAND TRIAL.

Medina next argues that he was incompetent to stand trial. He notes that trial counsel moved for an additional psychiatric exam and questioned Medina's mental health (Initial brief at 80). This issue should have been raised on direct appeal and is procedurally barred. Smith v. State, 14 FLW S81 (Fla. February 15, 1990). Bundy v. State, 538 So.2d 445 (Fla. 1989). The trial court did not err in denying an evidentiary hearing on this issue. Francis v. State, 529 So.2d 670, 672 n.2 (Fla. 1988).

Furthermore, the issue has no merit. A full competency hearing was held the day before trial. Although Medina may have been unruly at times, he settled down after he was advised what the appropriate behavior was. As Ms. Rodriguez observed during the penalty phase, he was unfamiliar with courtroom proceedings and did not know how to behave. Although Medina became upset because he thought the deputies were roughing him up, after he was shackled and knew his behavior was inappropriate, he was fine. Medina testified at trial, at the penalty phase, and at sentencing (R 669, 988, 1037). His testimony shows he appreciated the charges, the penalties, understood the adversary nature of the legal process, could disclose pertinent facts to his attorney, and could testify relevantly. His ability to relate details of the night of the murder show he was able to recall and recount the events. A subsequent finding of possible brain damage does not mean a person was incompetent at the time of trial. James v. State, 489 So.2d 737 (Fla. 1986). Even though Medina may have had mental problems, he knew right from wrong and was capable of conforming his conduct to societal

standards. He simply did not wish to conform his conduct and did not care that his actions were wrong. This does not mean he is incompetent. See Henderson v. Dugger, 522 So.2d 835 (Fla. 1988). In fact, Medina apologized for his behavior, explaining it was only because he was unfamiliar with courtroom procedure (R 65, 71, 72, 73). A subsequent diagnosis made by a defense-hired expert five years after the conviction does not affect the evidence supporting competency. Id. at 837.

VII

MEDINA WAS COMPETENT AT SENTENCING.

As stated in Point VI, this issue is procedurally barred for failure to raise it on direct appeal. The issue has no merit. Medina's testimony at sentencing shows he was coherent, made an intelligent argument in his behalf, and was cognizant of what was happening.

VIII

MEDINA'S STATEMENTS WERE PROPERLY INTRODUCED INTO EVIDENCE AND COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PREVAIL AT THE SUPPRESSION HEARING.

Medina argues that the statements made April 8 and 9, 1982, and evidence seized from Ms. James' car should have been suppressed. He also argues that counsel was ineffective for failing to prevail at the suppression hearings and for failing to move to suppress statements made prior to the taped interrogation. The suppression issues were raised on direct appeal, and this court found that the search of the car was lawful and the statements were made freely and voluntarily.

Medina v. State, 466 So.2d 1046 (Fla. 1985). These issues are procedurally barred. Clark v. State, 460 So.2d 886, 888 (Fla. 1984). Raising the issues as ineffective assistance of counsel is a disguised attempt to relitigate the issue. Sireci v. State, 469 So.2d 119 (Fla. 1985); Quince v. State, 477 So.2d 535 (Fla. 1986); Clark v. State, 460 So.2d 886 (Fla. 1984). Since this court found the evidence was properly admitted, counsel cannot be ineffective for failing to exclude the evidence. Trial counsel cannot be deemed ineffective for failing to prevail on meritless claims or claims which had no reasonable probability of affecting the outcome. Strickland v. Washington, 46 U.S. 668 (1984); Suarez v. Dugger, 527 So.2d 190 (Fla. 1988); Gorham v. State, 521 So.2d 1067 (Fla. 1988).

IX

MEDINA WAS NOT ENTITLED TO BE PRESENT DURING THE DISCUSSION CONCERNING WHETHER HE SHOULD BE SHACKLED AND COUNSEL WAS NOT INEFFECTIVE FOR NOT ASSURING HIS PRESENCE.

Medina contends he should have been present while the court and his attorney were discussing his hostile behavior in his holding cell. He also contends counsel was ineffective for failing to object to his absence. The judge sent Ms. Rodriguez to talk to Medina and apprise him of the situation. She told the judge he was agitated because the guards roughed him up and he had to stay in isolation. He had agreed to behave in the courtroom. The judge ordered Medina be shackled over Mr. Edward's objections (R 240, 247).

This issue should have been raised on direct appeal and is procedurally barred. Buenoano v. State, 15 FLW S196 (Fla. April 5, 1990); Correll v. State, 15 FLW S147, S149 n.6 (Fla. March 16, 1990); Henderson v. Dugger, 522 So.2d 835, 836 (Fla. 1988). Raising the issue as ineffective assistance of counsel is a disguised attempt to relitigate the issue. Sireci v. State, 469 So.2d 119 (Fla. 1985); Quince v. State, 477 So.2d 535 (Fla. 1986); Clark v. State, 460 So.2d 886 (Fla. 1984).

X

COUNSEL DID NOT FAIL TO PRESERVE MEDINA'S RIGHT TO A MISTRIAL WHEN A JUROR WAS DISQUALIFIED.

Medina alleges that counsel was ineffective in acquiescing to the court excusing a juror. The record shows that Mr. Edwards moved for a mistrial which was denied (R 664). On direct appeal, Medina contended that the trial judge erred in not granting a mistrial and in refusing to allow defense counsel to question an excused juror about the other jurors' feelings concerning White's unsolicited testimony. Medina v. State, 466 So.2d 1046 (Fla. 1985). This court observed that the trial court properly removed the juror, that Medina's request to question this juror would have produced only speculation and conjecture and the trial court correctly refused to allow such questioning, that Medina failed to demonstrate prejudice, and that the trial court committed no error. Id. at 1049.

Couching the issue in terms of ineffective assistance of counsel does not warrant relief where the issue has been disposed of on appeal. Quince v. State, 477 So.2d 535 (Fla. 1986).

Counsel is not ineffective for not prevailing on a non-meritorious issue. Strickland v. Washington, 466 U.S. 668 (1984); Suarez v. Dugger, 527 So.2d 190 (Fla. 1988); Gorham v. State, 521 So.2d 1067 (Fla. 1988). Furthermore, Medina has failed to show deficient performance under Strickland where counsel moved for a mistrial and there was no error which would have required relief in any case. This court has previously found that Medina was not prejudiced, so the second prong of Strickland is likewise not established.

XI

THE TRIAL COURT DID NOT ERR IN RESTRICTING CROSS EXAMINATION OF LINDI JAMES AND COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO THE COURT'S LIMITATION.

Medina disputes the trial court's limiting counsel's cross-examination of Lindi James regarding Billy Andrews, and maintains counsel was ineffective for failing to object to this limitation.

This issue should have been raised on direct appeal and is procedurally barred. Correll v. State, 15 FLW S147, S149 n.6 (Fla. March 16, 1990). Raising the issue as ineffective assistance of counsel is a disguised attempt to relitigate the issue. Sireci v. State, 469 So.2d 119 (Fla. 1985); Quince v. State, 477 So.2d 535 (Fla. 1986); Clark v. State, 460 So.2d 886 (Fla. 1984).

A similar issue was raised on direct appeal, and this court found that the scope and control of cross-examination is within the trial court's discretion, that Medina failed to show an abuse

of that discretion, and there was no reversible error. Medina v. State, 466 So.2d 1046, 1050 (Fla. 1986). Likewise, in this situation the trial court did not abuse its discretion, and its rulings were proper. The court sustained state objections to testimony which was clearly hearsay, irrelevant, asked and answered (R 252-59). Medina has demonstrated no error or prejudice in the court's ruling which would support a claim of ineffectiveness of counsel. He has failed to show deficiency under Strickland. Furthermore, there was no prejudice. The information that Billy Andrews was a suspect was presented to the jury. The jury chose to believe Medina committed the offense. Presentation of more evidence would not have changed the verdict where Medina admitted to being in the apartment before and after the murder, took Ms. James' car without permission and tried to sell it, and could not adequately explain how she happened to be murdered during the one hour he was absent.

XII

THE STATE'S CLOSING ARGUMENT WAS NOT IMPROPER AND DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT.

Medina contends that the prosecutor engaged in improper comments in closing arguments. This issue is procedurally barred for failure to raise it on appeal. Smith v. State, 15 FLW S81 (Fla. February 19, 1990); Lightbourne v. Dugger, 549 So.2d 1364 (Fla. 1989); State v. Washington, 453 So.2d 389 (Fla. 1984).

Medina also contends that trial counsel was ineffective for failing to object to the prosecutor's comments. Whether to object is a matter of trial tactics which are left to the

discretion of the attorney *so* long as his performance is within the range of what is expected of reasonably competent counsel. Muhammed v. State, 426 So.2d 533, 538 (Fla. 1982). Although counsel may have decided not to voice appropriate objections, few trials proceed without any such error and it is almost always possible to imagine a more thorough job being done that was actually done. White v. State, 15 FLW S151 (Fla. March 15, 1990), quoting Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). Medina has not shown deficient performance or prejudice under Strickland. Even if the prosecutor's comments were objectionable, relief is warranted only where the error is *so* egregious as to vitiate the entire trial. Johnston v. State, 493 So.2d 863, 869 (Fla. 1986); State v. Murray, 443 So.2d 955, 956 (Fla. 1986). A prosecutor is entitled to comment on the evidence and inferences to be drawn therefrom. Gibson v. State, 475 So.2d 1346 (Fla. 1st DCA 1985). A comment on the lack of evidence is proper. Tarpley v. State, 477 So.2d 63 (Fla. 3d DCA 1985). Wide latitude is permitted in arguing to the jury. Breedlove v. State, 413 So.2d 1 (Fla. 1982); Darden v. State, 329 So.2d 287 (Fla. 1976).

XIII

MEDINA'S RIGHTS WERE NOT VIOLATED BY BEING HANDCUFFED AND SHACKLED AND COUNSEL DID NOT FAIL TO OBJECT

Medina argues that he was handcuffed in the presence of the jury to which counsel failed to object or request a curative instruction.

This issue was raised on direct appeal and is procedurally barred. Buenoano v. State, 15 FLW S196 (Fla. April 5, 1990); Correll v. State, 15 FLW S147, S149 n.6 (Fla. March 16, 1990). Raising the issue as ineffective assistance of counsel is a disguised attempt to relitigate the issue. Sireci v. State, 469 So.2d 119 (Fla. 1985); Quince v. State, 477 So.2d 535 (Fla. 1986); Clark v. State, 460 So.2d 886 (Fla. 1984).

This court found there was no impropriety or undue prejudice from the court's denial of a motion for mistrial because Medina had been shackled and handcuffed during the trial. Medina v. State, 466 So.2d 1046 (Fla. 1986). Medina cannot show prejudice under Strickland.

There is no merit to the allegations. The record shows that Medina was handcuffed after the venire left the courtroom (R 66). Counsel moved for a mistrial (R 67-68). The judge stated that the panel had just about exited when the restraints were placed on Medina (R 68). Counsel also asserted that five or six jurors saw the cuffs placed on Medina when he was lead from the courtroom (R 69). Defense counsel also repeatedly objected to Medina being chained and shackled (R 240, 247). The judge did instruct the jury during the charge to the jury that they should not draw any inference of guilt whatsoever from the fact the defendant appeared in the courtroom in handcuffs (R 817). Medina was behaving poorly and had previously tried to escape (R 228). The bailiffs felt he was unpredictable and hostile (R 228). Medina calmed down when he was shackled (R 229-231). The judge asked the bailiffs for their recommendations and was

informed that, given Medina's history of escapes, he should not be in the courtroom unsecured (R **232**). The bailiff also observed that the safety of the personnel and jury were at issue (R **233**). The judge decided that the least restrictive measures that could be used would be to bring Medina into the courtroom in belly belt, leg irons and handcuffs then remove the leg shackles after he was seated (R **233**). Medina could keep his hands underneath the table (R **233**). The judge also observed that the jury was facing the bench and not Medina (R **233**). The bailiff also added that rather than using leg irons they could use a leg brace which fit under the pants, and the court agreed (R **234**). Defense counsel objected (R **235**). Ms. Mead observed that Medina had announced to the jurors that he had been in jail for a year (R **236**). The judge indicated that the modern jury expects a defendant charged with murder to be in custody (R **237**). Defense counsel stated for the record that Medina made the statement only after they saw him shackled (R **237**). The bailiff offered a suggestion whereby the jury would not be able to see the leg brace (R **238**). The judge agreed (R **239**).

The trial court did not abuse its discretion in shackling Medina because he was a security risk. Correll, supra. In Holbrook v. Flynn, **475** U.S. **560 (1986)** the United States Supreme Court held that a defendant was not denied his constitutional right to a fair trial when, at his trial with five codefendants, the customary courtroom security force was supplemented by four uniformed state troopers sitting in the front row of the spectator section. The law has never been that extra security

measures visible to the jury destroy impartiality, no less those that are not visible to the jury.

XIV

CALDWELL V. MISSISSIPPI DOES NOT APPLY TO FLORIDA CASES.

Medina urges this court to reconsider its position that Caldwell v. Mississippi, 472 U.S. 320 (1985), does not apply in Florida, and argues that the trial court and prosecutor violated Caldwell. This issue is procedurally barred for failure to raise it on direct appeal. Buenoano v. State, 15 FLW S196 (Fla. April 13, 1990); Correll v. State, 15 FLW S147 (Fla. March 16, 1990).

This court has repeatedly held that Caldwell does not apply in Florida. Combs v. State, 525 So.2d 853 (Fla. 1988); Daugherty v. State, 533 So.2d 287, 288 (Fla. 1988). Unlike Caldwell, in Florida the judge rather than the jury is the ultimate sentencing authority. Ford v. State, 522 So.2d 345, 346 (Fla. 1988). Caldwell is distinguishable from the Florida procedure which treats the jury's recommendation as advisory only and places the responsibility for sentencing on the trial judge. Advising the jury that its sentencing recommendation is advisory only and that the ultimate decision rests with the trial judge is an accurate statement of Florida law and does not improperly minimize the sentencing jury's role or misstate Florida law. Cave v. State, 529 So.2d 293, 296 (Fla. 1988); Grossman v. State, 525 So.2d 833 (Fla. 1988); Combs, supra.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the order denying post conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail to Billy H. Nolas, Chief Assistant, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 7 day of June, 1990.

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