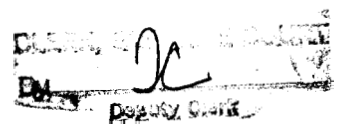
IN THE SUPREME COURT OF FLORIDA



JAMES ROGER HUFF,

Appellant,

v. CASE NO. 74,201

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT, IN
AND FOR SUMTER COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On April 21, 1980, at approximately 3:15-3:25 p.m., Norman and Genevieve Huff went to Bergman Realty with their son, James Roger Huff, ("Huff") (R 615).[1] Genevieve worked as a real estate salesperson at Bergman Realty (R 632). Genevieve was driving, Norman was in the passenger seat, and Huff was in the back seat (R 616, 634). At approximately 3:30-3:45 p.m., Huff and his parents left Leesburg heading west toward Wildwood, with Genevieve driving (R 1181). Genevieve was expected back at Bergman Realty at approximately 5:00 p.m. that afternoon (R 635). Genevieve and Norman were murdered at approximately 4:15-4:30 p.m. in a dump area just south of Wildwood near the main road that runs between Wildwood and Leesburg (R 1512-14).

Chief Lynum, Wildwood police chief, owned a home in the dump area, but Huff knew his work hours were 8:00 a.m. to 4:00 p.m. and that he usually did not go out there because he wasn't living on the property (R 709). Huff was familiar with the landfill area, had been there several times looking at a home, and had mentioned that there was hardly any traffic (R 702). Huff had been in the area two or three times within two months of the murders (R 703-04). Huff told Lynum he had some money coming in soon, and would buy the property at that time (R 703). Huff

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[1] The record cites will correspond to those used by Huff. "M" cites to the record of the 3.850 motion on appeal, "R" cites to the record in the second trial. All other cites should be self explanatory.

had also visited the scene, drinking beer, with a black female(R **705).**

Norman was shot through the left eye, which bullet exited behind the right ear (R **1605).** Another bullet entered behind the left ear and exited the right side of the face. There was a bullet entrance wound in the palm of the right hand which exited the back of the hand (R **1605).** The shots were fired from behind Norman, whose hand would have been raised in a defensive position (R **1609).** The bullet that went through his hand was the bullet that passed through the eye (R **1609).** The assailant would have been positioned to the left of Norman and in the rear seat (R **1610).** Norman's head was turned toward the back seat, looking at the assailant (R **1610, 1651).** The first bullet would not have killed him immediately, but he would have become unconscious (R **1611).** The second bullet would have killed him immediately (R **1611).**

Genevieve was shot three times from behind (R **1599).** If she had been in the driver seat, the shooter would have been in the back seat slightly to the right (R **1599).** The first bullet entered the right side of the face and exited the lip. (R **1598).** The next bullet entered through the scalp (R **1598).** The last bullet entered one side of the neck and came out the other (R **1587, 1598).** She was also severely beaten on the back of the head with a hard, blunt object, similar to the butt of a **.32** caliber pistol **(R 1586-89).** The seven or eight blows would have been from the right side in short choppy blows, and the assailant right handed (R **1600, 1602).** She would have been conscious after

the first and second bullets, and through several of the blows (R 1600-01). She died as a result of a combination of the blunt trauma to the head which caused swelling of the brain and bleeding. The third bullet hastened the process (R 1601). If anyone had been seated between the victims, he would have been covered with blood and would have been struck with a bullet (R 1612-13). The bullet wounds were consistent with being inflicted with a .32 caliber automatic pistol (R 1615). The medical expert testified that all shots were fired inside the vehicle (R 1706-07).

Norman was lying on the dirt near the front of the car, and Genevieve was lying outside the driver door which was open (R 682, 687, 986). Blood consistent with Norman's was on the passenger side and blood consistent with Genevieve's blood was on the driver seat (R 2015-2028). When Huff was arrested, blood consistent with Genevieve's was on his pants and had soaked through to his underwear (R 2040-2102). Tire marks show that the car left the scene, made a turn in the sand, and drove away, running over the foot of Norman (R 690). At approximately 4:30 p.m. Huff was seen driving the car toward the crime scene (R 1557). The tire tracks show that the car returned to the crime scene (R 730, 781, 784).

At approximately 4:50 p.m., Huff went to the house of Francis Foster asking for help, rang the doorbell, and asked Foster to call the police (R 658). Huff asked for a drink of water and told Foster someone was killed, or being killed nearby (R 659). Huff told Foster two men ran him off the road, the men

had left, and he went to call the police (R **660**). After Foster returned from the crime scene, he told his son it didn't "look right" that two men ran them off the road, killed two people, and Huff just walked away (R **659-661**).

When Chief Lynum arrived at the scene, Huff told him he had been forced off the road and a man with a gun told him to drive to a wooded area (R **681**). Huff refused to go to the crime scene (R **684**). Lynum asked Officer Overly to read Huff his Miranda rights and put him in the back of the patrol car (R **681**). Huff gave no description of the man who jumped in the car (R **682**). Huff understood what he was saying and pointed out the area where the bodies were (R **683**). Lynum was present when Overly started reading Huff the Miranda rights, and Huff understood his rights (R **683**). Huff had no visible injuries, nor did he complain that he had been hit (R **684**). Lynum thought he remembered bloodstains on Huff's shirt on the left side (R **685**).

Sheriff Johnson, Sumter County, arrived and was advised Huff had been given his rights. He stuck his head in the patrol car door and asked Huff what happened. Huff told him "I shot them in the face", put his hands over his face, then later said "they shot them in the face" (R **1006, 1023**). He told Johnson two men in a dark green Ford forced him off the road and made him drive to the landfill, but did not give a description of the men (R **1006**). He later told the Sheriff there were four men (R **1006, 1026**). Huff told Mabry Williams his mother was driving when they were stopped on State Road **44**. Someone got in the car and knocked him unconscious and that is the last he remembers (R **1181-1182**).

An expert from the regional crime lab testified that the victims were killed with a .32 caliber army automatic pistol (R 2099-2102). The murder weapon was never found (R 766). A few months before the murders, Huff offered to let Paul Moore's daughter use his .32 caliber army automatic (R 2082). Huff never gave Paul the weapon, but said he had changed his mind. About a month before the murders, Huff asked Chief Lynum, Wildwood Police, for a gun permit (R 707-08).

Huff testified at the trial that on the day of the murders his parents picked him up at 3:00 p.m. and they went to Bergman Realty (R 2618-2620). When they left the realty office, he was driving (R 2623). He stopped to help two motorists in a green LTD Ford who appeared to be in trouble (R 2627). One of the motorists came over to Huff and stuck a gun through the window. The man told Huff to unlock the door, then got into the back seat (R 2628). Huff was told to drive down the highway, and the green LTD followed (R 2629). Huff drove around at the direction of the gunman, at one point coming within six blocks of the Wildwood Police Department (R 2631). Eventually, they turned into the dump area where the gunman asked for money (R 2634-35). According to Huff, his mother and father were both in the front seat with him (R 2635). Huff was hit on the head, and when he woke up he saw his mother's and father's bodies (R 2637).

Huff was indicted on two counts of first degree murder and convicted on both counts after a jury trial ending November 1, 1980. The jury recommended the death penalty on both counts, and the trial judge sentenced Huff to death on both counts. This

court reversed the conviction and remanded for a new trial because of prosecutorial misconduct. Huff v. State, 437 So.2d 1087 (Fla. 1983). A new trial from May 1 to June 1, 1984, resulted in a second conviction on both counts. Huff waived the right to an advisory sentencing jury recommendation; and the trial judge sentenced him to death on both counts.

This court affirmed both convictions of first degree murder and both sentences of death. Huff v. State, 495 So.2d 145 (Fla. 1986). On December 2, 1988, Huff filed a motion to vacate which was stricken by the circuit court judge because Julie Naylor, Huff's attorney, was not an attorney authorized to practice law in the State of Florida (M 9-15, 118). The motion was stricken as null and void without prejudice as to the defendant's right to bring any and all other collateral attacks in this cause to which he may be entitled (M 118). On March 14,

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[2] Huff raised nineteen issues on appeal: 1) trial court erred in restricting Huff's presentation of evidence; 2) trial court erred in denying motion for mistrial for prosecutor comment; 3) trial court erred in denying motion for mistrial after he commented on Huff's credibility; 4) trial court erred in denying Huff's motion to suppress statements; 5) trial court erred in allowing lay witnesses to give opinion testimony; 6) trial court erred in allowing evidence of crimes for which Huff was not charged; 7) trial court erred in denying motion for mistrial after prosecutor commented on credibility of witness; 8) trial court erred in denying motions for judgment of acquittal; 9) trial court erred in denying motion for mistrial for prejudicial cross-examination of Huff; 10) trial court erred in overruling objection to state introduction of evidence; 11) conduct by judge and prosecutor indicating that proceedings not to be taken seriously; 12) failure of state to maintain physical evidence; 13) trial court erred in limiting Huff's cross-examination of state witness; 14) trial court erred in admitting bloody clothes and gruesome photographs; 15) trial court erred in denying motion to dismiss indictment; 16) trial court erred in conducting portions of trial without Huff present; 17) cumulative error; 18) imposition of death penalty not warranted; 19) death penalty is unconstitutional.

1989, Huff filed a second motion to vacate and motion for rehearing (M 119-199; 208-219). The circuit court judge denied the motion for rehearing (M 220). The circuit court judge denied the second 3.850 motion to vacate without a hearing (M 221-228). Huff filed a motion for rehearing which was summarily denied (M 250-258). Huff appealed the denial of the motion to vacate on May 3, 1989 and filed his initial brief on January 12, 1990.

SUMMARY OF ARGUMENT

Point I, Parts I, II, III: The trial court did not err in striking the first motion to vacate because Huff's attorney was not admitted to practice law in the State of Florida. A foreign attorney is not automatically allowed to practice in Florida courts. A trial court has the discretion whether to admit an attorney *pro hac vice*. An application to appear before a court should be filed and granted before an attorney appears. The motion to appear *pro hac vice* was not timely filed. Larry Helm Spalding did not sign the motion to vacate and cannot be considered attorney of record. A defendant's *pro se* motion is a nullity when he is already represented by counsel.

Point I, Part IV: The trial court was correct in denying the 3.850 motion as untimely where the first motion was stricken as null and void and the second motion was filed after the two year period provided in Rule 3.850 had expired. The Office of Capital Collateral Representative is appointed when direct appellate proceedings are final and have a duty to take timely action. The direct appellate proceedings were final when the Supreme Court of Florida denied rehearing on October 27, 1986. Mandate should have issued within 15 days of the denial of rehearing.

Point II: The motion to vacate, files, and records conclusively show that Huff is not entitled to relief; therefore, the judge did not err in summarily denying the motion without a hearing. Points III, V, VIII, and the first part of XI were raised on appeal and are procedurally barred. Points IV, IX, and

the second part of XI should have been raised on direct appeal and are procedurally barred. The ineffective assistance of counsel claims, Points VI and VII, are disguised attempts to litigate issues raised or which should have been raised on appeal. Point I, and II involve procedural issues dealing with the denial of the **3.850** motion. Point **X** is not cognizable in a **3.850** motion.

Point 111: The issue whether Huff knowingly waived his Miranda rights was raised and decided on direct appeal and is procedurally barred. Even if the issue were cognizable in a post-conviction motion, it has no merit. Huff has failed to demonstrate deficient performance of counsel or prejudice, and raising the ineffectiveness of counsel issue is a disguised attempt to relitigate the issue.

Point IV: The issue whether Huff was advised he had the right to appointed counsel is procedurally barred since it should have been raised on direct appeal. In any case, the supplemental record and record show he was advised of this right. Even if he had not been advised of this right, Huff is not entitled to the benefit of a change in law.

Point V: The issue whether Huff invoked his right to silence is procedurally barred since it was raised and disposed of on direct appeal. Even if the issue were cognizable on collateral review, it has no merit. Huff did not invoke his right to silence where he answered "yes" he understood his rights, not "yes" he wanted to remain silent.

Point VI: Huff has failed to demonstrate deficient performance of counsel and that, but for the deficient performance of counsel, the outcome of the entire proceeding would have been different. The prior decision of this court shows the crime scene expert's testimony was irrelevant. Whether to object and what evidednce to present are tactical decisions which should not be second guessed in hindsight. The record shows that Huff was present at all critical stages. Raising the issues as ineffective assistance is an attempt to relitigate issues already raised on appeal.

Point VII: Counsel was not ineffective for failing to move for a continuance when Huff waived the jury's advisory sentence, where Huff knowingly and voluntarily waived the advisory sentence after advice from counsel and inquiries from the court and state attorney. This is a disguised attempt to relitigate an issue already decided on appeal.

Point VIII: Whether Huff was denied the right to confront Sheriff Johnson with alleged sexual improprieties, was raised on direct appeal and is procedurally barred. Even if it were cognizable in a post conviction motion, the issue has no merit where the impeachment evidence was irrelevant and collateral.

Point IX: The issue of prosecutorial misconduct was raised in five points on direct appeal, and the issue now raised in the motion to vacate should have also been raised. The issue is procedurally barred and in any case, without merit. The prosecutor did not refer to Huff's right to remain silent when he asked an investigator whether Huff asked about his parents and when Huff was asked to take a gun residue test.

Point X: Whether the Supreme Court of Florida erred in striking a mitigating circumstance is not cognizable in a 3.850 motion addressed to the circuit court.

Point XI: The two issues addressed in the "catch-all" argument were either raised, or should have been raised, on direct appeal and are procedurally barred. The issues are not developed, and the motion is insufficient on its face.

ARGUMENT

POINT I

I, 11, 111. THE TRIAL COURT PROPERLY STRUCK THE MOTION TO VACATE BECAUSE IT WAS SIGNED BY A FOREIGN ATTORNEY

Huff argues that the trial court erred in striking his motion to vacate judgment on the basis it was signed by Julie Naylor because not only should she automatically have been allowed to represent Huff *pro hac vice,* but also because Huff could have filed the motion ***pro se*** and because Larry Helm Spalding was Huff's Florida counsel.

Only Julie Naylor signed the motion to vacate filed December 2, 1988 (M89). Huff argues that because Mr. Spalding signed the motion to vacate, the motion was valid. Mr. Spalding's name was listed on the motion, but he did not sign it (M 89). What Mr. Spalding did sign was a motion to withdraw which was filed contemporaneously with the motion to vacate (M 100, 111). However, the only attorney who signed the actual motion to vacate was Ms. Naylor. Mr. Spalding, in any event, has declared his role to be purely administrative to "get money and take the heat" and he does not practice law. See Florida, The Orlando Sentinel Sunday Magazine, p. 8, April 23, 1989. (App. A).

Since Huff was represented by CCR, who is appointed when state appellate proceedings are final, he was not entitled to file a *pro se* motion, and any such motion would be treated as a nullity and stricken. §27.702 Fla. Stat.; Smith v. State, 444 So.2d 542 (Fla. 1st DCA 1984); Sheppard v. State 391 So.2d 346 (Fla. 5th DCA 1980).

The statute and appellate rule cited by Huff do not require a different result. Rule 9.440, Fla.R.App.P. provides that an attorney of another jurisdiction may be permitted to appear in a proceeding if a motion to appear has been granted. Julie Naylor never asked the court for permission to file the motion to vacate and appear as counsel until the date the motion was filed. Section 454.021 Fla. Stat. (1987) provides that admission to practice law is a judicial function. These rules do not require a judge to automatically recognize an attorney who files a motion to appear *pro hac vice*. In fact, the right of an attorney of another state to practice is permissive and subject to the sound discretion of the court to which he applies. Buntrock v. Buntrock, 419 So.2d 402, 403 (Fla. 4th DCA 1982); Parker v. Parker, 97 So. 2d 136, 137 (Fla. 3rd DCA 1957). Even though Ms. Naylor now has been granted the right by the State of Florida to file and litigate a motion to vacate judgment and sentence, this was not done in accordance with the procedural rules and in a timely fashion. When *pro hac vice* admission is sought, filing should be undertaken early enough within the two year rule of Florida Rule of Criminal Procedure 3.850 *so* that refiling can be accomplished in the event that the court exercises its rightful discretion and refuses to grant such status.

IV. THE TRIAL COURT PROPERLY DENIED THE SECOND MOTION TO VACATE BECAUSE IT WAS UNTIMELY.

Huff argues that the court erred in denying the motion to vacate filed December 2, 1988, on the basis of untimeliness. Actually, the trial court struck the motion on the basis that

Julie Naylor was not a Florida attorney (M 118). The motion which was denied for untimeliness was the one refiled on March 14, 1989 (M 221).

Huff argues that because the Florida Supreme Court mandate was issued December 2, 1986, the December 2, 1988 motion to vacate was timely pursuant to Fla. R. Crim. P. 3.850 which requires a motion to vacate sentence to be filed within two years of the date the judgment and sentence become final. First, even if the December 2, 1988, date were the appropriate final date to file the motion, the motion which was filed on December 2, 1988, was null and void and a proper motion was not filed until March 14, 1989.

Second, as the trial court observed, rehearing was denied on October 27, 1986. See, Huff v. State, 495 So.2d 145 (Fla. 1986). A judgment and sentence "becomes final" for purposes of Rule 3.850 when direct review proceedings have concluded and jurisdiction to entertain a motion for post-conviction relief returns to the sentencing court. Johnson v. State, 508 So.2d 779 (Fla. 3rd DCA 1987). The trial court had jurisdiction when the motion for rehearing was denied because the appeal was no longer pending. See Bryant v. State, 442 So.2d 309 (Fla. 5th DCA 1983). In Burr v. State, 518 So.2d 903 (Fla. 1987), this court held that the trial court erred in finding a judgment and sentence was final when the Florida Supreme Court issued the mandate. Rather, the time should not begin to run until the writ of certiorari filed with the United States Supreme Court was finally determined. See also Tafero v. State, 524 So.2d 987 (Fla. 1987).

In the present case, Huff did not file for certiorari; however, if he had, the date the Court has set for the time for filing a petition for certiorari is the date rehearing is denied. Rule 20.4, Supreme Court Rules. According to Rule 20.4, a judgment is final when the judgment sought to be reviewed is rendered or when rehearing is denied, not from the date of the issuance of the mandate. Rule 11.3, Supreme Court Rules, similarly provides that the time for filing a notice of appeal runs from the date the judgment sought to be reviewed is rendered or the date rehearing is denied, and not from the date of the issuance of the mandate. The trial court was correct in recognizing the rehearing denial date as the significant starting date from which the two years runs. The final date for filing the motion was therefore October 27, 1988.

The state acknowledges that the defendant may have been advised his motion date ran on December 2, 1988, and that CCR may have relied on that representation. However, CCR is under a duty to investigate and take necessary action in a case. 827.702 Fla. Stat. (1987). Florida Rule of Appellate Procedure 9.340(b) provides that the mandate shall be issued within 15 days of the rendition of the order denying the motion for rehearing. The mandate should have been issued on or about November 11, 1989. CCR should have been aware this was the penultimate date to begin the two year period to file a 3.850 motion.

Under any of the above theories, the motion to vacate was untimely. In any case, Huff was not prejudiced by the summary dismissal since all issues raised in the motion are either

procedurally barred or without merit, and the trial court should summarily deny relief in this situation.

POINT II

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING HUFF'S MOTION TO VACATE WITHOUT *AN* EVIDENTIARY HEARING OR STATE RESPONSE BECAUSE THE MOTION, FILES AND RECORDS SHOW CONCLUSIVELY THAT HUFF IS ENTITLED TO NO RELIEF.

Huff argues that the trial court erred by summarily denying his motion to vacate without an evidentiary hearing because his claims are "of the type classically recognized as issues warranting full and fair Rule **3.850** evidentiary resolution", i.e. ineffective assistance of counsel, inadequate pre-trial mental health evaluation, and "numerous other evidentiary claims" (M14). As discussed herein, the record shows that Huff's classic issues are without merit. Rule **3.850** provides that when the motion, files and records conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. Since the records conclusively show that Huff is entitled to no relief, Rule **3.850** exempts the court from ordering the state attorney to file an answer. Failure of a trial judge to attach a copy of the record to his order in a capital case denying an evidentiary hearing is not reversible error. Lightbourne v. State, 471 So.2d 27 (Fla. **1985).**

Almost every issue Huff now raises either was, or should have been, raised on direct appeal. The others have no merit. Points 111, V, VIII, and the first part of XI were raised on appeal and are procedurally barred. Points IV, IX, and the

second part of XI should have been raised on direct appeal and are procedurally barred. The ineffective assistance of counsel claims, Points VI and VII, are disguised attempts to litigate issues raised or which should have been raised on appeal. Points I and II involve procedural issues dealing with the denial of the **3.850** motion. Point X is not cognizable in a **3.850** motion. The ineffective assistance of counsel claims are disguised attempts to litigate issues which were raised or should have been raised on direct appeal. In McCrae v. State, **437** So.2d **1388, 1390** (Fla. **1983),** this court explained:

> The purpose of a Rule **3.850** motion is to provide a means of inquiry into the alleged constitutional infirmity of a judgment or sentence, not to review ordinary trial errors cognizable by means of a direct appeal. . . The motion procedure is neither a second appeal nor a substitute for appeal. Matters which were raised on appeal and decided adversely to the movant are not cognizable by motion under Rule **3.850**. . . Furthermore, any matters which could have been presented on appeal are similarly held to be foreclosed from consideration by motion under the Rule. . . Therefore, a Rule **3.850** motion based upon grounds which either were or could have been raised as issues on appeal may be summarily denied. . . (Citations omitted).

The trial court properly denied the motion without an evidentiary hearing. See Stano v. State, **520** So.2d **278** (Fla. **1988);** Agan **v.** State, **503** So.2d **1254,** 1256 (Fla. **1987);** Johnson **v.** Wainwright, **436** So.2d 207 (Fla. **1985).**

POINT III

THE ISSUE WHETHER HUFF KNOWINGLY AND INTELLIGENTLY WAIVED HIS MIRANDA RIGHTS

IS PROCEDURALLY BARRED BECAUSE IT WAS RAISED ON DIRECT APPEAL; THE ISSUE WHETHER COUNSEL EFFECTIVELY LITIGATED THE ISSUE IS NOT PROPERLY RAISED, AND IS WITHOUT MERIT.

Hu f argues that because he was hysterical, h did not understand the Miranda[3] rights and did not knowingly waive his rights. This argument was raised on direct appeal in point IV and disposed of by this court in Huff v. State, **495** So.2d **145, 148-149** (Fla. **1986)** as follows:

> Appellant next claims as error the trial court's failure to suppress an inculpatory statement made by the appellant. Once the police arrived on the murder scene, appellant was given his Miranda warnings and was placed in the back of a Wildwood police car by Officer Overly. Shortly thereafter, Sheriff Johnson arrived on the scene, put his head in the police car and asked what had happened. Appellant responded: "I shot them in the face". Johnson testified that the appellant put his hands over his face and would not respond to Johnson's question of whom he had shot. When the appellant spoke again he stated, "They shot them in the face."
> In Huff I, the trial court determined that the Miranda warnings were adequate and determined that the statement was admissible. Due to the unavailability of Overly at trial, however, the statement was not used in Huff I. Appellant's claim sub judice is that the trial judge erroneously relied on the "law of the case" from Huff I to determine the admissibility of the statement. Our review of the record reveals that this is simply not *so.* A new suppression hearing was held and Overly was questioned extensively by counsel concerning the adequacy of the Miranda warnings. Overly testified that

[3] Miranda v. Arizona, **384** U.S. **436 (1966).**

> he read appellant the warnings from the standard form used by the Wildwood police which was subsequently introduced into evidence at trial. Overly had originally testified at the ~~Huff I~~ suppression hearing that appellant understood his rights. His testimony at the instant suppression hearing was essentially that, with the passage of four years since the first trial, he was not as sure that appellant fully understood the warnings. Although Overly's most recent testimony is somewhat ambiguous, the inferences drawn from his testimony were resolved by the trial court in favor of the state, and we will not substitute our judgment for that of the trial court. Ross v. State, 386 So.2d 1191, 1195 (Fla. 1980). In ruling the statement admissible following the suppression hearing, the trial judge held: "The state has shown by preponderance of the evidence that the Miranda warning was adequately given. I feel it is law of the case and res judicata and will not disturb the original ruling." The trial court's statement on law of the case simply was his way of stating that no new evidence had been presented in this suppression hearing that would require overturning the Huff I holding of this issue. This was not error.

Huff is procedurally barred from raising this issue on post-conviction motion where it was previously raised and disposed of on direct appeal. Cave v. State, 529 So.2d 293 (Fla. 1988); Woods v. State, 531 So.2d 79, 81 (Fla. 1988). Smith v. Dugger, 15 F.L.W. S81 (Fla. Feb. 15, 1990); Correll v. Dugger, 15 F.L.W. S147 (Fla. March 16, 1990).

Furthermore, the claim is without merit *so* that even if it wasn't procedurally barred Huff could be granted no relief. Before Overly testified, there was a proffer of the testimony, during which Overly testified that Huff was read all the rights

from a card and understood his rights (R 791-858). The officer thought that Huff may have been perplexed about why the rights were being read to him, but he understood the rights at the time they were given (R 798). Overly said that over the years he had reflected on the matter and could not say for sure Huff understood his rights, but his testimony from 1980 was true and had stated in his deposition eight days after the killings he felt that Huff understood his rights (R 805).

Overly was no longer with the police force (R 804). In fact, the state requested he be called as a court witness since he had been fired from the police force and the state attorney's office had issued a capias for his arrest (R 908). The court declared Overly a court witness since he was a hostile witness to the state (R 910). Overly was later called by the defense and testified favorably for Huff (R 2211-2227). The state asked to be allowed to impeach Overly with evidence that he left the Miami Police Department because of excessive brutality charges, was fired by Chief Lynum for conduct unbecoming an officer and use of unnecessary force, didn't like policemen, attorneys or judges, had a close relationship to Huff's present and prior attorneys, was previously held in contempt by the prosecutor, and refused to appear at Huff's first trial (R 2234-2238). At the end of his testimony, Overly said he never wanted to have anything to do with the criminal justice system and only wanted to get out of the courtroom (R 2364). This court was correct in observing Overly's attitude had changed over the years. Huff v. State, 495 So.2d 145, 148 (Fla. 1986).

Huff also argues that counsel was ineffective in not seeking mental health assistance or presenting evidence of Huff's emotional state at the time he was given his Miranda rights. This argument is improper as an attack based on the use of a different argument to relitigate the same issue which was decided on direct appeal. Quince v. State, 477 So.2d 535, 536 (Fla. 1985). It is improper to raise a claim under the guise of ineffective assistance of counsel where it is procedurally barred otherwise. Clark v. State, 460 So.2d 886 (Fla. 1984). There was no evidence whatsoever that Huff was psychologically disturbed, and an after-the-fact evaluation regarding his state of mind at the time of the statement would serve no purpose. Dr. Krop examined Huff eight years after the trial. This examination has no relevance to Huff's state of mind eight years prior. See Adams v. State, 456 So.2d 888 (Fla. 1984). In fact, since Huff testified at trial (R 2613-2839) his credibility was at issue and any psychological problems could have only damaged his credibility. This was a reasonable tactical decision. See Jones v. State, 528 So.2d 1171 (Fla. 1988). Not only has Huff failed to show a need for a psychological exam, but even if one had been conducted, his condition at the time of trial was irrelevant to his condition at the time of the offense. Counsel is not ineffective for not pursuing inadmissible testimony. Combs v. State, 525 So.2d 853, 855 (Fla. 1988). Even if defense counsel had some reason to question Huff's sanity, Huff has not shown the verdict would have been any different absent the error. Bertolotti v. State, 534 So.2d 386 (Fla. 1988). Recently the

United State Supreme Court has held counsel was not ineffective in failing to present abnormal EEG results at the penalty phase where the EEG was done years before, nor did the trial court err in denying an EEG exam three years after trial since the exam could not establish the defendant's mental condition at the time of trial. Harris v. Pulley, 46 Crim. L. Rptr. 3127 (1990).

Huff has not shown counsel was deficient and committed errors so serious as to undermine confidence in the outcome of the trial. Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, a decision not to investigate "must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments." 466 U.S. at 691. A court must endeavor to eliminate the "distorting effects of hindsight". Blanco v Wainwright, 507 So.2d 1377, 1381 (Fla. 1987). See also Felde v. Butler, 817 F.2d 281 (5th Cir. 1987) (counsel not ineffective for failing to request competency hearing when strategy was "acquittal or death").

POINT IV

WHETHER OFFICER OVERLY FAILED TO ADVISE HUFF HE HAD THE RIGHT TO APPOINTED COUNSEL CANNOT BE ESTABLISHED, AND THIS ISSUE IS PROCEDURALLY BARRED

Huff argues that since Overly did not advise Huff he had the right to appointed counsel, any statement made was not admissible. The supplemental record on appeal shows that the Miranda sheet used by the Wildwood Public Defender at the time included the advice that "if you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if

you wish one." (Supp. R. filed 2-17-90). As Overly testified he could not remember advising Huff specifically of this right after so long, but that he had read from the sheet provided by the Wildwood Police Department (R 900-912). The sheet was admitted into evidence during the testimony of Chief Lynum (R 967-975).

This issue should have been raised on direct appeal and is procedurally barred. Smith v. Dugger, 15 F.L.W. S81 (Fla. Feb. 15, 1990); Correll v. Dugger, 15 F.L.W. S147 (Fla. March 16, 1990). Even if Huff had not been advised he had the right to appointed counsel, he would not have exercised that right. Huff was represented by private counsel throughout the trial proceedings, and sent the public defender away (R 825).

And even if Huff had not been advised of his right to appointed counsel, he is not entitled to the benefit of a change in law. At the time of the prior proceedings, the prevailing rule was that of Alvord v. State, 322 So.2d 533 (Fla. 1975), which held it was not reversible error to fail to advise a defendant he had the right to appointed counsel if he was indigent. Huff argues that Caso v. State, 524 So.2d 422 (Fla. 1988) is a fundamental change in law, but cites no authority for this position. In State v. Glenn, 15 FLW S69 (Fla. February 15, 1990), this court recently addressed whether a change in law requires retroactive application. This court stated that "only major constitutional changes which constitute a development of fundamental significance are cognizable under a motion for post conviction relief", even in death cases. This court also stated that whether a change in law is a major constitutional change

involves balancing decisional finality against fairness. Finality should only be abridged when fairness and uniformity in adjudication is a compelling objective. This court went on to say that because of the strong concern for finality, a finding of change in law requiring application is rare. This court declined to apply retroactivity in Haliburton v. State, 514 So.2d 1088 (Fla. 1987), involving waiver of right to counsel under Miranda, and in State v. Wright, 300 So.2d 674 (Fla. 1974), involving failure to give Miranda warnings. In Glenn, the court concluded:

> We must emphasize that the policy interests of decisional finality weigh heavily in our decision. At some point in time cases must come to an end. Granting collateral relief to Glenn and others similarly situated would have a strong impact upon the administration of justice. Courts would be forced to reexamine previously final and fully adjudicated cases. Moreover, courts would be faced in many cases with the problem of making difficult and time-consuming factual determinations based on stale records. We believe that a court's time and energy would be better spent in handling its current caseload than in reviewing cases which were final and proper under the law as it existed at the time of trial and any direct appeal.

Green, supra at 569.

The United States Supreme Court has recently issued two opinions which preclude raising a change in law in collateral proceedings. Butler v. McKellar, 4 FLW Fed. S161, Case No. 88-6677 (March 5, 1990) (Arizona v. Roberson, which held that the Fifth Amendment bars police-initated interrogation following a suspect's request for counsel, is not a "new rule"); Saffle v.

Parks, 4 FLW Fed. S134, Case No. 88-1264 (March 5, 1990) (jury instruction in penalty phase of capital trial telling jury to avoid any influence of sympathy is not "new rule").

As stated in Caso v. State, 524 So.2d 422 (Fla. 1988), even if there were error in advising Huff of his rights, the erroneous admission of statements obtained is subject to the harmless error analysis. In Caso, the confession was the only evidence connecting Caso to the murders. In Huff's case, there was ample evidence linking him to the murders aside from the statement he made. The statement was not introduced in his first trial due to the unavailability of Overly, and he was convicted. Error, if any, did not affect the jury verdict, and was harmless in light of the evidence that Huff had been seen in the back seat of the car with his parents an hour and a half before the murder, the killer had to be positioned in the back seat, the car had been moved after the murder, Huff was driving the car alone after the murder, was familiar with the dump area, owned the same type gun used to kill the victims, had blood on his shorts, rubbed his hands after learning about the gun residue test, and gave conflicting and far-fetched accounts of the events. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). See also, Kwallek v. Engle, 46 Crim. L. Rptr. 911 (1990). As observed by this court in Huff v. State, 495 So.2d 145, 150 (Fla. 1986), all the evidence adduced at trial, with the exception of Huff's testimony, pointed to his guilt and the jury could reasonably believe that his story was untruthful and unreasonable.

POINT V

WHETHER HUFF EXERCISED THE RIGHT TO REMAIN SILENT IS PROCEDURALLY BARRED AND IS WITHOUT MERIT

Huff argues that he invoked his right to silence and all questioning should have ceased. This issue was raised on direct appeal in point IV and is procedurally barred. Smith v. State, **453** So.2d **388** (Fla. **1984).** McRae v. State, **437** So.2d **1388** (Fla. **1983).** This issue was fully briefed on direct appeal, and this court found that the inferences drawn from the testimony were resolved by the trial court whose findings would not be disturbed. Huff v. State, **495** So.2d **1087** (Fla. **1986).** The trial judge heard testimony on this issue and ruled that he agreed with the state's interpretation of whether Huff exercised his right to remain silent (R **880).** The state's position was that there was no indication that Huff had exercised his right to remain silent and any speculative reference to this right was ambiguous (R **878).** Furthermore, the references to the exercise of this right are from testimony from the first trial record, which is not properly before this court. As the state argued at the second trial, Huff answered "yes" that he understood the right to remain silent, not "yes" he wanted to remain silent.

POINT VI

HUFF WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL; THIS ISSUE IS A DISGUISED ATTEMPT TO RELITIGATE ISSUES WHICH HAVE BEEN RAISED ON DIRECT APPEAL AND ARE PROCEDURALLY BARRED, AND IS WITHOUT MERIT

Huff next raises ineffective assistance of counsel in eight instances. The first allegation is that counsel failed to adequately brief defense witness White so that he could testify regarding contamination of the crime scene. This issue was raised on its merits in the initial brief on direct appeal in point I. This court stated that its review of the record indicates that, at best, the testimony would have been a general critique of proper police practice in processing crime scenes, a collateral and irrelevant issue. Huff v. State, 495 So.2d 145, 148 (Fla. 1986). The trial court excluded the testimony not only because the witness was incompetent to testify, but the testimony was irrelevant and immaterial (R 2478-2479). Even if the expert had been adequately briefed on the crime scene issue, his testimony would have been excluded as irrelevant and collateral. Huff now attempts to raise this issue under the guise of ineffective assistance of counsel, which is improper. Clark v. State, 460 So.2d 886 (Fla. 1984).

The second allegation of ineffective assistance is counsel's failure to object at critical periods of the trial, for instance, when Huff was absent from the jury's view of the crime scene and discussions. This point was raised on the merits on direct appeal in point XVI. This court held in Huff v. State, 495 So.2d 145, 153 (Fla. 1986), that the arguments not addressed by this court were without merit. Again, Huff attempts to raise a meritless issue under the guise of ineffective assistance. Huff was present at the jury view of the scene, although he was in a separate vehicle (R 597). In another alleged situation, the

discussion regarding physical evidence was stopped and Huff brought to the courtroom (R **1618**). Defense counsel stated that because of security reasons, he would rather not have Huff in chambers, but that he would not stipulate to anything without discussing it with Huff (R **2064-2065**). None of these instances were "critical stages", and Huff was either present or consulted as to what was happening.

The third allegation of ineffective assistance was that counsel failed to object when the judge was absent on one occasion. This issue was raised in point XVII on direct appeal and found to be without merit. Huff now attempts to raise the issue under the guise of ineffective assistance of counsel. The judge was absent when affidavits from courtroom observers were taken. The statements were attached to a motion for mistrial which was presented to the judge (R **2292-2294**). There was no reason for the judge to be there, and there is no allegation that anything improper occurred that would have required a judge to be present. Taking affidavits from spectators is not part of a trial over which a judge must preside. Whether to object is a matter of trial tactics which is left to the discretion of counsel. Muhammad v. State, **426** So.2d **533, 538** (Fla. **1982**). Under the performance prong of Strickland v. Washington, **466** U.S. **668, 689** (1984), there is a "strong presumption that counsel's actions are tactical and strategic decisions and as such are reasonable." Huff has failed to overcome this presumption.

The fourth allegation of ineffective assistance was that counsel failed to raise inconsistencies in witnesses' sworn

testimony. The voluminous record shows defense counsel zealously represented Huff, including extensive cross-examination and closing argument which lasted over one hour.

The fifth allegation is that counsel failed to proffer Huff's testimony about why he was on his way to see his attorney at the time of the offense. This issue was raised on its merits on direct appeal in Point IX and is procedurally barred as an attempt to relitigate the issue as ineffective assistance.. The record shows that Huff was asserting the attorney/client privilege and did not want to answer the question (R 2687-2688). The reply brief on direct appeal establishes that defense counsel preserved this issue appropriately.

The sixth allegation involves counsel's failure to object to surprise testimony that Huff had asked Chief Lynum for a gun permit. Huff also complains that Counsel failed to request a hearing under Richardson v. State, 246 So.2d 771 (Fla. 1971). The record does not indicate there was any surprise involved, nor has Huff alleged a discovery violation by the state which would require a Richardson hearing. Counsel cannot be expected to request a Richardson hearing absent some discovery violation. When Chief Lynum testified, defense counsel did not appear surprised. In fact the record shows that counsel objected to various aspects of Lynum's testimony, but the gun permit did not come as a surprise (R 706-708).

The seventh alleged error of counsel was his failure to object that Miranda warnings were not administered prior to Huff being examined by Dr. Rojas. The record shows that Huff was

taken to the Project Health Medical Clinic three days after the murders (R **2861).** He had complained that he was hit in the head (R **2861).** He was taken to the doctor for the purpose of a medical exam, not for the purpose of custodial interrogation. Huff has pointed to no statement he made which required a Miranda warning, nor the introduction of any evidence which would have triggered a Miranda objection.

The eighth and final allegation of ineffective assistance involved failure of counsel to present surrebuttal testimony of a defense expert in response to Dr. Rojas' testimony. Huff concedes that he was not precluded from presenting surrebuttal testimony, but does not indicate that such testimony even exists. The trial was conducted four years after the murders, and was Huff's second trial. Counsel cannot be expected to produce expert testimony about a bump on Huff's head which existed four years previous. Any exam four years after the incident would hardly be conclusive of Huff's condition at the time. Dr. Krop recently examined Huff and found no evidence of neurophysiological disorder or organicity (initial brief at 52). The availability of any contradictory medical evidence is speculative. Defense counsel did present the testimony of Father Paddock that he had seen a bump on Huff's head the next day (R **2414).** The evidence available was presented. Furthermore, Dr. Rojas' testimony was cumulative to the testimony of Harris Rabon (R **1129, 1162),** Mabry Williams **(R 1347),** Bud Stokes (R **1730),** and Dr. Chatham (R **2895).**

The test for determining whether counsel has been ineffective was established in Strickland v. Washington, 466 U.S. 668 (1984), as set forth in Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986):

> A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. First, a claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency must further be demonstrated to have so affected the fairness and the reliability of the proceeding that confidence in the outcome is undermined.

Huff has failed to show that except for deficiency representation, the outcome would be different. A defendant is "not entitled to perfect or error-free counsel, only to reasonable effective counsel". Waterhouse v. State, 522 So.2d 341, 343 (Fla. 1988). The trial lasted from May 1 to June 2, 1984, and the instances Huff isolates are insignificant. Huff argues that he is entitled to an evidentiary hearing, but he has not demonstrated that there was a deficiency on the part of counsel which was detrimental to his cause. Kennedy v. State, 547 So.2d 912 (Fla. 1989).

POINT VII

HUFF WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL, AND THIS ISSUE IS A DISGUISED ATTEMPT TO RELITIGATE ISSUES WHICH HAVE BEEN RAISED ON DIRECT APPEAL, ARE PROCEDURALLY BARRED, AND ARE WITHOUT MERIT.

Huff alleges counsel was ineffective in failing to move for a continuance of the penalty phase after Huff personally waived all error in the sentencing phase and stated on the record he wanted to accept death sentences on both counts because everyone had "been through enough" (R **3094).** Huff stated that he had four years to think about it (R **3095).** The court gave defense counsel the opportunity to discuss the matter with Huff (R **3095).** The next morning, Huff executed a written waiver over counsel's objection (R **3096,** 3101). The court asked Huff about his education, mental or emotional disability, or influence of drugs (R **3098).** Huff also indicated that he was waiving any appellate matters that would relate to sentencing, and that his attorneys had fully and completely advised him of the consequences of the waiver (R **3099).** The state attorney also questioned Huff (R **3099-3101).** The issue whether Huff could waive the advisory jury recommendaiton was addressed on direct appeal in point XVIII and decided by this court. Huff v. State, **495** So.2d **145, 150** (Fla. **1986).** Huff now attempts to raise this issue as ineffective assistance when the record shows counsel advised him against the waiver.

Huff also argues that counsel could have presented evidence in mitigation; however, Huff waived the right to present mitigating evidence against counsels' advice. He concedes that the accused has the ultimate decision-making authority. (Initial Brief at **49).** Counsel is not ineffective for failing to present evidence of mental impairment at sentencing when defendant insists on alibi defense and evidence of insanity or impairment

could undercut this defense. Lowenfield v. Phelps, 817 F.2d 285 (5th Cir. 1987). Huff cannot claim ineffective assistance where he created the situation. See Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985); Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). Huff does not allege any specific mitigating evidence that could have been presented, and Dr. Krop's report shows there was no serious emotional disorder which could develop into a mitigating circumstance under Section 921.141(6)(b)(e) or (f). The claim presented here is similar to the claim in Strickland, which was rejected by the United States Supreme Court. The Court noted that the evidence would not have sufficiently altered the sentencing profile and, because of he aggravating factors, there was no reasonable probability that the omitted evidence would have changed the conclusion. See also, Harris v. State, 528 So.2d 361 (Fla. 1988).

Huff also argues that defense counsel failed to present evidence of "no prior criminal activity'' in mitigation. After Huff waived the jury advisory recommendation, the state requested the court to take judicial notice of the file from the first trial (R 3097). The court took judicial notice of the earlier proceeding, including the sentencing phase (R 3097). Huff expressly waived any appellate matters that would relate to the second phase (R 3099). Huff said that he understood he was waiving the right to present mitigating circumstances (R 3099). He requested to be sentenced to death and said counsel thoroughly advised him he could be electrocuted (R 3100, 3105). Huff did not want any witness to testify (R 3101). Huff also waived a

pre-sentence investigation (R 3106). The court then took judicial notice of the file from the first trial and sentenced Huff to death (R 3107-3112). One of the mitigating factors found was no significant history of prior criminal activity (R 3110). Under the circumstances, defense counsel cannot be faulted for failing to present evidence of no prior criminal history to the trial court when the trial court had already stated he would take judicial notice of the first trial in which no prior criminal history was a mitigating factor. The trial judge found this circumstance applied, *so* defense counsel's performance was not deficient in any way. There is no way he could know this factor would be stricken in Huff v. State, 495 So.2d 145, 152 (Fla. 1986). Likewise, counsel cannot be faulted for failing to present mitigation when Huff waived the presentation of mitigation and appellate review thereon, and requested the death penalty. See Eutzy v. State, 536 So.2d 1014 (Fla. 1988); Henderson v. State, 522 So.2d 835 (Fla. 1988).

POINT VIII

HUFF WAS NOT DENIED THE RIGHT TO CONFRONT SHERIFF JOHNSON REGARDING SEXUAL IMPROPRIETIES WHERE THIS ISSUE WAS IRRELEVANT AND COLLATERAL, AND IS PROCEDURALLY BARRED

Huff next alleges that he was denied his right to confront Sheriff Johnson with impeachment regarding sexual improprieties. This issue was raised on direct appeal in point XIII and found to be without merit in Huff v. State, 495 So.2d 145 (Fla. 1986). This issue is procedurally barred. Smith v. Dugger; Correll v. Dugger, supra.

This issue is without merit. Not only was the testimony collateral, but also the attempt to impeach credibility on an investigation which had concluded four months prior to the murders was improper. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981. Johnson's sexual misconduct is not relevant to any motive for testifying, and Huff was attempting to make a feature of unfounded allegations.

The trial court has broad discretion in the admission of evidence. Welty v. State, 402 So.2d 1159 (Fla. 1981); Demps v. State, 395 So.2d 501 (Fla. 1981). Unless an abuse of discretion can be shown, its ruling will not be disturbed. Hardwick v. State, 521 So.2d 1071 (Fla. 1988). Huff was afforded ample opportunity to cross-examine each witness. He is not entitled to unlimited cross-examination in whatever way and to whatever extent the defense might wish. Kentucky v. Stincer, 482 U.S. 730 (1987), quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985). In Steinhorst v. State, 412 So.2d 332 (Fla. 1982), this court recognized that an accused has a constitutional right to full and fair cross-examination. However, that right is not unlimited. Questions on cross-examination must be related to credibility, or to matters brought out on direct examination. Steinhorst at 337.

Even assuming for the sake of argument that this ruling was error, it is harmless at best. In Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986), the Court held:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strenath of the prosecution's case. Cf. Harrington, 395-U.S. at 254, 89 S.Ct., at 1728; Schneble v. Florida, 405 U.S., at 432, 92 S. Ct., at 1059.

In the present case, none of the testimony excluded was relevant, the allegations of sexual impropriety were unfounded, defense counsel was allowed liberal cross-examination, and the points he wished to elicit were only designed to embarrass the witness. Error, if any, was harmless beyond and to the exclusion of any reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Huff has not demonstrated the trial court abused his discretion in excluding the evidence. Smith v. State, 404 So.2d 167 (Fla. 1st DCA 1981).

POINT IX

> THERE WAS NO PROSECUTORIAL MISCONDUCT OR COMMENT ON HUFF'S RIGHT TO REMAIN SILENT, AND THIS ISSUE IS PROCEDURALLY BARRED.

Huff alleges prosecutorial misconduct regarding two occasions in which the prosecutor supposedly referred to Huff's right to remain silent. The first instance was a question to

Investigator Mabry Williams whether Huff mentioned his parents during a conversation about what had happened. Prosecutorial misconduct was raised in points 11, VII, IX, XI, XVII ono appeal. This issue could have been raised on direct appeal, and is procedurally barred. Smith v. Duqqer, 15 FLW S81, 83, n.2 (FLa. Feb. 15, 1990); Mikenas v. State, 460 So.2d 359 (Fla. 1984).

This argument is without merit. The incident occurred during the questioning of an investigator when the prosecutor asked if Huff had asked about the condition of his parents. During cross examination by defense counsel, the investigator had been asked about conversations with Huff regarding descriptions of the persons who allegedly killed his parents, that his mother had been driving the car, and that Huff was hysterical at the crime scene (R 1269-1274). The investigator was also asked about Huff telling him he had been hit it the head (R 1276). On redirect, the questioning involved what Huff had said about being hit in the head, whether he asked to see a doctor, or complain about his head hurting, what Huff had said to Sheriff Johnson, Huff's description of the assailants, and how Huff acted (R 1347-1350). Officer Overly had previously been asked by defense counsel whether Huff was concerned about his parents, and the door was open (R 918).

The case cited by Huff, Peterson v. State, 405 So.2d 997 (Fla. 3d DCA 1981), is inapplicable. In Peterson, the arresting officer testified that Peterson said he would answer some questions, but would stop when he didn't want to answer any more. The officer also said that Peterson made a partial explanation

about gloves he was wearing, but would not explain the time of day. The court held that the first statement was an improper reference to Peterson's assertion of the right to decline questioning, and the second statement exacerbated the effect of the first statement and an improper reference to the exercise of the privilege to decline to answer further questions. In the present case, Huff did not exercise the right to silence nor decline to answer any question. Rather, the question to the investigator was whether he had ever mentioned his parents condition, not whether he declined to answer questions regarding their condition. Huff never refused to answer any question.

Only those comments which are "fairly susceptible" of being interpreted as a comment on silence will be treated as such. McKay v. State, 504 So.2d 1280 (Fla. 1st DCA 1986). Huff's failure to ask about his parents was not susceptible of interpretation that Huff had chosen to exercise his right to silence, but was an omission in what he had told the officers. As in Watson v. State, 504 So.2d 1267 (Fla. 1st DCA 1986), the fact Huff had not inquired about his parents could not be construed as a comment on his right to silence where he had not invoked that right and had been talking with the officer.

The second instance was that Huff refused to take a gun residue test. This issue was specifically addressed in point XVII on appeal, and is procedurally barred. Furthermore, whether Huff refused to take a residue test is not a statement within the province of the Fifth Amendment. Schmerber v. California, 384 U.S. 757, 765, 86 S. Ct. 1826 (1966). Evidence of a gun residue

test is admissible in a criminal trial. Mills v. State, 476 So.2d 172 (Fla. 1985). Refusal to submit to the gunshot residue test is evidence of guilt and is admissible. Proffitt v. State, 315 So.2d 461 (Fla. 1975); State v. Esperti, 220 So.2d 416 (Fla. 2d DCA 1969); See also, South Dakota v. Neville, 459 U.S. 553, 103 S. Ct. 916, 74 L.Ed.2d 748 (1983).

POINT X

THE ISSUE WHETHER THIS COURT ERRED IS NOT COGNIZABLE IN A 3.850 MOTION AND IS WITHOUT MERIT.

Huff next argues that this court erred in striking the one mitigating circumstance in Huff v. State, 495 So.2d 145 (Fla. 1985). This issue is not cognizable on a 3.850 motion. A trial court is not authorized in a Rule 3.850 motion to review the findings of the Florida Supreme Court. Foster v. State, 400 So.2d 1 (Fla. 1981). Huff argues that the trial court should have taken judicial notice of the presentence investigation, but provides no authority for this argument. The issue of judicial notice was discussed extensively in Huff, supra, by this court. If, as Huff argues, the one mitigating factor was erroneously stricken, then so was the aggravating factor of pecuniary gain. The weighing procedure is then back to where the trial court started before Huff, supra, and nothing would have changed in its sentence. The trial court was correct in summarily denying relief on an attack on the Florida Supreme Court. See Eutzy v. State, 536 So.2d 1014 (Fla. 1988).

POINT XI

THE ISSUES RAISED IN THIS "CATCH-ALL" ARGUMENT ARE WITHOUT MERIT AND ARE PROCEDURALLY BARRED

This argument incorporates all other issues raised in the motion to vacate. The only two issues which were in the motion to vacate which were not addressed in the initial brief are 1) state's intentional withholding of material and exculpatory evidence, and 2) Witherspoon jury challenges. The first issue was addressed on direct appeal in point XII. This claim was never developed in the motion to vacate (claim VI), and cannot now be raised on 3.850 review. Doyle v. State, 526 So.2d 909 (Fla. 1988). ~~See also~~ Preston v. State, 528 So.2d 896 (Fla. 1988). Huff has not alleged that the result of the proceeding would have been different had the information been disclosed. See Duest v. State, 15 FLW S41 (Fla. January 18, 1990).

The second issue could have been raised on direct appeal, Voir dire issues were addressed point XVII, and any other jury selection issue could have been raised at the time. This issue is procedurally barred. Smith v. Duqqer, Correll v. Duqqer, supra.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the order summarily 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 Julie D. Naylor, Assistant Capital Collateral Representative, **1533** South Monroe Street, Tallahassee, Florida **32301**, this 30 day of March, **1990**.

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