IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,248

JAMES FRANKLIN ROSE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT, BROWARD COUNTY, FLORIDA

****

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Assistant Attorney General
Florida Bar No. 656879
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGES**

FLORIDA STATUTE:

PRELIMINARY STATEMENT

Appellee adopts the same symbols for record reference as utilized by appellant.

R - denotes this record on appeal.

S - denotes resentencing record.

T - denotes the original trial.

STATEMENT OF THE CASE AND FACTS

Appellant was convicted and sentenced to death on May 7, 1977. The details of the crime and relevant evidence to sustain the conviction are outlined in the this Court's opinion at Rose v. State, 425 So.2d 521, 522-523 (Fla. 1983). Appellant's sentence was reversed based on an Allen-type error. Rose, 425 So.2d at 525. Appellant was again sentenced to death, which was affirmed on the second direct appeal. Rose v. State, 461 So.2d 84 (Fla. 1985). Pursuant to a death warrant appellant filed a writ of habeas corpus, this Court granted a stay but ultimately denied all relief. Rose v. State, 508 So.2d 321 (Fla. 1987). Appellant then filed a motion for post-conviction relief which was denied by the trial court and forms the basis of the instant appeal.

SUMMARY OF THE ARGUMENT

1. The trial court properly decided the merits of the motion absent an evidentiary hearing. The trial court's order indicates that the issues were either procedurally barred or denied on the basis of the record already established.

Appellant has failed to establish any due process violation from the fact that the trial court adopted an order drafted by the state.

2. The trial court properly determined that appellant has failed to establish that he received ineffective assistance of counsel at either phase of his trial. Such a determination was properly made based on the record already established.

3. The trial court correctly determined that any allegation regarding incompetent or false testimony should have been raised on direct appeal and therefore is procedurally barred. The trial court also determined that appellant has failed to establish that the medical examiner was incompetent. The opinion of the two doctors are not materially different, consequently the state did not present misleading testimony.

4. This issue is procedurally barred as the admissibility of appellant's statements was raised on direct appeal. The trial court was correct in ruling that appellant failed to establish prejudice regarding trial counsel's performance in dealing with the admissibility of his statements.

5. The trial court properly determined that his Miranda claim was procedurally barred. This claim is also without merit as any error must be considered harmless as the statements were cumulative to other evidence presented.

6. The trial court correctly determined that any challenge to the resentencing proceedings is procedurally barred for failing to raise it on direct appeal. The remainder of this claim was raised on direct appeal and is therefore also procedurally barred. Furthermore the entire claim lacks merit.

7. The trial court correctly determined that any issue regarding an Ivory error or improper jury separation is procedurally barred as it has previously been litigated in the habeas petition. In the alternative, this issue should have been raised on direct appeal.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED RELIEF WITHOUT AN EVIDENTIARY HEARING

Appellant claims that the trial court erred in deciding the merits of this motion absent an evidentiary hearing. Claims of ineffective assistance of counsel and withholding of exculpatory evidence are traditionally those types of claims where such a hearing is held. However the law has never required an evidentiary hearing merely because such a "traditional claim" has been alleged. An evidentiary hearing is not required where the record conclusively demonstrates that the defendant is not entitled to relief. Agan v. State, 503 So.2d 1254 (Fla. 1987); Swafford v. Dugger, 569 So.2d 1264, 1267 (Fla. 1990); Kennedy v. State, 547 So.2d 912 (Fla. 1989).

In the instant case the trial court's order states a rationale that is based on the record which either refutes the claim or demonstrates that relief is not warranted. (R 481-487). Hoffman v. State, 571 So.2d 449, 450 (Fla. 1990). Regardless of the state's position that an evidentiary could have been conducted, the trial court did not error in failing to do so.

Appellee will address the propriety of the trial court's refusal to conduct an evidentiary hearing in the merits section of each specific claim where such a hearing was requested.

The fact that the state filed a proposed order which was later adopted by the trial court does not demonstrate any due

process violation. Appellant filed a motion for post-conviction relief, the state filed a response and the trial court denied the motion. There has been no allegation that any exparte communications were conducted between the state and the court. Any disagreement with the trial court's order is properly before this Court as an appeal of the that order. Appellant has failed to demonstrate that he was denied a fair review of all his claims.

POINT II

APPELLANT RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH PHASES OF HIS TRIAL

A. GUILT PHASE

Appellant alleges that trial counsel committed seventeen errors at the guilt phase of his trial. The trial court determined that appellant had failed to establish prejudice and denied the claim without an evidentiary hearing. (R 481-482). The trial court's ruling was correct. Strickland v. Washington, 466 U.S. 668, 697, 80 L.Ed.2d 674, 699, 104 S.Ct. 2052 (1984); Swafford v. Dugger, 549 So.2d 1264, 1267 (Fla. 1990).

i. Appellant claims that trial counsel was ineffective for failing to call Dr.Davis, a forensic expert, who would have provided rebuttal testimony against the state's medical examiner. Specifically appellant claims that Dr. Davis would have negated the state's theory regarding the nature of the murder weapon. Appellant also claims that the trial court should have granted an evidentiary hearing regarding this claim. Appellee disagrees.

The essence of Dr. Davis's findings are in agreement with Dr. Fatteh's conclusions regarding the cause of death. Both experts agreed that death was caused by a fractured skull. Both agreed that the force used to sustain those injuries was blunt trauma. (S 765-766,748,773-774,764, T 679,686,687,706,708,713). Dr. Davis opined that the injuries were not the result of a hammer. (S 788). Dr. Fatteh testified that the murder weapon could have been a hammer but he really could not be sure. (T 686-

688,706). He further testified that the injuries could also have been caused by hitting a concrete floor or furniture, or by being kicked. (T 688, 706). Appellee asserts that trial counsel was not ineffective for failing to call Dr. Davis at the guilt phase. A possible disagreement over the nature of the murder weapon is not information which would have changed the outcome of the proceedings. Strickland, 466 U.S. at 694). The trial court correctly denied this claim without an evidentiary hearing. Swafford.

ii. Next appellant claims that trial counsel was ineffective for failing to rebut the state's evidence regarding the last time Lisa was seen. Specifically appellant claims the following;

A. Trial counsel did not adequately impeach Walter Isler regarding his testimony. A review of the record dispels this claim.

On cross-examination defense counsel did impeach Mr. Isler by referring to a prior statement that he made to Detective McLellan regarding the last time he had seen Lisa alive. (T. 756 lines 12-25, 757). Failure to introduce a transcript of the prior statement or call Detective McLellan is not deficient performance under Strickland. Counsel is not required to pursue ever line of defense based on a particular claim nor can counsel be required to utilize every means of impeachment. Jackson v. Dugger, 547 So.2d 1197, 1200 (Fla. 1989).

b-f. Appellant next claims that five potential witnesses could have provided statements that Lisa was seen after 10:30-11:00 P.M. that night. Appellee has not seen these statements to evaluate their exculpatory value and they have not been made apart of the record. Appellee urges this Court to require appellant to supplement the record with these statements.

In any event even if these witnesses were called to say that Lisa was seen at 10:30, 11:00 or even 11:45 that night the statements would have done little to negate the impact of the following; Lisa's sister saw her for the last time standing by the bowling alley door with appellant. (T. 376). Lisa's mother could not find Lisa around the same time appellant called her at 10:23. (T. 358). Several witnesses, including her closet relatives who would have recognized her better than anyone else, testified that Lisa was never seen again after appellant returned to the bowling alley around 11:30 that night. (T. 302,307,363). The inconsistent statements regarding the time Lisa was last seen does nothing to explain appellant's suspicious behavior i.e., frequent trips to and from the bowling alley, changing his clothes, attempts to cover up the blood on his pants and inconsistent statements regarding the explanation for the existence of the blood. (T. 309,325-330, 350, 361,381-388,422). Nor do the inconsistent statements explain how Lisa's clothes or blood matching Lisa's type turned up in appellant's van. The evidence against appellant was overwhelming. Rose v. State, 425 So.2d 521, 522-523 (Fla. 1983).

The trial court properly found that the statements would not have changed the outcome of the proceedings had they been introduced. Strickland. Jones v. State, 528 So.2d 1171, 1173-1174 (Fla. 1988).

iii. Appellant next claims that trial counsel was ineffective for failing to properly challenge the state's theory regarding a motive for the killing. Appellant claims that trial counsel should have impeached Isler's "breakfast" statement. The state never claimed that appellant became enraged, upset or angry upon hearing Lisa's comment to Isler. The only evidence presented was Isler's testimony that upon hearing Lisa's statement appellant looked at Isler as if to say, what was going on. (T. 741). Impeachment of that statement was not necessary as it was not prejudicial. Other evidence of appellant's jealousy consisted of Mrs. Berry testimony regarding appellant's jealous behavior. Appellant's jealousy resulted in a threat to Mrs. Berry prior to that night. (T. 785-786). Consequently, impeachment of Isler's statement would not have undermined the state's characterization of appellant as a jealous person. Appellant has failed to establish any prejudice.

iv. The next allegation regarding ineffective assistance of counsel concerns trial counsel's failure to introduce "compelling" evidence to support a defense theory that two other boys committed the crime. This "compelling" evidence is a statement from Jim Hughes that appellant's van at one point prior to the night of the murder had "monkey decals" on the

windows, however those decals were not on the windows the night of the offense. Appellee asserts that this statement does not support any theory of innocence.

At trial Hughes testified that he had only seen the van from the rear (T 823), consequently it is possible that the decals were there but unnoticed due to the angle in which the van was seen. Furthermore, Hughes stated in his deposition that he knew the van as he had seen it more than once. That statement can hardly support the defense's theory regarding other suspects. Consistent with Hughes's statement is the fact that no one else saw or described appellant's van as having monkey decals on the windows that night. Lastly, it is not beyond the realm of possibility that appellant removed the decals prior to that night.

Another example of appellant's "compelling" evidence is a statement from Margaret Cobb who said that she saw a white van at the sight where the body was found between 11:55 p.m. and 12:05 a.m. Appellant claims that other evidence offered by the state indicated that he was at the bowling alley at that time. Appellant claims that this evidence is important as it disproves the state's theory that appellant was at the crime scene. Appellant is in error. Consistent with Cobb's statement is the testimony of Barbara Danello and Officer Walker who saw appellant leave the bowling alley at approximately 11:40-11:45 p.m. (T. 803-806), he returned after 12:17 p.m. (T.856-857). Cobb's statement was inculpatory as it corroborated Danello and Walkers'

testimony. Its admissibility would certainly not have changed the outcome of the proceedings.

v. Appellant claims that additional errors were made by defense counsel which constitute ineffective assistance of counsel. Appellant has failed to demonstrate either deficient performance or prejudice regarding any of the following claims.

a. On direct appeal appellant claimed that three potential jurors were impermissibly excused in violation of Witherspoon v. Illinois, 391 U.S 510 (1968). This court refused to reach the merits of that claim since it was not preserved for appeal. Rose v. State, 425 So.2d 521, 524 (Fla. 1983). Appellant now claims that trial counsel was ineffective for failing to object to the removal of the potential jurors. A review of the record demonstrates that an objection was not warranted for the removal of any of the potential jurors.

There was no Witherspoon violation regarding the removal of three potential jurors. Roberta Kendrick stated that she would be unable to convict appellant of a crime due to her strong belief against the death penalty. (T 1604-1605). Nellie Mills was excused because of her inability to reach a decision where death was involved. (T 1663). Harley Peoples did not say he was opposed to the death penalty, but that he would not want to make a decision on a person's life and he could not play God. (T 1662-1664).

Any error must be considered harmless as appellant ultimately received a new sentencing hearing anyway. Rose, supra.

Since Witherspoon error is not applicable to the guilt phase, the issue is moot. Id, 391 U.S. 510, 513, 20 L.Ed. 2d 776, 780, 88 S.Ct. 1770 (1968); Lockhart v. McCree, 470 U.S 162, 183, 90 L.Ed.2d 137, 154, 106 S.Ct. 1758 (1986).

b. Appellant argues that trial counsel should have obtained the services of an independent expert to examine the crushed hair of the victim. Such an expert would have cautioned against trying to establish any significance to the fact that the hair sample was crushed. Such an expert was not needed as trial counsel was able to elicit from the forensic chemist that he could not state how the hair was crushed or that it was crushed while still on the victim's head. (T 1134).

Appellant cannot establish prejudice as the probative value of the evidence is the fact that the hair crushed or not crushed belonged to the victim and it was found in the appellant's sock. (T 1129).

c. Appellant claims that trial counsel should have moved for a mistrial after he objected to the following prosecutorial remark:

> If the Court instructs you that a person's credibility is determined by his prior convictions, is there any of you who would just ignore the law and say "Well, I am not going to consider that"?
>
> (T. 1633)

The trial court gave the following curative instruction:

> I am going to instruct you that we are talking about how to determine the

> credibility of all the witnesses, anybody that might take the witness the stand.
>
> (T. 1634)

The prosecutor's comments were not a reference to appellant's convictions but a general comment regarding all witnesses. If any error occurred it was properly remedied with the curative instruction. A motion for mistrial would not have been granted. Duest v. State, 462 So.2d 446, 448 (Fla. 1985); Ferguson v. State, 417 So.2d 639 (Fla. 1982); James v. State, 429 So.2d 1362, 1363 (Fla. 1st DCA 1983).

d. Trial counsel did not object to the prosecutor's comment that the jury should "fulfill their obligation". An objection was not necessary as the prosecutor outlined the facts to be presented and then made the comment in the context of that based on that evidence the jury would need to convict a guilty defendant. (T. 660). When properly viewed the comment was not improper. Spaziano v. State, 429 So.2d 1344 (Fla. 2d DCA 1983); Lane v. State, 353 So.2d 194 (Fla. 3rd DCA 1977); Maggard v. State, 399 So.2d 973, 976 (Fla. 1981).

e. Appellant claims that trial counsel failed to renew his objection to Dr. Fatteh's speculation as to the identity of the murder weapon. Trial counsel did renew his objection to Fatteh's opinion. (T 686, 687). In any event Fatteh stated that he was unable to say what particular type of instrument caused the fatal injuries. (T 687-688).

f. Appellant also states that trial counsel should have objected to Ms. Berry's testimony that she had three children. (T 771). Ms. Berry did not display any emotional outburst. The fact that she is the victim's mother does not make her incompetent to testify. Mikenas v. State, 367 So.2d 606, 608 (Fla. 1978). The jury was already aware of that fact as the victim's sister properly testified to what she saw that night as well. Trial counsel was not ineffective for failing object. Furthermore, appellant cannot establish that if the jury was unaware of such information that the outcome of the trial would have been different.

g. Appellant further claims that trial counsel should have objected to the "extensive" inquiry made by the trial court regarding Tracy Berry's ability to tell the truth. Trial counsel was not deficient in his performance as the trial court's inquiry was not only proper but it was required. Rutledge v. State, 374 So.2d 975, 979 (Fla. 1979). A review of the record demonstrates that the court asked the appropriate questions to ascertain whether the seven year child could appreciate the nature and obligation of the oath. Williams v. State, 400 So.2d 471, 472 (Fla. 5th DCA 1981). (T 795-796).

h. Appellant next alleges that trial counsel was deficient is failing to object to the prosecutor's closing argument where he allegedly buttressed the state's case with assertions that the state could have but did not manufacture evidence. The record reveals that the prosecutor was simply

outlining the evidence presented, pointing out the weaknesses as well as the strength's of the state's case in order to illustrate the credibility of the state's witnesses. (T. 1214).

i. It is further alleged that trial counsel was deficient in failing to object to the prosecutor's comment regarding the state's burden in proving kidnapping. The prosecutor's statement did not warrant an objection as it was a correct statement of the law. (T1228-1229). Section 787.01, Fla. Stat. (1975) (1977). Furthermore the jury was correctly instructed as to what was required to prove kidnapping. (T. 1243-1244). Finally this Court determined that there was sufficient evidence to sustain a conviction for kidnapping. Rose, 425 So.2d at 523.

j. & k. Appellant claims that trial counsel was deficient in failing to object to an alleged colloquy between the court and the jury in the absence of the defendant. Appellant further claims that trial counsel should have objected to the trial court's allowing the jury to separate for the night. Both of these issues are procedurally barred regardless of the fact that are couched in terms of ineffective assistance of counsel. The substance of these claims have already been determined in appellant's prior habeas petition. Rose v. Dugger, 508 So.2d 321, 323, 325 (Fla.1987); Quince v. State, 477 So.2d 535, 536 (Fla. 1985).

l. The next alleged instance of deficient performance by trial counsel is that he failed to object to the prosecutor's

closing remarks regarding appellant's testimony. The comment now challenged, "He can't even keep his story straight", (T 1217-1218) was a proper comment on the evidence. Rose stated that he was cooperative with police during the investigation. (T 1096). To rebut that statement the prosecutor cross-examined Rose regarding various instances of inconsistent statements given to police. (T 1096-1101). One of those inconsistent statements was in regard to when appellant said he had last seen the victim. (T 1099). The prosecutor's comment during closing argument was a permissible reference to those inconsistent statements. An objection was not warranted.

m. Lastly appellant claims that trial counsel should have objected to the admissibility of statements given while in jail based on a pretextual arrest. A review of the record indicates that appellant went to the police station voluntarily to give a statement. He was not under arrest.(T. 279). In any event the statements were only inculpatory due to their inconsistency. The state offered proof of those numerous inconsistent statements via other witnesses. Any statements given to police were merely cumulative.

Appellant has failed to demonstrate that trial counsel was ineffective. An evidentiary hearing is not necessary when the allegations are clearly rebutted by the record. The trial court was correct in finding that appellant failed to meet his burden in demonstrating any prejudicial error which would entitle him to either an evidentiary hearing or relief. Swafford v. Dugger, 569 So.2d 1264, 1267-1268 (Fla. 1990).

B. PENALTY PHASE

Appellant claims that he was denied the effective assistance of counsel during the penalty phase of his trial. The trial court found without an evidentiary hearing that additional penalty phase evidence would not have changed the outcome of the sentencing proceeding. (R 482-483). The trial court's ruling was correct. Swafford. The first alleged instance of deficient performance is that trial counsel failed to present evidence of statutory and nonstatutory mental health evidence, appellant's positive adjustment to prison, his lack of future dangerousness, and his amenability to incarceration and rehabilitation. A review of the record demonstrates that such evidence is either rebutted by the record, contrary to the defense strategy employed or simply too weak to overcome the strength of the aggravating factors present.

A review of the DOC files indicates that appellant is not amenable to rehabilitation. A psychological evaluation was conducted in 1986 pursuant to a clemency hearing. Contrary to appellant's assertions otherwise, the report indicates a lack of willingness to seek help. Appellant's antisocial personality is quite resistant to change and/or treatment. He himself admits to an unwillingness to participate in counseling. (Appendix 1). His resistance to rehabilitation dates back to his juvenile delinquent behavior. (Appendix 1, T 96-103).

Also belied by the record is appellant's claim that he suffers from mental illness. Psychological reports dating back

from 1971, 1976 and 1986 all indicate that appellant is not mentally ill as he does not suffer from any psychosis. (R 88-103). Appellant himself reported to Dr. Taubel that there has been no previous history of mental or nervous illness or psychiatric history. (T 93).

Furthermore this new found reliance on mental mitigating evidence is in direct opposition to defense counsel's strategy at sentencing. Relying on psychiatric reports defense counsel sought to negate the existence of a motive for the killing by emphasizing the lack of any evidence that appellant was mentally ill, nor was there any evidence that he was a child molester. Since the circumstances of the crime were not known defense counsel was trying to show that the crime may have been an accident. (S 852-864). Appellant's attempt to now sabotage a valid defense that was based on psychiatric reports and defendant's own statements should be dismissed. Burger v. Kemp, 483 U.S. 776,793, 97 L.Ed.2d 638,656, 107 S.Ct. 3114 (1987); Correll v. Dugger, 558 So.2d 422, 426 (Fla. 1990); Strickland, 466 U.S. at 691.

Also contradicted by the record is appellant's assertion that he has a low IQ. He is of at least average intelligence.(Appendix 3, T 88, 93, 100). Likewise regarding the claim that he does not possess any future dangerousness, his DOC file indicates that he could be dangerous as extreme caution should be used when he is out of his cell and that he is prone to acting out behavior. (Appendix 1 & 2). The fact that he has

consistently been diagnosed as possessing an antisocial personality certainly makes any prediction of future nonviolent behavior tenuous at best. Appellant's claim that statutory and nonstatutory mental mitigating evidence exist is simply not supported by the record. Trial counsel's "failure" to present such mitigating evidence cannot be considered deficient performance. Correl, 558 So.2d at 426 f.n.3.

In any event, Appellant's good behavior in prison along with the alleged incidents of sexual abuse do not qualify as mitigating evidence enough to justify the imposition of a life sentence. Any abuse that occurred when he was a young boy would carry very little weight to excuse the kidnapping and beating to death of an eight year child. Francis v.Dugger, 908 So.2d 696, 703-704 (11th Cir. 1990). Likewise the fact that appellant may have adjusted to prison life does little to justify his crime, or offset the established aggravating factors which are present in the instant case. Lusk v. Dugger, 890 F.2d 332, 339 (11th Cir. 1989).

Appellant's recent self reported claims that he suffers from alcoholism, history of blackouts and head injuries are contrary to any of the information he or his family have provided to officials. Furthermore any information is weak mitigation which would not have resulted in a life sentence. Correll, supra. Even this Court has previously stated that the sentence of death would have withstood a jury override. (R 482-483). Rose v. State, 508 So.2d 321, 324 (Fla. 1987).

Appellant also claims that trial counsel should have objected to the prosecutor's opening statement during the penalty phase as an unconstitutional comment on his right to remain silent. This Court has previously held in a similar case that even if such a statement can be considered a comment on the right to remain silent, any error must be considered harmless since appellant has already been convicted of the murders. Chandler v. State, 534 So.2d 701, 704 (Fla. 1988). Trial counsel was not ineffective for failing to object.

Appellant alleges that defense counsel was deficient in failing to object to the prosecutor's improper reference to nonstatutory aggravating factors. Specifically appellant claims that the prosecutor's reference to Dr. Taubel's diagnosis of appellant as not being a child molester was improper. (S 845). The prosecutor's remark was a fair reply to appellant's opening remarks. (S 248-254). The defense attorney's strategy at resentencing was to emphasize the circumstantial nature of this case. (S 248). Appellant's attorney argued that there was a complete lack of motive for this crime. A crime of this nature usually involved someone who has molested children and appellant has never been diagnosed as exhibiting such tendencies. (S 249-251). Defense counsel also emphasized the fact that appellant has no previous mental or psychiatric illness which would prompt such a killing. (S 251). The prosecutor's comment was simply a proper rebuttal to appellant's implication of his innocence.

Also without merit is appellant's claim that defense counsel should have objected to the prosecutor's reference to the "breakfast" remark. (S 237). The prosecutor's remark was a comment on the evidence to be presented. He merely asked the jury to listen to that particular testimony. (S 237, 322). No objection was warranted.

Appellant claims that trial counsel was deficient by failing to properly preserve an issue for direct appeal. The trial court properly admitted appellant's prior burglary with intent to rape as aggravating evidence. In an attempt to soften the impact of such evidence, defense attorney asked the witness several questions regarding the circumstances of that offense. The trial court precluded counsel from doing so. Appellant claims that defense counsel should have then proffered the evidence for a subsequent appellate issue. This claim is barred as the merits have been raised on direct appeal. (R 303-304). This Court determined that this issue did not warrant reversal. Rose v. State, 461 So.2d 84, 86 f.n.3 (Fla. 1985). Appellant's attempt to relitigate this same claim under the guise of ineffective assistance of counsel must be denied. Quince v. State, 477 So.2d 535 (Fla. 1985).

In any event even if the jury would have heard evidence that appellant knew the victim, the prior conviction was still admissible. Furthermore the state could have rebutted appellant's version with evidence obtained in the DOC files. (Appendix 3). In conclusion the jury would have heard reference

to the prior incident several more times. The negative impact of the valid conviction would have not have been underminded by appellant's version of the events.

The trial court properly concluded that Appellant has failed to establish that he received ineffective assistance of counsel at either phase of his trial.

POINT III

THE MANNER OF LISA BEERY'S KILLING WAS NOT MISREPRESENTED AS THE STATE AND DEFENSE EXPERTS AGREED AS TO THE CAUSE OF DEATH

Appellant claims that the prosecution knowingly used false information provided by a state witness to mislead the jury. The gravamen of this claim is whether or not Dr. Fatteh's testimony was misleading or in conflict with a defense expert's opinion regarding the nature of the murder weapon. The trial court ruled that this claim was procedurally barred as it should have been raised on direct appeal. The court further stated that mere disagreement between experts does not render one expert incompetent. (R 483-484). Appellant claims that the trial court erred in failing to conduct an evidentiary hearing on this claim. Appellee asserts that trial court correctly ruled that this claim was procedurally barred, as such the need for an evidentiary hearing is moot. Furthermore appellant's claim is rebutted from the record already before this Court, an evidentiary hearing is not warranted. Agan v. State, 503 So.2d .

Appellant does not even attempt to challenge the trial court's ruling that this claim is procedurally barred. The very nature of the claim illustrates that the underlying facts were known prior to the direct appeal and should have been raised then.Blanco v. State, 507 So.2d 1377 (Fla. 1987). Kelly v. State, 569 So.2d 754, 756 (Fla. 1990). The trial court properly found this claim to be procedurally barred.

In the alternative this claim lacks merit as well. An evidentiary hearing was not needed as the record conclusively refutes appellant's claim. Mann v. State, 482 So.2d 1360 (Fla. 1986); Agan v. State, 503 So.2d 1254 (Fla. 1987) Dr. Fatteh testified that death was caused by a fractured skull. (T. 679). Dr. Davis also said that death was caused by a fractured skull. (S 765,766). Dr. Fatteh testified that the injuries were caused by blunt trauma. (T 679, 686, 687, 706,708,713). Dr. Davis also stated that the injuries were caused by blunt trauma. (S 748, 764, 773-774). Dr. Fatteh testified that the nature of the murder weapon could have been a hammer. He also stated that it could have been caused by hitting a concrete floor, being kicked, or hitting furniture. (T 686, 687, 688). On cross-examination he qualified his testimony by saying that he really couldn't say what caused the injuries. (T 688, 706). Dr. Davis stated that it probably was not a hammer. (S 788).

Appellant characterizes the opinions of the two doctors above as proof that Dr. Fatteh's testimony is somehow constitutionally tainted. "Disagreement" over an educated guess as to the nature of a murder weapon can hardly be considered an example of incompetence of the doctor or an example of misleading testimony. Appellant's reliance on Tordel v. Wainwright, 667 F. Supp. 1456, 1458-1459 (S.D. Fla. 1986) is to no avail. In that case an expert for the state testified at two separate trials of codefendants. In essence his testimony at both trials was that the respective defendant was the shooter. Trodel. In the case at

bar at best there is a difference of opinion as to the possible nature of the murder weapon. The fact that the state's theory was not shared by the defense witness is hardly error. In conclusion the trial court correctly determined that Dr. Fatteh was not incompetent. This claim should be denied.

POINT IV

THE STATE DID NOT USE FALSE TESTIMONY NOR WAS TRIAL COUNSEL INEFFECTIVE REGARDING HIS PERFORMANCE AT THE MOTION TO SUPPRESS

Appellant alleges that the state allowed a witness to offer false testimony at the motion to suppress. Appellant relies on the comparison between the testimony and depositions of Sgt. LaValle and Det. McCellan as proof that the witnesses lied under oath. Appellant further alleges that trial counsel was ineffective for failing to challenge the admissibility of his statements based on the "conflicting" testimony.

The trial court ruled that even if the statements would have been suppressed, appellant has failed to prove that the results of the proceedings would have been different.(R 483). The trial court properly denied this claim without an evidentiary hearing. Swafford v. State, 569 So.2d 1264, 1276-1268 (Fla. 1990). Appellee asserts that trial court properly determined that appellant has not established prejudice under Strickland v. Washington, 466 U.S. 668 (1984). However appellee also asserts that this claim is procedurally barred as the admissibility of the statements was challenged on direct appeal. (R 188-192). Claims already raised on direct appeal are not cognizable in a motion for post-conviction relief even under the guise of ineffective assistance of counsel. Porter v. Dugger, 559 So.2d 201 (Fla. 1990); Sireci v. State, 469 So.2d 119 (Fla. 1985). The basis of the claim i.e. "false testimony" is something that was

known or could have been known before the direct appeal. Kelly v. State, 569 So.2d 754, 756 (Fla. 1990).

As for the merits appellant has failed to establish that the state witnesses in fact offered false testimony. LaValle testified that appellant called his attorney to ask whether or not he should submit to a lie detector test. (R 293) His attorney advised him not to and one was not conduced. (R 293). La Valle opined that he felt a call was not made and that appellant was just stalling for time. (R 292) He also stated that appellant later admitted that a call was not made. (R 293). LaValle's police report and deposition indicates that appellant told him that his attorney would not represent him because he still owed him money. This was not testified to at the suppression hearing. The fact that LaValle never stated at the hearing that Fogan would not represent appellant is hardly evidence that false testimony was provided. Appellant had every opportunity to tell his version if the state was actually mispresenting what happened.

Appellant also relies on a supplemental report prepared by Detective McClellan to prove his claim. McClellan's report indicates that appellant's attorney was contacted later to verify whether he was in fact contacted.

Appellant fails to mention that both pretrial reports indicated that appellant admitted that the call was simply to stall for time. Not once did appellant ever say that he wanted a lawyer present at the questioning.

The fact that neither witness testified that Fogan was later contacted and told appellant that he would not represent him is not information that would have changed the outcome of the case. McClellan never said who called Fogan nor was he asked anything about that issue at the hearing. There is no evidence that LaValle made a call to Fogan or that he had knowledged that McCllellan made any such call. Appellant has failed to establish that the state used any false testimony.

Appellant has failed to demonstrate how he was prejudiced by the absence of this material regardless of how the information was "kept" from the trial court, either via misconduct by the state or ineffective representation by trial counsel. The alleged critical information that Fogan would not represent appellant because he owed him money, would not have resulted in the suppression of the statements made between 8:00 A.M. - 4:30 P.M. (T. 54, 188). After making the call to his attorney appellant was given his Miranda warnings and said he would talk to police. (T 293-295). Furthermore appellant maintained his innocence throughout the questioning. (T. 336, 385, 390).

The only possible value of the statements was that they were inconsistent with the statements made to other witnesses. (R. 188, 483). A review of the record indicates that inconsistent statements given by appellant to various witnesses regarding the blood on his pants and the last time he had seen Lisa were made either before the police arrived at the scene or

before appellant was ever questioned at the police station. (T 229-230,234,240,242-243,251,256,489,490,725-727,749,765,767,858,879,933,951). Consequently, absent any of appellant's statements made at the police station the jury was still well aware of the fact that appellant made inconsistent statements to various witnesses.

In summation appellant has failed to establish any misconduct by the state. Furthermore he has failed to establish any prejudice under Strickland as appellant's inconsistent statements were already before the jury.

POINT V

APPELLANT'S STATEMENTS WERE NOT ADMITTED IN VIOLATION OF HIS MIRANDA WARNINGS

Appellant claims that this Court should redetermine the alleged Miranda violation [See claim IV] because there has been a change in the law based on Edwards v. Arizona, 451 U.S. 477 (1981). The trial court properly ruled that this issue was procedurally barred. (R 483). Edwards was decided twenty months before appellant's direct appeal was decided. Appellant had a second direct appeal regarding sentencing and he also filed a habeas petition. Rose v. State, 461 So.2d 84 (Fla. 1985); Rose v. State, 508 So.2d 321 (Fla. 1987). The opportunity to raise this issue with Edwards in mind was available during appellant's direct appeal consequently the trial court properly determined that this issue was procedurally barred. Atkins v. Dugger, 541 So.2d 1165, f.n. 1 (Fla. 1989). Using a different argument to relitigate the same issue is inappropriate. Quince v. State, 477 So.2d 535 (Fla. 1985).

Briefly as to the merits, appellant cannot establish error as he waived his rights under Miranda and agreed to speak with LaValle. (R 293). A request to be represented at trial is not an invocation to remain silent at the time of questioning. Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979). This claim is without merit.

POINT VI

THE TRIAL COURT DID NOT ERROR IN PRECLUDING APPELLANT FROM ARGUING OR INSTRUCTING THE JURY ON FELONY MURDER AND PREMEDITATED MURDER

Appellant has consolidated various claims raised in his motion for post-conviction relief into one issue on appeal. (See Appellant's claims F & G in the motion for post-conviction relief).(R 75-83). The trial court properly concluded that these claims were procedurally barred as they could have or should have been raised on direct appeal. (R 484-485). Furthermore the trial court properly found that these issues were without merit as well.

Appellant claims that the trial court erred in denying a request to instruct the jury on felony murder. Appellant argues that such was relevant to cast doubt on his culpability. The trial court properly denied the request as guilt was not an issue. The trial court did not abuse it's discretion by denying this request. Chandler v. State, 534 So.2d 701,703 (Fla. 1988). Appellant's reliance on Jackson v. State, 575 So.2d 181, 190 (Fla. 1990) is unavailing as culpability in that case was considered in the context of whether a defendant was a major participant in the crime relative to other codefendants. Jackson, 575 So.2d at 191. Such is not an issue in the case at bar as articulated by this Court:

> Although circumstantial in nature, the evidence was sufficient for the jury to have found beyond a reasonable doubt

> that defendant and no other person, kidnapped and murdered eight-year old Lisa Berry.

Rose v. State, 425 So.2d 521, 522 (Fla. 1983). Furthermore, although circumstances of the crime are relevant in sentencing, residual doubt about guilt is not. Aldrige v. State, 503 So.2d 1257, 1259 (Fla. 1987); Franklin v. Lynaugh, 487 U.S. 164, 101 L.Ed. 2d 155, 108 S.Ct. 2320 (1990). Lastly since special verdict forms are not required in the guilt/innocence of the trial, there can be no doubt that they are not required in the penalty phase as well. Brown v. State, 473 So.2d 1260 (Fla.), cert. denied, 474 U.S. 1038 (1985); Schad v. Arizona, 501 U.S. ___, 115 L.Ed. 2d 555, 111 S Ct.___ (1991).

The trial court's finding that these claims should have been raised on direct appeal was proper, however, portions of this claim were actually raised on direct appeal and are also subject to a second procedural bar as well. For instance, on direct appeal appellant claimed that there was insufficient evidence of both premeditated murder and felony murder. (R 170-185). Also in the second direct appeal appellant claimed the trial court erred in denying his request for jury instructions on felony murder, premeditation and circumstantial evidence. (R 292-295). Although now presented in a somewhat different argument, this claim has already been reviewed by this Court, a second review is not warranted. Burr v. State, 518 So.2d 903, 905 (Fla. 1987).

Finally appellant was not precluded, in violation of Lockett v. Ohio, 438 U.S. 586 (1978), from arguing as mitigating evidence the circumstances of the crime. Appellant argued the lack of evidence to show that this crime was neither cold, calculated and premeditated nor heinous atrocious and cruel. In opening and closing arguments appellant argued the circumstantial nature of the evidence including a lack of motive for the killing. He stressed the fact that appellant is not a child molester nor is he mentally ill. (S 248-254, 852-860). The evidence presented at resentencing included witnesses who discussed the nature of the victim's injuries. (S 741 - 803). Appellant also presented testimony of his good relationship with children. (S 739, 809, 817). Appellant has not demonstrated that he was precluded from presentening any relevant mitigating evidence at the penalty phase.

In conclusion the trial court was correct in finding that these claims are procedurally barred, or in the alternative that they lack merit as well.

POINT VII

APPELLANT WAS NEITHER ABSENT FROM ANY CRITICAL PHASE OF HIS TRIAL NOR WAS THE JURY IMPERMISSIBLY ALLOWED TO SEPARATE FOR THE NIGHT DURING DELIBERATIONS WITHOUT HIS CONSENT

Appellant claims that he was not present during communications between the trial court and the jury. He further alleges that the jury was allowed to separate for the night without his consent. This alleged constitutional error was further compounded by a lack of a complete record on this issue. The trial court correctly determined that this issue is procedurally barred as it has already been determined to be without merit. (R 486). Rose v. State, 508 So.2d 321 (Fla. 1987).

Appellant fails to even mention to the Court that these two identical issues and the respective predicate facts have been litigated before this Court. This Court determined that appellant has failed to prove that he was absent from any critical stage of his trial. Furthermore the jury was permitted to separate for the night with appellant's consent. Rose, supra. Appellant has not brought forth any new evidence to warrant any further review by this Court let alone a reversal of the prior determination. Porter v. Dugger, 559 So.2d 201, 203 (Fla.1990); Roberts v. State, 56 So.2d 1255, 1260-1261 (Fla. 1990); Burr v. State, 518 So.2d 903, 905 (Fla. 1987).

CONCLUSION

WHEREFORE, based on the above facts and applicable case law, appellee respectfully requests that this Court **AFFIRM** the trial court's denial of appellant's motion.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Assistant Attorney General
Florida Bar No. 656879
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(407) 837-5062

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been furnished by United States Mail to: GAIL E. ANDERSON, ESQUIRE, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Floirida 32301, and to BILLY H. NOLAS, ESQUIRE and JULIE D. NAYLOR, ESQUIRE, Post Office Box 4905, Ocala, Florida 32678-4905, this 30th day of August, 1991.

Of Counsel

/pas

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,248

JAMES FRANKLIN ROSE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT, BROWARD COUNTY, FLORIDA

****

APPENDIX TO

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Assistant Attorney General
Florida Bar No. 656879
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Counsel for Appellee

APPENDIX 1