IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,775

JOEL DALE WRIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR PUTNAM COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The body of a 75-year-old woman was found in the bedroom of her home on February 6, 1983. The victim was discovered by her brother, who testified that he became concerned when she failed to respond to his knock on the door. Medical testimony established that the victim died between the evening of February 5 and the morning of February 6 as a result of multiple stab wounds to the neck and face, and that a vaginal laceration could have contributed to the victim's death.

The state's primary witness, Charles Westberry, testified that shortly after daylight on the morning of February 6, Joel Dale Wright came to Westberry's trailer and confessed to him that he had killed the victim. Wright told him he entered the victim's house through a back window to take money from her purse and, as Wright wiped his fingerprints off the purse, he saw the victim in the hallway and cut her throat. Wright stated he killed the victim because she recognized him and he did not want to go back to prison. Westberry further stated that Wright counted out approximately $290 he said he had taken from the victim's home and that Wright asked Westberry to tell the police he spent the night of February 5 at Westberry's trailer. When Westberry related Wright's confession to his wife several weeks later, she notified the police. The record also reflects that a sheriff's department fingerprint analyst identified a fingerprint taken from a portable stove located in the victim's bedroom as belonging to Wright. Paul House testified that approximately one month before the murder, he and Wright had entered the victim's

home through the same window that was found open by the victim's brother, and had stolen money.

In his defense, Wright denied involvement in the murder and introduced testimony that, between 5:00 and 6:00 p.m. on February 5, a friend had dropped him off at his parents' home, which neighbored the victim's, and that he left at 8:00 p.m to attend a party at his employer's house. He stated that he returned to his parents' home, where he resided, at approximately 1:00 a.m. on February 6, but was unable to get into the house because his parents had locked him out. He testified that he then walked down Highway 19 to Westberry's trailer, where he spent the night.

On April 22, 1983, Joel Dale Wright was indicted for first degree murder, sexual battery, burglary of a dwelling, and grand theft. After a trial from August 22 to September 1, 1983 he was convicted on all counts. On September 2, 1983, the jury returned an advisory sentence of death by a 9-3 vote. In the penalty phase, Wright presented the testimony of members of his family relating to his character and upbringing, as well as a nine-year old psychological report which indicated that at that time Wright was depressed, emotionally immature, and had difficulty controlling his impulses. The trial court followed the jury recommendation and sentenced Wright to death on September 23, 1983. The trial court found four aggravating circumstances: 1) the murder took place after the defendant committed rape and burglary; 2) the murder was committed for the purpose of avoiding or preventing lawful arrest; 3) the murder was heinous, atrocious and cruel; 4) the murder was committed in

a cold, calculated and premeditated manner without any pretense of moral or legal justification. The trial court found no mitigating circumstances.

This court affirmed the convictions and sentence of death. Wright v. State, 473 So. 2d 1277 (Fla. 1985). [1] The United States Supreme Court denied certiorari on January 21, 1986. Wright v. Florida, 474 U.S. 1094 (1986).

Wright filed a Florida Rule of Criminal Procedure 3.850 motion on February 22, 1988 which was amended July 19, 1988. An evidentiary hearing was conducted in the Circuit Court for the Seventh Judicial Circuit on October 3 and 4, 1988.

At the evidentiary hearing, Wright's brother and sister testified that they had asked the Public Defender, Howard Pearl, to change the venue of the trial (T 618, 625). Wright's sister testified that the glass vase introduced at trial belonged to their mother (T 626, 633). Howard Pearl never asked the sisters to testify as to ownership of the vase (T 636). Charles Westberry testified that Assistant State Attorney Dunning never

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[1] Wright raised ten points on appeal: 1) trial court erred in restricting Wright's right to cross examine witnesses 2) trial court erred in refusing defense request to reopen case to allow newly discovered evidence 3) trial court erred in instructing jury to consider evidence of Wright's prior burglary of victim's house 4) trial court erred in permitting police officer to comment on Wright's right to remain silent 5) corpus delicti not established on grand theft 6) trial court erred in denying defense instruction on circumstantial evidence 7) trial court erred in finding the murder committed to prevent arrest 8) trial court erred in finding murder to be cold, calculated, and premeditated which constituted a doubling of heinous, atrocious and cruel 9) Florida's capital sentencing statute is unconstitutional because the judge, not the jury, determines the aggravating and mitigating circumstances 10) Florida's capital sentencing statute is unconstitutional 11) additional point that Wright was not present when a juror inquiry was conducted.

told him he would not file charges on the scrap metal thefts if he testified against Wright (T 658). Westberry also said he had gone over his testimony with Mr. Dunning before trial, but did not testify solely from the questions Mr. Dunning had written out (T 668, 691).

Another of Wright's brothers testified that the victim's house had been burglarized several times but not on a regular basis (T 706). Mr. Dunning testified that all documents in his files had been provided to Howard Pearl or his investigator, Freddie Williams (T 724, 726, 728, 730, 732, 734, 737).

Mr. Dunning had used a sign-out system in this case because of the amount of discovery. Mr. Pearl or Mr. Williams would sign for the documents as they were provided (T 730). The only contract of immunity Dunning ever gave Westberry was for the murder case (T 747). He learned of the scrap metal thefts after he had executed the contract of immunity on the murder case (T 748). He did not prosecute the theft cases because there was no corpus delicti (T 748-750). Mr. Dunning had given Westberry a handwritten list of possible questions he would ask at trial and asked him to review them to make sure that was what Westberry had told him (T 759). Mr. Dunning told Westberry the notes were not for use at trial and they should be returned to him before trial (T 759). Mr. Dunning prepared all witnesses similarly (T 757).

Howard Pearl testified that he was aware of the contract of immunity (T 790). He and Freddie Williams had interviewed witness Holt and were aware of the incident with Jackson in the grocery store (T 793-794). He may have had the Holt statement (T

807). He had not seen the statement of Wanda Brown, which he thought was "mildly interesting" (T 796). He had not seen the Luce statement but knew Jackson and Strickland lived together (T 799). Freddie Williams may have interviewed Luce (T 867). It did not surprise him that Jackson had learned of the victim's death so quickly because news traveled fast in the neighborhood (T 801). Mr. Pearl and Mr. Williams investigated all possible leads and talked to the Sheriff's Department about possible suspects (T 807, 893, 894). He was aware Jackson and Strickland were suspects and argued in closing argument that Strickland may have committed the murder (T 871). The Sheriff's Department had eliminated Jackson and Strickland as suspects (T 807-808). The reason he did not present testimony about the ownership of the glass vase was because the State Attorney had decided not to delve into the matter. (T 819). He was aware Wright had taken two polygraph tests but believed the court had precluded their use in the penalty phase as well as the guilt phase (T 831,834).

Mr. Pearl also informed the court he had done over three hundred capital cases, seventy-five of which went to trial (T 844, 847). Only six of his defendants received the death penalty (R 847). Mr. Pearl usually requested a mental evaluation, but did not have an expert appointed in this case because of what might be found (T 845, 850, 891). He used the school report in the penalty phase in an attempt to inspire jury sympathy (T 851). His strategy was that Wright was innocent and some day the true murderer would be found, so the jury should not impose the death penalty (T 853-856). He was also creating a record for appellate

review (T 855). Mr. Pearl did not read the school report as admitting sexual problems (T 859). He had discussed a change of venue with Judge Perry who had given him extra peremptory challenges (T 882). The judge told Mr. Pearl that if he felt he could not seat an impartial jury, the judge would change venue on his own motion (T 882-884). Mr. Pearl rejected a voluntary intoxication instruction (T 893). He never considered Marion Wright or Earl Smith as suspects (T 894). There was no evidence the murder was committed by more than one person (T 901).

Freddie Williams told the court that he was familiar with the statements of Wanda Brown, Luce and Holt (T 980-990). He felt there was nothing held back (T 987). He was aware of Strickland and Jackson and that they lived together (T 987). He and Mr. Pearl had canvassed the entire neighborhood for leads and sometimes discovered information before the state did (T 989). There was a free flow of information (T 991). When he advised the State of any leads, they were checked out (T 994).

Dr. Krop testified about potential mental health mitigation (T 1024-1029), but admitted he did not know what Wright's mental state was in 1983 (T 1043). He said that brutal murderers can be model prisoners (T 1049). He also might have found aggravating factors if he had done an evaluation in 1983 (T 1052).

After hearing testimony Judge Perry denied all relief (T 1084-1166). Wright moved for rehearing and to amend with an additional claim involving trial counsel's undisclosed conflict of interest. The motion was denied (T 1385-1386). This appeal. follows (T 1387).

SUMMARY OF ARGUMENTS

I. The state did not fail to disclose evidence which was material and exculpatory. The items Wright complains of were either disclosed or the same information had been discovered by defense counsel and his investigator. Even if there were material evidence which was not disclosed, Wright has not shown there was a reasonable probability the evidence would have changed the outcome of the proceeding.

II. Charles Westberry was not granted immunity, limited or otherwise, from prosecution for scrap metal thefts. The claim that the state failed to disclose this grant of immunity had absolutely no merit.

III. Defense counsel was not ineffective for failing to establish ownership of a glass vase where that ownership was never conclusively established. The prosecutor did not make an improper comment that ownership was never established, since that was the state of the evidence. Any inference that the glass vase was the same vase Charles Westberry referred to was a logical inference from the evidence. Defense counsel was not ineffective in cross examination, and the questions presented involve tactical decisions which cannot be second guessed. Wright has failed to show deficient performance or prejudice.

IV. The issue whether Wright was forced to testify is procedurally barred. Counsel was not ineffective in advising Wright to testify since that was the only possibility of rebutting the plethora of evidence presented against him.

V. Counsel was not ineffective at the penalty phase. Not taking issue with a jury verdict is appropriate professional judgment. Not challenging certain aggravating factors which are irrebuttably established is good judgment. Failing to introduce evidence of a polygraph test was not improper where the judge had ruled this evidence inadmissible. Introducing a psychological report and not having the defendant examined by a new psychologist were tactical decisions which are virtually unassailable.

VI. The issue of juror misconduct is procedurally barred and without merit where no such conduct occurred. The trial court conducted a hearing on the issue and found it to be without merit.

VII. The issue of the state commenting on Wright's right to remain silent is procedurally barred since it was raised on appeal and found to be without merit by this court.

VIII. The immunity issue is procedurally barred for failure to raise it on appeal. The trial court did not improperly limit defense counsel's cross-examination into a "limited grant of immunity" where no such grant existed.

IX. The issue of the defense reopening its case to present newly discovered evidence is procedurally barred. This issue was decided by this court on direct appeal and is harmless error.

X. The claims of prosecutorial misconduct for comments made in closing argument are procedurally barred for failure to raise the issue on direct appeal. All comments referred to were proper comments on the lack of evidence, logical inferences from the evidence, or fair comments on the evidence.

XI. The claim that Wright was denied an adversarial testing because the jury did not hear evidence of break ins to the victim's house is procedurally barred for failure to raise it on appeal. Any claim of ineffective assistance of counsel is without merit where the decisions were tactical decisions.

XII. The issues regarding pretrial publicity and change of venue are procedurally bared for failure to raise it on appeal. Counsel was not ineffective for not requesting a change of venue where the record shows he was afforded extra peremptory challenges and the judge would have changed venue on his own motion if defense counsel was not satisfied with the jury. Wright has shown no instance of prejudice or juror bias.

XIII. Wright's absence from the courtroom is procedurally barred for failure to raise it on appeal. Wright has shown no prejudice or fundamental change in law which can be retroactively applied.

XIV. The issue regarding a jury instruction on voluntary intoxication is procedurally barred. Counsel was not ineffective for not requesting the instruction where there was no question of Wright's being under the influence of drugs or alcohol at the time of the murder. A jury instruction need not be given simply because there is some evidence of drug or alcohol consumption.

XV. The claim that the jury instructions shift the burden to the defendant is procedurally barred and has been rejected by this court numerous times.

XVI. Caldwell v. Mississippi, 472 U.S. 320 (1985), is not applicable in Florida, and any claim based on Caldwell is procedurally barred.

XVII. Whether the aggravating circumstance of heinous, atrocious, or cruel was improperly applied to Wright is procedurally barred and this issue has been repeatedly rejected by this court.

XVIII. The claims that aggravating factors were doubled and that the trial court improperly instructed the jury on applicable aggravating circumstances are procedurally barred. There was no limitation on the presentation of mitigating evidence and this is not a true Hitchcock claim.

XIX. The issue of non-statutory aggravating circumstances being presented in the penalty phase is procedurally barred and not a true Hitchcock claim.

XX. The issue regarding instructing the jury they must return a majority vote is procedurally barred and without merit.

XXI. The claim that there was a conflict of interest because defense counsel was an honorary deputy sheriff is procedurally barred. This issue is identical to that raised in Harich v. State, Case. No. 74,620, in which an evidentiary hearing was held and the judge found there was no conflict of interest and defense counsel's effectiveness was not affected by his status.

ARGUMENT

I

THE STATE DISCLOSED ALL MATERIAL EXCULPATORY EVIDENCE. EVEN IF CERTAIN DOCUMENTS WERE NOT DISCLOSED, IT WOULD NOT CHANGE THE OUTCOME OF THE TRIAL AND ANY ERROR WAS HARMLESS.

Wright contends that he was denied a fair trial because the jury never heard evidence that Clayton Strickland and Henry Jackson either separately or together killed Lima Paige Smith. Specifically, Wright complains that he was not provided statements from Charlene Luce, Wanda Brown, Kim Holt, and that these witnesses along with Strickland and Jackson were not listed as witnesses. Wright also argues that testimony from William Bartley was not provided.

After the evidentiary hearing, the trial court found that:

> [Subpart C] alleges a violation of discovery in that the State suppressed exculpatory evidence concerning the statements of Wanda Brown, Kimberly Holt and Charlene Luce. The investigator for the Public Defender's Office, Mr. Freddie Williams, testified that he was aware of the statements by Brown and Luce. An excerpt is attached hereto as Exhibit "6". Mr. Williams and defense counsel worked closely and it is likely defense counsel was made aware of the statements through Mr. Williams. Additionally, defense counsel testified that he knew of the incident involving Ms. Holt and, in fact, had interviewed her with Mr. Williams but that he had never seen the attached hereto as Exhibit "7". Whether the statements were exculpatory in nature is highly speculative and, thus the claim is legally insufficient to support a claim under Brady. Gorham v. State, 521 So. 1067 (Fla. 1988).

(T 1085-86).

As stated by Judge Perry, Freddie Williams was aware of the statements of Luce and Brown (T 979-980, 1131-32). He had probably talked to Luce (T 867, 980, 1132). He and Mr. Pearl interviewed Holt (T 981, 983, 986). He was familiar with Jackson and Strickland and had put Jackson in jail several times (T 984-985). There was no evidence which was not provided except possibly the statement from Holt, who Mr. Williams discovered anyway (T 987, 1135). Mr. Williams worked closely with Howard Pearl (T 1136). They had canvassed the neighborhood and their discovery was not limited to what the State provided (T 1137-1139). Williams had talked to the Sheriff's Department regarding Jackson and Strickland and was free to develop his own information (T 1139).

Howard Pearl interviewed Miss Holt with Freddie Williams and may have had her statement (T 807-1143). He was well aware of Jackson and Strickland, and had discussed them with the Sheriff's department investigators (T 808-809). If he had suspected Jackson, he could have gotten a rap sheet from the Sheriff (T 813). He argued at trial that Strickland was a possible suspect (T 871).

Wright argues that law enforcement chose not to follow up on Jackson and Strickland solely on the basis of their denials and their performance on polygraph examinations. This has nothing to do with a discovery violation attributable to the state but rather takes issue with the Sheriff's department investigative procedures.

The record demonstrates that Taylor Douglas, the investigator assigned to this case, testified that they ruled out Strickland and Jackson's involvement in this case as suspects because the information they have received and the leads that they were following were not significant (T 951). Neither was found to have knowledge of the Lima Paige Smith murder. Douglas checked the alibis and found out that Jackson had done some tree work, and that he had been paid cash. The department was confident that the information they received did not justify Strickland and Jackson being related to the murder (T 951).

Captain Miller, chief of detectives of the Putnam County Sheriff's Office, testified that Jackson was a dead-end because they had the interview of Jackson and the interview with the man who had hired Jackson to cut down the tree which showed why Jackson had the money when he went into the grocery store (T 1066-1069). Captain Miller eliminated Jackson and Strickland as suspects only after interviews and investigation (T 1071). He had also received a knife from the victim's brother, which supposedly belonged to Strickland. The knife was sent to the Florida Department of Law Enforcement Crime Laboratory, and there was no human blood on the knife (T 1060). With respect to the knife, Captain Miller said it would be extremely difficult for someone to remove all traces of blood considering the nature of the wounds that were on Mrs. Smith. The Sheriff's department did not withhold any evidence from the defense (T 1063). Mr. Dunning testified that the statements should have all been given to Mr. Pearl (T 724, 726). Some of the statements he was sure he had provided (T 728, 734).

Wright also speculates about what defense counsel could have done if he had the information. This is nothing more than speculation since hindsight vision is always 20/20. Defense counsel was well aware of Jackson and Strickland, and there were no restrictions whatsoever on their investigation. In fact, defense counsel conducted a deposition on July 23, 1983, in which their possible involvement was discussed (R 227). Wright argues both sides of the coin. First, he argues that the State impeded the defense investigation; then he argues defense counsel was ineffective in his investigation (Initial Brief at 31). The record on appeal and record from the evidentiary hearing show that the State cooperated in every aspect of the investigation. By Mr. Pearl's and Mr. Williams own admission, they had a "free flow" of information (T 886, 987, 991).

Even if evidence which had exculpatory value was not disclosed, Wright has not shown that its availability would have changed the result of his trial. The test for measuring the effect of a failure to disclose exculpatory evidence, regardless of whether such failure constitutes a discovery violation, is whether there is a reasonable probability that "had the evidence been disclosed to the defense, the result of the proceeding would have been different". Duest v. State, 15 FLW S41 (Fla. Jan. 18, 1990), (quoting United States v. Bagley, 473 U.S. 667, 682 (1985). In Bagley, the court stated that evidence is material only if there is a "reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. at 682. The Court further defined

"reasonable probability" as a "probability sufficient to undermine confidence in the outcome." *Id*.

The prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. 473 U.S. at 678. See also, United States v. Agurs, 427 U.S. 97 (1976). A prosecutor is not constitutionally obligated to obtain information unconnected with or beyond his files for the purpose of discovering material that the defense can use in impeaching government witnesses. See, Morgan v. Salamack, 735 F.2d 354, 348 (2d Cir. 1984). A court is not required to ensure a defendant access to all government material in order that he might find something exculpatory; the interests of judicial economy militate against granting such "fishing expeditions". United States v. Davis, 752 F.2d 963, 976 (5th Cir. 1985); United States v. Andrus, 775 F.2d 825 (7th Cir. 1985). The government is not obliged under Brady to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself. United States v. McMahon, 715 F.2d 498 (11th Cir. 1983). Disclosure requirements for the prosecution principally concern those matters not accessible to the defense in the course of reasonably diligent preparation. Breedlove v. State, 413 So.2d 1, 4 (Fla. 1982).

Brady does not require the Government to create exculpatory evidence. See United States v. Walker, 559 F.2d 365, 373 (5th Cir. 1977); Richards v. Solem, 693 F.2d 760, 766 (8th Cir. 1982). Nor does Brady entitle a defendant to know everything unearthed

by the Government's investigation. United States v. Arroyo-Angulo, 580 F.2d 1137 (2nd Cir. 1978). Generally, police reports are not discoverable. Breedlove, supra, at 4. Wright has failed to show any of the evidence cited was 1) exculpatory and 2) material and 3) would have changed the outcome.

Failure to disclose the availability of possible exculpatory witnesses as well as information that would impeach the credibility of a chief witness does not necessitate a reversal where a defendant either has other information of the same nature or the information is of no value. Waterhouse v. State, 522 So.2d 341 (Fla. 1988). The mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense. United States v. Agurs, 427 U.S. 97, 109-10, (1976). See also Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988).

II

CHARLES WESTBERRY WAS NOT GRANTED IMMUNITY FROM PROSECUTION FOR THE SCRAP METAL THEFTS. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO DISCOVER THE NON-EXISTENT IMMUNITY.

Wright contends that he was denied a fair trial because the jury never heard the total extent of Charles Westberry's criminal liability and the prosecutor's decision not to prosecute on charges arising from the illegal scrap metal business. He argues that this evidence was exculpatory as to Wright because it "may have been used to impeach the State's witness by showing bias or interest." He also argues counsel was ineffective.

The trial court found:

> [Claim I, Subpart B,] alleges that the State entered into a secret contract of immunity with Westberry. At the evidentiary hearing, Westberry specifically denied entering into a secret deal with the State. An excerpt is attached hereto as Exhibit "4". According to the former prosecutor, there was a contract of immunity entered into on July 19, 1983 with Westberry but the defense counsel fully cross-examined Westberry about the immunity contract at trial. Consequently, the jury was aware of this deal and able to believe or disbelieve the witness. An excerpt from the record pages 2162-2166 is attached hereto as Exhibit "5".

(T 1085).

Charles Westberry testified at the evidentiary hearing that the State Attorney never promised him he would not be prosecuted on the scrap metal thefts (T 1123). Mr. Dunning testified that he found out about the scrap metal thefts after he had given Westberry immunity on the murder (T 748, 751). The reason he did not prosecute the scrap metal thefts was because there was no way to track down the stolen metal and he could not prove corpus delicti (T 748-750).

Howard Pearl was aware of the scrap metal thefts (T 791). In fact he proffered testimony at trial regarding the activity (R 2184). There was no immunity from prosecution on the scrap metal thefts. Although Wright concedes that Mr. Pearl was aware of the scrap metal thefts, he says there was some "limited grant of immunity of which he was not aware". The record shows there was no immunity, limited or otherwise. Wright again proceeds to argue forwards and backwards, saying in one breath the prosecutor

failed to disclose evidence and in another breath says counsel was ineffective for failure to investigate. Defense counsel knew of the scrap metal theft and proffered testimony at trial. The court did not allow the defense to talk about the illegal nature of the business (R 2187, 2192-94). Counsel cannot be faulted for failing to discover a contract of immunity which did not exist. Since Westberry was never convicted of the offenses the theft charges were not available as impeachment as prior convictions. Any other impeachment value is speculative, particularly in view of the trial court's ruling.

Even if this information existed and had exculpatory value, Wright has not shown that its availability would have changed the result of his trial. Duest v. State, 15 F.L.W. S41 (Fla. Jan. 18, 1990). Where information which may have been improperly withheld was either already in the defendant's possession or was of little or no use to the defendant it cannot be stated with any degree of certainty that there is a reasonable probability that the outcome of the trial would have been different. Waterhouse v. State, 522 So.2d 341, 343 (Fla. 1998); (no prejudice from government's failure to disclose written immunity offer to a government witness when defense attorney knew of offer and used this information to full advantage to impeach witness on cross examination). See also, United States v. Chestang, 849 F.2d 528, 532 (11th Cir. 1988).

III

WRIGHT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND THE PROSECUTOR'S COMMENTS REGARDING A GLASS VASE WERE NOT IMPROPER.

Wright contends that counsel was ineffective in a) failing to introduce evidence of ownership of a vase and b) failing to impeach Charles Westberry and corroborate Jody Wright's testimony.

The trial court found:

> In [Claim II] the Defendant alleges ineffective assistance of counsel at both the guilt and sentencing phases of the trial, including allegations that are also claimed in subsequent claims contained herein. Some examples of the numerous allegations include trial counsel's failure to impeach key state witnesses, failure to make objections, failure to prevent introduction of other crimes, etc. Such allegations are completely without merit. "It is well established that for relief to be granted pursuant to a claim of ineffective assistance of counsel, a defendant must show that counsel's conduct included a specific omission or overt act which was a substantial and serious deficiency, measurably below that of competent counsel. Then, it must be shown that counsel's performance was prejudicial to the defense", Atkins v. Dugger, Nos. 73,869 and 73, 910 (Fla. April 13, 1989). Defendant's offer of proof with regard to his allegations of ineffective assistance of trial counsel are insufficient to demonstrate deficient conduct below those professionally recognized and accepted standards of professional conduct as enunciated by the U.S. Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Additionally, the majority of the alleged errors are strategic in nature, and this court will not second guess trial strategy employed by trial counsel.

(T 1086).

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court established a two-prong standard to govern

ineffective assistance claims. To obtain reversal of a conviction based on ineffective assistance of counsel, the defendant must show 1) that counsel's performance fell below an objective standard of reasonableness and 2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 694. Because a defendant must satisfy both prongs of the Strickland test to demonstrate ineffective assistance, a court concluding that a defendant has failed to satisfy one prong need not consider the other. 466 U.S. at 697. The court in Strickland further explained that, because the purpose of the sixth amendment right to counsel is to ensure a fair trial, the "benchmark for judging any claim of ineffectiveness must be whether the counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 697.

Under the performance prong of Strickland, counsel is "strongly presumed" to have rendered adequate assistance and strategic decisions made after thorough investigation of law and facts are "virtually unchallengeable". 466 U.S. at 690. Under the prejudice prong, it is not enough for the defendant to show that an error had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. The defendant must show there is a reasonable probability that, but for the errors, the result of the proceeding would be different. A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome". 466 U.S. at 693, 694.

A. Glass jar

Wright argues that Howard Pearl's representation was deficient because he introduced evidence that Wright had to get coins from a jar to purchase beer but did not introduce evidence of ownership of the jar. Ownership was never conclusively established. Wright's sisters said it was part of a set which was a gift to Wright's mother, yet Marion Wright, the father who lived in the house, did not recognize the vase (T 625-26, 633-36, 816). Because Wright's father did not recognize the jar, the State Attorney thought the jar produced during the trial may have been the one Westberry referred to (T 816).[2] After Wright's sister said the glass jar was similar to one given to their mother, the state attorney decided he would drop the matter (T 818-819). Mr. Pearl felt it was important to have the young lady testify that Wright had to use coins from a piggy bank to buy beer to show it was unlikely he had stolen almost $300.00 (T 819) In retrospect, Mr. Pearl felt he made a mistake due to the pressure of other matters during the trial (T 820). Hindsight opinion has little meaning or value under Strickland. Francis v. State, 529 So.2d 670, 672, n.4 (Fla. 1988). At the time, the ownership issue may have been one more disputed issue which was better left alone. There was no way defense counsel could have

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[2] Although Wright makes much of the fact that the jar was produced by the state attorney's present wife, the record shows that the woman had been at pre-trial with Wright's family and that the state attorney "had seen" the woman before, not that he was "seeing" her before trial.

anticipated the State Attorney would argue the issue in closing argument (T 820).

In Point X, Wright argues that the prosecutor's mention of the lack of evidence of ownership was improper. This issue is procedurally barred because it could have been raised on appeal. Henderson v. Dugger, 522 So.2d 835 (Fla. 1988). The trial court found the comments were not improper (T 1090). The record shows that the vase was produced during trial and the prosecutor did not pursue the issue after the sister placed the ownership issue in dispute (R 2322-2345). On Monday, August 29, 1983, the state attorney indicated at the end of the day that he had provided defense counsel with supplemental discovery (R 2323). The Friday before, it came to the attention of the state that a glass vase containing old coins had been in Wright's possession (R 2323). The state also furnished the name of a witness who would testify that the victim collected old coins and put them in certain types of receptacles (R 2323). Defense counsel requested time to investigate the matter, indicating that there were witnesses in either North or South Carolina, Jacksonville, and Georgia, who could testify as to the origin of the decanter (R 2325). Defense counsel indicated that there were people who professed to have seen a "similar object" in Mrs. Wright's home and one witness who gave Mrs. Wright a gift of a decanter and glasses (R 2328). He asked for an expert to determine whether the glasses matched the vase in question (R 2328). The judge then set a Richardson hearing for the next day (R 2340). The next day, after a conference in chambers, the state announced they would not

introduce the vase into evidence (R 2345). The ownership of the vase was never established. If the prosecutor's comments were objectionable, the issue should have been raised on appeal.

There was nothing improper in the prosecutor arguing that there was no evidence as to who owned the jar. This is a correct statement, and it is appropriate to comment on the lack of evidence in closing argument. Gibson v. State, 475 So.2d 1346 (Fla. 1st DCA 1985); Tarpley v. State, 477 So.2d 63 (Fla. 3rd DCA 1985). The prosecutor is allowed wide latitude in arguing to the jury and can argue all logical inferences. Breedlove v. State, 413 So.2d 1 (Fla. 1982). Arguing that the vase could be the same vase Westberry referred to was a logical inference when the testimony of Westberry and Charlotte Martinez was pieced together (R 2742). This was not a misrepresentation of the facts, but was a "fair comment on the evidence". Craig v. State, 510 So.2d 857 (Fla. 1987) The prosecutor did not know who the vase belonged to. Wright's father did not recognize the vase, but suddenly when ownership becomes an issue, a sister appears who says it belongs to their mother. There was never testimony under oath as to ownership. Furthermore, the vase issue was a minor issue and any error in defense counsel introducing it into evidence or the state attorney's comments were harmless where evidence about its relevance was never developed and the incriminating evidence proved Wright committed the murder. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

The most logical assumption the jury would make is that if the vase were important and the state has the burden of proof,

the vase would have been introduced into evidence by the state, not the defense. In fact, the prosecutor was the first to admit the vase could have nothing to do with the residence of the victim (R 2742). Mr. Pearl dissipated any possible effect the prosecutor's comment may have had since his closing argument followed the comment (R 2782-83).

None of the tactical decisions by defense counsel were outside the wide-range and scope permitted effective competent counsel. Strickland v. Washington, 466 U.S. 668 (1984). Defense counsel created the inference that Wright could not have recently stolen almost $300.00 because he had to use coins from a piggy bank identified as belonging to his mother. The state created the inference that perhaps the glass jar was the one Westberry talked about. It cannot be said this one inference uncorroborated by direct testimony, could have, in and of itself, changed the jury's verdict. See, Jackson v. State, 452 So.2d 533 (Fla. 1984).

B. Cross Examination

Wright argues that Howard Pearl did not adequately cross examine state witnesses. Specifically, Wright *contends* that counsel should have impeached Taylor Douglas with Marion Wright's statement that Douglas told Wright he should go ahead and confess. Impeaching a law enforcement officer is a precarious situation, particularly when the impeachment testimony comes from the defendant's father. Not only could counsel alienate the jury by an attack on a law officer, but he could also appear to be grasping at insignificant straws. Wright's theory of defense was

that he was innocent, not that the state conspired to convict him. This was a question of tactics and strategy. There are times cross examination opens doors to the state bringing forth adverse testimony. Counsel cannot be deemed ineffective for not exposing his client to possible detrimental matters. Cave v. State, 529 So.2d 293 (Fla. 1988). Mr. Pearl had tried to suppress Wright's statement about "if I confess I will die in the electric chair, if I don't talk I stand a chance of living" (R 64). Surely he would not open the door on the confession issue and waive the issue for appeal. Furthermore, Wright testified that Walter Perkins told him to go ahead and confess, so this testimony was cumulative (R2547).

According to Wright, Mr. Pearl should have introduced the testimony of Gloria Clark, Wright's aunt, regarding whether Wright had told his father about police cars at the victim's house while his father was inside the residence. Whether to introduce certain testimony is a question of trial tactics which should not be second guessed. Jackson v. State, supra. Wright has failed to show how this testimony would have changed anything. Whether Marion Wright was inside or outside was a trivial issue, and Marion testified that he was in the living room when he first saw the defendant, then went out on the porch (R2574-78). Further testimony on this issue would have been a waste of time.

Wright further contends that Mr. Pearl should have objected during cross examination when the state attorney asked him whether he believed other witnesses were lying. Whether to

object is a question of strategy. Muhammed v. State, 426 So.2d 533, 538 (Fla. 1982). Objections call attention to the testimony. It is often better judgment not to object. Besides which, there was nothing objectionable about this line of questioning.

There was supposedly impeachment evidence available as to Walter Perkins. Defense counsel attempted to bring the testimony out, but the witness denied it. Absent some prior inconsistent statement on direct testimony from a witness, Mr. Pearl took the appropriate action in apologizing to the witness. It is a matter of professionalism not to attack a witness, especially a detective who is respected in the community. The testimony that supposedly came forward at the evidentiary hearing was that Wright's sister said that Perkins told their mother to keep Wright and his brother away from his stepdaughter. The impeachment value of this testimony is questionable, even if true.

Another allegation of ineffectiveness is that counsel did not effectively cross-examine Westberry. The trial transcript demonstrates that counsel's cross examination was exceptionally focused (R2162-2194)

Of course there will always be inconsistencies and possible avenues of impeachment which can be gleaned from the record on appeal. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way". Strickland, 466 U.S. at 689. Wright attacks details in a trial

which lasted ten days. When one considers the magnitude of the case "all facts could not be expected to match perfectly". Ziegler v. State, 402 So.2d 365, 377 (Fla. 1981). Wright has not only failed to show deficient performance, he has failed to demonstrate prejudice.

The Supreme Court of Florida recently affirmed a denial of a motion to vacate in Correll v. Dugger, 15 F.L.W. S147 (Fla. March 16, 1990), in which various issues of ineffective assistance of counsel were raised. This court held that the defendant failed to meet the prejudice prong of Strickland which requires a showing that "but for such ineffectiveness, the outcome probably would have been different." Id at S148. The court did not discuss whether counsel provided ineffective assistance, but passed onto the prejudice prong. In Wright's case, neither prong is met and even if he were able to show counsel was ineffective, he has not shown prejudice. Even assuming all such actions had been taken by counsel, there is no showing that the judge or jury would have arrived at a different result. The additional evidence simply would not have made any difference. See Correll at S149.

Although Mr. Pearl indicated he was not satisfied with his performance and he may have made mistakes, his statement has little meaning or value under Strickland v. Washington, 466 U. S. 668, 689 (1984) which provides:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged

> conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'.

See also Francis v. State, 529 So.2d 670, 672, n.4 (Fla. 1988). Hindsight vision is usually 20/20 and there are always ways to improve on a trial in retrospect. Yet every attorney does the best he can, and it is inconceivable that any attorney would intentionally be ineffective and expose himself to disciplinary proceedings. A court must endeavor to eliminate the "distorting effects of hindsight." Blanco v. Wainwright, 507 So. 2d 1377, 1381 (Fla. 1987).

IV

WRIGHT WAS NOT COERCED INTO TESTIFYING AGAINST HIS WILL.

Wright contends that defense counsel coerced him into testifying which not only violated his privilege not to testify but also was ineffective assistance of counsel.

This issue was not raised in either the Motion to Vacate or the Motion to Amend which was filed after the evidentiary hearing (T 1167-1271). As late as August, 1989, Wright filed a Response to Order to Advise Court of Additional Evidence (T 1274-1280). The issue regarding Wright being forced to testify was never presented to the trial court and was raised for the first time

in this appeal. The issue is procedurally barred. Preston v. State, 528 So.2d 896 (Fla. 1988).

Even if it were not procedurally barred, the issue has no merit. At the evidentiary hearing, Mr. Pearl said he made a tactical decision that Wright should testify (T 837-838). Tactical decisions are presumed reasonable. A defendant alleging ineffective assistance must overcome this presumption. Strickland at 466 U.S. at 689. Tactical decisions cannot be second guessed. See Gilliard v. Scroggy, 847 F.2d 1141, 1144 (5th Cir. 1988); Stewart v. Dugger, 847 F.2d 1486, 1494 (11th Cir. 1988); Williams v. Kemp, 846 F.2d 1276, 1280 (11th Cir. 1988).

In United States v. Dyer, 784 F.2d 812, 817 (7th Cir. 1986), the court even declined to review the attorneys tactical decision whether to put the defendant on the stand because a reviewing court may only consider those acts or omissions not classifiable as an attorneys' tactics. Mr. Pearl did not coerce Wright into testifying. He said that although Wright indicated reluctance to testify, he accepted the attorney's advice to take the stand (T 837- 838). The fact that Mr. Pearl had represented in opening statement that Wright would testify indicates that Wright had agreed to testify. Mr. Pearl reserved opening statement until the state rested, so Wright was not committed to testify until then (R2418). When Wright later was reluctant to testify, Mr. Pearl had to make a tactical decision whether to expose the defense to the prosecutor's inevitable comments that the defense did not live up to promises made in opening statement

since he said Wright would testify. The fact that counsel did not prevent Wright from testifying is not deficient performance. See White v. State, 15 F.L.W. S151, 152 (Fla. March 15, 1990).

V

COUNSEL WAS NOT INEFFECTIVE AT THE PENALTY PHASE.

Wright asserts trial counsel was ineffective at the penalty phase because:

1) In closing argument he said he would not take issue with the verdict from the guilt phase.

2) He did not argue the crime was not heinous, atrocious, and cruel.

3) He failed to introduce the fact that Wright agreed to take a polygraph test.

4) He offered inconsistent theories by introducing a psychological report which was outdated and incompetent.

Judge Perry's order after the evidentiary hearing states:

> In [Claim III] the Defendant alleges that defense counsel was ineffective for failure to call additional witnesses to testify as to the Defendant's character. Trial counsel made a strategic decision as to which witnesses to call to testify on behalf of the Defendant. It was then up to the jury whether to believe the witnesses presented by the defense or the State. Clearly, such a tactical decision is not subject to collateral attack.
>
> In [Claim III] the Defendant also alleges that use by trial counsel of a juvenile psychiatric evaluation was ineffective assistance of counsel. Defense counsel testified at the evidentiary hearing that the decision to use the evaluation was a "balancing

> act." Defense counsel testified that he was unsure what a current evaluation would disclose and chose to go forth with the previous examination. An excerpt of the defense counsel's testimony is attached hereto as Exhibit "8". Again, defense counsel made a tactical decision which is not subject to collateral attack.

(T 1087).

At the penalty phase, defense counsel told the jury he would not take issue with the verdict and that it would be inappropriate for him to question their judgment. This was an entirely proper and reasonable technique to establish credibility with the jury. After a guilty verdict, defense counsel is in a precarious position. He faces a jury who has determined his client is guilty, and must try to bring that jury back over to his side in recommending life. This difficult situation is illustrated in Stewart v. State, 15 FLW S138 (Fla. March 15, 1990) where defense counsel moved to withdraw before the penalty phase because he felt he had lost credibility with the jury who convicted his client since he had argued his innocence. By informing the jury he was not attacking their judgment as to the guilt phase, Mr. Pearl was communicating with the jury and trying to establish a relationship of trust.

Wright isolates the comment that counsel would not take issue with the fact that the murder was heinous, atrocious and cruel; however when this comment is considered in the context of the entire argument, it is entirely reasonable. Counsel argued that although the State argued four aggravating circumstances, there were two which absolutely did not apply (T 2987). By

saying he did not take issue with two of the circumstances, he was bolstering his credibility with the jury. This is a reasonable strategical decision. Logically, when counsel argues against two factors then says he will not argue against two others, the jury thinks the first two must be inapplicable or counsel would have told them so since he was so honest regarding the other factors. Mr. Pearl was well aware that the death penalty is a weighing process and his best shot was at getting rid of two aggravating circumstances. If he argued against all four factors, when there were two which were obvious from the record, the jury most likely would question his integrity and conclude he was just arguing for the sake of argument. The jury had found Wright guilty of burglary, so obviously the murder was committed during the burglary. The jury had heard evidence that a 75-year old woman was brutally murdered by multiple stab wounds to the face and neck, had been raped and had vaginal lacerations which were inflicted while she was still alive (R 812, 1587-1601, 822, 1815-1822, 2001). Counsel could only lose credibility by arguing that the murder was not heinous, atrocious and cruel. This was a reasonable tactical decision.

Mr. Pearl testified at the evidentiary hearing that his understanding was that the court order denying admissibility of the polygraph tests extended to the penalty phase (T 834). The state filed a motion in limine to preclude Wright from admitting evidence of the polygraph exams (R 373). A hearing was held August 19, 1983 (R 458-463), after which the court ruled that any mention of polygraph evidence was inappropriate (R 462). The

court ruled that the results were inadmissible, as well as the fact the polygraph exams took place. Counsel was instructed not to bring out, either in direct or cross-examination, anything to do with the polygraph (R 462). The rule that polygraph evidence is inadmissible unless stipulated into evidence is well established in Florida. Delap v. State, 440 So.2d 1242, 1247 (Fla. 1983).

Judge Perry found that the introduction of the psychological evaluation was a tactical decision which could not be collaterally attacked (T 1087). Counsel testified at the evidentiary hearing that he did not ask to have an expert appointed because he was afraid of what could be discovered and the state would have access to whatever he discovered (T 889, 891). He made a strategic decision not to introduce evidence pointing to guilt in order to make the best record for appeal (T 853-855). Although it was a close decision whether to admit the psychological report, he was hoping the good would outweigh the bad (T 856, 889). He did not read the report as indicating Wright had sexual problems with a mother figure (T 859). He felt it was important the jury know certain things about his client because he had been cross-examined so sharply (T 400). Counsel thought it was important for the jury to realize the brilliant prosecutor was dealing with a young man of borderline intelligence who was poorly educated, and had trouble expressing himself well (T 860). Taking the report as a whole, counsel thought it was more helpful than harmful (T 860). The choice by counsel to present or not present evidence in mitigatin at the

penalty phase is a tactical decision properly within counsel's discretion. See, Magill v. State, 457 So.2d 1367, 1370 (Fla. 1984).

Wright has failed to meet the two-prong of Strickland by demonstrating deficient performance and prejudice. This court has rejected similar claims as being without merit. White v. State, 15 F.L.W. S151 (Fla. March 15, 1990); Duest v. State, 15 FLW S42 (Fla. Jan. 18, 1990); Harich v. State, 484 So.2d 1239 (Fla. 1986). The additional mitigating evidence would not change the outcome where there were four aggravating circumstances and no mitigating circumstances. See Gore v. Dugger, 532 So.2d 1048 (Fla. 1988); Bertolotti v. State, 534 So.2d 386 (Fla. 1988); Spaziano v. State, 545 So.2d 843 (Fla. 1989); Buenoano v. State, 15 F.L.W. S196 (Fla. April 5, 1990). Recently, in Correll v. State, 15 FLW S47 (Fla. March 16, 1990), this court passed directly to the second prong and decided there was no prejudice under Strickland, which requires a showing that "but for such ineffectiveness, the outcome probably would have been different". Id at S148. This court also observed that in view of the fact that the defendant continued to insist that he was not guilty of the crimes, it is understood why counsel may not have wanted the jury to believe he was an alcoholic and a drug addict. Id. at S148.

In fact, since Wright testified at trial 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).

Wright has not shown the verdict would have been any different absent the error. Bertolotti v. State, 534 So.2d 386 (Fla. 1988). Wright had four aggravating circumstances and no mitigating circumstances. 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").

As the Supreme Court stated, a defendant "must overcome the strong presumption that counsel provided effective assistance. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689. See also Harich v. Dugger, 844 F.2d 1464, 1471, n,7 (11th Cir. 1988) (in which the court states of Mr. Pearl: "Indeed we think that the lawyer was above average if not outstanding in representing his client in this case.") [3] It is a travesty of justice that Mr. Pearl has to face accusations of ineffectiveness which are gleaned from a voluminous record in an attempt to raise a doubt as to his abilities. As the trial court observed, Mr. Pearl is a "consummate advocate" (T 836). Mr. Pearl testified that of three hundred capital cases, he has

[3] The trial in Wright was sixteen months after the Harich trial.

tried about seventy-five cases and only has six defendants on death row (T 844-847).

VI

THE TRIAL COURT PROVIDED A FULL AND FAIR INQUIRY INTO WRIGHT'S ALLEGATIONS OF JUROR MISCONDUCT AND WRIGHT WAS AFFORDED A FAIR TRIAL.

Wright's allegations are 1) that spectators who were friends of one of the jurors stated that the juror had made up her mind before trial and would need only five minutes to convict Wright, 2) that the jurors shifted the burden of proof to the appellant and found him guilty because the defense failed to prove his innocence, and 3) that at least one juror slept throughout much of the trial (T 225-226).

Judge Perry found that the allegations of juror misconduct were previously determined by the court to be an issue inhering in the verdict and not the subject of external influence (R 1088).

This issue is procedurally barred because it should have been raised on appeal. Smith v. Dugger, 15 FLW S81 (Fla. Feb 15, 1990); Correll v. Dugger, 15 FLW S47 (Fla. Mar. 16, 1990).

During the trial, Mr. Pearl informed the judge that one of the jurors expressed an opinion that it would only take five minutes to convict Wright (R 2832-2833). The court indicated he would conduct an inquiry into the matter as soon as he could find the ladies who overheard the comment (R 2837). The judge also indicated that if there was a problem, there were three alternate jurors (R 2837). The judge brought Mr. Schwing into chambers.

He said he heard two other ladies in the audience say that a friend of theirs on the jury had already made up her mind (R 2842). The court then brought in Beaulah Cannon, who said the two ladies knew juror Hayes (R 2848). The judge also tried to obtain information on the two ladies and whether they knew juror Hayes (R 2851). The judge called Marlene Tyler, one of the two ladies in the audience, who told him juror Hayes never expressed such an opinion (R 2855). She thought that someone may have mentioned they hoped it took more than five minutes to make up their minds (R 2855). The other woman in the audience was Ava Thornton, who the judge paged in the halls (R 2856). Ms. Thornton did not respond and defense counsel said the only other thing they could do was call every member of the audience, which wouldn't be very productive (R 2858).

The information involving this issue was known at the time of trial. On July 26, 1984, during the pendency of the direct appeal, appellate defense counsel filed a motion to file an additional point and to supplement the record on appeal regarding Wright being present during this inquiry. On August 27, 1984, this court denied the motion without prejudice to properly supplement the record by having the court relinquish jurisdiction to the trial court for that purpose. Defense counsel then filed a motion to relinquish jurisdiction to resolve the ambiguity in the transcript, which motion was granted September 19, 1984. Judge Perry, Circuit Court for Putnam County, conducted a hearing October 5, 1984, and the record was supplemented with the transcript (R 3078-3140). Defense counsel then filed a motion to

file an additional point on appeal which this court accepted October 29, 1984.

Regarding the claims that a juror was sleeping and shifted the burden to the defendant, the information underlying this claim was known during the direct appeal process and should have been raised at that time. During the pendency of the appeal, on June 18, 1984, the appellate public defender filed a motion to relinquish jurisdiction to conduct an evidentiary hearing concerning possible improper deliberation procedure by the jury. Attached to the motion was an affidavit by Judith Marks indicating that a juror remarked that the defense did not prove innocence and that another juror may have fallen asleep. This court denied the motion on June 28, 1984.

On July 9, 1987 the trial judge conducted a hearing on a motion to interview jurors (T 1395-1416). On September 3, 1988, Wright filed an amended notice of intent to interview jurors (T225-236). The trial court held a hearing September 16, 1988 on the issue after which he entered a comprehensive order denying the motion. (T 1417-1483, 238-239). The order shows that Wright was unable to establish any external influence on the jury and that this claim is without merit. Not only is this issue procedurally barred, the issue has been rejected by the trial court, whose findings are supported by competent substantial evidence.

VII

THE CLAIM THAT WRIGHT'S CONVICTION AND SENTENCE ARE INVALID BECAUSE THE STATE USED A COMMENT ON SILENCE IS

PROCEDURALLY BARRED AND WITHOUT MERIT.

This claim is procedurally barred since it was raised on appeal. Henderson v. Dugger, 522 So.2d 835 (Fla. 1988). This court rejected Wright's argument. Wright v. State, 473 So.2d 1277, 1279 (Fla. 1985). Wright again tries to raise the issue, citing decisions which have issued since Wright v. State, but does not allege there has been a fundamental change in law which would entitle him to relief. Judge Perry denied relief as follows:

> [Claim VI] alleging Miranda violations should have been raised on direct appeal. In his claim, the Defendant alleges that allowing the deputy sheriff to testify to the statement that, "if I confess to this," I'll die in the electric chair. If I don't talk I stand a chance of living," allegedly made by the Defendant after being advised of his Miranda rights was in violation of his Fifth Amendment Right to Silence. The statement was clearly voluntary as the Defendant had just been advised of his Miranda rights. Even accepting that the statement was taken in violation of Miranda, the Supreme Court of Florida has held that allowing such statements to be admitted at trial was harmless error, when, as in the instant case, the statement was not the primary evidence linking the Defendant to the crime, but rather cumulative to the evidence presented by the key witness. Alvord v. Dugger, No. 71,192 (Fla. May. 11, 1989). Therefore, even if the Defendant's allegation of a Fifth Amendment violation is taken as true, the Defendant's claim is insufficient to merit relief.

(T 1088).

The trial court's order was supported by competent, substantial evidence. Moreover, this was not a comment on Wright's right to remain silent, but on what he said. See Antone v. State, 382 So.12d 1205 (Fla. 1980).

VIII

THE CLAIM THAT DEFENSE COUNSEL WAS UNABLE TO FULLY CROSS-EXAMINE WESTBERRY CONCERNING HIS LIMITED GRANT OF IMMUNITY IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Wright claims that his right to fully cross-examine Charles Westberry regarding a "limited grant of immunity" from prosecution on scrap metal thefts, was improperly limited.

This claim is procedurally barred since it was raised on appeal. Henderson v. Dugger, 522 So.2d 835 (Fla. 1988). This court rejected Wright's argument in Wright v. State, 473 So.2d 1277, 1279 (Fla. 1985). Judge Perry denied relief as follows:

> Defendant's allegation in [Claim VII] that defense counsel was unable to fully cross-examine Westberry concerning his involvement with the defendant in dealing in scrap metal should have been raised on direct appeal, as this issue was contained in the defendant's statement of judicial acts to be reviewed filed October 14, 1983. A copy of the statement is attached hereto as Exhibit "11"

(T 1088).

Furthermore, as discussed in point II, there was no "limited" claim of immunity. Wright first argues ineffective assistance of counsel for failing to cross examine Westberry, then claims he was precluded from cross examination. Evidentiary

matters such as the scope of cross examination are within the trial court's discretion. Demps v. State, 395 So.2d 501, 508 (Fla. 1981).

IX

THE CLAIM THAT THE TRIAL COURT'S REFUSAL TO PERMIT THE DEFENSE TO REOPEN ITS CASE TO PRESENT NEWLY-DISCOVERED EVIDENCE AFTER THE CLOSE OF ALL EVIDENCE IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Wright claims that he should have been allowed to reopen his case after he rested to present the testimony of Kathy Waters that she had been seeing somone who looked like Wright walking on State Road 19 and three people in the vicinity of the victim's house near the time of the murder.

This claim is procedurally barred since it was raised and disposed of on direct appeal. Henderson v. Dugger, 522 So.2d 835 (Fla. 1988). This court held any error to be harmless in Wright v. State, 473 So.2d 1277, 1280-81 (Fla. 1985), as follows:

> Having determined that the trial court erred, we must now consider whether that error was harmless. The record indicates Kathy Waters would have testified that, shortly after midnight on February 6, she saw three persons in the neighborhood of the victim's house; that an individual of the appellant's general description was walking in the opposite direction from the victim's house; and that she knew appellant and would have offered him a ride had she recognized the person on Highway 19 as appellant. The record already contained unrefuted testimony that three individuals were gathered near the victim's home. The defense did not contend that the proffered witness would purport to identify appellant as being the person she observed on the road or

> that her testimony, if accepted by the jury, would require a finding by the jury that appellant did not commit the murder. Based upon our review of the record, including the nature of the proffered testimony, we conclude that the excluded evidence would not have affected the verdict and its exclusion was harmless beyond a reasonable doubt. (Citations omitted).

The trial court properly found this issue to be procedurally barred (T 1089).

X.

THE CLAIM OF PROSECUTORIAL MISCONDUCT IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Wright contends that the prosecutor's comments in closing argument regarding the glass vase were a misrepresentation of facts. He also contends the prosecutor misled the jury regarding a flashlight that may have belonged to Ruby Ammons. The prosecutor supposedly vouched for the credibility of witnesses and implied there was other evidence of guilt.

This issue is procedurally barred because it should have been raised on direct appeal. Smith v. Dugger 15 FLW S81 (Fla. Feb. 15, 1990); Correll v. Dugger, 15 FLW S147 (Fla. March 16, 1990).

The trial court found:

> [Claim X] alleges prosecutorial misconduct for statements made during the State's closing argument. It is this Court's opinion that the prosecutor did not overstep the bounds with his closing remarks to the jury. Mills v. State, 507 So.2d 602 (Fla. 1987). Additionally, such a claim could have and should have been raised on direct appeal. Adams v. State, 380 So.2d 423 (Fla. 1980). As to the claim of

> ineffective assistance of counsel, the Defendant failed to show that defense counsel's failure to object to the prosecutor's alleged improper remarks was a "substantial and serious deficiency measurably below that of competent counsel," even when taking into consideration that the instant case is a death penalty case. Knight v. State, supra.

(T 1090).

The issue regarding the comment on the vase is discussed in Point III.

The testimony regarding the Ruby Ammons' flashlight is apparent from the trial record (R2512, 2515). If the prosecutor's closing argument was improper, the issue should have been raised on appeal. It is procedurally barred. Henderson v. State, 522 So.2d 835 (Fla. 1988).

The comment about the flashlight was not that Wright had stolen it to navigate in the victim's house. The comment was that Ruby Ammons testified that if Wright needed a flashlight, he was familiar with her trailer or van or car and someone had taken a flashlight from her car the night of the murder (R2741). This is precisely what the evidence showed.

The comment regarding whether Wright had denied going to prison was proper rebuttal to Mr. Pearl's argument that there was no evidence Wright had ever been in prison as Westberry inferred (R2762). See Dufour v. State, 495 So.2d 154, 160 (Fla. 1986). The trial court denied Mr. Pearl's motion in limine on this issue (R2126). The comment was a fair comment on the evidence. Craig v. State, 510 So.2d 857 (Fla. 1987).

The fact that the prosecutor was able to argue certain issues to the jury is not error. Counsel may argue the evidence, lack of evidence, and inferences therefrom. Dufour, supra; Gibson v. State, 475 So.2d 1346 (Fla. 1st DCA 1985); Tarpley v. State, 477 So.2d 63 (Fla. 3rd DCA 1985). The prosecutor is allowed wide latitude in arguing to the jury and can argue all logical inferences. Breedlove v. State, 413 So.2d 1 (Fla. 1982). Even if there were prosecutorial misconduct, a new trial is warranted only in the case of absolute necessity and where the error is so egregious as to vitiate the entire trial. Johnston v. State, 497 So.2d 863 (Fla. 1986); State v. Murray, 443 So.2d 955 (Fla. 1984). Error, if any, was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

XI

THE CLAIM THAT WRIGHT WAS DENIED AN ADVERSARIAL TESTING BECAUSE THE JURY DID NOT HEAR THAT MS. SMITH'S HOUSE HAD BEEN REGULARLY BURGLARIZED IS WITHOUT MERIT AND PROCEDURALLY BARRED; DEFENSE COUNSEL WAS NOT INEFFECTIVE.

Wright's next argument is that the trial court improperly limited cross-examination of Clayton Hughes who testified there had been numerous break-ins at the victim's residence in the two weeks before her murder.

Wright's claim is procedurally barred because it should have been raised on direct appeal. Smith v. Dugger, 15 F.L. S81 (Fla. Feb. 15, 1990); Correll v. Dugger, 15 F.L.W. S147 (Fla. March 16, 1990). Wright first argues the trial court erred in excluding testimony about the break-ins, then he argues counsel

was ineffective for not urging the introduction of evidence. Counsel was not ineffective for not pursuing inadmissible evidence. Combs v. State, 525 So.2d 853, 855 (Fla. 1988).

The trial court properly found:

> [Claim IX] concerns an allegation by the Defendant that he should have been allowed to present evidence that the victim's house had been burglarized regularly . Actually, the jury was informed that the victim's house had recently been burglarized, as the quote from the record, page 2593, contained on page 115 of Defendant's Amended Motion to Vacate Sentence, illustrates. The objection which was sustained by the Court merely disallowed the witness from testifying as to the number of break-ins as told to the witness by the victim and not to the fact that there were "numerous break-ins in the last two weeks." An excerpt is attached hereto as Exhibit "12". Clearly the jury was aware of the previous break-ins to the victim's home. As the Defendant pointed out, the jury was never instructed to disregard the witnesses' response by the Court, and it is highly unlikely that the jury would misunderstand the objection and disregard the statement by the witness. As to the claim of ineffective assistance of counsel, defense counsel did make an attempt to continue questioning the witness about the number of break-ins but the Court sustained the State's objection.
>
> The Defendant also alleges that defense counsel should have called a particular witness to testify as to those persons that the victim suspected were involved in the previous break-ins. Such a decision is strategic in nature and, consequently , not subject to collateral attack. Neither defense counsel's failure to continue questioning a witness when the State's objection had been sustained by the court, nor the failure to call this particular witness was a "substantial

> and serious omission measurably below that of competent counsel." Knight v. State, 394 So.2d 997, 1001 (Fla. 1981). Therefore, both claims of ineffective trial counsel included in Claim [IX] are denied.

(T 1089-90).

The scope of cross examination is within the discretion of the trial court. Demps v. State, 395 So.2d 501, 505 (Fla. 1981).

XII

> THE CLAIM THAT TRIAL COUNSEL FAILED TO REQUEST A CHANGE OF VENUE IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Wright contends he was prejudiced by pretrial publicity, failure of the trial court to change venue, and denial of the motion for individual sequestered voir dire. He also contends counsel's failure to request a change of venue was ineffective assistance.

This issue is procedurally barred for failure to raise it on direct appeal. Henderson v. State, 522 So.2d 835 (Fla. 1988). Raising the claim as ineffective assistance of counsel does not resurrect a barred claim. Woods v. State, 531 So.2d 79 (Fla. 1988).

Judge Perry found that the challenge to venue was barred.

> Defendant alleges in [Claim IV] that the failure to change venue violated several Constitutional amendments. Challenges to venue should be raised on direct appeal and are, therefore, not cognizable on a motion for relief pursuant to Fla.R.Crim.P. 3.850 Henderson v. State, 522 So.2d 835 (Fla. 1988). Additionally, the Defendant was allowed additional pre-emptory strikes,

> a larger venire panel, and an opportunity to renew the motion to change venue if an impartial jury could not be empaneled. Defense counsel evidently believed he had a fair and impartial jury because he had approximately two to three strikes remaining after a panel was selected. Consequently, this claim does not warrant relief. An excerpt of testimony by defense counsel is attached hereto as Exhibit "9".

(T 1087).

Whether to allow sequestered and individual voir dire is within the discretion of the trial court. Lambrix v. State, 529 So.2d 1110 (Fla. 1988); Davis v. State, 461 So.2d 67, 69 (Fla. 1984); Stone v. State, 378 So.2d 765 (Fla. 1979). The record shows counsel believed he had an impartial jury. Wright has failed to show that there was any jury bias which prejudiced the outcome of the trial. Conclusory allegations are insufficient to warrant relief on an ineffective assistance claim. Kennedy v. State, 547 So.2d 912 (Fla. 1989). Absent a demonstration of partiality of his jury, and an abuse of discretion by the trial court, no basis for reversal is demonstrated. Davis, supra. See also Cummings v. Dugger, 862 F.2d 1504, 1507 (11th Cir. 1989); United States v. Holman, 680 F.2d 1340, 1344 (11th Cir. 1982). Counsel was not ineffective because he was satisfied with the jury chosen and there was no reason to change venue. Most publicity was long before the trial (T 841). There was no reference in the Palatka daily news about a sexual assault (T 885). Mr. Pearl had discussed a change of venue with Judge Perry, was given extra peremptory challenges, and informed that

if he could not seat an impartial jury the judge would change venue on his own motion (T 822). Wright can point to nothing partial or biased about the jury.

XIII

THE ISSUE OF WHETHER WRIGHT WAS ABSENT FROM THE COURTROOM WHILE THE COURT COMMUNICATED WITH JURORS DURING GUILT/INNOCENCE DELIBERATIONS IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Wright alleges that although he was present when the judge refused the jury's request for testimony, he was not present when the judge communicated with the jury. [4] He also alleges ineffective assistance of counsel for failure to raise this issue.

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). Point 11 on appeal addressed Wright's absence during the inquiry of a juror and this issue could have been raised also. The trial court properly found the issue was procedurally barred (T 1090).

The record indicates the jury sent a question requesting testimony about a pubic hair. The judge discussed it with counsel and exchanged inquiries with the jury trying to narrow the question (R 2899-2907). The jury was brought in and the record reflects the defendant was present (R 2908).

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[4] Wright's record cite, R 2050-2052, involves expert testimony regarding fingerprints.

Wright claims there is new case law which makes this claim cognizable on a 3.850 motion, citing Hildwin v. State, 531 So.2d 124 (Fla. 1988), and Rhodes v. State, 547 So.2d 1201 (Fla. 1989). Both Hildwin and Rhodes were direct appeal cases. In Hildwin, the court found that any error was harmless where both counsel made their positions known. In Hildwin, the judge did not bring the jury into the courtroom. In the present case, the judge conferred with both counsel and brought the jury into the courtroom with the defendant present. In Rhodes, the judge responded to a juror question without notifying the defendant or either counsel. The judge informed the jurors they might be polled on their penalty recommendation. This court held the error was not harmless because the recommendation of death may have been affected by a juror's concern his recommendation would be announced in open court.

Not only are the above cases inapposite to the present case, but those cases did not involve a change in law. Only major constitutional changes which constitute a development of fundamental significance are cognizable in a motion for post conviction relief, even in death cases. State v. Glenn, 15 FLW S69 (Fla. Feb. 15, 1990). Even if the cases did constitute a change in law, 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); Saffle v. Parks, 4 FLW Fed. S134, Case No. 88-1264 (March 5, 1990). Wright has not demonstrated that his case fits into an exception for such rule.

Even if there was error, it was harmless and Wright was not prejudiced. See Garcia v. State, 492 So.2d 360 (Fla. 1986).

The claim of ineffective assistance of counsel is a disguised attempt to litigate a claim which is procedurally barred. Clark v. State, 460 So.2d 886 (Fla. 1984); Quince v. State, 477 So.2d 535 (Fla. 1985). Wright has shown neither deficient performance nor prejudice as required by Strickland.

XIV

THE CLAIM THAT DEFENSE COUNSEL FAILED TO REQUEST, AND THE COURT ERRED BY NOT GIVING A JURY INSTRUCTION REGARDING VOLUNTARY INTOXICATION AND SPECIFIC INTENT IS PROCEDURALLY BARRED.

Wright argues that the absence of the voluntary intoxication instruction relieved the state of its burden of proving intent beyond a reasonable doubt and prevented the jury from considering guilt for a lesser offense. He maintains there was sufficient evidence to require the instruction and counsel was ineffective for failing to request the instruction.

The trial court found:

> In Claim XI, the defendant alleges that the jury should have been instructed on voluntary intoxication. Clearly, challenges to jury instructions should be raised on direct appeal. Henderson v. State, supra. As to the issue that trial counsel was ineffective for failing to request an instruction on voluntary intoxication, the Supreme Court of Florida held in Buford v. State, 492 So.2d 355, 359 (Fla. 1986), that the decision to include a voluntary intoxication instruction is tactical and, therefore, not subject to

> collateral attack. Defense counsel testified at the evidentiary hearing that he had considered the instruction and had rejected it. An excerpt from the defense counsel's testimony at the evidentiary hearing is attached hereto as Exhibit "13". This Court will not second guess strategy employed by trial counsel.

(T 1090).

As the trial court observed, the issue should have been raised on appeal. Point VI on appeal concerned the trial court's refusal to instruct on circumstantial evidence, and any other issue regarding jury instructions could have been raised. Although Wright says there was substantial evidence to support the instruction, this assumption is not evident from the record. In fact, requesting the instruction never occurred to counsel.

A jury instruction need not be given simply because there is evidence of alcohol consumption. If there is evidence of the use of intoxicants but not intoxication, a jury instruction is not required. Edwards v. State, 15 F.L.W. D383, 384n.1 (Fla. 1st DCA, Feb. 1, 1981); Lambrix v. State, 534 So.2d 1151 (Fla. 1988).

Since the theory of defense was innocence, trying to establish that Wright was intoxicated is inconsistent with this negation of guilt. Consequently, counsel cannot be deemed ineffective for failing to request a voluntary intoxication instruction. See Combs v. State, 525 So.2d 853 (Fla. 1988); Harich v. State, 484 So.2d 1239 (Fla. 1984).

XV

> THE CLAIM THAT THE STANDARD JURY INSTRUCTIONS SHIFT THE BURDEN OF PROOF IS PROCEDURALLY BARRED AND WITHOUT MERIT.

This court has rejected appellant's argument on the merits. Arango v. State, 411 So.2d 172 (Fla. 1982); Preston v. State, 531 So.2d 154 (Fla. 1988).

As the trial court found, the issue is procedurally barred for failure to raise it on direct appeal (T 1091). Jones v. Dugger, 530 So.2d 293 (Fla. 1988). This court precluded retroactive application of Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), in Clark v. Dugger, 15 F.L.W. S50 (Fla. Feb. 1, 1990). The United States Supreme Court recently decided a similar issue adverse to Wright's position. Blystone v. Pennsylvania, 4 F.L.W. Fed. S99 Case No. 88-6222 (Feb. 28, 1990). Neither does this issue present a true Hitchcock [5] claim which Wright cites in an attempt to avoid a procedural bar because the judge and jury were not restricted in any way from considering nonstatutory mitigation. See Adams v. State, 543 So.2d 1244 (Fla. 1989).

XVI

WRIGHT'S CALDWELL CLAIM IS PROCEDURALLY BARRED AND WITHOUT MERIT.

This court has repeatedly rejected claims based on Caldwell v. Mississippi, 472 U.S. 320 (1985). Brown v. State, 15 F.L.W. S165 (Fla. March 30, 1990).

Substantive claims based on Caldwell can and should be raised on appeal, if preserved at trial, and are, therefore, procedurally barred in post conviction proceedings. King v. Dugger, 15 F.L.W. S11 (Fla. Jan. 4, 1990); Dugger v. Adams, 109

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[5] Hitchcock v. Dugger, 107 S.Ct. 1821 (1987).

S.Ct. 1211 (1989); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989); Jones v. Dugger, 533 So.2d 290 (Fla. 1988). Furthermore, Caldwell is inapplicable in Florida. Combs v. State, 525 So.2d 853 (Fla. 1988); Grossman v. State, 525 So.2d 833 (Fla. 1988). The trial court properly found the issue procedurally barred (T 1091).

XVII

THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS AND CRUEL WAS CONSTITUTIONALLY APPLIED.

This court has repeatedly rejected claims based on Maynard v. Cartwright, 108 U.S. 1853 (1988). Brown v. State, 15 F.L.W. S165 (Fla. March 30, 1990). As the trial court found, the issue is procedurally barred for failure to raise it on direct appeal and is without merit (T 1091). Furthermore, Maynard is inapposite to Florida's death penalty sentencing. Brown v. State, 15 F.L.W. S165 (Fla. March 22, 1990); Clark v. Dugger, 15 F.L.W. S50 (Fla. Feb. 1, 1990); Smalley v. State, 546 So.2d 720 (Fla. 1989); Smith v. Dugger, 15 F.L.W. S81, S82 n.3 (Fla. Feb. 15, 1990).

XVIII

THE CLAIM THAT THE INSTRUCTIONS INCORRECTLY INFORMED THE JURY AS TO WHAT AGGRAVATING CIRCUMSTANCES COULD BE CONSIDERED IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Wright claims that because the instructions "duplicated" the aggravating circumstance of pecuniary gain and committed during a burglary, the jury's recommendation of death was "skewed."

As the trial court found, this issue should have been raised on direct appeal and is procedurally barred (T 1092). McCrae v. State, 510 So.2d 874 (Fla. 1987).

Wright contends this is a Hitchcock violation, but this is not a true Hitchcock claim at all. There was no limitation placed on the consideration of non-statutory mitigating circumstances, nor did the judge err in instructing the jury on the inability to consider non-statutory mitigation. A Hitchcock violation is one in which either 1) efforts to introduce nonstatutory mitigation were thwarted or 2) both the judge and jury were under the impression nonstatutory evidence could not be considered. Adams v. State, 543 So.2d 1244, 1247 (Fla. 1989).

The trial judge instructed the jury that the aggravating circumstances they could consider were 1) committed during burglary and rape; 2) committed for financial gain; 3) heinous, atrocious and cruel; and 4) cold, calculated and premeditated. He did not say these were the aggravating factors that had been proven, only that they could consider these. He did not instruct on the avoid lawful arrest factor, which is a factor this court upheld. Any error was harmless and whether the jury was instructed on an aggravating circumstance which the judge did not find, is irrelevant. Stewart v. State, 15 F.L.W. S138 (Fla. March 5, 1990).

In fact, this court upheld Wright's death sentence after the cold, calculated and premeditated factor was stricken. This is proper. Clemons v. Mississippi, 4 F.L.W. Fed. S224 (April 6, 1990).

Wright cites not one case to support his allegation that it is an improper doubling to instruct on the two aggravating circumstances. Under the circumstances of this case, both aggravating factors were proper. See Brown v. State, 473 So.2d 1260 (1985); Routly v. State, 440 So.2d 1257 (Fla. 1983).

XIX

THE ISSUE WHETHER NON-STATUTORY AGGRAVATING CIRCUMSTANCES WERE INTRODUCED DURING THE PENALTY PHASE IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Wright claims that the introduction of documents regarding his juvenile record improperly contributed to the jury's recommendation. This is not a true Hitchcock claim as previously discussed. As the trial court found, the issue is procedurally barred for failure to raise it on appeal (T 1092). The trial court also found that counsel was not ineffective because he made a tactical decision which would not be second guessed (T 1092). Wright has cited no authority for his allegations that introduction pursuant to stipulation by defense counsel was error. Neither has he explained how the juvenile record was a nonstatutory aggravator. Mr. Pearl's objection to the information was because it charged burglary of a dwelling when Wright had been convicted of burglary of a structure. He did not object to introduction of the judgment and sentence on the burglary charge (R 835, 2940). Furthermore, the state was allowed to introduce evidence of prior criminal activity not only under the court's ruling that it was admissible under section 921.141 Florida Statutes (1983), but also because it was a trade

off for the defense introducing the psychological report (R 2940-41). The evidence was relevant to the mitigating circumstance of "no prior criminal activity." It was not introduced for the purpose of aggravation.

XX

THE JURY WAS NOT MISINFORMED OF ITS FUNCTION AND THIS ISSUE IS PROCEDURALLY BARRED.

Wright contends that the prosecutor's comments and judge's instructions improperly informed the jury they must return a majority vote in the penalty phase. This issue is procedurally barred for failure to object or raise the issue on direct appeal. Henderson, supra; Preston v. State, 531 So.2d 154 (Fla. 1988); Buenoano v. Dugger, 15 F.L.W. S165 (Fla. April 5, 1990). Harich v. State, 437 So.2d 1082 (Fla. 1983) and Rose v. State, 425 So.2d 521 (Fla. 1982) were decided before the direct appeal was filed, and the issue could have been raised. Wright also concedes that the judge informed the jury that a recommendation of life could be made by a 6-6 vote (R 3001). Therefore, the jury was properly instructed pursuant to Harich. The jury returned a recommendation of 9-3 so the issue is moot.

XXI

WRIGHT'S CLAIM THAT HOWARD PEARL'S STATUS AS AN HONORARY DEPUTY SHERIFF CREATED A PREJUDICIAL CONFLICT OF INTEREST IS PROCEDURALLY BARRED AND WITHOUT MERIT. NO EVIDENTIARY HEARING IS NECESSARY.

Wright's final claim is that his attorney, Howard Pearl, was an active law enforcement officer which created a conflict of

interest which was presumptively prejudicial. Wright also claims an evidentiary hearing is necessary, as it was in Harich v. State, 542 So.2d 980 (Fla. 1989).

The evidentiary hearing on Wright's motion for post-conviction relief was heard October 3 and 4, 1988. The trial court denied relief on June 8, 1989 (T 1084-1092). On June 22, Wright filed a motion for rehearing and motion to amend with one issue: whether Howard Pearl's status as a deputy sheriff created a conflict of interest which deprived Wright of conflict-free representation (T 1167-1271). The judge allowed Wright fifteen days to advise him of any evidence not already contained in the motion to amend which was essentially identical to the motion filed in Harich v. State, Case No. 81-1894-BB, Seventh Judicial Circuit, Volusia County, Florida (T 1272-1273).

In Harich, Judge Foxman held an evidentiary hearing on this issue and found no actual, implied, or per se conflict between Howard Pearl's position as an honorary deputy sheriff and his duties as a defense attorney. Judge Foxman also found that counsel for defense could and should have discovered and raised the issue of trial counsel's status as a special deputy in Wright's previous 3.850 motion. Judge Perry also found that because Judge Foxman held a full evidentiary hearing on the identical motion, his preliminary opinion was that a further hearing was unnecessary when the same issues were previously determined to be meritless by a court of competent jurisdiction (T 1272-73).

Wright responded to the court's order, citing case law from Michigan and Massachussetts, the Code of Professional Responsibility, Florida Code of Ethics for Public Officers, reiterated that there existed a conflict of interst, and said the evidentiary hearing in Mr. Harich's case was "fact specific to that case and does not resolve the issue of conflict in Mr. Wright's case" (T 1274-1279). Wright said that his June 22, amended motion presented sufficient facts to warrant an evidentiary hearing on the issue and that, therefore, counsel had no additional matters to present to the court (T 1279).

Judge Perry denied the motion to amend, observing that on June 21, 1989, Judge Foxman denied relief on the identical motion, that Wright failed to furnish the court with any new evidence per his order, and that he approved and adopted the findings of Judge Foxman in his order denying 3.850 relief and the reasoning therein (T 1385-1386). Judge Perry also stated in his order that "[t]his court has known Howard Pearl for over thirty years and he has never compromised his advocacy for any reason" (T 1386). [6]

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[6] The appellee has filed a notice of similar issue and moved to utilize the record of the evidentiary hearing in Harich v. State, Florida Supreme Court Case No. 74,620. A copy of the brief in Harich which is presently pending before this court is attached as Appendix A. The state has also moved to hold the decision on this issue in abeyance until the issue in Harich is resolved. In Harich v. State, Case No. 81-1894-BB, Seventh Judicial Circuit for Volusia County, Florida, Judge Foxman specifically found that the claim was procedurally barred since Mr. Pearl's status was common knowledge in the Volusia County legal system and could easily have been disovered at the time of Harich's 1982 trial or anytime thereafter. He also concluded that no actual conflict of interest had been demonstrated.

This issue is procedurally barred for failure to raise it on direct appeal, since Howard Pearl's status was common knowledge. There was no actual or implied conflict of interest. Furthermore, Wright has failed to show how Mr. Pearl's status affected him in any way. Although a reviewing court will presume prejudice when the trial court has notice of a potential conflict and fails to inquire, Holloway v. Arkansas, 435 U.S. 475, 484 (1978), when a trial court has no notice of a potential conflict and the claim is raised for the first time on appeal or in a collateral proceeding, the defendant must prove that an actual conflict of interest adversely affected the lawyer's performance to demonstrate a constitutional violation. Cuyler v. Sullivan, 446 U.S. 335, 346-47 (1980). In distinguishing possible conflicts of interest from actual conflicts of interest, the Supreme Court held that an allegation of a possible conflict does not result in the conclusion that a defendant received inadequate representation. On the other hand, in those instances in which a defendant can show a conflict of interest that actually affected the adequacy of representation, prejudice need not be demonstrated in order to obtain relief. *Id.* at 349. In Cuyler, the Supreme Court explained that, for a defendant to demonstrate that counsel's performance was adversely affected by a conflict of interest, the defendant must show: 1) that the attorney was actively representing conflicting interests and 2) that the record demonstrates specific instances in which defense counsel acted or refrained from acting due to the conflicting interests. *Id.* at 346-47.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court explained its decision in Cuyler v. Sullivan. The Court in Strickland held that a two-part test must be met to establish ineffective assistance of counsel. First, counsel's performance must be shown to have been deficient. Second, the deficient performance must have actually prejudiced the client. Applying that rationale to its earlier decision in Cuyler, the Court said that a conflict of interest is so egregious a violation that it clearly establishes the first prong of Strickland and gives rise to a presumption of prejudice to satisfy the second prong, even in the absence of other proof of actual prejudice. Strickland, 466 U.S. at 692. However, the Court specifically noted that the presumption of prejudice for conflicts of interest is not quite the per se rule of reversal that exists for certain other sixth amendment claims such as the denial of the right to counsel. *Id*. Therefore, under certain circumstances the presumption of prejudice in conflict cases could be rebutted if other evidence against a defendant is so overwhelming that prejudice could not be found merely because of the conflict of interest. Buenoano v. State, 15 F.L.W. S196 (Fla. April 5, 1990).

Wright has not alleged that Mr. Pearl's performance was in any way affected by his status as a special deputy nor that he was deficient in representing Wright. The record does not show any instance in which defense counsel acted or refrained from acting due to conflicting interests. There is no prejudice alleged. Even a conclusory allegation of prejudice is

insufficient to warrant post conviction relief. See Kennedy v. State, 547 So.2d 912 (Fla. 1989).

Wright relies on Harich v. State, 542 so.2d 980 (Fla. 1989) in requesting an evidentiary hearing. In Harich, this court remanded for an evidentiary hearing on the issue of counsel's duties as a special deputy sheriff and whether this relationship to law enforcement affected his ability to provide effective legal assistance. Harich, 542 So.2d at 981. This court also stated that

> It may be that this issue could not have been discovered previously thorugh due diligence and that, as a consequence, our procedural default rule would be inapplicable.

542 So.2d at 981.

Judge Foxman specifically found the issue was procedurally barred after the evidentiary hearing, and Judge Perry adopted his reasoning. Judge Perry gave Wright every opportunity to present any additional evidence which had not been presented at the Harich evidentiary hearing since the motions in the two cases were identical. Wright presented no additional evidence but merely claimed that the Harich hearing was "fact specific." However, Wright has failed to show how the facts surrounding the issue presented are different in any way. Judge Perry's reliance on the court order from the same judicial circuit, entered within two months of his order, was entirely proper. There is no reason for each judge in the Seventh Judicial Circuit to hold an evidentiary hearing on the same issue, raised by an identical motion, presenting the same evidence.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the order denying post conviction relief. Judge Perry held a full and fair evidentiary hearing on the issues contained herein, and his order is supported by substantial, competent evidence. See Henderson v. Dugger, 522 So.2d 835 (Fla. 1988); Martin v. State, 515 So.2d 189 (Fla. 1987); Stewart v. State, 481 So.2d 1210 (Fla. 1986); Demps v. State, 462 So.2d 1074 (Fla. 1985).

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 Martin J. McClain, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 26 day of April, 1990.

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