IN THE SUPREME COURT OF FLORIDA

TODD MICHAEL MENDYK,

Appellant,

v. CASE NO. 77,865

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee rejects Mendyk's Statement of the Case because it is incomplete and contains irrelevant and argumentative statements. Mendyk has set forth no statement of facts, so appellee sets forth the following Statement of the Case and Statement of Facts upon which it will rely. Appellee will utilize the same cites as Mendyk.

STATEMENT OF THE CASE

Mendyk was indicted on one count of first degree murder on April 16, 1987 (R 1325). On May 4, 1987, the state filed an information charging him with one count of kidnapping and two counts of sexual battery (R 1692-93). A change of venue was granted and the trial was moved from Hernando County to Lake County (R 1546). The case proceeded to jury trial before the Honorable L. R. Huffstetler Jr. October 8 through October 20, 1987 (R 1-1297). Mendyk was convicted on all four counts, the jury returned a unanimous advisory sentence of death, and the trial court imposed a sentence of death for the murder on November 10, 1987 (R 1291, 1509, 1558-60). Mendyk received three consecutive life sentences on the remaining counts (R 1576-77, 1863-68).

Mendyk appealed his conviction to this court, raising seven claims of error.[1] Mendyk's convictions and sentences were

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[1] Mendyk claimed: 1) In violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9 and 16 of the Florida Constitution, the trial court erred in denying appellant's motion to suppress confessions which were obtained following his unequivocal request for counsel; 2) the trial court erred in denying appellant's motion to quash the information and in granting the state's

affirmed. *Mendyk v. State,* 545 So.2d 846 (Fla. 1989). Certiorari was denied by the United States Supreme Court on November 27, 1989. *Mendyk v. Florida,* 110 S.Ct. 520 (1989).

On October 19, 1990, Governor Martinez signed a death warrant, and Mendyk's execution was scheduled for January 15, 1991. On or about November 6, 1990, Mendyk filed a petition for extraordinary relief and motion for stay of execution in this court. On November 26, 1990, this court entered an order staying Mendyk's execution until April 30, 1991, and setting a schedule for the filing of post conviction pleadings. On or about November 21, 1990, Mendyk filed a motion for clarification of that order, specifically concerning the filing of an amended habeas petition. This court granted the motion and stated that Mendyk was allowed to file an amended habeas petition on or before January 25, 1991.

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motion to consolidate; 3) the trial court erred in denying appellant's motion for additional peremptory challenges; 4) in violation of the Fifth, Eighth and Fourteenth Amandments to the United States Constitution and Article 1, Sections 9, 16, and 17 of the Florida Constututution appellant was denied due process because of the admission of irrelevant evidence during the penalty phase and the refusal of the trial court to give proper requested jury instructions; 5) the imposition of the death penalty in the instant case violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 17 of the Florida Constitution because it is based on aggravating circumstances which were not proven beyond a reasonable doubt; 6) the trial court erred in sentencing appellant in excess of the recommended guidelines sentence where the reasons given for departure are not clear and convincing; 7) the Florida capital sentencing statute is unconstitutional on its face and as applied.

On January 25, 1991, Mendyk filed his motion for post conviction relief setting forth 21 claims for relief (PC 1-236).[2]

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[2] Mendyk claimed: 1) Mr. Mendyk's sentence of death violates the Fifth, Sixth, Eighth and Fourteenth amendments because the penalty phase jury instructions shifted the burden to Mr. Mendyk to prove that death was inappropriate and because the sentencing judge himself employed this improper standard in sentencing Mr. Mendyk to death; 2) Mr. Mendyk's death sentence rests upon an unconstitutional automatic aggravating circumstance, in violation of Maynard v. Cartwright, Lowenfield v. Phelps, Hitchcock v. Dugger, and the Eighth Amendment; 3) the admission of numerous inflammatory photographs violated Mr. Mendyk's Fifth, Eighth, and Fourteenth amendment rights; 4) the recent decision of Minnick v. Mississippi, makes it clear that the trial court and the Florida Supreme Court erroneously decided Mr. Mendyk's motion to suppress based on Miranda and Edwards and as a consequence Mr. Mendyk has been deprived of the rights guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution; 5) the prosecutor's inflammatory, emotional and improper comments during closing arguments at both the guilt-innocence and penalty phases rendered Mr. Mendyk's conviction and resulting death sentence fundamentally unfair and unreliable in violation of the Sixth, Eighth, and Fourteenth amendments; 6) Mr. Mendyk's sentencing jury was improperly instructed on aggravating circumstances, in violation of Maynard v. Cartwright, Hitchcock v. Dugger, and the Eighth and Fourteenth Amendments; 7) the application of Rule 3.851 to Mr. Mendyk's case has violated his rights to due process and equal protection of law and denied him his rights to reasonable access to the courts; 8) the state's intentional withholding of material and exculpatory evidence violated the constitutional rights of Todd Michael Mendyk under the Fifth, Sixth, Eighth and Fourteenth Amendments, and the discovery provisions of the Florida Rules of Criminal Procedure; 9) Mr. Mendyk's capital trial and sentencing proceedings were rendered fundamentally unfair and unreliable, and violated the Fifth, Sixth, Eighth and Fourteenth Amendments, due to the prosecution's deliberate and knowing presentation and use of false evidence and arguments and intentional deception of the jury, the court and defense counsel; 10) the introduction of nonstatutory aggravating factors so perverted the sentencing phase of Mr. Mendyk's trial that it resulted in the totally arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments of the United States Constitution; 11) the intense security measures implemented during Mr. Mendyk's trial in the jury's presence abrogated the presumption of innocence, diluted the state's burden to prove guilt beyond a reasonable doubt, and injected misleading and unconstitutional factors into the trial and sentencing proceedings, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; 12) Mr. Mendyk was denied the effective assistance of counsel at the sentencing phase of his capital trial, in

Pursuant to this court's order, the state filed its response February 6, 1991 (PC 272-602). On February 18, 1991, the trial court notified the parties that he would be summarily denying the

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violation of the Sixth, Eighth and Fourteenth Amendments; 13) the cold, calculated, and premeditated aggravating circumstance was applied to Mr. Mendyk's case in violation of Maynard v. Cartwright, Hitchcock v. Dugger, and the Eighth and Fourteenth Amendments; 14) Mr. Mendyk's right to a reliable capital sentencing proceeding was violated when the state urged that he be sentenced to death on the basis of victim impact and other impermissible factors, in violation of Booth v. Maryland, South Carolina v. Gathers, and the Eight and Fourteenth Amendments; 15) Mr. Mendyk was denied the effective assistance of counsel at the guilt-innocence phase of his trial, in violation of the Sixth, Eighth and Fourteenth Amendments; 16) Mr. Mendyk was deprived of his rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments, because the mental health expert who saw him could not conduct a constitutionally adequate evaluation, because defense counsel failed to render effective assistance and prove [sic] the expert with the necessary background information. Mr. Mendyk was thus deprived of a constitutionally adequate mental health evaluation at the penalty phase; 17) Mr. Mendyk's capital conviction and death sentence, resulting from proceedings which did not provide for a unanimous, or even majority, vote by the jury as to whether the petitioner was guilty of premeditated felony murder, violates the Sixth, Eighth and Fourteenth Amendments; 18) Mr. Mendyk's sentencing jury was repeatedly misled by instructions and arguments which unconstitutionally and inaccurately diluted their sense of responsibility for sentencing, contrary to Hitchcock v. Dugger, Caldwell v. Mississippi, and Mann v. Dugger, and in violation of the Eighth and Fourteenth Amendments. Mr. Mendyk received ineffective assistance of counsel when counsel not only failed to zealously advocate and litigate this issue, but also misled the jury; 19) the erroneous jury instruction that a verdict of life must be made by a majority of the jury materially misled the jury as to its role at sentencing and created the risk that death was imposed despite factors calling for life, and Mr. Mendyk's death sentence was thus obtained in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments; 20) substantive errors, which cannot be harmless when viewed as a whole since the combination of errors deprived him of the Fourteenth Amendments; 21) access to the files and records pertaining to Mr. Mendyk in the possession of the certain state agencies have been withheld in violation of Chapter 119, Fla. Stat. The due Process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, the Eighth Amendment, and the corresponding provisions of the Florida Constitution.

motion for post conviction relief. That same day, Mendyk mailed an offer of proof to support the claims appearing in the motion (PC 644-1341). On March 11, 1991, the trial court entered an order denying the motion for post conviction relief (1351-61). Mendyk filed a motion for rehearing on or about March 20, 1991, which was denied April 18, 1991 (PC 1362-69, 1378-79).

STATEMENT OF FACTS

The following facts were found by this court on direct appeal:

> Late in the evening of April 8, 1987, appellant and a friend, Philip Frantz, drove to a convenience store so appellant could buy a hamburger. As they approached the store, appellant said to Frantz, "Let's grab this bitch," but Frantz claimed not to have taken him seriously. However, after entering the store, appellant grabbed the clerk, a woman named Lee Ann Larmon, led her out to their truck, forced her inside, and directed Frantz to drive away.
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> Taking Larmon to a secluded area, appellant led her from the truck and began removing her clothes. Appellant tied each of her legs to the legs of a sawhorse, and sexually tortured her by several means, including inserting a broom handle in her vagina. Appellant then untied Larmon, led her to a new location, gagged her and tied her with wire between two trees with her back arched. Returning to their car, appellant and Frantz then attempted to leave the scene.
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> While driving along the dirt road, however, appellant steered too far to one side and the truck became stuck. Several attempts to extricate it failed. Appellant then said he was going back to check on the girl. After doing so, appellant returned to the truck and again attempted to free the truck from

> the roadside. When further attempts failed, appellant announced, "I'm going to have to kill her," and walked back toward the girl once more. Frantz asked why, but appellant did not answer. Upon his return appellant told Frantz he had strangled the girl, cut down her body and dragged her into the bushes. Frantz then took all of the girl's clothes, a billy club which had also been used on the victim, and the broomstick, and threw them into the swamp. They then left the truck, returning with Frantz's mother and some tools to tow the truck out of the mud.
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> In the meantime, police had discovered the disappearance of Larmon. Conducting an aerial search, police observed the blue pickup truck in the woods. Ground units responded to the report, and found appellant, Frantz and Frantz's mother. Appellant and Frantz told the police they had been "mudslinging" in the woods with the truck and had become stuck. Searching the areas, police found Larmon's body and arrested appellant and Frantz.
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> The grand jury indicted appellant for first-degree murder on April 16, 1987. The state subsequently filed an information additionally charging appellant with two counts of sexual battery and one of kidnapping. At trial, the state presented physical evidence tying appellant to the crime, including his fingerprints in the convenience store as well as evidence of Larmon's presence in appellant's truck. In addition, the state presented testimony from several police officers to whom appellant had confessed and the direct and comprehensive testimony of Frantz, who had agreed to testify against appellant as part of his plea bargain.

Mendyk, supra, at 847-48.

Other physical evidence introduced by the state includes the following. Mendyk was found approximately 100 yards from the

body, which was lying in a fetal position with electrical wires around the neck, wrists and feet (R 535, 538). The coaxial cable binding the victim's ankles was at one time connected to cable in Mendyk's truck as a single continuous piece. The wire binding the victim's hands and the wire wrapped around her neck were also cut from Mendyk's truck, as identified by fracture matches at the end of the wires (R 910-924). The plastic insulation on the wires also matched (R 933-42). There were copper deposits on the knife used by Mendyk consistent with cutting the wire (R 932). Soil on Mendyk's shoes matched soil at the drag marks from the tree where the victim was strung up to the location of the body in the brush (R 956-59).

An analysis of the vacuum sweepings from Mendyk's truck revealed head hair and pubic hair matching those of the victim (R 819-20). The head hair had been forcibly removed (R 819). Hairs removed from a stick found in the area were compared with the victim's public hair, and although there were insufficient characteristics for a conclusive match, every identifiable characteristic matched (R 827-30). There was also blood on the stick (R 800). Although the medical examiner could not make a firm judgment of semen in the victim's mouth, he did find some evidence of enzyme activity (R 725). A body fluid specialist testified the victim's mouth tested positive for the presence of semen (R 791-92). Stains inside Mendyk's athletic supporter were consistent with a mixture of the victim's saliva and Mendyk's semen (R 890-91, 900). Blood, semen and the victim's saliva were found on Mendyk's shirt (R 885-89). Blood and semen were on the

victim's socks, and blood and saliva were on the bandana apparently used as a gag.

Mendyk's statement reveals he first strangled her by wrapping a bandana around her neck and using the knife to twist it as a tourniquet until Lee Ann Larmon slumped, shook, and spit up blood (R 1071). Mendyk described killing Ms. Larmon as "an incredible high" (R 1071).

Frantz testified that he knew he had to make a statement first, and at the time he made the statement he was scared he was going to get blamed for everything (R 1020-23). Frantz also testified that he saw Mendyk every day and it was their common practice to smoke pot and drink beer, and that was what they were doing the night the murder occurred (R 974). He testified they left the house around eleven o'clock and got a six pack of beer (R 975). He said they drank beer and smoked some joints while they drove around (R 975). They went to Eddie Craven's house around 12:00 or 12:30 and smoked another joint, but did not have any more beer (R 977). Frantz was driving because he did not like the way Mendyk drove when he was drinking (R 978). They could not get any more beer because they did not have enough money (R 980). On cross examination Frantz admitted that between six at night and two in the morning he and Mendyk smoked at least five or six joints and drank beer, and though Frantz drank Schnapps he did not know if Mendyk did (R 1025-26). He stated they were both high on marijuana, though on redirect he stated that they were both used to consuming amounts of marijuana and still functioning (R 1035, 1041). In addition, the state

presented another witness who had been with the pair until around eleven o'clock, who stated that they both appeared okay (R 775).

During the penalty phase, the state proffered the testimony of John Cousins, and the trial court found it inadmissible (R 1228-44, 1246). The prosecutor asked that Cousins remain until the conclusion of testimony so that he could perhaps be used in rebuttal, and the trial court stated that Cousins was to be conducted back to where he came from (R 1247).

Prior to trial, counsel had moved for appointment of a confidential expert and Dr. Barnard was appointed (R 1356, 1361-63). Dr. Barnard diagnosed Mendyk as having a Mixed Personality Disorder, with traits of an Antisocial and Sadistic Personality Disorder (PC 952). Dr. Barnard found no indication of a thought disorder with loosening of associations, delusions, or flight of ideas PC 952). Factors known to Dr. Barnard in reaching this include the following: a detailed account of the crimes, including the fact that Mendyk drank only about six beers and smoked 3 1/2 joints; at age eighteen Mendyk had been charged with accessory to a murder after the fact, but took a polygraph and the charges were dropped; Mendyk did not know his father; Mendyk had problems with his stepfather, who was an alcoholic, as he was growing up, and at times the stepfather got drunk and slammed Mendyk against the wall; he beat Mendyk after he caught Mendyk smoking a cigarette; Mendyk ran away from home at age sixteen because he was tired of putting up with his stepfather; Mendyk quit school at age sixteen but got his GED; Mendyk had a few friends while in school; Mendyk first became active in the game

"Dungeons and Dragons" while in the seventh grade and continued to play until the time he was arrested; Mendyk's employment history was noted; Mendyk's biological father was known to beat his mother but Mendyk had no recall of that; at age ten to twelve Mendyk began to read some writings of John Norman, a science fiction writer who wrote about the planet gore where men were masters and women were slaves; Mendyk began to buy a number of these books for himself; Mendyk has had no need to get close to anyone since he has been an adult; Mendyk's beliefs about the occult and satanism was described; Mendyk had no serious illnesses except asthma as a child; Mendyk has never been a patient in a mental hospital and no outpatient psychiatric treatment; at age sixteen Mendyk had some thoughts of suicide because he was tired of his stepfather telling him what to do; Mendyk began to use alcohol at the age of fifteen and used it on a regular basis at eighteen; on weekends he drank a fifth of alcohol plus a case of beer; he also drank six beers plus one or two pints per day during the week; he began the use of pot at age sixteen and later used cocaine, LSD, hash, uppers, and sniffed "rush"; Mendyk had seen another woman that evening and planned to rape her and "do a little torture in order to get my kicks"; Mendyk liked Dungeons and Dragons because it was a game in which he could rob, steal, and rape and not get into any trouble but at the same time exercise his mental functions; while in the Navy Mendyk passed fifteen to twenty bad checks to the Navy and forty to fifty bad checks to civilians, had been on unauthorized absence four times, used marijuana, and was in the brig four

months before his discharge; Mendyk saw himself as a violent person, but held back because society did not like it; Mendyk believed the system is wrong to emphasize equal rights for women; he did not want to waste time and money on a chick when she would not agree to have sex; he never forced sex before because he was waiting for a chance where he could not get caught; killing Ms. Larmon was not anything, it was like lighting a cigarette, and Mendyk had no remorse except that he got caught; he has thrown lighter fluid on cats and lit it up in order to give himself kicks; and, Mendyk's belief is in personal gratification and he followed the Satanic bible sayings that once you do what you want it is not a sin (PC 948-52).

SUMMARY OF THE ARGUMENTS

POINT 1: No evidentiary hearing was required in the instant case. The motion and record conclusively demonstrate that Mendyk is not entitled to relief. The majority of the claims are procedurally barred, and as to the rest there were either insufficient allegations of or no demonstration of prejudice.

POINT 2: The trial court correctly found that the claims presented in Arguments VII through XX are procedurally barred. These claims are consistently raised and found barred in post conviction proceedings. Mendyk's one sentence allegations that counsel was ineffective do not revive these claims substantively, and are legally insufficient to present a claim of ineffectiveness.

POINT 3: The state did not withhold material and exculpatory evidence nor did it present false testimony. The notes dated

April 17, 1987, which Mendyk attributes to a conference between Frantz and the prosecutor, are not from a conference between those two. Even if such notes should have been disclosed to Mendyk and could have been utilized, they contain nothing that would have affected the outcome of this trial, as they are consistent with Frantz's deposition and trial testimony. The allegation that the state presented false testimony regarding Frantz's involvement in the crime is based on nothing more than inferences drawn by police officers and is not even relevant to Mendyk's involvement in this crime. Mendyk's claim regarding the proffer of false testimony at the penalty phase is procedurally barred, and alternatively without merit as it had no effect on the sentence in this case. Mendyk's allegations of "psychotropic medication" and competency are barred as they were not presented to the trial court, and Mendyk himself would have known whether he asked for and received tranquilizers. The "undisclosed memo" in the state attorney investigator's file was not subject to discovery, and even if it was the outcome was not affected. Any claim regarding portions of police reports not disclosed should have been presented to the trial court pretrial as it is apparent from the face of the reports that they were edited, and is barred in post conviction proceedings. Even if the claim is cognizable there was no demonstration of materiality.

POINT 4: Mendyk received effective assistance of counsel at the sentencing phase of his trial. Mendyk was examined pretrial, and both counsel and the expert were fully informed as to Mendyk's background. The now proffered evidence would not have affected

the outcome, as it fails to show significant deprivation or abuse, and contains a lot of derogatory information which would have significantly diminished any mitigating value.

POINT 5: Mendyk's claim regarding his mental health evaluation is not cognizable due to insufficient allegations below. Alternatively, it is without merit. Mendyk asked for and received the assistance of an expert. The expert was fully informed of Mendyk's background.

POINT 6: Mendyk received effective assistance of counsel at the guilt-innocence phase of his trial. While Mendyk complains that counsel failed to present a reasonable theory of defense, he offers no alternative to counsel's handling of this case. The record demonstrates that counsel's strategy was reasonable under the circumstances of a case where the state had overwhelming circumstantial evidence, a confession, and a codefendant's testimony to support both premeditated and felony murder with two counts of a general intent felony. There was neither a mental illness nor intoxication defense to present. The remainder of Mendyk's claims have been waived as they have not been developed on appeal.

POINT 7: There was no violation of Chapter 119, Florida Statutes. Defense counsel had a copy of the videotape and it was shown at trial, so it cannot provide a basis for any claims that the state withheld evidence, and any claims directly relating to it should have been raised on appeal. Further, collateral counsel obtained a copy of it from the court file, and the sheriff's office said they do not have a videotape. The Pasco

County records contain active criminal investigation information. No claim was presented to the trial court regarding records from the Parole Commission.

POINT 1

SUMMARY DENIAL WAS APPROPRIATE IN THE INSTANT CASE.

No evidentiary hearing was required in the instant case. A motion for post conviction relief can be denied without a hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. *Kennedy v. State,* 546 So.2d 912 (Fla. 1989). Claims devoid of factual allegations are insufficient on their face, and mere conclusory allegations that trial counsel was ineffective do not warrant an evidentiary hearing. *Roberts v. State,* 568 So.2d 1255 (Fla. 1990). *See also, Swafford v. Dugger,* 569 So.2d 1254 (Fla. 1990); *Kight v. Dugger,* 574 So.2d 1066 (Fla. 1990).

The trial court denied an evidentiary hearing after reviewing all of the claims raised and allegations set forth. It found that the majority of the issues were procedurally barred, and as to the rest there were either insufficient allegations or no demonstration of prejudice sufficient to undermine confidence in the outcome, thus negating the need for a hearing. *Kennedy, supra; Correll v. Dugger,* 558 So.2d 422 (Fla. 1990). As will be demonstrated in the following points, the trial court's rulings are correct in all respects.

Mendyk claims that in light of affidavits and other supporting material submitted, an evidentiary hearing was and is

required. Mendyk omits the fact that such documents were submitted after the state's response had been filed and the trial court had indicated it would be summarily denying the motion (PC 1346-47). Mendyk's death warrant was signed in October, 1990, and on November 26, 1990, his execution was stayed and he was granted until January 25, 1991 to file a motion for post conviction relief. The state was given twelve days in which to respond. Mendyk should not be permitted to further delay the proceedings by claiming that a hearing is required on the basis of documents filed after set deadlines. In any event, Mendyk's offer of proof further demonstrates the lack of merit to his claims, so a hearing would not be required on that basis either.

POINT 2

THE TRIAL COURT CORRECTLY FOUND THAT THE CLAIMS PRESENTED IN ARGUMENTS VII THROUGH XX ARE PROCEDURALLY BARRED.

In Argument VII, Mendyk claims that a recent decision of the United States Supreme Court establishes that this court erroneously decided his direct appeal (IB 58). This argument was presented as Claim IV in Mendyk's motion for post conviction relief and the trial court found that it was procedurally barred as it had been raised on direct appeal, that *Minnick v. Mississippi,* 111 S.Ct. 486 (1990), did not represent a change in law, and that relief was not warranted in any event (PC 1353). This ruling is correct.

Post conviction relief is not authorized for issues that were raised and rejected on direct appeal. Fla. R. Crim. P. 3.850; *Roberts, supra.* In *Witt v. State,* 387 So.2d 922 (Fla. 1980),

this court held that only major changes of law emanating from it or the United States Supreme Court would be sufficient to precipitate a post conviction challenge to a final conviction and sentence, and further stated that "evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for like matters" would not be recognized as grounds for collateral relief. *Id.* at 929. The United States Supreme Court has stated that a case announces a new rule if the result was not dictated by precedent at the time the defendant's conviction became final. *Teague v. Lane,* 109 S.Ct. 1060 (1989).

Under these standards, the *Minnick* decision does not represent a change in law to preclude a procedural bar. The *Minnick* Court held that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Id.* at 491. The Court specifically stated that its ruling was an appropriate and necessary application of the rule announced in *Edwards v. Arizona,* 451 U.S. 477 (1981). Thus, the *Minnick* Court simply applied the *Edwards* rule, that officials may not reinitiate interrogation after a defendant has requested an attorney, to those situations where a defendant has already consulted an attorney. Consequently, *Minnick* does not preclude a procedural bar. *See, Roberts, supra,* at 1258 (case relied upon as fundamental change requiring retroactive application is simply an application of the long-established and well-recognized

principle of law that was relied upon in rejecting original claim on appeal). Indeed, the situation in *Minnick* is not even present in the instant case as Mendyk did not consult an attorney prior to making a statement, so it thus remains a pure *Edwards* reinitiation issue.

Even if the instant claim was cognizable relief is not warranted as this court did not even address the merits of the claim, but simply found that even if error had occurred, it was harmless at worst. *Mendyk v. State,* 545 So.2d 846 (Fla. 1989). Thus, even re-reviewing the claim would not merit a new trial. Since the claim is procedurally barred, and this court has already determined that the admission of the confession, even if error, was harmless, the trial court properly found that neither a hearing nor relief was warranted.

In Argument VIII, Mendyk claims that defense counsel was ineffective in not objecting to prosecutorial comment during guilt phase closing argument. In Claim V of his motion for post conviction relief, Mendyk argued that the prosecutor's comments rendered his conviction and sentence fundamentally unfair (PC 43-47), and included a one sentence allegation that counsel's failure to object was ineffective assistance (PC 47). The trial court found that the claim was procedurally barred, that fundamental error had not been demonstrated, and that the one sentence allegation of ineffective assistance of counsel was legally insufficient as prejudice had not been demonstrated (PC 1353). This ruling is correct.

This court has consistently found that such claims could and should be raised on direct appeal and are thus procedurally barred in post conviction proceedings. *Medina v. State,* 573 So.2d 293 (Fla. 1990); *Roberts, supra; Kelley v. State,* 569 So.2d 754 (Fla. 1990); *Buenoano v. Dugger,* 559 So.2d 1116 (Fla. 1990); *Atkins v. Dugger,* 541 So.2d 1165 (Fla. 1989). While Mendyk attempted to couch his claim in terms of fundamental error, this court has stated that this is not an "open sesame" for trial errors not properly preserved. *Smith v. State,* 240 So.2d 807, 810 (Fla. 1970). Fundamental error is error which goes to the foundation of the case or goes to the merits of the cause of action. Further, prosecutorial error alone will not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. *State v. Murray,* 443 So.2d 955 (Fla. 1984). Mendyk failed to demonstrate that the limited comments during guilt phase closing argument were even erroneous, much less that they warranted the granting of a new trial. At worst, even if some of the comments went beyond the limits of proper argument, any error was harmless at worst, and certainly not fundamental. *Id.* The evidence against Mendyk was overwhelming.

Mendyk's attempt at casting this claim under the guise of ineffective assistance is likewise unavailing. A procedural bar cannot be avoided by simply couching otherwise-barred claims in terms of ineffective assistance of counsel. *Kight, supra.* As the trial court found, a one sentence allegation with no demonstration of prejudice is legally insufficient. *See, Kennedy,*

supra (a defendant must allege facts that demonstrate a deficiency on the part of counsel which is detrimental to the defendant); *Roberts, supra; Strickland v. Washington,* 466 U.S. 668 (1986). Any additional allegations presented in the instant brief must be found waived as they were never presented to the trial court. *Doyle v. State,* 526 So.2d 909 (Fla. 1988) (a claim not presented to the trial court cannot be raised for the first time on appeal from the denial of post conviction relief).

Even if the claim of ineffective assistance was cognizable, relief is not warranted. Where the remarks of a prosecutor in closing are not so improper and prejudicial as to cause a mistrial, defense counsel is not ineffective for failing to object to such, but rather the decision to object is a matter of trial strategy left to the discretion of the trial attorney so long as his performance was within the range of what is expected of reasonably competent counsel. *Muhammed v. State,* 426 So.2d 533 (Fla. 1982). Since this claim is procedurally barred and alternatively without merit, the trial court properly determined that neither a hearing nor relief was warranted.

In Argument IX, Mendyk claims that his conviction and sentence resulted from proceedings which did not provide for a unanimous vote by the jury as to whether he was guilty of premeditated or felony murder, and that counsel's failure to raise this fundamental error was ineffective assistance (IB 66-68). This was presented in Claim XVII of Mendyk's motion for post conviction relief (PC 184-96), and as in the other claims there was a one sentence allegation that counsel's failure to

object was deficient performance (PC 196). The trial court found that the claim was procedurally barred, that Mendyk's conclusory allegation that counsel was ineffective was legally insufficient, and alternatively, that the instructions were proper and counsel's failure to object was not a serious deficiency (PC 1359). This ruling is correct.

A claim of error regarding jury instructions should be raised on direct appeal and is not cognizable through collateral attack. *Gorham v. State,* 521 So.2d 1067, 1070 (Fla. 1988). A procedural bar cannot be avoided by simply couching otherwise-barred claims in terms of ineffective assistance of counsel. *Kight, supra.* Further, the instructions Mendyk claims were deficient were the standard instructions on first degree murder under the premeditated and felony-murder theories. A reading of the transcript reveals that the jury was instructed that its verdict must be unanimous (R 1185, 1186). As the trial court found, Mendyk's one sentence allegation that counsel was ineffective for failing to object is legally insufficient as it neither alleges nor demonstrates prejudice. *Kennedy, supra; Roberts, supra; Strickland, supra.* In any event, because the instructions were proper, the failure to object did not constitute a serious and substantial deficiency, measurably below the standard of competent counsel. *Gorham, supra. See also, Young v. State,* 16 F.L.W. 192 (Fla. February 28, 1991). Neither a hearing nor relief was warranted.

In Argument X, Mendyk alleges that he was left in leg shackles during the penalty phase of his trial in the presence of

the jury and that this violated due process, and that counsel was ineffective for failing to object to this fundamental error (IB 68-70). This argument was presented as Claim XI in Mendyk's motion for post conviction relief (PC 115-20), which also contained the one sentence allegation that counsel's failure to object was deficient performance that prejudiced Mendyk (PC 120). The trial court found this claim procedurally barred and that Mendyk's conclusory allegation that counsel was ineffective was legally insufficient (PC 1355). This ruling is correct.

This is a claim which could and should have been raised on direct appeal and is procedurally barred in post conviction proceedings. *Medina, supra; Swafford, supra; Correll, supra; Buenoano, supra. Elledge v. Dugger,* 823 F.2d 250 (11th Cir. 1987), having been decided before this case and also being the decision of an intermediate federal court, breathes no new vitality into this claim. *See, Witt, supra.* Likewise, *Bello v. State,* 547 So.2d 914 (Fla. 1989), announced no new rule of law to be applied retroactively. Mendyk's attempt to raise this claim cast in the guise of ineffective assistance of counsel is improper and will not revive such claim. *Kight, supra.*

As the trial court found, Mendyk's one sentence allegation that counsel's performance was deficient is legally insufficient, as he fails to demonstrate how he was prejudiced by counsel's failure to object. *Kennedy, supra; Roberts, supra; Strickland, supra.* Even assuming that Mendyk was in leg irons, he has not and cannot demonstrate that counsel's failure to object affected the outcome. First, Mendyk does not even allege that the jury saw

him, but merely states that he "was left in leg shackles during the penalty phase of his trial in the presence of the jury". The record demonstrates that all parties were already in the courtroom when the jury was escorted in and out (R 1197, 1248, 1267, 1289, 1290). Thus, in order to demonstrate prejudice, Mendyk would have to demonstrate that the shackles were not necessary, the jury saw him in the shackles, was affected by seeing such, that any potential prejudice could not have been cured by action taken at that time, and that if this had not occurred the outcome of the proceeding would have been different. Such claim is far to speculative. The trial court properly determined that neither a hearing nor relief was warranted.

In Arguments XI and XII, Mendyk claims that the jury instructions on heinous, atrocious or cruel and cold, calculated and premeditated violated the Eighth and Fourteenth Amendments (IB 70-73). Mendyk argued in Claims VI and XIII of his motion for post conviction relief that the jury was improperly instructed on aggravating circumstances (PC 48-58, 138-50), and again included a one sentence allegation that counsel's failure to object was deficient performance which prejudiced him (PC 57). The trial court found that the claim was procedurally barred and that the one sentence allegation of ineffective assistance was legally insufficient (PC 1353). This ruling is correct.

These are claims which this court has consistently found could and should be raised on direct appeal and are thus procedurally barred in post conviction proceedings. *Roberts, supra; Swafford, supra; Buenoano, supra; Correll supra.* Mendyk did in fact

challenge the aggravating factors on direct appeal and any argument on this issue should have been raised at that time. *Jones v. Dugger,* 533 So.2d 290, 292 (Fla. 1988). A procedural bar cannot be avoided by simply couching otherwise-barred claims in terms of ineffective assistance of counsel. *Kight, supra.* Again, Mendyk's one sentence allegation that counsel was ineffective is legally insufficient. In any event, this court has rejected such claim as to both aggravating circumstances, *Smalley v. State,* 546 So.2d 720 (Fla. 1989); *Brown v. State,* 565 So.2d 304 (Fla. 1990), so counsel cannot be deemed ineffective. Since the claim is procedurally barred and the allegation of ineffectiveness is legally insufficient and without merit, the trial court properly determined that neither a hearing nor relief was warranted.

In Argument XIII, Mendyk claims that his death sentence rests upon an unconstitutional automatic aggravating circumstance (IB 73-74). Mendyk raised this as Claim II in his motion for post conviction relief (PC 14-22), and again included a statement that counsel was ineffective for failing to object and he was prejudiced (PC 22). The trial court found the claim procedurally barred, that the allegation of ineffectiveness was insufficient, and that alternatively the claim was without merit (PC 1352). This ruling is correct.

Again, this is an issue which this court has consistently found could and should be raised on direct appeal and is procedurally barred in post conviction proceedings. *Engle v. Dugger,* 576 So.2d 696 (Fla. 1991); *Roberts, supra; Smith v. Dugger,* 565 So.2d 1293 (Fla. 1990); *Correll, supra; Duest v. Dugger,* 555 So.2d 849

(Fla. 1990); *Bolender v. Dugger,* 564 So.2d 1057 (Fla. 1990); *Mills v. Dugger,* 559 So.2d 578 (Fla. 1990); *Tompkins v. Dugger,* 549 So.2d 1370 (Fla. 1990). A procedural bar cannot be avoided by simply couching otherwise-barred claims in terms of ineffective assistance of counsel. *Kight, supra.* Even if the claim was cognizable relief is not warranted as such claim has previously been rejected by this court, *Bertolotti v. State,* 534 So.2d 386, 387 n. 3 (Fla. 1988), and the United States Supreme Court has rejected nearly identical claims. *Lowenfield v. Phelps,* 484 U.S. 231 (1988); *Blystone v. Pennsylvania,* 110 S.Ct. 1078 (1990). The trial court's finding of this factor is supported by the evidence and independent of the murder conviction. *Engle, supra.*

Again, the trial court properly found that Mendyk's one sentence allegation that counsel was ineffective is legally insufficient. *Roberts, supra; Kennedy, supra; Strickland, supra.* Even if legally sufficient, relief is not warranted as Mendyk cannot demonstrate either deficient performance or prejudice since the underlying substantive claim has been rejected, and counsel cannot be ineffective for failing to raise a claim that is without merit. *Strickland, supra; Gorham, supra.* Since the claim is procedurally barred and the allegation of ineffectiveness is legally insufficient and without merit, the trial court properly found that neither a hearing nor relief was warranted.

In Argument XIV, Mendyk claims that the introduction of nonstatutory aggravating factors perverted the sentencing phase of his trial and that counsel's failure to object to this fundamental error was deficient performance (IB 74-76). In Claim

X of his motion for post conviction relief Mendyk argued that the introduction of nonstatutory aggravating factors resulted in a capricious sentencing (PC 110-15), and again included a statement that counsel's failure to object prejudiced him (PC 113). The trial court found that this claim was procedurally barred (PC 1354-55). This ruling is correct.

This argument was never raised at trial or on direct appeal. Improper argument on aggravation is an issue that should be raised on direct appeal. *Roberts, supra; Meeks v. State,* 382 So.2d 673 (Fla. 1980). Improper consideration of the same is likewise an argument that should have been raised on direct appeal. *Goode v. State,* 403 So.2d 932 (Fla. 1981): *Dobbert v. State,* 409 So.2d 1053 (Fla. 1982); *Atkins, supra.* Thus, the instant claim is procedurally barred in post conviction proceedings. *Henderson v. Dugger,* 522 So.2d 835 (Fla. 1988); *Harich v. State,* 542 So.2d 980 (Fla. 1989). A procedural bar cannot be avoided by simply couching otherwise-barred claims in terms of ineffective assistance of counsel. *Kight, supra.*

Even if this claim was cognizable it is without merit. Judge Huffstetler's findings of fact in support of imposition of the death penalty reflect that he only found three *statutory* aggravating factors (R 1558-60). This court reviewed the case on direct appeal and found death to be the appropriate penalty, and no allegation has been made that it considered extraneous matter. *Mendyk, supra.* Mendyk's one sentence allegation that counsel was ineffective is legally insufficient. The trial court properly determined that neither an evidentiary hearing nor relief was warranted.

In Argument XV, Mendyk claims that his right to a reliable capital sentencing was violated when the state urged that he be sentenced to death on the basis of victim impact and other impermissible factors (IB 76-79). In Claim XIV of his motion for post conviction relief, Mendyk claimed that the state presented arguments regarding the victim's personal characteristics, worth, and suffering, urging the jury and court to sentence him to death on the basis of unconstitutional victim impact arguments. Mendyk referred to questions asked during *voir dire*, one statement made during opening statement, several questions asked during direct examination, and several comments during closing argument of the penalty phase (PC 151-59). Again, in one sentence, Mendyk stated that to whatever extent counsel failed to object to these comments, it was ineffective assistance (PC 159). The trial court found that this claim is procedurally barred (PC 1356). This ruling is correct.

This court has consistently found such claims procedurally barred in post conviction proceedings. *Correll, supra; Kight, supra; Provenzano v. Dugger,* 561 So.2d 541 (Fla. 1990); *Buenoano, supra; Engle, supra; Smith, supra; Roberts, supra; Swafford, supra.* The decision in *Booth v. Maryland,* 482 U.S. 496 (1987), was rendered June 15, 1987, and rehearing was denied September 21, 1987. Thus, there is no issue of retroactively applying it, as it was already decided at the time of trial and direct appeal. *See, Jennings v. Dugger,* No. 74,926 (Fla. June 13, 1991). Mendyk's one sentence allegation that "to whatever extent defense counsel failed to object to the prosecutor's improper comments, counsel provided ineffective

assistance", does not revive this claim, *Kight, supra,* and without more, is an insufficient allegation and not cognizable. There has been no demonstration that an objection would have been sustained on the basis of *Booth v. Maryland,* 482 U.S. 496 (1987), and even if counsel could have limited such references, the result would have been unchanged. *Provenzano, supra.* Neither a hearing nor relief was warranted.

In Argument XVI, Mendyk contends that his sentencing jurors were repeatedly misled by instructions which diluted their sense of responsibility, and that counsel was ineffective for failing to litigate this (IB 79-80). This was presented as Claim XVIII in Mendyk's motion for post conviction relief, and the trial court found that it was procedurally barred, that the allegation of ineffective assistance was legally insufficient, and alternatively, that the instructions were proper and counsel was not ineffective (PC 1359-60). This ruling is correct.

Substantive claims based on *Caldwell v. Mississippi,* 472 U.S. 320 (1985), can and should be raised on direct appeal, if preserved at trial, and are therefore procedurally barred in post conviction proceedings. *King v. Dugger,* 555 So.2d 355 (Fla. 1990). A procedural bar cannot be avoided by simply couching otherwise-barred claims in terms of ineffective assistance of counsel. *Kight, supra. Caldwell* is not a change in law and is not applicable in Florida. *Combs v. State,* 525 So.2d 853 (Fla. 1988); *Daugherty v. State,* 533 So.2d 287 (Fla. 1988). Because this court has found *Caldwell* inapplicable in this state and has upheld the standard instructions on the jury's role in sentencing, such arguments are

meritless and trial counsel is not ineffective for failing to object. *Tafero v. State,* 561 So.2d 557 (Fla. 1990); *Provenzano, supra.* Neither a hearing nor relief was warranted.

In Argument XVII, Mendyk claims that the shifting of the burden of proof in the jury instructions at sentencing was erroneous (IB 80-81). This was presented as Claim I in Mendyk's motion for post conviction relief (PC 7-13), and the trial court found it is procedurally barred (PC 1351).[3] That ruling is correct. *Kight, supra; Engle, supra; Swafford, supra; Smith, supra; Roberts, supra; Bolender, supra; Buenoano, supra; Correll, supra; Hill, supra; Atkins, supra.* Neither a hearing nor relief was warranted.

In Argument XVIII, Mendyk claims that the admission of numerous inflammatory photographs violated his rights (IB 81-82). This was argued in Claim II of Mendyk's motion for post conviction relief, and found procedurally barred and alternatively without merit by the trial court (PC 22-26, 1352-53).[4] This ruling is correct.

Claims based on information contained in the original record of the case must be raised on direct appeal and are procedurally barred in post conviction proceedings. *Engle, supra; Lambrix v. State,* 559 So.2d 1137 (Fla. 1990); *Kelley, supra.* Further, while Mendyk stated that 36 photographs of the victim's body were admitted, the record demonstrates that the bulk of these photos

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[3] Mendyk also included the standard one sentence allegation of ineffectiveness, but that has not been pursued and is waived as well as insufficient and without merit. *See,* Medina, *supra.*

[4] Mendyk alleged ineffective assistance in his motion but has not pursued that on appeal so such claim is waived as well as insufficient and without merit. Medina, *supra.*

were of the crime scene, with what appears to be three which show the victim or part of the victim, in addition to one photograph of the victim at the morgue and the five photographs used by the medical examiner. (PC 450-66). Thus, no abuse of discretion in the admission of these photographs can be demonstrated, as they were relevant to identity, cause of death, and injuries sustained by the victim throughout the course of her torturous death. *See, Nixon v. State,* 572 So.2d 895 (Fla. 1990) (seven photos of charred victim). Since the claim is procedurally barred the trial court properly found that neither a hearing nor relief was warranted.

In Argument XIX, Mendyk claims that the instruction that a verdict of life must be made by a majority of the jury was erroneous (IB 83-84). This was presented as Claim XIX in Mendyk's motion for post conviction relief (PC 212-16). The trial court found that the claim is procedurally barred, that the one sentence allegation of ineffectiveness was legally insufficient, and alternatively that the jury was properly instructed so the claim is without merit (PC 1360). This ruling is correct.

This is a claim that could and should have been raised on direct appeal and is thus procedurally barred in post conviction proceedings. *Buenoano, supra; Lightbourne v. Dugger,* 549 So.2d 1364 (Fla. 1989); *Atkins, supra*; *Henderson, supra; Maxwell v. State,* 490 So.2d 927 (Fla. 1986). A procedural bar cannot be avoided by simply couching otherwise-barred claims in terms of ineffective assistance of counsel. *Kight, supra.* In any event, the claim is without merit as the jury was *not* instructed that a life

recommendation must be made by a majority. The jury was instructed:

> ...Then, on the other hand, if six or more votes of the jury determine that Todd Mendyk should not be sentenced to death, your advisory sentence will be, the jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Todd Mendyk without the possibility of parole for 25 years.

(R 1288, 1514). Finally, it must be remembered that the jury in the instant case unanimously recommended death. Again, Mendyk's one sentence allegation that counsel was ineffective is legally insufficient and without factual basis as the jury was not instructed as he claims it was. Neither a hearing nor relief was warranted.

In Argument XX, Mendyk claims that his trial was fraught with procedural and substantive errors which cannot be held harmless when viewed as a whole (PC 84-85). This was presented as Claim XX in Mendyk's motion for post conviction relief (PC 216-28), and found procedurally barred by the trial court (PC 1360). This ruling is correct. Claims not cognizable separately are not cognizable cumulatively. The evidence in this case was truly overwhelming, and Mendyk has in no way demonstrated that he was denied a fair trial. Any complaints about the trial being taped could have been presented to the trial court and raised on direct appeal. This court has consistently rejected claims that Florida Rule of Criminal Procedure 3.851 violated a defendant's rights. *Swafford, supra.* Neither a hearing nor relief was warranted.

POINT 3

THE STATE DID NOT WITHHOLD MATERIAL AND EXCULPATORY EVIDENCE NOR DID IT PRESENT FALSE TESTIMONY.

Mendyk claims that the state withheld material and exculpatory evidence and knowingly presented false evidence and arguments to intentionally deceive the jury, the court, and defense counsel. These claims are based on handwritten notes dated 4/17/87, which were apparently in the state attorney's file (PC 476-87); Frantz's post sentence report; records related to testimony proffered at the penalty phase; jail records on medication that was given to Mendyk; a handwritten memo dated 4/17/87, which was apparently in the state attorney's file; and police reports. The trial court found that there was no violation of *Brady v. Maryland,* 373 U.S. 83 (1963), or even if these were the type of documents contemplated for disclosure, there was no reasonable probability that had they been furnished to the defense the outcome of Mendyk's trial would have been different (PC 1354). As to Mendyk's claims that the state presented false evidence, which related to Frantz's testimony, Frantz's post sentence report, and the South Carolina incident, the trial court found these claims procedurally barred as they could have been raised on direct appeal (PC 1354). These rulings are correct.

This court recently stated that in order to establish a violation of *Brady, supra,* a defendant must establish the following:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself

> with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So.2d 170, 172 (Fla. 1991), quoting, *United States v. Meros,* 866 F.2d 1304, 1308 (11th Cir. 1989). The term reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. *Waterhouse v. State,* 522 So.2d 341 (Fla. 1988). Due process rights are not violated in every case involving the suppression of evidence. If upon consideration of the entire record as a whole, the omitted evidence creates a reasonable doubt not otherwise existing, the evidence is material and constitutional error has been committed. *Kelley, supra.* "The mere possibility that an item of undisclosed evidence might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id.,* quoting, *United States v. Agurs,* 427 U.S. 97, 109-10 (1976). *See also, Gorham, supra.*

The state need not actively assist the defense in investigating a case, *Hansbrough v. State,* 509 So.2d 1081 (Fla. 1987), nor is it required to make a complete and detailed accounting to the defense of all police investigatory work on a case. *Spaziano v. State,* 570 So.2d 289 (Fla. 1990), quoting, *Moore v. Illinois,* 408 U.S. 786, 795 (1972). There is no *Brady* violation where allegedly exculpatory evidence is equally accessible to the defense and the prosecution. *Roberts, supra.* When there is no *Brady* violation or the defendant fails to establish materiality,

an evidentiary hearing is not required. *Swafford, supra.* Based on these standards, the trial court properly determined that Mendyk was not entitled to an evidentiary hearing or relief.

In subpoint A, Mendyk alleges that after Frantz gave a taped statement, he talked to the prosecutor and told of matters not contained on the tape (IB 11), and that this evidence was critical to explain Frantz's motives (IB 12). Mendyk further claims that this evidence would have constituted *Williams* Rule[5] evidence that the police did not comply with *Edwards v. Arizona,* 451 U.S. 477 (1981), for just as the police did not honor Frantz's invocation of his right to counsel, the police refused to honor Mendyk's invocation.[6] In subpoint B, Mendyk alleges that these "State's notes of a pre-plea deal, April 17, 1987," indicate heavy substance abuse, and were thus contrary to Frantz's trial testimony (IB 13-16). In subpoint G, Mendyk refers to these "notes from the prosecutor's conference with co-defendant Frantz," and complains that despite the clear language of the discovery rules, "Frantz's statements to the prosecutors were not disclosed" (IB 28).

Even assuming that these hand written notes were found in the prosecutor's file, a review of them reveals that they are not from a conference with the prosecutor. In the upper left corner of the first page is written "JMB & JRV w/client" (PC 476-87).

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[5] Williams v. State, 110 So.2d 654 (Fla. 1959).

[6] This latter claim was never presented to the trial court and is not cognizable. Doyle, *supra.* In any event it is without merit as the record demonstrates that Frantz reinitiated conversation, and this court has already found the admission of Mendyk's statement, if erroneous, harmless.

Frantz was represented by James M. Brown and John Vitola (PC 571). These notes also include such things as "object to joinder of charges/defendants"; "need severance of defendants"; need change of venue"; "need alco/drug M/H evals"; "need aff & order re: indigent for costs"; "need pvt. psych if declared indigent"; "need P.I. if indigent"; and "do m to suppress" (PC 476-77). These are obviously things that defense counsel, and not the prosecutor would be doing, and in addition, it is quite unlikely that Frantz would be meeting with the prosecutor at a time when he was still facing the same charges as Mendyk.

Even if these notes did come into the possession of the prosecutor before Mendyk's trial, with an express waiver of any privilege attached thereto, so that either party could have utilized them, and the defense did not have these notes, they contain nothing that would have affected the outcome of this trial. As to Frantz's motive, it was quite clear that he had given a statement, entered a plea, and was testifying to save his own skin. Frantz testified that he knew he had to make a statement first, and at the time he made the statement he was scared that he was going to get blamed for everything (R 1020-23). Even if this could have been used to more effectively impeach Frantz, there is no possibility that the defense would have prevailed. *Steinhorst v. State,* 574 So.2d 1075 (Fla. 1991). Frantz's statement was corroborated by the physical evidence, and Mendyk himself gave several statements. Materiality cannot be demonstrated. *Hegwood, supra.*

As to "Frantz's inconsistent statements" and alcohol and drug usage, again, there is nothing in those notes that would have affected the outcome. The now proffered material on alleged intoxication does not differ in any significant way from Frantz's deposition and trial testimony. *See, Spaziano, supra.* The state would first point out that the notes refer to what Frantz, and not Mendyk, was ingesting that night, and Frantz's habits. Mendyk did not even go to Frantz's until around 6:00 or 6:30 that evening, so the notes certainly cannot support Mendyk's current allegation that he had been smoking marijuana and drinking throughout the day (IB 16). Further, there is nothing to indicate heavy substance abuse after 11:30, and again the notes are consistent with Frantz's deposition and trial testimony on that issue. Mendyk quotes the notes as stating "drove around drunk", but a review of this shows it says "drove around S Hill [Spring Hill]" (IB 27, R 478).

In his deposition, Frantz stated that he and Mendyk drank beer and smoked pot every day. On the night before the murder, Mendyk came over around 6:00, and they smoked a couple of joints. They were drinking beer, and smoked a couple more joints. Frantz and his roommate drank some Schnapps, but he did not know if Mendyk did. They left around 11:00 and got a six pack. Frantz drove because Mendyk did not drive well when he was drunk. They smoked a joint while driving around, and one more at Craven's house (PC 576-90).

At trial, Frantz testified that he saw Mendyk every day and it was their common practice to smoke pot and drink beer, and

that was what they were doing the night the murder occurred (R 974). He testified they left the house around 11:00 and got a six pack of beer (R 975). He said they drank beer and smoked some joints while they drove around (R 975). They went to Eddie Craven's house around 12:00 or 12:30 and smoked another joint, but did not have any more beer (R 977). Frantz was driving because he did not like the way Mendyk drove when he was drinking (R 978). They could not get any more beer because they did not have enough money (R 980). On cross examination Frantz admitted that between six at night and two in the morning he and Mendyk smoked at least five or six joints and drank beer, and though Frantz drank Schnapps he did not know if Mendyk did (R 1025-26). He stated they were both high on marijuana, though on redirect he stated that they were both used to consuming amounts of marijuana and still functioning (R 1035, 1041). In addition, the state presented another witness who had been with the pair until around eleven o'clock, who stated that they both appeared okay (R 775). Finally, in a statement to Ralph Decker, Mendyk said they both had little to drink and were basically sober (PC 535). It also must be remembered that the pair did not abduct the victim until between two and three in the morning (R 495, 500), and Mendyk did not kill her until several hours after that. Further, both remained awake and alert until well into the next day.

Thus, there is no reasonable probability that if the defense had these notes the outcome of the proceeding would have been different. *Hegwood, supra.* Any further claim that the state deliberately used false and misleading testimony is barred. *See,*

Hill v. Dugger, 556 So.2d 1385 (Fla. 1990) (claim that prosecutor's knowing and deliberate presentation and use of false evidence and arguments and intentional deception of jury, court and defense counsel procedurally barred). Mendyk himself would have known how much he had to drink and smoke. *Roberts, supra* (defendant himself knew whether he had been drinking or taking drugs prior to the offense and would have been aware who witnessed this, so there is no *Brady* violation where alleged exculpatory evidence is equally accessible to the defense and prosecution). Even if the claim was cognizable, these notes cannot support a claim that the prosecutor deliberately used false and misleading evidence, as there is no indication that the testimony was indeed false. This allegation does not constitute the presentation of false evidence by the state and provides no basis for post conviction relief. *See, Engle, supra*. Neither a hearing nor relief was warranted.

In subpoint C, Mendyk contends that the defense was not told that the state believed that Frantz was far more culpable than he admitted, but was given life (IB 16-17). This claim is based on statements contained in Frantz's post sentence report dated October 22, 1987, which was a week before the motion for new trial was filed in the instant case, so any claim could have been discovered by that time and presented to the trial court and on direct appeal and is now barred. In any event, Mendyk failed to demonstrate materiality. The allegation that the state presented false testimony regarding Frantz's involvement in the crime is based on nothing more than inferences drawn by police officers, and is not even relevant to Mendyk's involvement in

this crime. *See, Thompson v. State,* 553 So.2d 153 (Fla. 1989) (witness' statements and testimony do not conflict on the important point that kidnapping took place at defendant's behest and direction, and there is no contradiction as to the facts of the killing, so no reasonable probability results of proceedings would have been different). It is not as if the officers had concrete evidence that Frantz killed the victim; rather, they simply felt, as well the jury may have based on his testimony, that his involvement was greater than he admitted. Further, even if Frantz's participation was greater, it does not necessarily follow that Mendyk's was lesser, and Mendyk's statement indicates it was not. Finally, the other evidence presented at trial supports Frantz's version of events, as Mendyk's statement reveals that Frantz lost interest early in the course of events (R 1062, 1064), and the soil on Frantz's shoes, unlike Mendyk's, did not match soil from the location of the body (R 968-69), indicating Mendyk alone killed the victim. This allegation simply does not constitute presentation of false evidence by the state and provides no basis for post conviction relief. *Engle, supra.*

In subpoint D, Mendyk argues that the state presented false evidence concerning Mendyk's alleged connection to a prior homicide in South Carolina, that the court was influenced by this testimony, and even though it was never heard by the jury the state used it as a hammer against the defense, threatening to use

it if the defense opened the door (IB 17-25).[7] This claim is procedurally barred, as any argument regarding allegedly false testimony that was proffered during the penalty phase should have been presented to the trial court and raised on direct appeal. *Hill, supra.* Counsel and Mendyk heard the proffered testimony, and Mendyk would have been well aware of his involvement in the South Carolina incident. *Roberts, supra.*

In any event, the claim is without merit. The testimony was merely proffered, and it is axiomatic that a judge is able to sort relevant testimony from irrelevant testimony, which is exactly the purpose of a proffer. The jury unanimously recommended death without hearing this testimony, the trial court's sentencing order reflects that this evidence played no part in sentencing, and that sentence was affirmed by this court which never heard such evidence. Finally, the record clearly demonstrates that the trial court found such testimony totally irrelevant and perhaps even incredible, because when the state requested that the witness remain until the conclusion of testimony so he could perhaps be used in rebuttal, the trial court stated that the witness was to be conducted back to wherever he came from (R 1247), so even if Mendyk's hammer claim is cognizable, it is refuted by the record. Thus, even if by some stretch of the imagination it could be found that the state knew the witness' testimony was false, there is no reasonable likelihood that the testimony affected anything. *United States v.*

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[7] Mendyk never presented this "hammer" theory to the trial court so it is not cognizable. Doyle, *supra.* In any event, as will be demonstrated it is without merit.

Agurs, 427 U.S. 97 (1976). The trial court properly found that the claim was procedurally barred, and alternatively it is without merit so neither a hearing nor relief was warranted.

In subpoint E, Mendyk claims that defense counsel was not provided with information regarding his suicidal ideation while in jail or that the state had put him on "psychotropic medication", and that this raises a question about his competency (IB 25).[8] Mendyk never presented any competency claims to the trail court, so the instant claim is barred. *Doyle, supra.* In his motion, Mendyk simply alleged that the fact that the defendant was on a strong tranquilizer which modifies his demeanor is similar to the presentation of false or misleading evidence (though on the previous page he acknowledged he was not receiving a necessarily high dosage) (PC 71-72). Mendyk certainly knew if he wanted tranquilizers and received them, so there was no *Brady* violation.[9] *Roberts, supra.* It certainly is not reasonable to assume that had counsel gotten this information he would have presented it as evidence since it bears no relevance to the crime, or for that matter that it even would have been admissible. Thus, even if counsel did not know that Mendyk asked for medication while in custody, there was no prejudicial effect

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[8] In his motion, Mendyk alleged he received a total of ten doses of 25 mg. of Vistaril over a period of four days, for an average dose of 62.5 mg. per day (PC 71). According to the *Physician's Desk Reference,* Vistaril is for the symptomatic relief of anxiety and tension, has mild and transitory side effects, and the recommended dosage for a child under six is 50 mg. per day, and for adults 50 to 100 mg. per day. In other words, Mendyk received a mild dose of a tranquilizer.

[9] This also appeared in the newspaper (PC 984).

on the outcome of the trial. *Tompkins, supra*. Neither an evidentiary hearing nor relief was warranted, and any claims as to competency are not cognizable.

In subpoint F, Mendyk claims that there was an undisclosed memo in the state attorney investigator's file which contained mitigating evidence (IB 26-27). Mendyk alleged that this report should have been disclosed to defense counsel as it would have alerted counsel to mitigation, was essential for a mental health expert to review, and supports a mental illness. It is unknown from the report who wrote it, (although whoever did spelled psychological wrong on page 3), why it was written, or what it was based upon. In fact, from a review of the document it appears to be some type of profile on a person who would commit this type of crime, derived from books or a seminar or something similar on a serial killer, and is not even factually specific to Mendyk (PC 467-75).

As stated, it is not the state's job to do the defense's work for them, and obviously any information on Mendyk's past was equally available to the defense, so there was no *Brady* violation. *Hansbrough, supra; Roberts, supra.* Further, there is no reasonable probability that the outcome would have been affected by disclosure of this anonymous report. It is nothing more than hearsay inferences made by some anonymous person, and certainly would not have been admissible. *See, Spaziano v. State,* 570 So.2d 289 (Fla. 1990) (investigator's notes asserted to be important information are nothing more than inferences investigator drew from his investigation and would not have been admissible). *See*

also, Steinhorst, supra. Thus, neither an evidentiary hearing nor relief was warranted.

In subpoint H, Mendyk claims that the first two pages of Ralph Decker's May 29, 1987 report were marked "no disc" and never turned over to the defense; Royce Decker's April 20, 1987 report was withheld; and "no disc" was marked on substantial portions of the Sheriff's Narrative Report dated April 12, 1987 and Alan Arick's April 27, 1987 report (IB 28). As to the three reports with portions allegedly marked "no disc", since counsel did receive portions of them it would have been clear that they were edited and any objection should have been presented to the trial court and is procedurally barred in post conviction proceedings. Further, there has been no allegation that these witnesses' names were never disclosed to the defense, and at the time of Mendyk's trail the discovery rules did not automatically require disclosure of all police reports, and Mendyk has failed to allege or demonstrate that they were subject to discovery. In any event, Mendyk has failed to demonstrate, and in several instances has not even alleged materiality.

As to the first two pages of Ralph Decker's report, Mendyk simply states that this contains statements by Frantz's mother, who acknowledges her son's marijuana use, but does not state how the outcome would have been affected, so this claim is insufficient. *Gorham, supra.* In any event it is without merit as well. Mrs. Frantz merely stated that her first impression when she heard the helicopter was that the "boys" probably had a marijuana field down the road. The essence of this impression

was revealed in her deposition when she stated that she saw the helicopter and thought "oh, boy, what if they got drugs back there?" (PC 551-52). Such unsubstantiated impression was not relevant to anything, it is highly unlikely that the defense would have used the statement for anything, or even would have been able to, and no doubt would have vociferously objected had the state attempted to put this before the jury. Materiality was not alleged or demonstrated, and the trial court properly determined that neither an evidentiary hearing nor relief was warranted.

As to Royce Decker's report, Mendyk alleged that Royce Decker filed a report containing information which was presented at trial in an inflammatory manner, and the defense may have been able to object and prevent the inflammatory manner in which the evidence was presented. Mendyk did not specify what evidence this was, nor did he allege that it was never disclosed, or that it was inadmissible for any reason. The fact that the defense "may" have been able to object and prevent the inflammatory manner in which it was presented does not constitute materiality in the *Brady* sense. *Gorham, supra.* The manner in which this evidence, whatever it is, was presented certainly would not have changed the outcome of this case. Such allegation is legally insufficient because there are no supporting factual allegations, *see, Engle, supra,* and no allegation of materiality, and materiality has not and cannot be demonstrated so the trial court properly determined that neither an evidentiary hearing nor relief was warranted.

Mendyk has neither alleged nor demonstrated that the outcome was affected by the marking of "no disc" on portions of the narrative report or Arick's report, so he has not even presented a cognizable claim. In sum, the now proffered documents do not constitute *Brady* material. Even if they do, there has been no demonstration that there is a reasonable probability that the outcome of the proceedings would have been different. The defense either knew or should have known such facts, or the evidence simply was not favorable. *Hegwood, supra.* Summary denial was appropriate.

POINT 4

MENDYK RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL; NEITHER DEFICIENT PERFORMANCE NOR PREJUDICE HAS BEEN DEMONSTRATED.

In Argument III, Mendyk claims he was denied the effective assistance of counsel at the sentencing phase of his capital trial (IB 31-44). Ineffective assistance of counsel at the penalty phase was presented as Claim XII in Mendyk's motion for post conviction relief (PC 120-38). The trial court found that the evidence proffered by Mendyk in his motion would not have changed the outcome, considering the nature of the offense and the circumstances that would have diminished the weight of the proffered mitigation (PC 1355). The trial court further found that trial counsel properly waived reliance on the statutory mitigating factor of no significant prior criminal history in light of the circumstances surrounding Mendyk's discharge from the Navy as well as his history of use of illegal drugs (PC

1355). In light of what was presented to the trial court, this ruling was correct. Mendyk's later filed offer of proof in fact further supports the trial court's findings, and also demonstrates that counsel's performance was not deficient.

A claimant asserting ineffective counsel must first identify the specific omission and show that counsel's performance falls outside the wide range of reasonable assistance. In reviewing such a claim, courts must eliminate the distorting effects of hindsight by evaluating counsel's performance from counsel's perspective at the time and must grant a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. The burden is on the claimant to show that counsel was ineffective. Having demonstrated inadequate performance, the claimant must then show an adverse effect so severe that there is a reasonable probability that the results would have been different except for the inadequate performance. *Strickland, supra; Cave v. State,* 529 So.2d 293, 297 (Fla. 1988). A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied. *Kennedy, supra.*

In considering ineffectiveness of counsel as it relates to a death sentence, this court has adopted the standard in *Strickland, supra*:

> When a defendant challenges a death sentence...the question is whether there is a reasonable probability that, absent

> the errors, the sentencer-including an appellate court to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been...affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one by overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely been different absent the errors.

Bertolotti v. State, 534 So.2d 386, 387 (Fla. 1988). The choice by counsel to present or not to present evidence in mitigation at the sentencing phase of the trial is normally a tactical decision properly within counsel's discretion. *Gorham, supra.*

Further, to be granted an evidentiary hearing on a claim of ineffective assistance of counsel, a petitioner must allege specific facts not conclusively rebutted by the record that show a deficient and prejudicial performance. *Kennedy, supra; Roberts, supra.* Summary denial is appropriate where a defendant fails to allege specific facts which demonstrate a deficiency in performance that prejudiced him and which are not conclusively rebutted by the record. *Kight, supra.* Claims devoid of factual

allegations are insufficient on their face. Mere conclusory allegations that trial counsel was ineffective do not warrant an evidentiary hearing. *Roberts, supra.*

The thrust of Mendyk's claim was that counsel failed to adequately investigate and prepare for the penalty phase, and thus failed to discover and use the wealth of mitigating evidence available on Mendyk's background, which establishes reason for sympathizing with him. Mendyk claimed the unpresented mitigation included his serious mental health problems, his intoxication at the time of the offense, his history of substance abuse, child abuse in his critical developmental period, a history of family alcoholism, a sustained and heavy pattern of substance abuse, and a history of emotional and psychological disturbances. In light of the prolonged, torturous and brutal crime committed by Mendyk, it is difficult to imagine the amount and quality of evidence that could possibly have mitigated it. But what is clear is that the now proffered evidence would not have done so, and Mendyk cannot demonstrate prejudice as there is no possibility the outcome would have been affected. Further, a number of his factual allegations were legally insufficient. In light of Mendyk's offer of proof which demonstrates that counsel and the mental health expert were aware of most of this information, deficient performance cannot be demonstrated either. Thus, an evidentiary hearing was not and is not required. *Correll, supra.*

As to his family background, Mendyk noted his problematic gestation and birth, he was hit by his father as a baby,[10] he had asthma and could not go out and play so he read books and went to school, was a loner without a close relationship to his stepfather, and once ran away from home after his stepfather beat him for smoking.[11] Mendyk failed to allege how counsel was supposed to have discovered this evidence, or who exactly would have testified to this.[12] In any event, it would not have significantly altered the sentencing profile. *Strickland, supra.* First, such allegations fail to show extensive deprivation or abuse. *Smith, supra.* Further, these circumstances, even if somewhat unfortunate, are not so grave or extreme to outweigh the three applicable aggravating circumstances. *Buenoano, supra* (counsel would have discovered significant information regarding defendant's impoverished background and dysfunctional psychological state, including as a child defendant was separated

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[10] Mendyk's offer of proof demonstrates that it was Mendyk's mother who was hit, and she quickly remedied the situation by leaving. Mendyk was born April 18, 1966, and there was a beating incident on October 23, 1966, after which Mendyk's mother filed for divorce (PC 911). The parties apparently reconciled, but after another incident January 27, 1967, Mendyk's mother filed for divorce February 18, 1967, which was granted (PC 911, 927). Mendyk's mother's affidavit supports this (PC 877).

[11] While it appears that Mendyk ran away from home after he was caught smoking, it appears it was about a year after, and the record contains various reasons for this. According to Dr. Barnard, it was because Mendyk was tired of putting up with his stepfather (PC 949). According to Dr. Fleming, Mendyk "suddenly disappeared" to find his best friend (PC 1234). Mendyk's mother had no idea why he ran away, and Mendyk told her he did not know why (PC 878).

[12] As will be demonstrated shortly, counsel was aware of most of this, and as will also be demonstrated, it is apparent why it was not presented.

from family at young age after mother's death, was moved around from one family, foster home and orphanage to another, and there were reports of sexual abuse). Even accepting as true these alleged failures, none of them were so serious as to deprive the defendant of a fair trial, or a trial whose result is reliable. *Hill, supra.* Even if it could somehow be said that counsel was deficient for failing to present this evidence, even though Mendyk did not allege how it could have been discovered or presented, such factors simply do not mitigate the circumstances of the crime. *Tompkins, supra*.

Mendyk next noted that he never finished high school though he got his GED, and he joined the Navy where his sense of security was horribly shattered when he was arrested as an accessory to murder. He apparently was using drugs because the Navy offered to send him to drug rehabilitation which he refused, which Mendyk attributed to poor judgment. He was eventually sent to the brig and apparently dishonorably discharged. Mendyk then worked as a laborer by day and abused drugs by night. His interest in pornography continued but was joined by an obsession by fantasy, and he began to believe in astral projection.

Again, these factors are neither so grave nor extreme as to alter the sentencing profile. *Strickland, supra; Buenoano, supra; Hill, supra; Tompkins, supra.* In fact, the bulk of this evidence is derogatory, and would have had an adverse effect on the jury and most likely would have opened the door for the state to bring out more derogatory information. *Medina, supra.* Counsel strenuously objected to any reference to the South Carolina incident, and

from the arguments presented in Mendyk's motion it is clear that the presentation of such would not have benefitted Mendyk.[13] Likewise, it would not have behooved Mendyk for the jury to hear that he frequently went AWOL, had been thrown in the brig, and dishonorably discharged. While Mendyk attributes his refusal of drug rehabilitation to "poor judgment", it is just as easily attributable to his disregard for rules and the law. Likewise, while Mendyk claims he continuously abused drugs, this did not prevent him from earning a living. *Correll, supra.* Thus, given the mixed nature of this material, there is not a reasonable probability that the outcome would have been different. *Blanco v. Wainwright,* 507 So.2d 1377 (Fla. 1987).

Mendyk next alleged there was a wealth of information about his mental health problems, though he did not list anything specifically. The only support for this allegation was that he had recently been examined by a psychologist who determined he suffers from schizophrenia. Counsel had moved for the appointment of a confidential expert prior to trial, and one was appointed (R 1356, 1361-63). Thus, counsel was not totally in the dark regarding Mendyk's mental condition at the time of the offense, and most likely did not want to place such in issue.

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[13] Mendyk relies upon an affidavit prepared by his South Carolina attorney and claims counsel should have contacted her, but the affidavit demonstrates that she did not have much contact with Mendyk, and contains mostly subjective beliefs based on this limited contact. She notes that Mendyk was detached and she was not able to establish trust or rapport with Mendyk, but did not believe that this was due to personal conflict or tension because of her husband's position in the Navy. Appellee would note that Mendyk's attitude toward women could well explain such detachment.

Indeed, a review of Mendyk's offer of proof demonstrates that counsel was aware of many of these things, and obviously decided not to attempt to present them due to their derogatory nature.

After reading Dr. Barnard's report, it certainly cannot be said that if he had been asked to evaluate for mitigating factors that the outcome would have been different. First, a review of that report shows that Dr. Barnard obtained thorough background information on Mendyk, including: a detailed account of the crimes, including the fact that Mendyk drank only about six beers and smoked 3 1/2 joints; at age eighteen Mendyk had been charged with accessory to a murder after the fact, but took a polygraph and the charges were dropped; Mendyk did not know his father; Mendyk had problems with his stepfather, who was an alcoholic, as he was growing up, and at times the stepfather got drunk and slammed Mendyk against the wall; he beat Mendyk after he caught Mendyk smoking a cigarette; Mendyk ran away from home at age sixteen because he was tired of putting up with his stepfather; Mendyk quit school at age sixteen but got his GED; Mendyk had a few friends while in school; Mendyk first became active in the game "Dungeons and Dragons" while in the seventh grade and continued to play until the time he was arrested; Mendyk's employment history was noted; Mendyk's biological father was known to beat his mother but Mendyk had no recall of that; at age ten to twelve Mendyk began to read some writings of John Norman, a science fiction writer who wrote about the planet gore where men were masters and women were slaves; Mendyk began to buy a number of these books for himself; Mendyk has had no need to get

close to anyone since he has been an adult; Mendyk's beliefs about the occult and satanism was described; Mendyk had no serious illnesses except asthma as a child; Mendyk has never been a patient in a mental hospital and no outpatient psychiatric treatment; at age sixteen Mendyk had some thoughts of suicide because he was tired of his stepfather telling him what to do; Mendyk began to use alcohol at the age of fifteen and used it on a regular basis at eighteen; on weekends he drank a fifth of alcohol plus a case of beer; he also drank six beers plus one or two pints per day during the week; he began the use of pot at age sixteen and later used cocaine, LSD, hash, uppers, and sniffed "rush" (PC 948-52). Thus, counsel was well aware of this potential mitigating evidence.

However, there are a number of things in the report that counsel most certainly would have wanted kept from the jury, such as: Mendyk had seen another woman that evening and planned to rape her and "do a little torture in order to get my kicks"; Mendyk liked Dungeons and Dragons because it was a game in which he could rob, steal, and rape and not get into any trouble but at the same time exercise his mental functions; while in the Navy Mendyk passed fifteen to twenty bad checks to the Navy and forty to fifty bad checks to civilians, had been on unauthorized absence four times, used marijuana, and was in the brig four months before his discharge; Mendyk saw himself as a violent person, but held back because society did not like it; Mendyk believed the system is wrong to emphasize equal rights for women; he did not want to waste time and money on a chick when she would

not agree to have sex; he never forced sex before because he was waiting for a chance where he could not get caught; killing Ms. Larmon was not anything, it was like lighting a cigarette, and Mendyk had no remorse except that he got caught; he has thrown lighter fluid on cats and lit it up in order to give himself kicks; and, Mendyk's belief is in personal gratification and he followed the Satanic bible sayings that once you do what you want it is not a sin (PC 948-52). Such factors go a long way to refute claims of inability to appreciate criminality of conduct or conform it to the law and extreme mental or emotional disturbance to mitigate this crime, and in no way diminished the cold, calculated and premeditated nature of it. Contrary to Mendyk's assertion, there is not much to sympathize with.

Significantly, while in his affidavit Dr. Barnard states that he could have testified to mitigating circumstances, he never states that he would have changed his diagnosis, which was Mixed Personality Disorder with traits of an Antisocial and Sadistic Personality Disorder (PC 952). This certainly would be entitled to little weight. *See, Carter v. State,* 576 So.2d 1291, 1292 (Fla. 1989) (sociopathic condition cannot be considered in mitigation). Further, while in his affidavit Dr. Barnard gives a general account of what *could* be mitigating, he never says that it *is* mitigating in *this* case, or that the instant crimes were the result of such.

Further, Dr. Fleming's diagnosis of schizophrenia is based on three episodes in Mendyk's life: his running away from home, the South Carolina incident, and the instant crimes (PC 1233-36).

Dr. Barnard was aware of these three incidents, as well as Mendyk's interest in science fiction and dungeons and dragons, the fact that Mendyk was a loner, and Mendyk's beliefs in the occult and satanism. Dr. Barnard found no indication of a thought disorder with loosening of associations, delusions, or flight of ideas (PC 952). It was Dr. Barnard's opinion that at the time of the crimes Mendyk knew the nature and quality of his acts and the wrongfulness of them. The fact that a defendant has now secured an expert who might have offered more favorable testimony is an insufficient basis for relief. *Provenzano, supra.*

Mendyk also discussed his drug abuse problem in his motion, noting he regularly consumed vast amounts of marijuana, beer, hashish and whiskey, and on occasion took LSD and mushrooms. The fact that Mendyk regularly consumed beer and marijuana was before the jury through the testimony of Frantz. According to Frantz's deposition, the only other drugs he and his constant companion Todd did was speed a couple of times (PC 576). Dr. Barnard noted Mendyk's drug and alcohol history in his report, as well as what he had consumed on the night of the offense, which is consistent with all other reports, and while his current affidavit states that "such substances impair judgment and control, effect one's emotions and thought processes, and effect one's behavior", he never states that this is true in Mendyk's case (PC 1367). Further, what was not before the jury was the fact that Mendyk had been court martialed for smoking marijuana while on duty in

the Navy, and refused rehabilitation.[14] This significantly diminishes any potential mitigating value of this evidence. Instead of demonstrating an inability to conform one's conduct to the law, it demonstrates a blatant disregard for the law. Also, as stated, Mendyk's drinking and use of drugs did not prevent him from earning a living. *Correll, supra.* Again, as stated, such evidence would not have changed the outcome so there is no prejudice. *Tompkins, supra.*

Finally, Mendyk claimed that evidence of his intoxication at the time of the offense combined with these other factors could have established the statutory mitigating factors. However, Mendyk did not state what this evidence of intoxication at the time of the offense consists of, so this claim must fail as being factually insufficient. *Engle, supra.* The fact of the matter is that there simply was no evidence of intoxication at the time of the offense, with Mendyk's own statement indicating he was not intoxicated. Again, Mendyk's vivid recall of the detailed facts of this crime belies any claim of intoxication at the time of the offense. Counsel did argue that Mendyk's capacity to conform his conduct to the requirements of the law or to appreciate the criminality of his conduct was substantially impaired, and the trial court specifically rejected this based upon the fact that the evidence showed the last marijuana was consumed at 12:30, and the murder did not occur until

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[14] According to Dr. Fleming's report, Mendyk's parents also urged drug rehabilitation after Mendyk was released from the Navy, which Mendyk refused (R 1230).

approximately five hours later (R 1559). Thus, neither deficient performance nor prejudice can be demonstrated. *Hill, supra.*

In sum, the mitigation proffered in Mendyk's motion simply would not have affected the outcome of this proceeding. Both counsel and the expert were aware of Mendyk's background,[15] so this is not a case where counsel failed to investigate the defendant's background. *See, e.g., Stevens v. State,* 552 So.2d 1082 (Fla. 1989). In order to provide relief, this court would have to find that such evidence would have convinced the jury to recommend life (it unanimously recommended death) and that the judge would have then sentenced him to life. Considering the nature of the offense and the totality of the circumstances which would have diminished the weight of this now proffered mitigation, the outcome would not have been affected. *See, Bertolotti, supra; Tompkins, supra.*

Finally, Mendyk argued that counsel ineffectively waived the statutory mitigation factor of no significant history of prior criminal history. The trial court correctly found that

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[15] While Dr. Barnard states in his affidavit that his conclusions would have been "strengthened with extensive background information, he does not refer to any "background information" he did not have at the time he evaluated Mendyk. The only additional information Dr. Fleming had related to things occurring contemporaneously with or after Mendyk's trial and conviction, which obviously could not have been given to Dr. Barnard. Dr. Fleming may have had reports concerning certain things, but Dr. Barnard was aware of this information, i.e., Dr. Fleming had the polygraph report, but Dr. Barnard knew Mendyk had taken one and passed; Dr. Fleming had transcripts from Mendyk's parents' divorce proceedings, but Dr. Barnard knew that Mendyk's father had beaten his mother. Thus it does not even appear that Dr. Barnard was without any significant information, and even if his information differed slightly, it does not rise to the level of an objectively established head injury or previous mental treatment. *See,* Hill, *supra;* Correll, *supra.*

counsel properly waived reliance on this factor in light of the circumstances surrounding Mendyk's discharge from the Navy (PC 632-38), as well as his history of use of illegal drugs. *See, Walton v. State,* 547 So.2d 622 (Fla. 1989). Indeed, counsel would have been derelict in *not* waiving this, as it would have permitted the state to present evidence of all of Mendyk's prior criminal activity. Neither deficient performance nor prejudice can be demonstrated, *Strickland, supra,* so neither a hearing nor relief was warranted.

POINT 5

THIS CLAIM IS NOT COGNIZABLE DUE TO INSUFFICIENT ALLEGATIONS BELOW; ALTERNATIVELY, MENDYK RECEIVED AN ADEQUATE MENTAL EVALUATION.

In Argument IV, Mendyk claims that he was deprived of his rights to due process and equal protection under the Fourteenth Amendment as well as his rights under the Fifth, Sixth, and Eighth Amendments, because the mental health expert who evaluated him was not provided with the necessary background information and was not asked to evaluate for the presence of mitigation or intoxication negating specific intent (IB 44-48). This was presented as Claim XVI in Mendyk's motion for post conviction relief (PC 180-84). The trial court found that the claim was legally insufficient as it did not contain specific factual allegations as to what counsel should have provided, how it would have affected the outcome, or that the examiner could not and did not obtain such information from Mendyk (PC 1359). This ruling is correct.

Appellee would first point out that the state deprived Mendyk of nothing. Mendyk asked for and received the assistance of an expert to determine his sanity at the time of the offense and his competence to stand trial. Mendyk has neither alleged nor demonstrated that the expert's conclusions in either of these areas was deficient. The state did nothing wrong and the expert did nothing wrong, so at best this claim can only be viewed in terms of ineffective assistance of counsel, which was thoroughly discussed in the previous point.

In his motion, Mendyk simply alleged that counsel failed to provide "background information", but did not specify what this entailed, that the examiner could not or did not obtain this information from Mendyk, or that the absence of such affected the evaluation that was done (PC 182-83). Mendyk also stated that counsel would have been able to present evidence of statutory and nonstatutory mental health evidence, that substantial statutory and nonstatutory mitigation should have been established, and aggravating factors should have been undermined, but did not specify what any of these factors are (IB 183). These conclusory allegation fall far short of specific facts that demonstrate a deficiency on the part of counsel that was detrimental to Mendyk, and the trial court properly declined to have a hearing or grant relief. *Kennedy, supra; Roberts, supra.* Further allegations raised on appeal but not presented to the trial court are not cognizable. *Doyle, supra.* In any event, as demonstrated in the previous point, the expert had significant background information on Mendyk, which was essentially the same information as the latest expert had. *See, Jennings v. State,* No. 75,689 (Fla. June 13, 1991).

POINT 6

MENDYK RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL.

In prosecuting a murder case, the state may have good circumstantial evidence, it may occasionally have a confession, and in rare instances it may have an eyewitness other than the victim or killer. In the instant case, the state had all three. This evidence not only overwhelmingly supported premeditated murder, but also felony murder for two counts of a general intent felony (sexual battery). While Mendyk complains that counsel failed to present a reasonable theory of defense, he offers no alternative to counsel's handling of this case. He points out alleged omissions, but fails to demonstrate how a different handling could possibly have changed the outcome. Thus, even if it could be said that any aspect of defense counsel's performance was deficient, Mendyk has failed to demonstrate that the outcome would have probably been different except for the errors of his lawyer. *See, Squires v. State,* 558 So.2d 401 (Fla. 1990) (after all, Squires confessed to the killing); *Gorham, supra*; *Smith v. State,* 445 So.2d 323, 325 (Fla. 1983) ("Nothing has been shown to this Court concerning what evidence would have been discovered had counsel not failed to do the specific acts which appellant claims constitute ineffective assistance of counsel); *Provenzano, supra* (failure to show even remotely how a different handling of matters would have most probably changed the result). Further, Mendyk cannot demonstrate deficient performance as the record demonstrates that counsel's strategy was reasonable under the circumstances.

A claimant asserting ineffective counsel must first identify the specific omission and show that counsel's performance falls outside the wide range of reasonable assistance. In reviewing such a claim, courts must eliminate the distorting effects of hindsight by evaluating counsel's performance from counsel's perspective at the time and must grant a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. The burden is on the claimant to show that counsel was ineffective. Having demonstrated inadequate performance, the claimant must then show an adverse effect so severe that there is a reasonable probability that the results would have been different except for the inadequate performance. *Cave, supra*. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied. *Kennedy, supra*.

Further, to be granted an evidentiary hearing on a claim of ineffective assistance of counsel, a petitioner must allege specific facts not conclusively rebutted by the record that show a deficient and prejudicial performance. *Kennedy, supra; Roberts, supra.* Summary denial is appropriate where a defendant fails to allege specific facts which demonstrate a deficiency in performance that prejudiced him and which are not conclusively rebutted by the record. *Kight, supra.* Claims devoid of factual allegations are insufficient on their face. Mere conclusory allegations that trial counsel was ineffective do not warrant an

evidentiary hearing. *Roberts, supra.* Based on these standards, as will be demonstrated, neither a hearing nor relief was warranted.

A. Defense counsel did not abandon Mendyk.

Mendyk noted that counsel conceded Mendyk was guilty of kidnapping (and maybe second degree murder), and asked that he rot in prison for the rest of his life. Mendyk further noted that in closing argument counsel conceded Mendyk's guilt by stating that Frantz was equally culpable, but made no effort to investigate or argue Frantz's domination or participation in the "alleged" murder. Mendyk stated counsel failed to learn or present the state's belief that Frantz was lying or minimizing his role in the crime. The trial court found that in light of the overwhelming evidence of premeditated and felony murder, counsel's strategy to chip away at the circumstantial evidence implicating solely Mendyk, and attempt to shift the blame to Frantz, who would receive a life sentence for his participation in these brutal events, was entirely reasonable under the circumstances (PC 1356).

As noted, the evidence in this case was overwhelming. Counsel not only had to defend against premeditated murder, but also felony murder where one of the underlying felonies, sexual battery (two counts), is not a specific intent crime, thus negating the possibility of utilizing an intoxication defense. See, *Buford v. State,* 492 So.2d 355 (Fla. 1986). Thus, counsel's strategy to chip away at the circumstantial evidence implicating solely Mendyk, and attempt to shift the blame to Frantz, who would receive a life sentence for his participation in these

brutal events, was entirely reasonable under the circumstances. *See, Bertolotti, supra* (counsels' decision to present "reasonable doubt" defense to underlying felonies of robbery, sexual battery and burglary was reasonable under the circumstances). Indeed, in light of the evidence the state had against Mendyk, counsel would have looked like a buffoon and had no credibility whatsoever with the jury had he attempted to argue that Mendyk did not commit these crimes.

In closing, counsel noted that Frantz was there, yet the state had ignored evidence indicating such, in order to make the crime fit his version of events. He noted Frantz was not visible when the helicopter first circled, indicating he could possibly have been at the body; he argued the voluntariness of Mendyk's statement, noting that none of his statements had been recorded whereas Frantz's statement had been, and also noting that this also would make it easier to make the crime fit Frantz's version; he noted the state's lack of testimony on Mendyk's lack of intoxication; he noted that the broom handle had never been tested for fingerprints; he noted that common sense would dictate that Frantz must have had a bigger role, that there was no evidence as to who cut the wires and it could well have been Frantz and broke the broom handle; he noted that Frantz had pled guilty to sexual battery, but if you listen to his statement he never admitted to such, thus casting doubt on the statement; he noted that while it is possible to lift prints from wires the state never attempted to do such; he noted inconsistencies in the state's evidence, pointing out that at times it was convenient to

believe Frantz, at other times it was not; he acknowledged that Mendyk was guilty of kidnapping, and that he should get a life sentence as Frantz did; he argued that, consistent with Mendyk's statement, it was Frantz's idea to kill the victim, and Phillip Frantz was the reason why she was dead, and finally, he argued that the state had decided that the appropriate punishment for Frantz was life, and should be the same for Mendyk. This strategy was entirely reasonable under the circumstances of a very difficult case, and as Mendyk failed to demonstrate how a different handling of the matter would have changed the outcome, neither a hearing nor relief was warranted. *Strickland, supra; Kennedy, supra.*

B. There was no "mental illness" defense to present.

Mendyk claimed that counsel failed to adequately investigate, develop, and present amply available evidence in support of a mental illness defense. Mendyk noted that reasonable counsel would have been alert to his delusional attitude, and defense counsel's failure to adequately enlighten the court appointed expert with background information that a mental illness existed was unreasonable.[16] Mendyk also claimed that mental health evidence could have been presented regarding voluntary intoxication as it relates to specific intent. Mendyk also alleged as deficiencies counsel's failure to file a memorandum of law regarding the appointment of an expert in the areas of the occult and satanism and counsel's option to do an in

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[16] A review of the expert's report demonstrates that Dr. Barnard was well aware of Mendyk's beliefs and practices, yet found no indication of delusions (PC 948-52).

camera hearing and counsel's failure to cite *Ake v. Oklahoma*. In a different section of ineffectiveness claims in his 3.850, Mendyk claimed that counsel failed to investigate the state's administering drugs to him during the trial, but did not allege any effect this may have had on the outcome. Since Mendyk failed to allege what type of "mental health defense" counsel should have presented or how it would have affected the outcome, the trial court correctly found that his conclusory allegations are legally insufficient (PC 1357). *Kight, supra; Roberts, supra; Kennedy, supra.*

In any event, the claim is without merit. It is well established under Florida law that the test for insanity, when used as defense to a criminal charge is the McNaughton Rule, under which the only issues are the individual's ability at the time of the incident to distinguish right from wrong and the ability to understand the wrongfulness of the act committed. *Gurganus v. State,* 451 So.2d 817 (Fla. 1984). Evidence which does not go toward proving or disproving an individual's ability to distinguish right from wrong at the time of an incident is irrelevant under the McNaughton Rule, including evidence of irresistible impulsive behavior, evidence of diminished mental capacity, or evidence of psychological abnormality short of an inability to distinguish right from wrong. *Id.* at 820-21. *See also, Occhione v. State,* 570 So.2d 902 (Fla. 1990); *Kight v. State,* 512 So.2d 922 (Fla. 1987); *Zeigler v. State,* 402 So.2d 365 (Fla. 1981).

Counsel moved for the appointment of a confidential expert pursuant to Florida Rule of Criminal Procedure 3.216 (a), which

covers the recognized defense in Florida. Thus, counsel cannot be deemed ineffective for failing to present some unspecified "mental illness defense", nor can prejudice be demonstrated as Mendyk has cited no authority for the proposition that such evidence would have been admissible, and under existing precedent it would not have been. As to Mendyk's beliefs in the occult and satanism, Dr. Barnard found that this did not affect his sanity at the time of the offense (PC 952), and even the latest expert, Dr. Fleming, stated that these were not related in a significant way to the crimes (PC 1236). Thus, counsel's performance was not deficient, there is no possibility the outcome would have been different, so neither a hearing nor relief was warranted.

In his brief, Mendyk has made several additional allegations. These are that counsel failed to contact his previous attorney in South Carolina, and that counsel failed to learn of Mendyk's suicidal ideations while in jail and failed to know his client was receiving psychotropic medication while in jail and failed to present this information to the circuit court to have his competency evaluated (IB 51). These were never presented to the trial court, so they have been waived. *Doyle, supra.* Further, Mendyk has failed to allege or demonstrate how this affected the outcome. In his motion for post conviction relief, Mendyk did allege that counsel failed to investigate the state's administering drugs to him during trial, but again, failed to allege prejudice, so the claim is legally insufficient, and cannot be expanded on appeal. *See, e.g., Tompkins, supra* (counsel's lack of knowledge that Tompkins asked for medication

while in custody had no prejudicial effect on the outcome of trial). Further, as noted in Point 4, Mendyk's former attorney did not possess considerable information, and as noted in Point 3, Mendyk was receiving a small dosage of a tranquilizer.

C. Mendyk was not intoxicated.

Mendyk next claims that counsel was ineffective for failing to adequately investigate, develop and present amply available evidence in support of a voluntary intoxication defense. In his motion, Mendyk claimed that there was evidence to establish that he was intoxicated at the time of the offense, but cited to nothing that was not presented during trial, with the exception of Mrs. Frantz's deposition statement that she felt Mendyk was always under the influence of drugs.[17] Mendyk claimed that had the jury been so instructed, there is a reasonable probability it would have returned a verdict of second degree murder.

Again, this claim was legally insufficient as Mendyk failed to allege what evidence counsel would have discovered had counsel done what Mendyk claims he should have. *Gorham, supra.* While Mendyk claims that a mental health expert would have testified, he does not demonstrate how such evidence would have been admissible, and in light of the absence of evidence that Mendyk was intoxicated, it most likely would not have been. *See, Cirack v. State,* 201 So.2d 706 (Fla. 1967). The absence of evidence of intoxication is even less than in *Cirack,* as there is not even e "self-serving" declaration from Mendyk that he was intoxicated;

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[17] Mendyk has now added Craven's affidavit, as well as his Navy records and family affidavits indicating a history of alcohol abuse.

rather, he indicated to Detective Decker that he was not intoxicated (PC 535). Since there was no additional evidence that could have been presented, counsel's performance cannot be deemed ineffective. *Henderson, supra* (allegation that counsel ineffective for failing to raise intoxication defense without merit as record devoid of facts indicating defendant was drunk at time offenses were committed).

Nor did Mendyk demonstrate prejudice. There is no reasonable probability that the jury would not have found him guilty of first degree murder in light of the testimony of those who actually saw him that night and indicated he was not intoxicated. *Lambrix v. State,* 534 So.2d 1151 (Fla. 1988). Further, the jury could have found him guilty under a felony murder theory even if he was too intoxicated to have formed the requisite intent for premeditated murder, as voluntary intoxication is no defense to felony murder where the underlying felony is not a specific intent crime. *Buford v. State,* 492 So.2d 355 (Fla. 1986). (Mendyk was convicted of two counts of sexual battery.) Finally, Mendyk's deliberate actions and ability to give a detailed account of the crime belie any claim of intoxication. *White v. State,* 559 So.2d 1097 (Fla. 1990) (counsel rejected intoxication defense because it was inconsistent with the deliberateness of the defendant's actions during the shootings and the evidence supported that assessment); *Cooper v. State,* 492 So.2d 1059 (Fla. 1986) (trial court properly rejected mitigating circumstance of impaired capacity due to ingestion of intoxicants where it was inconsistent with testimony given and

defendant was able to give detailed account of crime). Neither an evidentiary hearing nor relief was warranted.

D. Counsel rendered effective assistance.

In his motion for post conviction relief, Mendyk set forth a variety of conclusory allegations that counsel failed to do certain things, but did not set forth a supporting factual basis or demonstrate prejudice. The trail court found that the underlying substantive claims were procedurally barred as they should have been raised on direct appeal, and found that no showing of prejudice had been made to demonstrate ineffective assistance of counsel (PC 1358-59). In the instant brief, Mendyk has done nothing more than set forth a laundry list of counsel's alleged omissions, with no factual support or demonstration of prejudice. Appellee contends these claims have been waived. *Duest, supra* at 852 ("The purpose of an appellate brief is to present arguments in support of the points on appeal"). Alternatively, the trial court correctly found there was no prejudice, and neither a hearing nor relief was warranted.

Mendyk claimed that defense counsel failed to object to lay witnesses' "many opinions" as to his mental capacity since no foundation was provided for any of these opinions. In his motion, Mendyk did not specify which opinions he took issue with, although he now cites to (R 552-53, 775, 978, 1041). Such conclusory allegation is legally insufficient because of the absence of facts to support it and failure to show how he was prejudiced by this alleged unspecific omission. *Kight, supra; Roberts, supra; Kennedy, supra; Engle, supra.* Neither a hearing nor relief was warranted.

Mendyk stated that counsel did not object to improper videotaping of the trial, but did not elaborate any further. Again, this conclusory allegation is legally insufficient because Mendyk has failed to demonstrate how he was prejudiced by this alleged omission. *Roberts, supra.* Neither a hearing nor relief was warranted.

Mendyk next alleged that counsel ineffectively argued the voluntariness of his April 9, 1987 statements by failing to investigate whether the state had administered any drugs, employed psychological coercion, or improperly shackled him, as the presence of either of these factors would have caused the statements to be inadmissible. In the absence of an allegation that any of these things did indeed occur, Mendyk cannot demonstrate prejudice as he cannot demonstrate that counsel was ineffective for failing to discover such or that the statements would have been suppressed. Mendyk also cannot demonstrate prejudice because this court has already determined that even if the admission of this statement was error, it was harmless at worst. *Mendyk, supra* at 848. Thus, the presentation of alternate theories for suppression would not have affected the outcome. Neither a hearing nor relief was warranted.

Mendyk next faulted counsel for failing to challenge a juror who had strong views in favor of the death penalty because of Mendyk's wish to keep the juror. Again, in the absence of specific factual allegations or an allegation of how he was prejudiced, Mendyk's allegation must be found legally insufficient. While Mendyk did not specify which juror he was

referring to, it would appear from a review of the record that it would be Juror Whitman, who had lived in Saudi Arabia and did not feel it was extreme to impose the death penalty for adultery, rape or murder. On direct appeal, Mendyk claimed that the court erred in denying his request for additional peremptories, and specifically referred to this juror (PC 377). This court found no error. *Mendyk, supra* at 849. Claims previously raised on direct appeal cannot be raised under the guise of ineffective assistance of counsel. *See, Sireci v. State,* 469 So.2d 119 (Fla. 1985); *Kelley, supra* at 759. Further, there is no evidence that the juror remained on Mendyk's recommendation, and the point on appeal would indicate the opposite. Finally, prejudice cannot be demonstrated as the juror also stated she did not believe death was the appropriate penalty for all first degree murders and she could be objective in reaching her decision (R 438). It must also be remembered that the jury recommendation in the instant case was unanimous. Neither a hearing nor relief was warranted.

Mendyk next alleged that counsel unreasonably delayed in deposing Frantz, did not receive a copy of the deposition prior to trial, and declined an audiotaped copy of Frantz's statement. Again, Mendyk failed to allege what admissible evidence would have been forthcoming or what material may have been brought out on cross examination. *See, Magill v. State,* 457 So.2d 1367 (Fla. 1984). Thus, there is no showing of a causal relationship between the alleged omissions and Mendyk's conviction. *Id.* at 1370. Further, the record reflects that the reason Frantz was not deposed until the day before trial is because that was when

he entered a plea in exchange for his testimony (R 670-71). Thus, prior to that time there was no indication that Frantz was going to be a witness, and indeed it is quite unlikely that his attorney would have permitted him to answer any questions while he was still facing the same charges as Mendyk. In addition, while counsel may have declined a tape of Frantz's statement, it is clear that he had a transcribed copy of it (R 1336, 1023-25). Neither a hearing nor relief was warranted.

Mendyk next claimed that counsel failed to object to the state's incessant leading questions on direct and redirect, but again gave no specific references. Again, the absence of factual allegations or an allegation of prejudice renders this claim legally insufficient. *Roberts, supra; Kennedy, supra.* Neither a hearing nor relief was warranted.

Mendyk next claimed counsel failed to adequately object to the use of color slides taken prior to the autopsy of the victim. Again, in the absence of an allegation of prejudice this claim must be found legally insufficient. *Roberts, supra.* Further, the record demonstrates that counsel did object, ironically enough presenting a more thorough argument than that presented in the instant claim, and the objection was overruled (R 708). The record also demonstrates that the five slides were utilized by Dr. Sass to explain the injuries and cause of death, so they were clearly relevant. *See, Nixon, supra.* This is nothing more than an attempt to raise a claim that should have been raised on direct appeal cast in the guise of ineffective assistance of counsel, which is improper. *Kelley, supra.* This claim is legally

insufficient, and even if it was not, it is without merit as it is refuted by the record. Neither a hearing nor relief was warranted.

Mendyk next alleged that counsel was ineffective for failing to object to prejudicial closing argument which included impermissible commentary on his right to counsel and on the victim impact. Mendyk did nothing more than quote a portion of the prosecutor's closing argument, and so again this claim is legally insufficient for failing to allege prejudice. Even if sufficient, relief was not warranted. Mendyk failed to demonstrate the statements were even objectionable, and certainly did not demonstrated that they warranted the granting of a new trial. *Burr v. State,* 518 So.2d 903 (Fla. 1987). Mendyk would have to demonstrate that an objection would have been sustained, a curative instruction would have been insufficient to cure any alleged prejudice, and a mistrial would have been granted or the trial court would had to have abused its discretion in not granting one. Alternatively, Mendyk would have to demonstrate that if an objection had been made and overruled, that error did indeed occur and it was not harmless. In short, there are too many ifs involved to conclude, particularly in the absence of allegations of such, that the outcome would have been affected. Further, whether to object to closing argument is a matter of trial tactics left to the discretion of the trial attorney, so long as his performance is within the range of what is expected of reasonably competent counsel. *Muhammed v. State,* 426 So.2d 533 (Fla. 1982). As that court noted, an attorney may decide it is

better not to object to the remark and ask for a curative instruction because to do so would only further call the jury's attention to such remarks. *See also, McCrae v. State,* 510 So.2d 874 (Fla. 1987) (whether to object to an improper comment can be a matter of trial strategy upon which a reasonable discretion is allowed to counsel). Neither a hearing nor relief is warranted.

Mendyk next claimed that counsel failed to effectively cross examine and impeach key state witnesses and unreasonably failed to impeach the medical examiner, but again did not state what counsel should have done or how this could have been accomplished. Again, this allegation must be found legally insufficient due to lack of specific allegations of fact and prejudice. *Roberts, supra; Kennedy, supra.* Mendyk again failed to demonstrate any causal relationship between the alleged deficiencies and the outcome, or what counsel would have discovered and should have done. *Gorham, supra; Magill, supra.* Neither a hearing nor relief was warranted.

Mendyk next claimed that counsel failed to object to violations of *Booth* and *Caldwell,* but elaborated no further. Again, the state contends such allegation is legally insufficient due to specific allegations of fact and prejudice. Further, the claim is without merit. The first three cites are to questions posed during *voir dire*. The next involves a witness' response that he knew the victim through his work from stopping in and talking to her. The next refers to a witness testifying that the victim worked the night shift because she attended school. Counsel did object to this comment (R 662-64). The final reference is to

eight pages of the prosecutor's closing argument in the guilt phase. Thus, the alleged victim impact evidence consists of the victim's age, the fact that she lived at home and went to school, and that one witness thought she was a very nice girl.

The victim's age was relevant to the charge of sexual battery on a person over the age of eleven, and the jury would have been well aware of her general age from the photographs in any event. The prosecutor's closing argument, which was in the guilt phase and not the penalty phase as alleged by Mendyk, is simply a review of the circumstances of the crime, which is not victim impact evidence. *See, Jennings, supra; South Carolina v. Gathers,* 109 S.Ct. 2207 (1989); *Bertolotti v. State,* 565 So.2d 1343, 1345 (Fla. 1990); *Mills, supra.* As noted, counsel did object to the question that revealed the victim attended school, so deficient performance has not been demonstrated. Thus, the only remaining evidence that defense counsel may have been able to limit was that the victim lived at home and was a nice girl. Arguably, this does not even rise to the level condemned in *Booth, see, Preston v. State,* 531 So.2d 154 (Fla. 1988); *Bertolotti, supra,* particularly since it was revealed in the guilt as opposed to penalty phase. *Smith, supra.* Even if such references would have been limited, the result would have been unchanged. *See, Provenzano, supra.* The evidence in this case was overwhelming, and counsel's failure to object would not have changed the outcome. Neither a hearing nor relief was warranted. Since *Caldwell* is not applicable to Florida, counsel cannot be deemed ineffective for failing to object. *Tafero v. State,* 561 So.2d 557, 559 n. 2 (Fla. 1990); *Provenzano, supra.* Neither a hearing nor relief was warranted.

Mendyk next claimed counsel failed to object to hearsay testimony by key state witnesses on how he "felt" during the murder and how he "reacted" to the death, but again provided no insight into the benefit of an objection. Once again, in the absence of an allegation of how this affected the outcome, such claim must be found legally insufficient. *Roberts, supra.* Neither a hearing nor relief was warranted.

Finally, Mendyk noted that counsel instructed the state how to ask questions on direct, which violated his duty of loyalty. Once again, this claim must fail for failure to allege prejudice. Further, the record demonstrates this entire exchange was basically irrelevant, as all it demonstrated was that nobody else was present during a conversation Frantz and Mendyk had. In fact, the question that defense counsel suggested was "Was anybody else present?", while the question the prosecutor was attempting to ask was "...at any time, did he ever mention grabbing someone and tying them up?" (R 775). There certainly is no reasonable probability that the outcome was affected. *Strickland, supra.* Neither a hearing nor relief was warranted.

POINT 7

THERE WAS NO VIOLATION OF CHAPTER 119, FLORIDA STATUTES, (1989).

In Argument VI, Mendyk claims that three agencies, the Hernando County Sheriff, the Florida Parole Commission, and the Pasco County Sheriff, denied him access to public records pertaining to this matter (IB 56-58). This was presented as Claim XXI in Mendyk's motion for post conviction relief (PC 229-

32), and was limited to the Hernando and Pasco County Sheriffs, so any claim pertaining to the Florida Parole Commission is not cognizable as it was never presented to the trial court.[18] *Doyle, supra.* The trial court found that the Pasco County records relate to an active investigation and are exempt from the Public Records Act, and that defense counsel had been provided with a videotape of the crime scene taken by a member of the Hernando County Sheriff's Department (PC 1360-61). This ruling is correct.

Since defense counsel was provided with a copy of the videotape, it cannot be the basis of any claims pursuant to *Brady, supra.* Further, the tape was shown at trial and a running narration of it appears on the record (R 582-87), so any claims pertaining to the contents of it should have been presented at trial and pursued on direct appeal. Since the tape was admitted into evidence, it could have been obtained in a timely fashion from the court file. In fact, an affidavit contained in Mendyk's offer of proof demonstrates that a copy of it was provided from that source (PC 1214). That same affidavit demonstrates that the Hernando County Sheriff's Office was not in possession of a videotape, so production of a nonexistent item cannot be ordered (R 1215), and since counsel already had a copy of the tape there would be no point in doing so.

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[18] The record demonstrates that the request to the Parole Comission is dated January 24, 1991, which is one day before the motion was filed (PC 1217-18). Further, the record also demonstrates that Mendyk's expert, Dr. Fleming, was provided with a Probation and Parole Services file on Mendyk (PC 1227).

Neither *Provenzano, supra,* nor *Kokal v. State,* 562 So.2d 324 (Fla. 1990), are applicable to production of the Pasco County records, as those cases simply hold that criminal investigative information with respect to a defendant is no longer active when his conviction and sentence have become final. *Provenzano* at 547; *Kokal* at 326. An *in camera* inspection is discretionary where an exemption for active criminal investigation information is claimed. §119.07(2)(b) and (3)(d), Fla. Stat. (1989); *Tribune Company v. Public Records,* 493 So.2d 480 (Fla. 2d DCA 1986). In finding an exemption in the instant case, the trial court relied on an affidavit from the legal advisor for the Pasco County Sheriff's Office stating that the only information it had on Mendyk was related to an ongoing investigation (PC 640), and appellee submits that this was not an abuse of discretion. *See, Lorei v. Smith,* 464 So.2d 1330 (Fla. 2d DCA 1985).

Further, in *Provenzano, supra,* this court recognized that the ordinary legal recourse for obtaining public records is through civil action, but believed that where a defendant's prior request for the state attorney's file has been denied it is appropriate for such a request to be made as part of a motion for post conviction relief. *Id.* at 547. The state contends that this should not be expanded to include other agencies claiming an exemption, particularly where they are not even located within the same circuit where the motion for post conviction relief is filed. Such a holding would lead to venue wars as a defendant attempted to hail in agency records from all over the state on the basis of a 3.850 motion, and would actually proliferate

proceedings instead of limiting them, as was the purpose of the court's holding in *Provenzano*. *See, e.g., Florida Public Service Commission v. Triple "A" Enterprises, Inc.*, 387 So.2d 940 (Fla. 1980). It would also provide the opportunity for further delay while a defendant goes on a last minute fishing expedition in the public records of various agencies.[19] Thus, when records other than the state attorney file are involved, a defendant should be required to pursue statutory remedies in the proper venue if access is denied or an exemption is claimed.

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[19] As noted, the Public Records request to the Florida Parole Comission was delivered the day before the instant motion was due, the request to the Pasco County Sheriff's Office was sent eleven days before the instant motion was due (PC 1221), and the videotape was requested a week before the instant motion was due (PC 1215).

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully requests this court affirm the order of the trial court summarily denying Mendyk's motion for post conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail to Martin J. McClain, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 20th day of June, 1991.

Kellie ~~A. Nielan~~
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