IN THE SUPREME COURT OF FLORIDA

BARRY HOFFMAN,

Appellant,

v. CASE NO. 78,686

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Procedural History

On October 28, 1981, Barry Hoffman was charged by indictment with the first degree murders of Frank Ihlenfeld and Linda Sue Parrish. Pretrial motions were filed on November 3, 1982, by the State, to compel the taking of blood samples and hair specimens. Speedy trial was waived by Hoffman on March 22, 1982, and on June 25, 1982, Hoffman's counsel filed a motion to suppress all confessions and/or admissions made by him. On that same date, Hoffman filed a pro se motion to dismiss counsel. Following a hearing on both motions, both were denied. Pretrial, Hoffman and his counsel pursued plea negotiations with the State. On June 28, 1982, Hoffman withdrew his guilty plea and entered a plea of guilty to two counts of first degree murder. The plea negotiations provided that Hoffman would receive two concurrent life sentences in exchange for Hoffman's truthful testimony in the State's case against codefendant Leonard Mazzara. The factual basis for the plea revealed that on September 7, 1980, in Jacksonville Beach, Florida, Hoffman and James White, a codefendant, murdered Frank Ihlenfeld and Linda Sue Parrish. Hoffman stabbed and then cut the throat of Mr. Ihlenfeld and aided in the murder of Linda Sue Parrish. Hoffman agreed to the plea and agreed to testify truthfully at Mazzara's trial.

On September 15, 1982, Barry Hoffman was called as a witness in the Mazzara trial and at such time, testified contrary to his plea negotiation, stating that he "never talked with either man (Rocco Marshall or Leonard Mazzara) about doing any

job for them." He testified he did not conspire with Marshall or Mazzara to kill Parrish or Ihlenfeld; that neither of them hired him. He stated he did not kill anyone.

Hoffman was made a court witness during the Mazzara trial. The State fully inquired of him whether he appreciated that his testimony that day violated the plea agreement. On the record Hoffman testified that he understood that his testimony violated the plea agreement; that the plea agreement was off and that the State would be seeking the death penalty. Moreover, Hoffman testified that his lawyer advised him to accept the plea because Hoffman's fingerprints were found in the room near Ihlenfeld's body and that evidence would be used against him at trial.

On September 17, 1982, Hoffman filed a **pro** se motion to withdraw his guilty plea. On September 24, 1982, a hearing was held at which time defense counsel Nichols stated that he was advised of the events regarding the Mazzara trial and he had spoken with Hoffman. Nichols then ore tenus moved to withdraw from the case. Said motion was granted and Nichols was allowed to withdraw as caunsel. The court also accepted Hoffman's motion to withdraw his guilty plea and he entered a plea of not guilty.

On October 1, 1982, Jack C. Harris was appointed to represent Barry Hoffman. Harris filed a plethora of pretrial motions seeking to have the death penalty declared unconstitutional, seeking a motion for individually sequestered voir dire, a motion in limine, a motion to declare the death penalty not a possible penalty, a motion to produce photographs, a demand for discovery of penalty phase evidence, a motion for

additional peremptory challenges, a renewed motion to suppress, and a motion for change of venue.

The trial occurred on January 10-14, 1983, and, at the conclusion of said proceedings, Hoffman was found guilty of first degree capital murder for the death of Frank Ihlenfeld and guilty of second degree murder for the death of Linda Sue Parrish. He was also found guilty of conspiracy to commit first degree murder. The penalty phase was held on January 20, 1983. No additional evidence was presented by the State. The defense presented the sworn remarks of Barry Hoffman. The jury returned a death recommendation as to the murder of Frank Ihlenfeld. On February 11, 1983, Judge Haddock concurred with the jury's recommendation of death and imposed the death penalty, finding four statutory aggravating factors and two mitigating factors. This Court, in Hoffman v. State, 474 So.2d 1178 (Fla. 1985), affirmed the convictions and imposition of the death penalty on appeal.

On October 2, 1987, Hoffman filed a Rule 3.850 motion. On October 7, 1987, the trial court entered an order denying said motion. Rehearing was filed on October 22, 1987, and on January 17, 1989, an order was entered denying the motion for rehearing.

On appeal from the denial of Hoffman's motion for post-conviction relief, this Court, in Hoffman v. State, 571 So.2d 449 (Fla. 1990), reversed and remanded for a hearing, holding:

> Without reaching the merits of any of these claims, we nevertheless believe that a hearing is required under rule 3.850. In its summary order, the trial court stated no rationale for its rejection of the present motion. It failed to attach to its order the

> portion or portions of the record conclusively showing that relief is not required and failed to find that the allegations were inadequate or procedurally barred.

571 So.2d at **450.**

On June 17, **1991**, Hoffman filed an amended motion for post-conviction relief. (RA **1-118).** The trial court, without the benefit of any response by the State, denied said amended motion on August 26, **1991**, finding specifically that ". . . [i]t affirmatively appears from a reading of the motion that it is legally insufficient to justify relief under Rule 3.850 of the Florida Rules of Criminal Procedure. . . ." **(RA 119).** **No** rehearing was filed by Hoffman and his notice of appeal was filed September 23, 1991. During the pendency of the state trial court proceedings, Hoffman also filed a motion to reconsider an order denying release of sealed records on June 20, **1991.** Said request was denied October 2, **1991**, and an appeal from said denial was filed October 15, 1991.

Facts

The facts of the case are set out in this Court's opinion in **Hoffman v.** State, supra, specifically they are:

> On September 7, **1980**, the bodies of Frank Ihlenfeld and Linda Sue Parrish were found in a motel room in Jacksonville Beach. Both had died by stabbing, having received numerous stabbing and slashing wounds.
>
> State's witness George Marshall testified that he had recruited Appellant Barry Hoffman and his codefendant James White to perform collections work for a Leonard Mazzara. Ultimately Hoffman **and** White were assigned by Mazzara to kill Ihlenfeld. Marshall testified that on September 7, 1980, he and

Mazzara accompanied Hoffman to the airport and that during the trip to the airport Hoffman said he had carried out the assignment by killing Ihlenfeld by stabbing and cutting his throat.

Three special agents of the FBI testified as to their participation in the arrest of Appellant on October 21, 1981, in Jackson, Michigan. Appellant was taken to a state police station there and interrogated. According to the testimony, Appellant was advised of his Fifth and Sixth Amendment rights and signed an acknowledgment of that fact. The acknowledgment was admitted into evidence. The FBI agents who interviewed Appellant testified that he admitted to committing the murders.

A detective of the Jacksonville Beach police testified that he went to Michigan to interview Hoffman. The officer testified that Appellant was advised of his rights, that he acknowledged his understanding thereof in writing, and that he confessed to receiving five thousand dollars in payment for his service in carrying out the killings.

There was testimony that a cigarette package was found at the scene of the murders. There was expert testimony that a fingerprint found on the package matched a knawn print made with the left thumb of Appellant Hoffman.

Appellant testified in his defense. He denied committing the murders. He presented the testimony of his girlfriend to the effect that he was at her home on the day the murders occurred and was there when she left to go out that morning. Hoffman himself testified that he departed the area by airplane early in the afternoon of that day. In rebuttal, the State presented the testimony of a detective concerning a prior statement of Appellant's girlfriend. The testimony was that in that statement the girlfriend told the officer that Hoffman and White spent the night prior to the murders at her home but left together in the morning.

The jury returned verdicts finding Appellant guilty of first degree murder for the death of Ihlenfeld, second degree murder for that of Parrish, and conspiracy to commit murder in the first degree.

> At the sentencing phase, the State presented no additional evidence. The State and defense stipulated that the statutory mitigating factor of lack of a significant history of criminal activity existed. Section 921.141(6)(a), Fla.Stat. (1979). They stipulated further to the fact that both Mazzara and White had received consecutive life sentences on their conviction for the murders. Hoffman testified at the sentencing phase, denying his guilt of the crimes. The jury recommended a sentence of death.

Hoffman v. State, 474 So.2d at 1180.

SUMMARY OF ARGUMENT

The trial court did not err in summarily denying Hoffman's Rule 3.850 motion which was legally insufficient on its face. Additionally, Hoffman's public record request demonstrates why a Rule 3.850 motion is not the proper vehicle by which a defendant should perfect any Chapter 119 request.

Hoffman argues he was denied access to information which constitutes a Brady v. Maryland, 373 U.S. 83 (1963), violation. Such a contention is clearly erroneous and warrants no further review.

Hoffman was not denied his right to the effective assistance of counsel at either the guilty or penalty phases of his trial.

Regarding Hoffman's Miranda issue, this issue was raised on direct appeal in Hoffman v. State, 474 So.2d at 1180-1181, and as such was an improperly, not cognizable claim for a Rule 3.850.

The question of whether the trial court should have found the murder was heinous, atrocious or cruel - albeit the jury was not instructed on this factor - was raised on direct appeal and therefore was improperly raised in the amended Rule 3.850.

Other claims raised by Hoffman are equally legally insufficient because they are not cognizable pursuant to Rule 3.850 due to the failure to object to said claims at trial or because they were raised and resolved adversely to Hoffman on direct appeal.

ARGUMENT

ISSUE I

WETHER HOFFMAN HAS BEEN DENIED AN ADVERSARIAL TESTING OF HIS RULE 3.850 WHEN THE TRIAL COURT SUMMARILY DENIED THE MOTION WITHOUT AN EVIDENTIARY HEARING

In Hoffman v. **State, 571** So.2d 449 (Fla. 1990), the court reversed and remanded for further evidentiary consideration, Hoffman's first Rule 3.850 motion. In concluding that the trial court had erred in summarily denying Hoffman's motion, the court observed:

> The trial court stated no rationale for its rejection of the present motion. It failed to attach to its order the portion or portions of the record conclusively showing that relief is not required and failed to find that the allegations were inadequate or procedusally barred.

571 So.2d at 450.

As a result of the remand, Hoffman filed an amended motion for post-conviction relief on June 17, 1991. (RA 1-118). The trial court, in an order entered August 28, 1991, concluded that:

> It affirmatively appears from a reading of the motion **that it is legally insufficient to justify relief** under Rule **3.850. . . .**

(RA 119).

Rule 3.850 provides, in material part:

> **. . . In those instances when such denial is not predicated upon the legal insufficiency of a motion** on its face, a copy of that portion of the files and records which conclusively show that the prisoner is entitled to no relief shall be attached to the order. . . .

In the instant case, the trial court was not required to attach any portions of the record because its denial of relief was based

on legal insufficiency rather than the fact that the records conclusively demonstrated that the prisoner was not entitled to relief. Certainly it is within the trial court's discretion to determine the legal sufficiency. **Jones v. State**, 384 So.2d 736 (Fla. 4th DCA 1980). Hoffman claims that his trial counsel rendered ineffective assistance of counsel are wanting in that he is arguing via counsel's competency claims that could have and should have been raised on appeal. This Court has long recognized that claims that state purely conclusory allegations or fail to set forth facts challenging the fundamental fairness of the trial or the denial of a specific constitutional protection, will justify the summary denial of a motion as legally insufficient.

Should there be any question as to the basis upon which the trial court concluded that Hoffman's amended post-conviction motion was insufficient on its face, a remand to the trial court for a further delineation of the court's reasons might be in order.

ISSUE II

WHETHER THERE HAS BEEN A CONTINUING FAILURE BY THE STATE TO DISCLOSE PUBLIC RECORDS PURSUANT TO THIS COURTS ORDER AND CHAPTER 119, FLORIDA STATUTES

Hoffman next argues that, ''theState Attorney's Office, the Jacksonville Beach Police Department, and the Florida Department of Law Enforcement have not complied with the law or the earlier rulings of this Court" regarding his Chapter 119 request. (Appellant's Brief, page 16). While the Attorney General's

Office agrees that pursuant to Chapter 119, Florida Statutes, any person may seek access to public records and purchase copies of such records, it is submitted that a Rule 3.850 motion should not be the vehicle by which defendants attempt to perfect "criminal discovery" or "fishing expeditions" in order to delay their collateral litigation. In State v. Kokal, 562 So.2d 324 (Fla. 1990), this Court determined the issue was whether the State Attorney's criminal investigation files were public records after a conviction had become final and the direct appeal completed. This Court concluded that after a conviction became final and the direct appeal completed, such records were public records to which Kokal and others were authorized access pursuant to the provisions of Chapter 119, Florida Statutes. Kokal was a dispute between Kokal as a private citizen (or any citizen and the custodians of the records at issue who happened to be the State Attorney's Office. In Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990), the issue was whether a defendant's prior request for disclosure from a State Attorney's Office, where said request had been denied, could become a part of a motion for post-conviction relief. Again, in Provenzano, Provenzano as a citizen had the right to obtain public records from the State Attorney's Office. In an effort to prove up allegations made in his 3.850 motion, Provenzano asserted that the denial of his public records request made it impossible for him to prepare his 3.850 motion. Albeit, this Court, in Provenzano, permitted the defendant to assert he was being denied his ability to develop claims pursuant to a 3.850 motion, this Caurt never suggested that a Rule 3.850 motion

should be "the substitute" for the civil remedies available to any defendant should an agency improperly deny a public records request pursuant to Chapter 119.07(2), Fla.Stat. This is especially true in capital litigation where, unlike most defendants seeking records to support their Rule 3.850 motions, these defendants are provided the assistance of counsel in order to develop and test the validity of the judgments and sentences that obtained.

Recently in **Mendyk** v. State, ____ So.2d ____ (Fla. 1992), **17** F.L.W. S21, 22-23, the Court held:

> . . . The State argues that *Provenzano* should be limited solely to the State Attorney's files and that defendants seeking disclosure from other state agencies must pursue their requests through civil action. We decline to so limit *Provenzano* and thus find Mendyk's request in the instant case appropriate. To the extent the agencies at issue here have doubt as to the content of their particular files being subject to disclosure, the trial court shall hold an in *camera* inspection for its determination. ***See*** *Kokal*, 562 So.2d at 327.

17 F.L.W. S22-23.

Such a result, flies in the face of the purpose of Chapter **119**, Florida Statutes, which specifically holds that "it is not a vehicle intended to expand or limit the provisions of Rule 3.220, Florida Rules of Criminal Procedure regarding the right and extent of discovery by the State or by a defendant in a criminal prosecution." Florida Statutes 119.07(8). Moreaver, as observed in Cassoday v. State, **237** So.2d **146, 147** (Fla. 1970), **a** convicted "indigent" defendant seeking post-conviction relief is entitled to have the State furnish a transcript of only that portion of

the trial proceedings to which a Rule 3.850 motion is directed. To suggest now, as this Court has intimated in Mendyk v. State, supra, that a Rule 3.850 motion may be the basis upon which a defendant can seek redress, specifically, that he was denied his public records access, from agencies that have nothing to do with the judgment and sentence under scrutiny, is illogical. A defendant's Rule 3.850 motion must contain a statement as to the nature of the relief sought and a statement of the facts and other conditions "relied upon in support of the motion." Presumably, speculative claims without any factual support are legally insufficient as are assertions which are clearly refuted by the record or claims that could have and should have been raised at trial and, if properly preserved, on direct appeal. Nowhere in the commentary concerning Rule 3.850 is there any suggestion that a) a defendant is entitled to further discovery, or b) that unless agencies comply with Chapter 119, said rule can be used as a substitute vehicle for "fishing expeditions" or securing a plethora of irrelevant information with regard to the correctness of the judgment and sentence obtained.[1]

In the instant case, Hoffman argues that his public records request was not complied with because the State Attorney's Office, the Jacksonville Beach Police Department and the Florida Department of Law Enforcement have failed to comply with his public records demands. In this regard, he has had ample

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[1] Again, the State cannot reinforce too strongly that it is not opposed to any citizen gaining access to public records, however a defendant seeking past-conviction relief should not receive any greater right than the average citizen and should be required to seek redress as set forth in Chapter 119, Florida Statutes.

opportunity to seek public access but more importantly he has had ample opportunity to invoke his rights pursuant to Chapter 119, Florida Statutes, to gain access. The latter he has not done, What he has done is amend his Rule 3,850 motion and argue that he has been denied access. With all due respect to this Court's decision in Mendyk v. State, supra, it is suggested that the instant case is merely an example of the failure of a defendant to exercise his rights as provided by statute. It is subject to being repeated and more importantly it is likely to be abused. Assuming for the moment this Court remands the cause to the trial court for further consideration on this point, nothing prevents Hoffman from adding to his list of agencies from which he seeks public records demands and continuing to delay the prosecution of his Rule 3.850 motion.

In theory, a defendant, be he capital defendant or not, when he files his Rule 3.850 motion, must be able to stand up and demonstrate a basis upon which relief could be granted. To simply make an allegation without supporting documentation is not enough. It is furthermore not a valid excuse to suggest that a defendant has been thwarted from doing so because a "given agency" has denied him access to public records (whether related or not to his challenge to any conviction).

Based on the foregoing, the State would urge this Court to revisit its decision in Mendyk v. State, supra, and conclude that a Rule 3.850 motion cannot be used as a substitute to obtain public records access in lieu of the provisions set forth in Chapter 119, Florida Statutes.

ISSUE III

*HOFFMAN'S RIGHTS GUARANTEED BY **THE SIXTH,** EIGHTH **AND** FOURTEENTH AMENDMENTS, AND BY **BRADY** v. MARYLAND, 373 U.S. 83 (1963), AND ITS PRODIGY, WERE NOT VIOLATED **WHEN** THE STATE WITHHELD PURPORTEDLY LMPORTANT MATERIAL EXCULPATORY AND IMPEACHMENT EVIDENCE*

Hoffman next argues that "there was much more to the Ihlenfeld/Parrish murders than was revealed to the jury at Ms. Hoffman's trial. (Appellant'sBrief, page 17). Hoffman asserts that the State violated his Chapter 119, Florida Statutes, request by not complying with same and providing him with "nineteen hours of wiretap tapes of this investigation" which his lawyer never had access, thus bringing into question the "State's case against him." Hoffman asserts that additional information concerning the State's "star witness" George Rocco Marshall was withheld from the jury. **The** record evidence with regard to what the jury knew regarding George Rocco Marshall is readily discernible and defuses most, if not all, of Hoffman's allegations. Hoffman is entitled to no relief as to this claim.

George Rocco Marshall was not the first witness the State called at Hoffman's trial but rather, his testimony came mid-trial. His testimony reflects that he was arrested January 1981, **and** charged with the first degree murders of Frank Ihlenfeld and Linda Sue Parrish. (TR 681). Following his arrest, Marshall gave a statement to police that he had employed Hoffman and James White to strong arm and collect for his boss, Leonard Mazzara. Before testifying to any degree, Marshall admitted that his lawyer was present **and** that as a result of plea negotiations with the State for testifying in the Hoffman trial, he received

"complete immunity" from prosecution. (TR 683). He detailed how he procured the services of James White and Hoffman for Mazzara for collections and to kill someone. Marshall testified that his involvement with Mazzara occurred because his wife owed Mazzara ten thousand dollars, a drug debt. (TR 686-687). Mazzara worked for James Provost, a local gangster, and in order to pay back his wife's debt, he made an agreement to work for Mazzara. Marshall told that the fifty dollars he was to pay per week on the debt was not enough and as a result thereof, he started selling Quaaludes to help pay off the debt. (TR 689). Marshall saw Mazzara every day and sold drugs for him. (TR 690). One day Mazzara told Marshall to find some more people to work for them. (TR 691). Marshall recalled that he had met Frank Ihlenfeld at Mazzara's apartment in June 1980, when Ihlenfeld brought Mazzara a shipment of Quaaludes. (TR 692).

Marshall found two people to do collections. Mazzara then told Marshall that he wanted Ihlenfeld dead because Ihlenfeld owed money to him. (TR 693). Marshall was to find somebody to do the job. (TR 694). Marshall located Wayne Merrill and Barry Hoffman. (TR 697). Marshall told Mazzara that Hoffman was the man to do the job and also informed him that Hoffman wanted a backup. (TR 698). James White was selected as the backup and Marshall informed White approximately ten days prior to the murders that he wanted him to get in touch with Barry Hoffman because he needed someone burned. (TR 699). Two days prior to the murders, Hoffman and Marshall got together and Marshall showed Hoffman who the hit was to be. (TR 700). On September 5,

1980, Marshall pointed out Frank Ihlenfeld as the person to be killed. Marshall indicated the reason he did this was because Mazzara told him that if Marshall got the job done his wife's debt would be wiped clean. (TR 701). On Sunday, September 7, 1980, the day of the murders, Marshall received a call from Mazzara who said that he was coming by and that he, Marshall and Mazzara were going to take Hoffman to the airport. (TR 703). On the way, Barry Hoffman told them that he had gone to Room 205 with White and that while these he hit Ihlenfeld and then started stabbing him and ultimately slashed Ihlenfeld's throat. (TR 706). Hoffman told them Parrish returned to the room at which time he, Hoffman, hit her and knocked her down and slashed her throat. (TR 706-707). Hoffman said he killed Parrish because she came back and he wanted no witnesses. (TR 708). While driving to the airport, Hoffman mentioned that he was going to New Orleans. (TR 709). Although he saw both Hoffman and James White after the murders, Marshall never discussed the murders thereafter. (TR 710-711). Marshall had no prior knowledge that Linda Sue Parrish would be killed. (TR 713).

On cross-examination, Marshall testified that he had studied martial arts and that he routinely carried a buck knife. (TR 714-715). When he was first interviewed by police on September 13, 1980, he denied all knowledge of the murders, On June 11, 1981, he gave another statement at which time Marshall denied knowledge of the murders and then took a polygraph test which he failed. (TR 718). On October 19, 1981, in exchange for immunity, he testified that he told the truth. (TR 719). When

asked by he changed his mind, Marshall testified that he became a Christian while in jail and was still afraid for his family's safety. **(TR 720).** On **cross, he** detailed how on September 5, 1980, he met with Hoffman and pointed out the mark. (TR 722). During this time he admitted he was dealing in Quaaludes, cocaine, and that he got immunity which meant that he was not going to be prosecuted for the murders. **(TR 723-727).**

He further detailed that Wayne Merrill, the other person he secured, became a mule for Provost in Orlando and dealt **drugs.** (TR **730).**

Albeit, George Marshall was a witness against Hoffman and indeed told of how he hired Hoffman and James White to kill Frank Ihlenfeld, Marshall's testimony was not the only testimony connecting Barry Hoffman to the murders. There was fingerprint evidence, Hoffman's confessions or statements to police, the circumstances of his whereabouts September **7,** 1980, the morning of the murder, and his sudden departure from Jacksonville Beach, Florida, the day of the murders. The record before the jury exposed George Marshall for what he was, his involvement in the murders, the fact that he received immunity, the fact that he was involved in major drug dealings, and the fact that he had a vested interest in seeing Frank Ihlenfeld dead. To suggest that "there was more to this agreement with the State than was ever heard at Mr. Hoffman'S trial", Marshall had additionally agreed to provide the State with "all knowledge of the Provost organization he had prior to and after the homicides'' (Appellant's Brief, page 19), does not change anything. The

particulars of this "huge drug organization" and the fact that there were wire taps in the investigation of this drug organization has nothing to do with the actual murders sub judice. While there were a number of possible suspects, the facts remain that a) Barry Hoffman was involved in drug dealing with Mazzara and Provost; b) Hoffman testified that he was a personal caretaker and bookkeeper for Provost; c) defense counsel, in examining Hoffman on the stand, questioned him about his drug dealings as well as his ties to Mazzara and Provost thus the "particulars" of the Provost organization had little to no bearing on the instant murders except to explain why the hit was ordered.

Moreover, in response to Hoffman's first counsel, Mr. Nichols' demand for discovery, the State provided the names of George Marshall, Leon McCumbers and the fact that electronic surveillance was conducted by the Florida Department of Law Enforcement on the premises located and 2969 North A1A, St. Johns County, Florida, where "Barry Hoffman" was intercepted pursuant to a wire tap. The response also indicates that there was interception of wire communications and that Barry Hoffman was "intercepted by agents of the Drug Enforcement Administration pursuant to a court order authorizing the interception of wire communications in the residence of Jimmy Provost in the vicinity of Raleigh, North Carolina." (TR 14-15). Defense counsel Nichols sought a Motion to Compel Disclosure of Existence and Substance of Promises of Immunity Leniency or Preferential Treatment on November 5, 1981, and sought to suppress Hoffman's

confessions or statements as well as demanded a statement of particulars with regard to the crime. The State, throughout this period, continued to respond to Hoffman's demands for discovery including telephone toll records and notebooks. (TR 36). With the appointment of Jack Harris to Hoffman's case, additional motions to produce photographs, a demand for discovery of penalty phase evidence and a demand for additional discovery were made.

Both Harris and Nichols had knowledge of Marshall's involvement and sought information as to other discovery items. At trial, Hoffman took the stand and accused George Marshall of committing the murders. Moreover, Barry Hoffman's testimony (TR 936-1005) explained in graphic terms the drug dealings of Mazzara and Provost and the drug organization they possessed.

Hoffman also points to evidence with regard to hair sample evidence. The record reflects that the State sought and received permission to take a sample of Hoffman's hair. This evidence was not introduced at trial although defense counsel knew of its existence. There is no evidence in this record that the hair evidence was significant with regard to whether Hoffman was or was not the murderer.

Hoffman also contends that blood type evidence should have been disclosed. The record reflects Steven Platt, a crime laboratory technician, testified regarding the blood types found at the scene (TR 529, 542, 555) and the blood types found on the murder weapon, sheets and other items in the room. (TR 574-585). Hoffman's contention that the State never disclosed "the blood type of many of the other suspects" is unfounded and not based on

any factual support. Likewise, Hoffman's contention that Mr. Obringer did not disclose the "substance" of statements made to him by Hoffman at the Mazzara trial is absurd. The pretrial suppression hearing detailed the reason(s) why Hoffman reneged on his plea agreement. It is rather difficult to fathom Hoffman's Brady claim as to this point. Certainly, defense counsel could have called Mr. Obringer as a witness for the defense to corroborate "Hoffman's statements" or the "substance" of those statements. Moreover, there is "no evidence" that Hoffman made any statements to Mr. Obringer that detailed "he (Hoffman) was a lesser participant, that he was under the domination of the Provost organization or others, that he was a drug addict," or other statements regarding Hoffman's "character or mental health." (Appellant's Brief, page 23).

At best, Hoffman's allegations with regard to the State withholding information under "an alleged Brady violation" are cumulative of all the evidence presented at trial with regard to the drug dealings of these individuals and the reason for the murder of Frank Ihlenfeld. As observed in **Duest v.** State, **555** So.2d **849** (Fla. 1990), alleged exculpatory evidence must have a reasonable probability that its admission would have changed the outcome pursuant to United States v. **Bagley, 473 U.S. 667** (1985). No such showing can be made **sub judice. See Waterhouse v. State,** 522 So.2d 341, 342-343 (Fla. 1988). Additionally, this Court's decision in **Gorham v. State,** ____ So.2d ____ **(Fla.** March 19, 1992), ____ F.L.W. S___, supports the State's contention. In Gorham, the court granted relief because of the circumstantial

nature of the case and the "role" Johnson, as the State's key witness, played in the prosecution. The court further held that "the defense's inability to impeach Johnson based upon the undisclosed evidence", raised a reasonable probability the result would be different pursuant to United States v. **Bagley, 473 U.S.** 667 (1985). No such result is herein warranted.

ISSUE IV

*HOFFMAN WAS NOT DENIED **HIS** RIGHT TO COUNSEL, **AND TO** THE EFFECTIVE **ASSISTANCE** OF COUNSEL, **AT** CRITICAL STAGES OF THE PROCEEDINGS*

Hoffman argues that on two occasions he "stood by himself at critical stages of the proceedings at which he was entitled to counsel, **and** for which there was no waiver of counsel." (Appellant's Brief, page 25). He suggests that he "did things and made statements which placed him in the electric chair. when he appeared with counsel, he was guaranteed a twenty-five year sentence. When he appeared without counsel, he set in motion his death sentence." (Appellant's Brief, page 26). The two instances for which Hoffman now suggests he is entitled to relief relate to his testimony at his codefendant's trial. The record reflects that on June 28, 1982, at a motion for change of plea hearing, Hoffman, his counsel and the State entered into a plea agreement at which time in exchange for a plea to first degree murder and two **life** sentences and a nolle prosse on the conspiracy case, Hoffman agreed to testify truthfully for the State at Leonard Mazzara's trial. At that proceeding, Hoffman was specifically told that if he did not abide by the plea

agreement, it would be withdrawn and he would be subject to trial. (TR 77, 81). A plea colloquy followed at which time Hoffman admitted that he killed Mr. Ihlenfeld by cutting his throat and that he aided in the murder of Linda Sue Parrish. The court accepted the plea (TR 80-81), and deferred sentencing until after Hoffman testified at Mazzara's trial. (TR 81). At the plea colloquy, Hoffman was asked whether he was satisfied with his counsel's representation and he saw he was. (TR 82).

On September 15, 1982, Barry Hoffman was called as a State witness against Leonard Mazzara. At that time, he testified that **he never talked with either Rocco Marshall or Leonard Mazzara about doing any jobs for them. (TR 93). He further stated that he never conspired with either of the aforementioned persons nor did he kill Parrish or Ihlenfeld. He stated that he was nat hired to kill anyone and that he did not kill anyone. (TR 94).** When asked why he pled guilty, he testified that he did so because he was told that if he did not he would get the electric chair. (TR 95). At that point, the State requested Hoffman become a court witness. Hoffman stated that he wanted to withdraw his guilty plea. (TR 96). As a court witness, Hoffman testified that Mazzara never paid him money and although in the past he said he did kill people, he never told either Agent Lukepas or Officer Dorn that he killed anyone. (TR 100-101). He stated that he was told by his lawyer that he was going to be convicted no matter what and, the best thing to do, was to accept the plea and not get the death penalty. The State informed Hoffman that if he did not testify pursuant to his agreement, he

could get the death penalty. **(TR 103).** He further testified that because everybody was telling him that he was going to get the electric chair that he decided to enter into the plea agreement. **(TR 104).** Hoffman stated he had no real knowledge of the murders **and** that James Provost told him about them. (TR **107).** On recross by the State, Hoffman stated that he understood that his testimony violated the plea agreement, that he understood that the plea agreement was now off, and that he understood that the State would prosecute him for first degree murder and seek the death penalty. (TR 108). Hoffman stated that his lawyer advised him to accept the plea because counsel said the State had fingerprints that were found in the room near Mr. Ihlenfeld's body and that his fingerprints would be used against him. (TR **109-110).**

Hoffman thereafter filed a **pro** se motion to withdraw his guilty plea and at a hearing thereafter, Judge Haddock accepted same. At that same proceeding, Hoffman's counsel, Mr. Nichols, renewed his motion to withdraw from the case, stating that he had talked with Hoffman. **(TR 113-115).** Nichols was allowed to withdraw and the State concurred that Hoffman should be allowed to withdraw his guilty plea. **(TR** 118). Immediately thereafter, Hoffman was assigned a new attorney, Jack C. Harris.

Hoffman has cited no authority which requires counsel to appear with a defendant in a noh-related trial wherein the defendant is a witness, The recent decision in Minnick v. Mississippi, **111** S.Ct. **486** (1990), cited by Hoffman, does not stand far that proposition. Certainly, at the time Hoffman was

to testify at the Mazzara trial, all parties believed that he would testify as expected, that Mazzara had hired him to kill Frank Ihlenfeld. Hoffman's testimony came at a time after he had pled guilty and the court had accepted said plea after a factual predicate had been laid for that plea. Hoffman had admitted his guilt. Counsel was neither required to be present nos was this proceeding a critical stage of Hoffman's trial thus requiring the presence or, for that matter, the waiver of counsel.

Hoffman now asserts that he was placed in jeopardy of receiving the death penalty once he withdrew his plea. That is absolutely correct and in fact the record supports the fact that Hoffman was continually reminded that the failure to testify truthfully at Mazzara's trial per the agreement could result in Hoffman going to trial for capital murder and, the death penalty was a possible punishment.

Hoffman contends an evidentiary hearing is needed on this issue. The State submits that no evidentiary hearing is necessary far the record clearly reflects that Hoffman made an agreement, to-wit: plea agreement; he did not testify per the agreement and in fact gave contrary testimony from that of his plea colloquy; he was apprised of the inconsistent statements; he was apprised of the fact that he was now subject to the death penalty; he stated his reasons for entering the plea on the record (that he didn't want to get the electric chair), and as a result of the foregoing, he sealed his fate. The presence of Mr. Nichols in the courtroom while Hoffman testified in the Mazzara trial would not have insured any right nor altered the ultimate outcome.

Moreover, Hoffman had every right and indeed exercised his right to withdraw his guilty plea. The record reflects that he spoke with counsel before the proceedings at which time the guilty plea was withdrawn. He could have changed his mind a second time. Clearly, Hoffman had an agenda and a course of conduct which he followed. Accusing counsel of not being effective is bogus. Pleading guilty and having the death penalty removed as a possible penalty in exchange for truthful testimony cannot seriously be entertained as a basis to conclude counsel was not effective. The record belies any suggestion that counsel did not investigate the case or in any way misled Hoffman regarding the plea.

Hoffman also asserts that through vindictiveness, the prosecutor sought the death penalty after Hoffman's testimony at the Mazzara trial. The record reflects that throughout the proceedings, the State repeatedly informed Hoffman that he was susceptible to receiving the death penalty should the plea agreement not be satisfied.[2]

On direct appeal, Hoffman raised this very issue asserting that the death penalty was improper because the State sought the death penalty for punitive reasons aside from the crime for which

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[2] On November 15, 1982, Hoffman filed a motion to declare that death is not a possible penalty. (TR 67-68). Therein he asserted that because of the plea agreement, the fact that he testified truthfully, "none of the circumstances concerning the actual crimes charged against defendant, whether aggravating or mitigating, have changed, it is patently clear that defendant is being penalized not for commission of the crimes, but for his failure to testify as desired by the State of Florida, and for his exercise of his right to trial by jury." Moreover, defense counsel argued same before Judge Haddock on February 11, 1983, in his argument before sentencing. (TR 1215-1220).

he was convicted. He argued the death penalty was sought because Hoffman did not give testimony against a codefendant. This Court, in addressing same, found:

> Hoffman's next argument is that the State improperly sought the death penalty to punish him for not giving testimony against a codefendant. In support of this contention Appellant shows us that before trial, in exchange for a promise of a recommendation of life sentences, he agreed to plead guilty to two first degree murder charges and testify against Mazzara. When Appellant later reneged on his agreement to testify, the State withdrew from the bargain and proceeded to prosecute him on the charges. Appellant's argument is without merit.

Hoffman v. State, 474 So.2d **at** 1182.

As observed in Porter v. **State, 559** So.2d **201** (Fla. 1990), a defendant is procedurally barred from raising an issue which was raised on direct appeal in a Rule 3.850 motion by changing the grounds upon which the issue is presented. Hoffman's attempt now to assert that he was without counsel as opposed to arguing that the prosecution in some way acted vindictively because he did not testify as "the State wanted him to", is a poorly veiled attempt to re-raise an issue previously raised.

Based an the foregoing, this claim was properly, summarily dismissed by the trial court as legally insufficient and should be summarily dismissed sub judice.

ISSUE V

HOFFMAN **WAS** *NOT* ***DEPRIVED*** *OF EFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT-INNOCENCE AND THE PENALTY PHASES OF HIS CAPITAL TRIAL*

Hoffman alleged in his Rule 3.850 motion that his lawyer rendered ineffective assistance of counsel at the guilt-innocence

phase. Before addressing his specific issues, it should be noted that as to some of the allegations regarding pretrial "omissions", Hoffman is presumably assailing the effectiveness of Mr. Nichols' representation. At other times, with regard to pretrial and trial, Hoffman is asserting the effectiveness of Mr. Harris' representation. With regard to Mr. Nichols, Hoffman and Nichols apparently did not get along and did not agree on what trial strategy should take place. Nichols represented Hoffman up to the time Hoffman was allowed to withdraw his plea following the aborted plea agreement when Hoffman failed to uphold his end of the bargain with regard to his testimony at the Mazzara trial. Harris took over the case after that point. The record reflects that, at the first motion to withdraw filed by Nichols which was subsequently denied by the trial court, an exchange occurred as to what Nichols did and did not do. At that proceeding, Hoffman testified that there was disagreement as to how the case should be handled. (TR 42). Hoffman believed another attorney would be better because they were "talking about his life." His example of how his lawyer had not done what he wanted as that Hoffman had asked counsel to take some statements from people that he though important. His lawyer did not believe the statements Hoffman wanted were important. Hoffman wanted a change of venue and his lawyer did nat think that wise, Hoffman specifically said that there was a conflict between the two and that they did not get along. (TR 43). Nichols said the things that Hoffman wanted him to do would not be beneficial to Hoffman's case. Nichols testified that he spoke with the prosecution, he talked with

witnesses in the case and that he had attended the trial of another codefendant. (TR 45-46). The court determined that Hoffman had demonstrated no basis upon which to allow Nichols to withdraw. Apparently, Hoffman and Nichols discussed whether Hoffman should enter into a plea negotiation thus avoiding the death penalty. Additionally, Nichols filed a number of pretrial motions seeking to suppress Hoffman's admissions to the FBI and the Jacksonville Beach police.

When Harris took over the case, he renewed Hoffman's motion to suppress the confessions or admissions, he filed a plethora of pretrial motions with regard to striking the death penalty and sought additional discovery, and filed a motion for change of venue.

Hoffman has asserted that pretrial, his lawyers a) failed to investigate matters concerning the suppression of his statements, and failed to get expert witnesses regarding long term addiction; b) failed to shift the burden to others with regard to who committed the murders; c) failed to get evidence to impeach the State's key witness, George Marshall; d) failed to show up at the Mazzara trial to help Hoffman who was a witness; e) failed to investigate information regarding "Bubba" Jackson; and f) failed to produce any evidence that the hairs found at the scene were not Hoffman's. As to each, the State would submit that the record refutes or explains that counsel did not render ineffective assistance pretrial, With regard to the failure to investigate the facts surrounding the possible suppression of the statements, an attempt was made to show as a basis for the motion

to suppress that because of Hoffman's ingestion of drugs contemporaneous to his arrest, he could not possibly have made a knowing and intelligent waiver of his Miranda rights. Pursuant to **Glock** v. State, 537 So.2d 99, 101 (Fla. 1989); Bertalotti v. **State, 534 So.2d 386 (Fla. 1988); Lambrix v. State, 534** So.2d **1152** (Fla. **1988); White** v. **State, 565** So.2d 322 (Fla. **1990),** and Correll **v.** State, 558 So.2d 422 (Fla. 1990), **the** record specifically refutes the allegations that counsel rendered ineffective assistance.

Hoffman took the stand and testified that he did not commit the murders. He testified that George Marshall probably was the murderer and that he was only hired to go to the Ramada Inn that day to watch and see if Frank Ihlenfeld and Parrish left the premises. Evidence was presented that others had motives for killing Frank Ihlenfeld. Specifically, that Leonard Mazzara was owed fifteen thousand dollars from this man and that George Marshall was working off a drug debt. Counsel was not ineffective when he attempted to do that which is now the subject of his complaint.

Hoffman also argues that defense counsel should have secured evidence to impeach George Marshall. The record reflects that Hoffman's defense at trial was that he did not commit the murders. Counsel's responsibility at trial was to present a defense not prove who else might have committed the crime. This claims is specious. Hoffman also asserts that counsel should have been present at Mazzara's trial to help Hoffman during the course of his testimony. As previously discussed, while it may

have been preferable for defense counsel to be present with Hoffman when he testified at the Mazzara trial, there was no constitutional right to have counsel present. Moreover, there was no hint that Hoffman would renege on his plea agreement. This omission does not **fall** below the standard set forth in **Strickland** v. **Washington, 466 U.S. 668** (1984), nor does it constitute a basis upon which further evidentiary development is warranted.

With regard to trial failures, Hoffman argues that a) trial counsel failed to properly cross-examine George Marshall because he did not fully explore all the benefits Marshall was receiving in exchange for his testimony and immunity; b) trial counsel failed to investigate "Bubba" Jackson as a possible suspect, and c) trial counsel failed to present hair analysis evidence which showed that the hairs found were inconsistent with Hoffman's hairs. As to each of these issues, any error, if error, did not result in prejudice to Hoffman. As previously detailed, defense counsel carefully and meticulously cross-examined George Marshall with regard to the immunity he received and the basis for the immunity. While there was not extensive inquiry with regard to Marshall's involvement in the drug organization of James Provost, inquiry was made of Marshall with regard to the scope of his immunity **and** the reasons why he decided to testify against Hoffman. In truth no advantage would be gained by showing Hoffman's involvement in this ''major"crime organization in light of Hoffman's defense that he did not do the murders. Counsel cannot be faulted for not going further. In **White v.** State,

supra, regarding ineffectiveness, this Court observed, "it is almost always possible to imagine a more thorough job being done than was actually done," however that is not the standard. Based on the foregoing, trial counsel did not render ineffective assistance for failing to cross-examine George Marshall more "thoroughly". See Maxwell v. **Wainwright,** 490 So.2d 927 (Fla. 1986).

With regard to the failure to investigate "Bubba" Jackson as a possible suspect, it is curious to note that Hoffman devotes all of two sentences to this particular deficiency. While it might have been be important to point out to jurors the motives of others in discerning a defense that Hoffman was innocent, the record reflects that Hoffman, as well as his counsel, did just that and pinpointed the blame for the murders on George Marshall. Counsel can not be found to be wanting for making such a choice. George Marshall had a motive and "could" have committed the murders. Terminally, with regard to the hair analysis, neither the State nor the defense raised the hair analysis evidence. Moreover, **defense** counsel argued that the State failed in its proof. Hoffman is guessing at best whether his lawyer would have ever used such evidence except for noting a lack of evidence. Guessing is not the basis upon which either an evidentiasy hearing is generated or counsel may be found wanting. **See Tompkins** v. State, 549 So.2d 1370 (Fla. 1989).

Based on the foregoing, it is clear the trial court could have found the allegations factually defective and the motion legally insufficient.

ISSUE VI

WETHER THERE WAS A KNOWING AND INTELLIGENT WAIVER OF MIRANDA RIGHTS IN MR. HOFFMAN'S CASE: HIS MENTAL IMPAIRMENTS PRECLUDED HIM FROM COMPREHENDING, AND VALIDLY WAIVING, THOSE RIGHTS, DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN LITIGATING THIS ISSUE, AND THE LOWER COURT ERRONEOUSLY DENIED HIS CLAIM WITHOUT AN EVIDENTIARY HEARING

Hoffman next attempts to reargue a claim that was raised on direct appeal and decided adversely to him. On direct appeal, Issue I and II specifically addressed whether the trial court erred in denying his motion to suppress his confessions and admissions and, secondly, whether the trial court erred in failing to find Hoffman's confessions were not voluntarily made. Once again Hoffman argues "his state of mental impairment made it impossible for him to understand the 'rights' to which he was entitled under the Constitution, or to in any way knowingly, intelligently, and voluntarily waive what he did not comprehend.'' (Appellant's Brief, page 42). He now bottoms this assault of a claim already decided adversely to him, on the post-trial, post-direct appeal acquisition of a medical report from Dr. Fox who indicated that based on Hoffman's lifelong drug dependency it was impossible for him to have formulated and knowingly waive his Miranda rights prior to the admission of his statements.

This Court, in Hoffman v. State, supra, held:

> Hoffman's first point on appeal is that the trial court erred in denying his motion to suppress his confessions, He argues that his statements were not freely and voluntarily made since they were given after he had requested permission to make some telephone calls to seek assistance in obtaining a lawyer. The State notes that Hoffman's

> motion to suppress did not state this particular ground. The State also responds that even if Hoffman had made a request far an attorney, he knowingly and intelligently waived his right to have an attorney present by executing a written waiver before confessing. We find that, whatever intention Hoffman may have had about exerting his right to remain silent, his rights were knowingly and intelligently waived when he executed the written waiver and that his confessions were therefore properly admitted. *Cannady v. State*, **427** So.2d 723 (Fla. 1983); *Witt v. State,* **342 So.2d** 497 (Fla. **1977), *cert.* denied, 434 U.S. 935** (Fla. 1977).
>
> Hoffman next argues that the trial judge erred in failing to specifically find on the record that the confessions were voluntarily made and that the record does not satisfy the 'unmistakable clarity' test mandated in ***Sims v. Georgia,* 385 U.S. 538 (1967),** and *McDole v. State, 283* So.2d **553** (Fla. 1973). We have held that a trial judge need not recite a finding of voluntasiness of his having made such a finding is apparent from the record. *Peterson v.* ***State,*** *382* So.2d 701 (Fla. 1980). In this case, evidence was presented to show that the confessions were voluntarily given and the issue was argued by the parties. The judge ruled the testimony about the confessions admissible. We therefore find that the record shows with sufficient clarity that the trial judge made a finding that the confessions were voluntary.

Hoffman v. State, 474 So.2d at **1180-1181.**

It is now axiomatic that a Rule 3.850 motion cannot and will not stand as a substitute for a direct appeal. Moreover, **claims** raised an direct appeal are not cognizable in a Rule 3.850 unless a defendant can demonstrate how he falls into one of the exceptions. No such exception exists in the instant case. See **Eutzy** v. State, 536 So.2d 1014 (Fla. **1989).**

Hoffman also argues that although his lawyer raised this claim and the claim was also raised on direct appeal, counsel

failed his client when he failed to develop and present evidence that would have established that Hoffman's waiver was not voluntary, rational or intelligent. What Hoffman is now complaining about is that neither Nichols nor Harris found Dr. Fox. The record reflects however that at the motion to suppress hearing and at trial, Hoffman took the stand and testified that after the murders, he started taking and doing drugs heavily and on the day that he was arrested in Jackson, Michigan, October 12-13, 1981, he had ingested Quaaludes, smoked marijuana and presumably ingested some cocaine while he was in custody. At the "two" motion to suppress hearings, he testified that he was lucid at some times and not lucid at others. The trial court evaluated this evidence based on Hoffman's testimony as well as the testimony of the officers taking his statements and ruled against Hoffman. Here, just as in **Jackson** v. Dugger, 547 So.2d 1197 (Fla. 1989), counsel cannot be found to be ineffective for failing to raise every aspect or go the uncharted mile in unearthing evidence whether it be mental health evidence or evidence with regard to voluntary drug intoxication. This issue is totally without merit and procedurally barred.[3]

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[3] Moreover, Hoffman's suggestion that other family members could have provided incite into the voluntariness of the statements because of their knowledge of "long term" drug abuse is groundless. They were not present and had no way of knowing Hoffman's condition at the time of the plea any more than Dr. Fox. Additionally, there is no record support for Hoffman's contention that "if Hoffman did invoke his right to counsel, than any waiver is not valid." (Appellant's Brief, page 46). Sheer speculation specifically supports the conclusion by the trial court that the motion "on its face" is legally insufficient.

ISSUE VII

HOFFMAN DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Hoffman argues that his lawyer rendered ineffective assistance of counsel at the penalty phase of his trial. Specifically, he argues a) trial counsel failed to investigate all avenues of mitigation; b) counsel failed to obtain a mental health expert to demonstrate that Hoffman's lifelong drug involvement meant that he was a drug abuser and that his mental faculties were impaired, and c) counsel failed to use information that he had in his files that Hoffman was dominated by Leonard Mazzara and that he committed these murders because he was afraid of Provost and Mazzara.

With regard to each of the penalty deficiencies, the record either explains or sufficiently supports trial counsel's actions and, if not supported by the record, the allegations do not raise a sufficient basis upon which this court or any court would conclude Hoffman was prejudiced by the "omissions". Perhaps the most explicit omission to which Hoffman can point is the fact that he was a lifelong drug abuser. Such evidence was presented to the jury. At the penalty phase Hoffman testified and provided a "sworn" narrative statement that he did not commit the murders and up until a month after the murders, he was a regular working person trying to make a living. He admitted that he sold drugs to supplement his income but vehemently stated that he was not capable of doing this kind of crime. While he admitted that he

did not have a lot of character witnesses, most did not want to get involved. He stated that the few who did come and testify in his behalf at the trial, the jury apparently did not believe. (TR 1180). He re-emphasized that he did not commit the murders and that he was not capable of doing such a thing. **(TR 1181).**

At trial, Hoffman testified and admitted that he had been using drugs on and off since he was eighteen years old. (TR 955). He used marijuana, Quaaludes and early in his life when he was eighteen or nineteen, used heroin. (TR *956).* In **the summer of 1980, he was not addicted to drugs although he occasionally used cocaine, marijuana and ingested Quaaludes. (TR 956).** He testified that he started selling drugs to supplement his income (TR 941), and that after the murders, he started working for Provost personally and started doing provost's book work. (TR **954-956).** Between **September 1980** and September **1981,** after the murders, he worked for Provost, taking care of Provost, Provost's house, his children, setting up drug deals and received money from Provost whenever he needed it. (TR 957). He testified that during this period of time he had a bad drug habit and was ingesting Dilaudid **#4,** an opiate, used cocaine orally and Quaaludes. (TR 962-963).

To suggest that family members were necessary to explain to the jury that Hoffman was a long-term drug abuser and user is ludricrous. The fact that Hoffman's mental faculties may have been impaired because of this use, did not require a mental expert. Hoffman testified that at the time just preceding his arrest and the admissions or statements to the police, he had

ingested drugs, to-wit: cocaine, marijuana and Quaaludes. He recalled that while he remembered what was going on, he would "fade in and out" when he spoke with police regarding these murders. Certainly, a mental health expert was not necessary to testify before the jury that which the jury was told from Hoffman's own lips. The record is replete with evidence that Hoffman used drugs and "what" impact it had on his ability to function. Counsel did not render ineffective assistance for not going even further. See **Jackson v. Dugger,** 547 So.2d 1197 (Fla. **1989); White v. State, supra; Correll** v. State, supra, wherein this Court observed:

> First, he contends that an evidentiary hearing was required on his allegations that his lawyer was ineffective at the penalty phase of his trial. Specifically, Correll asserts that counsel knew or should have known that he had a lifetime history of heavy drug and alcohol usage but failed to introduce such evidence at the penalty phase. He also contends that trial counsel should have introduced available evidence of a deprived childhood.
>
> There is no doubt that counsel was aware of Correll's prior drug and alcohol usage. In fact, Correll testified that he had used alcohol and various kinds of drugs often, though not on a regular basis, throughout his adult life. Correll now submits affidavits from friends which recite the frequent use of an assortment of drugs and argues that counsel was ineffective for failing to present these witnesses.
>
> In response, the State points out that there was no evidence of any drug usage or excessive drinking the night of the murders. The State further points out that Correll told Dr. Pollack, the psychiatrist who examined him prior to trial, that he used alcohol several times a week and that he had experienced with various drugs, though not on a regular basis. Dr. Pollack concluded that

> he was not legally insane, that he did not suffer from brain damage, and that neither of the statutory mitigating circumstances was applicable. Thus, the State suggests that it was reasonable for trial counsel not to try to portray Correll as a heavy drug user but rather as a person who was good to his mother and brothers and one who had found religion and who was unlikely to be dangerous in the future.
>
> In view of the fact that Correll continued to insist that he was not guilty of the crimes, we can understand why counsel may not have wanted the jury to believe that he was an alcoholic and a drug addict. However, because there was no evidentiary hearing on this issue, we do not pass on whether counsel provided ineffective assistance. Rather, we conclude that Correll has failed to meet the second prong of *Strickland v.* ***Washington,*** **466 U.S. 668 (1984),** which requires a showing that but for such ineffectiveness, the outcome probably would have been different.
>
> Assuming that counsel had introduced all of the proffered evidence of drug use and intoxication, we are convinced that neither the jury nor the trial judge would have been persuaded to arrive at a different result. . . .

Correll v. State, 558 So.2d at 425-426. See **also** Tompkins **v. State, 549** So.2d **1370, 1372** (Fla. **1989); Atkins v. State, 541** So.2d 1165 (Fla. **1989); Bertolotti v. State,** 534 So.2d **386** (Fla. **1988),** and **Cave v.** State, **529** So.2d **293** (Fla. 1988), wherein this Court held that the burden is on the defendant to prove his counsel rendered ineffective assistance.

Terminally, Hoffman points to the fact that trial counsel had in his files evidence which he could have used in mitigation. Specifically, he points to the fact that Hoffman was dominated by Leonard Mazzara and that Hoffman performed these murders because he was afraid of Provost and Mazzara. Each of these allegations

are completely refuted by the record and contrary to Hoffman's own testimony. Hoffman maintained that he was not afraid of Provost and Mazzara rather, he became a close confidant of Provost and agreed to work with Mazzara in exchange for five hundred dollars (to observe at the Ramada Inn whether and when Frank Ihlenfeld and Linda Sue Parrish left the Ramada Inn). Hoffman and his defense counsel had a course of conduct and a story they intended to present which did not include a domination theory. **See Gore v. Dugger,** 532 So.2d 1048 (Fla. 1988), and Hill v. State, 515 So.2d 176 (Fla. 1987). At the penalty phase, Hoffman, in a sworn narrative, maintained his innocence and said that he was incapable of committing such crimes. He chase to portray himself as a regular person who dealt drugs on the side to supplement his income. Having "chosen" that which he desired to present, he cannot fault counsel for failing to "present" theories inconsistent with the aforenoted. **See** White v. State, supra, wherein this Court held, "trial counsel will not be found to be ineffective where he had to "fashion a defense compatible with defendant's testimony which did not include raising the intoxication (domination or other contrary) defense."

Based on the foregoing, the trial court was absolutely correct in summarily denying relief. The record reflects the course of conduct undertaken by Hoffman was his counsel and nothing suggested in the allegations challenging the effectiveness of counsel supports a finding that counsel rendered ineffective assistance as set forth in Strickland v. Washington, **supra.**

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN ITS APPLICATION OF THE AGGRAVATING FACTOR THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

Hoffman argues that albeit he argued the correctness of the trial court's finding that the murder was especially heinous, atrocious or cruel on direct appeal, the recent holding by the United States Supreme Court in **Lankford v. Idaho, 500 U.S.** 114 L.Ed.2d 173, 111 S.Ct. **1723** (1991), mandates reconsideration of the issue.

On appeal, Hoffman contended it was *error* for the trial court to consider this factor. This Court opined, in **Hoffman v. State, 474** So.2d **1178, 1182** (Fla. **1985):**

> Hoffman also argues that the trial court erred in finding that the murder was especially heinous, atrocious or cruel even though the jury itself was not instructed on this particular aggravating circumstance. We fail to see how the jury's not being instructed on this aggravating circumstance has worked to appellant's disadvantage and therefore find this argument to be without merit.

The trial court held, in his written order:

> The victim herein was killed in a manner designed to render him helpless by a blow to the head, and then, while he was in a position to perceive the imminence of death, to stab him to death through the throat in a slow, cruel, and painful manner. The evidence indicated the Defendant told the victim, who was prostrate, bleeding, and beaten, that he had stolen from the wrong person this time, meaning his employer. The actions of the Defendant evidence a desire to inflict mental and physical pain and suffering upon his victim, as an additional form of taunting punishment beyond merely causing his death. Therefore, the Court finds that the capital felony herein was

> especially heinous, atrocious, and cruel. (TR 134).

At the sentencing proceedings held February 11, 1983, the court read into the record the aggravating circumstances the court found proven. The court stated without objection by defense counsel that:

> I find that the manner of killing Mr. Ihlenfeld indicates that Mr. Ihlenfeld was in a dazed and semi-conscious condition and that the actions of the defendant evidenced a desire to inflict mental and physical pain and suffering upon the victim, apparently in a desire to punish him in some way for the alleged skimming of drug profits from the business in which Mr. Hoffman was participating at the request of his employer.
>
> I, therefore, find that the capital felony committed herein was especially heinous, atrocious and cruel.

(TR 1229-1230).

On **appeal,** Hoffman did not argue that he was denied an opportunity to rebut or challenge the sufficiency of the evidence for this factor (as now asserted), rather he complained that the trial court improperly used "this" factor as a non-enumerated aggravator, citing **Elledge** v. **State, 346 So.2d 988** (Fla. 1977).

The issue was not properly preserved and therefore is not cognizable as herein raised. Moreover, the decision in **Lankford** v. Idaho, **500 U.S. ____, 114 L.Ed.2d 173, 111** S.Ct. **1723** (1991), does not constitute a change in law sufficient to overcome the procedural bar. In **Lankford** v. Idaho, the court addressed the issue of whether Lankford was put on notice that he was eligible for the death penalty **after** the prosecution announced it would not seek the death penalty. Finding a Gardner v. Florida, **430**

U.S. 349 (1977), type error, the court held that "[P]etitioner's lack of adequate notice that the judge was contemplating the imposition of the death sentence created an impermissible risk that the adversary process may have malfunctioned in this case." 114 L.Ed.2d at 188-189.

Sub judice no such conclusion can be drawn. First, no bill of particulars is required for aggravating factors. Second, simply because the trial court did not instruct the jury as to this aggravator, it did not remove this aggravator as a possible aggravator after the jury's recommendation. Third, "any" intent to seek the death penalty was never waived. Fourth, the trial court provided a valid basis for imposing death. And terminally, defense counsel never objected to said finding which was read in open court although the court asked defense counsel if there was any legal cause why this sentence should not be imposed. (TR 1235).

Hoffman's suggestion that **Lankford v.** Idaho, **supra,** has any bearing on the instant case is incorrect. **Lankford** was not **decided** on the finding by the trial judge of an improper aggravating factor, rather the court concluded the defendant was not put on notice that he was being considered for the death penalty.

No relief is warranted on this procedurally barred claim.

ISSUE IX

***THE PROSECUTOR'S** CLOSING ARGUMENTS DID NOT INFECT THE **PROCEEDINGS WITH** UNFAIRNESS AS TO RENDER THE RESULTING DEATH SENTENCE FUNDAMENTALLY UNRELIABLE AND UNFAIR*

Hoffman complains that the prosecution, during his closing arguments at the guilt-innocence and penalty phases, intentionally misstated facts, testified, manipulated evidence and bolstered the veracity of the State's witnesses. None of the complained of actions were objected to at trial and although a portion of the instant complaint was raised on direct appeal, this Court found said claim to be barred because of no objection at trial. Hoffman **v. State**, **474** So.2d at 1181. In an effort to reach this claim, Hoffman points to the fact that "defense counsel failed to do anything about any of this. He allowed this presentation to go unchecked, interposing no objections." (Appellant's Brief, page 65). **A** casual review of the "objectionable" comments made by the prosecutor at the guilt-innocence and penalty phases of Hoffman's trial reflects that said comments were not error, did not prejudice the defendant, were fair statements of the evidence, were in rebuttal to defense comments and did not result in a substandard performance by Hoffman's trial counsel. Synthesizing this claim, Hoffman points to two issues: a) the impermissible reference to Linda Sue Parrish's murder, and b) the prosecution's explanation as to why Hoffman deserved **death** and White did not. The jury returned a verdict of second degree murder for Hoffman's role in the murder of Linda Sue Parrish. Evidence presented at trial revealed that when Ms. Parrish returned to the hotel room, Hoffman hit her and

then told James White that "this one is yours." The State postulated, as well as the trial court, that it did not matter whether Hoffman killed her or aided in her death, because he was a "principle" in her murder and as such her death constituted a valid basis to support an aggravating factor. In explaining why Hoffman should get the death penalty over codefendant, James White, the prosecution argued and the trial court found that the codefendants were not equal. Indeed, this Court, in its opinion in Haffman v. State, 474 So.2d at 1181-1182, held:

> The judge's finding that Hoffman had previously been convicted of a violent felony was based upon Hoffman's conviction for the second degree murder of Ms. Parrish. Hoffman argues this finding is in error because the evidence showed that James White, and not he, committed the murder of Ms. Parrish. This argument ignores the fact that as Mr. White's accomplice, Hoffman was a principle to the murder of Ms. Parrish. His conviction of second degree murder, standing alone is sufficient to show the existence of this aggravating circumstance.
>
> Hoffman next complains that the trial court erred in considering the manner of Ms. Parrish's death in making his findings. The judge did not consider the manner of Ms. Parrish's death as a separate aggravating circumstance, but rather, considered it in support of his findings that Hoffman had previously been convicted of a violent felony. Although this evidence was not necessary to support the judge's finding, since a conviction for second degree murder inherently involves violence to another person, we find no error in the judge's having considered it.

With regard to whether there was any harm in the explanation of White's role in the murder, the Court observed:

> Finally, Appellant argues that the sentence of death here violates his right to equal protection of law on view of the fact that

> Mazzara, who procured the murders, and White, who was Appellant's accamplice in carrying them out, each received consecutive sentences of life imprisonment for their roles in the crimes. State's witness Marshall received immunity from prosecution. Appellant relies on *Slater v.* ***State,*** 316 So.2d 539 (Fla. 1975), but his case is not like *Slater*. The decisions of this Court make clear that it is permissible to impose different sentences on capital codefendants whose various degrees of participation and culpability are different from one another. (cite omitted). Moreover, the exercise of prosecutorial discretion in granting immunity to a less **culpable** accomplice, coconspirators, or aiders and abetters, does not render invalid imposition of an otherwise appropriate death sentence. (cite omitted).

Hoffman v. State, 474 So.2d at 1182.

Hoffman is procedurally barred from rearguing a claim previously raised on direct appeal. The trial court correctly concluded the amended motion was legally insufficient as to this non-cognizable claim, since Rule 3.850 will substitute as a format to raise previously raised and adjudicated claims.

ISSUE X

> *HOFFMAN'S TRIAL COUNSEL WAS NOT INEFFECTIVE DURING THE* ***PENALTY*** *PHASE PROCEEDING* ***FOR*** *FAILING TO OBJECT TO THE* ***JUDGE'S*** *IMPROPER INSTRUCTION CONCERNING THE PRETRIAL STIPULATIONS OF DEFENSE COUNSEL AND THE PROSECUTOR; THE* ***JUDGE'S*** *IMPROPERLY EXHIBITING BIAS CONCERNING THE MITIGATING FACTORS APPLICABLE TO MR. HOFFMAN* ***AND*** *THE PROSECUTORS FAILURE TO HONOR THE TWO STIPULATIONS HE ENTERED INTO IN VIOLATION OF THE* ***SIXTH,*** *EIGHTH AND FOURTEENTH AMENDMENTS*

The record reflects that the State stipulated that two mitigating circumstances existed; that Hoffman had no significant criminal record and that Hoffman's coconspirators, Leonard Mazzara and James Robert White, had been sentenced to consecutive

life sentences. Hoffman herein argues that because the State attempted to diminish the weight to be given these two mitigating factors, the State somehow reneged on its agreement. Moreover, he asserts that the trial judge in some way diminished the force of these mitigating factors. The complained of statements went unobjected to at trial and at the penalty phase. Without citing any authority for the proposition that the trial court must given great weight to stipulated mitigating factors or that the prosecution cannot discuss the weight to be given these mitigating factors, Hoffman divines that he was cheated of the full weight to be given said factors. The State would disagree.

With regard to the prosecutor's comments, the State agreed to stipulate to these mitigating factors. The State did not agree to the weight to be given same. That was specifically what the trial judge and the prosecution observed about the mitigating factors. The trial court correctly noted that although the State was agreeing to stipulate that Hoffman had no significant prior history, the jury heard evidence that Hoffman repeatedly testified he sold and dealt and used drugs to supplement his income and to feed his habit. As to the life sentences received by his codefendants, the stipulation was merely that the jury was to be instructed that they may consider the codefendants sentences in mitigation. That is exactly what both the prosecutor and the trial judge stated in their respective comments. This issue is totally wanting. Moreover, it is procedurally barred in that as to the diminished weight to no significant criminal history, said issue could have been raised

on direct appeal. It was not. As to the equality of sentencing with regard to coconspirators, Hoffman unsuccessfully raised this point on direct appeal in a slightly different context, but nonetheless he raised it on direct appeal. See 474 So.2d at **1182.**

Moreover, Hoffman's reliance on **Lankford** v. **Idaho, supra, to** suggest he **was** given "no notice" that the State would not adhere to the stipulation is bogus. First, **Lankford** is distinguishable. Second, the State did not renege on its agreement. The weight given these two factors had nothing to do with their "existence". Unlike aggravating factors, mitigating evidence need not be found beyond a reasonable doubt; rather mitigating evidence exists by "mere presentation".

The claim is legally insufficient.

ISSUE XI

WHETHER THE AGGRAVATING FACTOR OF COLD, CALCULATED AND PREMEDITATED MURDER **WAS** ***PROPERLY APPLIED TO HOFFMAN'S CASE***

The record reflects that Hoffman's Maynard v. Cartwright, **108** S.Ct. **1853** (1988), issue was not raised on direct appeal, as such, it is procedurally barred.

Hoffman's argument that **Rogers** v. **State, 511** So.2d **526** (Fla. 1987), would change the applicability of this aggravating factor is faulty in that the **Rogers** decision spoke to the heightened premeditation that must be present to support this aggravating factor. Herein, the murder was well-planned as documented by the record. More importantly, it was also an execution-type murder, a murder for hire. As recognized in Eutzy v. State, **541** So.2d

1143 (Fla. 1989), **Rogers** does not constitute a significant change of law nor did it change the applicability of this aggravating factor to execution style/paid for hire killings. This issue is procedurally barred and the trial court did not err in summarily denying it **as** legally insufficient. **Atkins v. State, 541** So.2d **1165** (Fla. 1989); **Jones** v. **Dugger, 533** So.2d **290** (Fla. 1988); **Daugherty** v. **State, 533** So.2d 287 (Fla. **1988); Poster v. State, 559** So.2d **201** (Fla. **1990); Mendyk** v. State, ____ So.2d ____ (Fla. 1992), 17 F.L.W. S21.

ISSUE *XII*

WHETHER HOFFMAN'S SENTENCING ***JURY*** **WAS** *REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY* ***FOR*** *SENTENCING, CONTRARY TO CALDWELL* ***v. MISSISSIPPI, 105*** *S.Ct.* ***2633*** *(1985), AND* ***MANN v. DUGGER, 844*** *F.2d* ***1446*** *(11th Cir.* ***1988)*** ***(EN*** *BANC), AND* ***IN*** *VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS*

This Court has repeatedly held that **Caldwell** v. **Mississippi,** 105 **S.Ct. 2633** (1985), claims are procedurally barred where no objection was raised on appeal. **Dugger v. Adams,** ____ **U.S.** ____, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989); Atkins **v. State, 541** So.2d 1165 (Fla. 1989); **King v.** State, **555** So.2d 355 (Fla. 1990); **Combs v. State, 525** So.2d **853** (Fla. 1988); **Grossman** v. **State,** 525 **So.2d 833 (Fla. 1988); Demps** v. State, 515 So.2d 196 Fla. 1987), and **Daugherty v. State, 533** So.2d 287 (Fla. 1988). **The** trial court did not err in summarily denying this claim as legally insufficient. **Mendyk** v. State, **supra, 17** F.L.W. S22.

ISSUE XIII

WHETHER THE SHIFTING OF THE BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT SENTENCING DEPRIVED HOFFMAN OF HIS CONSTITUTIONAL RIGHTS

Hoffman's burden shifting claim was not preserved at trial nor raised on direct appeal. As such it is procedurally barred from consideration in his Rule 3.850 motion or on appeal from any denial thereof. Mendyk v. **State, 17** F.L.W. **S22; Bertolotti** v. **Dugger, 833** F.2d **1503, 1524-1525 (11th Cir.** 1989), and Kelly v. **Dugger,** ____ So.2d ____ (Fla. March 12, 1992), ____ F.L.W. S___.

CONCLUSION

Based on the foregoing, the trial court's denial of Hoffman's motion for post-conviction relief based on **insufficiency.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. John S. Sommer, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 20th day of March, 1992.

CAROLYN M. SNURKOWSKI
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