IN THE SUPREME COURT OF FLORIDA

JAMES ROGER HUFF,

Appellant,

v. CASE NO. 79,276

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

POINT 1: Huff was not denied due process of law. While Huff criticizes the procedure utilized by the trial court, he has never, either on rehearing in the trial court or in this court, set forth any specific objections to any specific matters addressed in the trial court's order. Reversal is not warranted.

POINT 2: Huff's claims pertaining to the admissibility of his statement were correctly found by the trial court to be procedurally barred, as they either were or could have been raised on direct appeal. The record refutes Huff's claim regarding the sufficiency of the warnings he received, and Huff failed to allege or demonstrate prejudice so as to support a claim of ineffective assistance of counsel.

POINT 3: Counsel rendered effective assistance at the guilt phase of Huff's trial. Huff's claims are either insufficiently pled as they contain conclusive allegations, are attempts to relitigate claims that were rejected on direct appeal under the guise of ineffective assistance of counsel, or are refuted by the record. Neither an evidentiary hearing nor relief was warranted.

POINT 4: Huff's claim that he was denied his fundamental right to confront the evidence against him is procedurally barred as it was raised on direct appeal. Alternatively, the claim is without merit and summary denial was appropriate.

POINT 5: Huff's claims that the state violated his rights by commenting on his right to remain silent are procedurally barred as one of the issues was raised on direct appeal and the other could and should have been raised on direct appeal.

Alternatively, the claim is without merit and summary denial was appropriate.

POINT 6: Huff's claims regarding this court's review of his death sentences are not cognizable in a proceeding pursuant to Florida Rule of Criminal Procedure 3.850,

POINT 7: Huff's claim that the prosecutor's use of peremptory challenges violated his rights is procedurally barred. Alternatively, it is without merit as Huff waived a sentencing jury.

POINT 8: Counsel rendered effective assistance. Huff knowingly and voluntarily waived an advisory recommendation against counsel's advice.

POINT 1

HUFF HAS FAILED TO DEMONSTRATE A DUE PROCESS VIOLATION,

Huff claims that the trial court's treatment of the motion to vacate violates due process and that the order was fundamentally flawed. The instant case is distinguishable from *Rose v. State*, 601 So.2d 1181 (Fla. 1992).

In the first place, there is absolutely nothing in this record or otherwise to indicate that there was any *ex parte* communication between the state and the trial court judge. Further, the state has always remained consistent in its position that summary denial was appropriate in this case. In fact, when this case was previously before this court, the state argued that even though the trial court had not reached the merits of Huff's motion, summary denial was appropriate.

The state has a clear interest in seeing that these cases do not languish in the trial courts, particularly in a case such as this where the murders occurred in 1980, there were two trials, and one postconviction remand. The submission of a proposed order generally brings the case to the attention of the trial court without having to resort to filing a petition for an extraordinary writ. Huff acknowledges that the prosecutor sent him a copy of the proposed order, and the state contends that there was nothing improper about the prosecutor's actions in this case.

While the trial court rendered an order before Huff had filed objections to the state's proposed order or submitted his

own proposed order (which he clearly could have done), Huff had the opportunity to file a motion for rehearing. Significantly, while Huff addressed the alleged improprieties in the procedures utilized by the trial court, he did not raise any specific objections to any specific matters addressed in the trial court's order. Likewise, in the instant appeal, Huff has still not presented any specific objections to the contents of the order. Appellee contends that Huff's failure to specifically contest any of the actual findings constitutes a waiver of the issue. It would be a tremendous waste of judicial time and resources to remand this case to the trial court where Huff has failed to allege or demonstrate in any way that the trial court's findings are flawed.

The trial court made minimal factual findings, as the bulk of Huff's claims are procedurally barred or insufficiently pled (M 392-97). Each of the trial court's four factual findings is supported by a cite to the record or to this court's opinion on direct appeal.[1] Reversal on this basis is not warranted, and would serve no purpose other than delay.

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[1] The trial court found that the Miranda sheet used by the Wildwood Police Department includes the advice that a lawyer would be appointed if one could not be afforded (R 967-75, M 393); that Huff was present at the jury view (R 599, M 394); that Huff was brought into the courtroom during the evidentiary discussion (R 1618, M 394); and, that Huff voluntarily waived the jury recommendation against the advice of counsel (M 395, Huff v. State, 495 So.2d 145, 150 (Fla. 1986)).

POINT 2

HUFF'S CLAIMS PERTAINING TO THE ADMISSIBILITY OF HIS STATEMENT ARE PROCEDURALLY BARRED; COUNSEL RENDERED EFFECTIVE ASSISTANCE.

Huff attacked the admissibility of his statement in Claims I, II, and III of his original motion for post conviction relief and in Claims A, B, and C of his supplemental motion (M 26-32, 337-53). The trial court found procedurally barred Huff's claims that there was no knowing and intelligent waiver of his rights, that Huff was not advised of his right to appointed counsel, and that Huff invoked his right to silence during interrogation (M 392-93). The trial court further determined that Huff had not demonstrated prejudice so as to support a claim of ineffective assistance of counsel, and that Huff's claim regarding the sufficiency of his rights was alternatively without merit (M 392-93). Huff has failed to demonstrate error in the trial court's rulings.

Huff first argues that since Overly did not advise him that he had the right to appointed counsel, any statement made was not admissible. The trial court correctly found that this issue should have been raised on direct appeal and is procedurally barred. *Smith v. Dugger, 565 So.* 2d 1293 (Fla. 1990; *Correll v. Dugger, 558* So.2d 422 (Fla. 1990). Huff is not entitled to the benefit of a change in law. At the time of the prior proceedings, the prevailing rule was that of *Alvord v. State, 322* So.2d 533 (Fla. 1975), which held it was not reversible error to fail to advise a defendant he had the right to appointed counsel

if he was indigent. Huff argues that Caso *v. State,* 524 So.2d 422 (Fla. 1988) is a fundamental change in law which should be applied retroactively. *See, Alvord v. Dugger,* 541 So.2d 598 (Fla. 1989. Appellee submits, as Justice Grimes pointed out in his concurring opinion in *Alvord,* that *Caso* should not be given retroactive effect. *Alvord* at 601-02 (Grimes, J., concurring).

In *State v. Glenn,* 558 So.2d 4 (Fla. 1990), this court addressed whether a change in law requires retroactive application. This court stated that "only major constitutional changes which constitute a development of fundamental significance are cognizable under a motion for post-conviction relief," even in death cases. This court also stated that determining whether a change in law is a major constitutional change involves balancing decisional finality against fairness. Finality should only be abridged when fairness and uniformity in adjudication is a compelling objective. This court went on to say that because of the strong concern for finality, a finding of change in law requiring retroactive application is rare. The court concluded:

> We must emphasize that the policy interests of decisional finality weigh heavily in our decision. At some point in time cases must come to an end. Granting collateral relief to Glenn and others similarly situated would have a strong impact upon the administration of justice. Courts would be forced to reexamine previously final and fully adjudicated cases, Moreover, courts would be faced in many cases with the problem of making difficult and time-consuming factual determinations based on stale records. We believe that a court's time and energy would be better

> spent in handling its current caseload than in reviewing cases which were final and proper under the law as it existed at the time of trial and any direct appeal.

Glenn, at 8. *See also, Teague v. Lane,* 489 U.S. 288 (1989); *Butler v. McKellar,* 494 U.S. 407 (1990); *Saffle v. Parks,* 494 U.S. 484 (1990).

Both this court and the United States Supreme Court declined to give the *Miranda*[2] decision retroactive application. *See State v. Statewright,* 300 So. 2d 674 (Fla. 1974); *Johnson v. New Jersey,* 384 U.S. 719 (1966). Consequently, it would be improper to give retroactive application to a case which simply clarified one of the procedural safeguards set forth in the *Miranda* decision, as opposed to establishing a significant constitutional right. This is particularly true in a case such as this, where Huff was represented by private counsel throughout the proceedings, has never claimed factual involuntariness on this basis, i.e., had that warning been given I would have remained silent, and is simply seeking reversal on the basis of a procedural technicality. Fairness was not abridged, and finality should prevail.

In any event, as the trial court found, the record refutes Huff's claim. While Overly testified that he could not remember specifically advising Huff of this right after so long, he also testified that he read from the sheet provided by the Wildwood Police Department (R 900-12). The sheet was admitted at trial during the testimony of Chief Lynum, who testified it was the only form that the Wildwood Police Department had used for

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

eighteen years, that it was used in April 1980, and used at the time of trial (R 967-68). That sheet specifically states:

> 4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.

(M 391).

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

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

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

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

The trial court correctly determined that Huff is procedurally barred from raising this issue in a motion to vacate where it was previously raised and disposed of on direct appeal. *Scott v. State,* 17 F.L.W. 545 (Fla. July *23,* 1992); *Byrd v. State, 597* So.2d 252 (Fla. 1992). Raising a different argument in a motion to vacate sentence in order to relitigate an issue raised and rejected on direct appeal is improper. *Brown v. State,* 596 So.2d 1026 (Fla. 1992).

Furthermore, the claim is without merit so that even if it wasn't procedurally barred Huff could be granted no relief. Before Overly testified, there was a proffer of the testimony, during which Overly testified that Huff was read all the rights from a card and understood his rights (R 791-858). Overly thought that Huff may have been perplexed about why the rights

were being read to him, but he understood the rights at the time they were given (R 798). Overly said that over the years he had reflected on the matter and could not say for sure Huff understood his rights, but his testimony from 1980 was true, and he had stated in his deposition eight days after the killings that he felt Huff had understood his rights (R 805).

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

Huff also argues that counsel was ineffective in not seeking mental health assistance or presenting evidence of Huff's

emotional state at the time he *was* given his *Miranda* rights. The trial court correctly found that this argument was improper as an attack based on the use of a different argument to relitigate the same issue which was decided on direct appeal (M 392-93). *Brown, supra; Quince v. State,* 477 So.2d 535, 536 (Fla. 1985). It is improper to raise a claim under the guise of ineffective assistance of counsel where it is otherwise procedurally barred. *Clark v. State, 460* So.2d 886 (Fla. 1984).

In any event, the record refutes this claim. There was no evidence whatsoever that Huff was psychologically disturbed, and an after-the-fact evaluation regarding his state of mind at the time of the statement would serve no purpose. Dr. Krop examined Huff eight years after the trial, and his report shows Huff has no significant mental disorder; Dr. Krop could not provide any definitive opinion as to Huff's mental state at the time of the offense (M 113-14). Consequently, even if an expert had been appointed, he could not extrapolate back to determine what Huff's mental state was at the time the *Miranda* rights were given. In other words, Huff neither alleged nor demonstrated prejudice. Dr. Krop found Huff competent and there is no reason to believe he was not (M 114).

Further, since Huff testified at trial (R 2613-2839), his credibility was at issue and any psychological problems could have only damaged his credibility. *See Jones v. State, 528* **So.** 2d 1171 (Fla. 1988). Not only has Huff failed to show a need for a psychological exam, but even if one had been conducted, his condition at the time of trial was irrelevant to his condition at

the time of the offense. Counsel is not ineffective for not pursuing inadmissible testimony. *Combs v. State, 525 So.* 2d 853, 855 (Fla. 1988). Since defense counsel was bound to seek out expert testimony only if evidence existed calling into question the defendant's sanity or competency, he cannot be faulted for not pursuing a mental issue. *See, Bush v. Wainwright, 505* So. 2d 409 (Fla. 1987), citing *Ake v. Oklahoma,* 105 S.Ct. at 1096 for the premise that "[a] defendant's mental condition is not necessarily at issue in every criminal proceeding."

Huff has not shown counsel was deficient and committed errors so serious as to undermine confidence in the outcome of the trial. *Strickland v. Washington, 46 6* U. S . 668 (1984) . Under *Strickland,* a decision not to investigate "must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments." 466 U.S. at 691. A court must endeavor to eliminate the "distorting effects of hindsight." *Rlanco v. Wainwright, 507* So.2d 1377, 1381 (Fla. 1987). This claim involves exactly the type of hindsight second guessing that *Strickland* condemns, *See Phillips v. State,* 17 F.L.W. 595 (Fla. September 24, 1992).

Huff next argues that he invoked his right to silence and all questioning should have ceased. This issue was raised on direct appeal in Point IV, and as the trial court found (M 393), is procedurally barred. *Byrd. supra.* This issue was thoroughly argued in the trial court and fully briefed on direct appeal, and this court found that the inferences drawn from the testimony were resolved by the trial court whose findings would not be

disturbed. *Huff v. State,* 495 So.2d 1087 (Fla. 1986). The trial judge heard testimony on this issue and ruled that he agreed with the state's interpretation of whether Huff exercised his right to remain silent (R 880). The state's position was that there was no indication that Huff had exercised his right to remain silent and any speculative reference to this right was ambiguous (R *878).* As the state argued at the second trial, Huff answered "yes " that he understood the right to remain silent, not "yes" he wanted to remain silent. Trial counsel thoroughly litigated this issue, and his performance cannot be found to be deficient simply because the trial court resolved all inferences from Overly's testimony in favor of the state.

POINT 3

COUNSEL RENDERED EFFECTIVE ASSISTANCE AT THE GUILT PHASE.

Huff sets forth a number of allegations which he claims constitute ineffective assistance of trial counsel at the guilt phase. In order to prevail on a claim of ineffectiveness, Huff must demonstrate that counsel's performance was deficient and that there is a reasonable probability that the outcome of the proceeding would have been different absent the deficient performance, *Strickland v. Washington, 466* **U.S.** 668 (1984) . 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 v. State,* 547 So.2d 912 (Fla. 1989) ; *Roberts v. State, 568* So.2d 1255 (Fla. 1990). 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 v. Dugger,* 574 So.2d 1066 (Fla. 1990). 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.* As will be demonstrated, the trial court was correct in summarily denying Huff's claims.

Huff first alleged that counsel failed to adequately brief defense witness White so that he could testify regarding contamination of the crime scene. The trial court had excluded the testimony not only because the witness was incompetent to

testify, but also because the testimony was irrelevant and immaterial (R 2478-79). This issue was raised on its merits in the initial brief on direct appeal in Point I. This court stated that its review of the record indicated that, at best, the testimony would have been a general critique of proper police practice in processing crime scenes, a collateral and irrelevant issue. *Huff v. State, 495* So.2d 145, 148 (Fla. 1986). Consequently, even if the expert had been adequately briefed on the crime scene issue, his testimony would have been excluded as irrelevant and collateral. The trial court correctly determined that Huff was attempting to relitigate this issue under the guise of ineffective assistance of counsel, which is improper (M 393). *Medina v. Stale,* 573 So.2d 293 (Fla. 1990).

Further, defense counsel cannot be faulted for failure to prevail on an issue which both the trial court and this court found to be nonmeritorious. *See, Suarez v. Dugger, 527 So,* 2d 190 (Fla. 1988). Since the evidence was inadmissible in any event, neither deficient performance nor prejudice can be demonstrated, It is clear from the record that trial counsel made a significant effort to impeach the officer's testimony and his inability to present further impeachment does not render him ineffective. See, *Waterhouse v. State,* 522 So.2d 341 (Fla. 1988). As Huff states, "[p]ractically every officer who testified stated that some other officer did something that was not proper preservation of the crime scene, but then denied that the crime scene was contaminated" (M 40, IB 36). Appellee submits that defense counsel's actions in getting the witnesses to essentially

contradict themselves is far more effective than presenting "expert testimony," particularly since the matters at issue would be readily understandable by the average lay person. Finally, while Huff states that a properly prepared expert would have illustrated "specific errors that resulted in lost or contaminated evidence in this case - including the crime scene, the evidence (e.g., clothing) taken from Mr. Huff, and the results of the gunshot residue test," he did not allege what these alleged errors were or how the outcome would have been affected, so neither an evidentiary hearing nor relief was required. *Roberts, supra.*

The second allegation of ineffective assistance is counsel's failure to object at critical periods of the trial, for instance, when Huff was absent from the jury's view of the crime scene, and discussions. This point was raised on the merits on direct appeal in Point XVI. This court held in *Huff v.* State, 495 So.2d 145, 153 (Fla. 1986), that the arguments not addressed by the court were without merit. Again, the trial court correctly rejected Huff's attempt to raise a nonmeritorious issue under the guise of ineffective assistance (M 393). Further, as the trial court found, Huff was present at the jury view of the scene, although he was in a separate vehicle (R 597), and the discussion regarding physical evidence was stopped and Huff brought to the courtroom (R 1618). Defense counsel stated that because of security reasons, he would rather not have Huff in chambers, but that he would not stipulate to anything without discussing it with Huff (R *2064-2065).* The record demonstrates that Huff was

either present or consulted as to what was happening. The trial court was correct in summarily rejecting this conclusory claim. *Phillips v. State,* 17 F.L.W. 595 (Fla. September 24, 1992).

The third allegation of ineffective assistance was that counsel failed to object when the judge was absent on one occasion. This issue was raised in Point XVII on direct appeal and found to be without merit. Again, the trial court correctly rejected Huff's attempt to raise the issue under the guise of ineffective assistance of counsel (M 394). The judge was absent when affidavits from courtroom observers were taken. The statements were attached to a motion for mistrial which was presented to the judge (R 2292-2294). There was no reason for the judge to be there, and there is no allegation that anything improper occurred that would have required a judge to be present. Taking affidavits from spectators is not part of a trial over which a judge must preside. Whether to object is a matter of trial tactics which is left to the discretion of counsel. *Muhammad v. State, 426 So.* 2d 533, *538* (Fla. 1982). Under the performance prong of *Strickland v. Washington, 46 6* U *. S . 6 6 8, 6 89* (1984), there is a "strong presumption that counsel's actions are tactical and strategic decisions and as such are reasonable." Huff has failed to overcome this presumption, and as the trial court found, Huff has failed to allege or demonstrate that even had the objections been made, the outcome would have been different. *Strickland; Provenzano v. Dugger,* 561 So.2d 541 (Fla. 1990) ; *White v. State,* 559 So.2d 1097 (Fla. 1990). The incident regarding the prosecutor allegedly saying "we got him" was

objected to, and trial counsel moved for a mistrial (R 2276). The fact he did not prevail on the motion for mistrial is not ineffective assistance. See, *Herring v. State*, 528 So.2d 1176 (Fla. 1988).

The fourth allegation of ineffective assistance was that counsel failed to raise inconsistencies in witnesses' sworn testimony, but Huff did not set forth any specific facts in support of this allegation. *Phillips, supra.* As the trial court found, this claim is insufficient as it fails to include specific allegations. *See, Kennedy v. State, 547* So.2d 912 (Fla. 1989). The voluminous record shows defense counsel zealously represented Huff, including extensive cross-examination and closing argument which lasted over one hour. Again, this claim is exactly the type of hindsight second guessing that *Strickland* condemns. *Phillips, supra.*

Huff's next allegation is that counsel failed to proffer Huff's testimony about why he was on his way to see his attorney before the offense. The totality of Huff's argument is that "[t]his was important, as the State was allowed to raise the specter that Mr. Huff was doing something improper" (IB 47-48). The trial court correctly found that the claim was insufficient as there were no allegations why this testimony was relevant or how it would have changed the outcome of the trial (M 394-95). Further, counsel vehemently objected to any testimony on this issue, and this claim was raised on direct appeal in Point IX. Huff should not now be permitted to relitigate it in converse form. Further, the fact that counsel objected and Huff invoked

the attorney-client privilege (R 2687-88), clearly demonstrates it was trial counsel's strategy to keep this information away from the jury. Summary denial was appropriate.

Huff's next allegation is that defense counsel failed to object to "surprise testimony" revealed during the state's opening statement, which was that Huff had asked Chief Lynum for a gun permit. Huff claims that a *Richardson*[3] hearing should have been requested. Huff does not explain how or why requesting a *Richardson* inquiry would have affected the outcome, so the trial court correctly found that the allegations were insufficient (M 395). Further, the witness had been disclosed to the defense (R 3162), and appellee knows of no basis (nor has Huff alleged one) for requesting a hearing on this type of 'surprise evidence," as opposed to an undisclosed witness.

The next allegation involves counsel's failure to object on the basis that *Miranda* warnings were not administered prior to Huff being examined by Dr. Rojas. The record shows that Huff was taken to the Project Health Medical Clinic three days after the murders (R 2861). He had complained that he was hit in the head (R 2861). He was taken to the doctor for the purpose of a medical exam, not for the purpose of custodial interrogation. Huff has pointed to no statement he made which required a *Miranda* warning, nor the introduction of any evidence which would have triggered a *Miranda* objection.

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[3] Richardson v. State, 246 So.2d 771 (Fla. 1971).

The final allegation of ineffective assistance involved failure of counsel to present surrebuttal testimony of a defense expert in response to Dr. Rojas' testimony. The trial court correctly found that the claim was insufficient for failure to allege what testimony could have been presented or how it would have affected the outcome (M 394). The trial was conducted four years after the murders, and was Huff's second trial. Counsel cannot be expected to produce expert testimony about a bump on Huff's head which existed four years previous. Any exam four years after the incident would hardly be conclusive of Huff's condition at the time. Dr. Krop's exam shows that he found no evidence of neurophysiological disorder or organicity. The availability of any contradictory medical evidence is speculative. Defense counsel did present the testimony of Father Paddock that he had seen a bump on Huff's head the next day (R 2414). The evidence available was presented. Furthermore, Dr. Rojas' testimony was cumulative to the testimony of Harris Rabon (R 1129, 1162), Mabry Williams (R 1347), Bud Stokes (R 1730), and Dr. Chatham (R 2895).

Huff has failed to show that counsel was deficient and that, except for counsel's deficient representation, the outcome would be different. A defendant is "not entitled to perfect or error-free counsel, only to reasonably effective counsel," *Waterhouse v. State*, 522 So.2d 341, 343 (Fla. 1988). The trial lasted from May 1 to June 2, 1984, and the instances Huff isolates are insignificant, Huff argues that he was entitled to an evidentiary hearing, but he has not demonstrated that there

was a deficiency on the part of counsel which was detrimental to his cause. *Kennedy v. State*, 547 So.2d 912 (Fla. 1989).

POINT 4

HUFF'S CLAIM THAT HE WAS DENIED HIS FUNDAMENTAL RIGHT TO CONFRONT THE EVIDENCE AGAINST HIM IS PROCEDURALLY BARRED.

Huff claims that he was denied his right to confront Sheriff Johnson when he was not permitted to impeach Sheriff Johnson with evidence regarding sexual improprieties. This was raised as Claim VII in Huff's original motion for postconviction relief (M 55-58), and presented as Claim F in Huff's supplemental motion (M 372-76). The trial court correctly found that the claim had been raised on direct appeal and was thus procedurally barred (M 396). See, Byrd *v. State* 597 So.2d 252 (Fla. 1992). The claim was raised in Point XIII on direct appeal, and this court found that all claims not specifically addressed were without merit. *Huff, supra* at 153.

Even if the claim were cognizable, it is clearly without merit. The investigation regarding Sheriff Johnson's conduct had been completed four months before the instant murders (R 1067-68), and any evidence regarding it was clearly a collateral matter. Questions on cross examination must be related to credibility or to matters brought out on direct. *See, Steinhorst v. State,* 412 So.2d 332, 337 (Fla. 1982). The trial court has broad discretion in the admission of evidence, and unless an abuse of that discretion can be demonstrated, its ruling will not be disturbed. *Hardwick v. State,* 521 So.2d 1071 (Fla. 1988). A defendant is not entitled to unlimited cross examination in whatever way and to whatever extent the defense might wish.

Kentucky v. Stincer, 482 U.S. 730 (1987), quoting, *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). Huff was afforded ample opportunity to cross examine the witness, and Johnson's sexual misconduct was not relevant to any issue or his credibility. [4]

Even if the claim were cognizable and error occurred, it was harmless at worst.

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. VanArsdall, 475 U.S. 673, 684 (1986). In the present case, none of the testimony excluded was relevant, the allegations of sexual impropriety were unfounded, defense counsel was permitted liberal cross examination, and the points defense counsel wished to elicit were designed only to embarrass the witness. Error, if any, was harmless beyond a reasonable doubt. *State v. Diguilio*, 491 So.2d 1129 (Fla. 1986).

In his brief, Huff also states:

> The trial court's ruling precluding defense counsel from pursuing appropriate avenues of confrontation rendered counsel ineffective. Counsel would so testify at an evidentiary hearing. The trial court's erroneous ruling also affected counsel's overall

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[4] Sheriff Johnson had lost his bid for reelection long before the instant trial (R 1068).

> performance, as counsel never recovered from the court's preclusion on a central aspect of the case the defense wished to present. An evidentiary hearing was needed on the effect of the trial court's ruling on defense counsel's performance and on the error resulting from the trial court's ruling -- affording this Court an appropriate record for review of this claim.

(IB 54). Huff never alleged below that counsel's "overall performance" was affected, and simply alleged:

> In denying this right [to confrontation], the trial court violated Mr. Huff's fundamental right to present his defense in this capital case, and rendered defense counsel ineffective.

(M 376). The allegations below were conclusory and insufficient to state an ineffectiveness claim, and were nothing more than an attempt to relitigate an issue that was decided adversely on direct appeal. *See, Medina v. State*, 573 So.2d 293 (Fla. 1990). The additional allegations presented on this appeal are not cognizable as they were never argued below. *Doyle v. State*, 526 So.2d 909, 911 (Fla. 1988) (a claim not presented to the trial court in a rule 3.850 motion cannot be raised for the first time on appeal from the denial of post conviction relief). The trial court was correct in finding the claim procedurally barred and in summarily denying relief.

POINT 5

HUFF'S CLAIMS THAT THE STATE VIOLATED HIS RIGHTS BY COMMENTING ON HIS RIGHT TO REMAIN SILENT ARE PROCEDURALLY BARRED.

Huff alleges that his conviction should be reversed based on two occasions where the prosecutor allegedly commented on Huff's right to remain silent. This was raised in Claim VIII in Huff's original motion for postconviction relief (M 59-62), and in Claim G in his supplemental motion (M 376-79). The first instance involves evidence of Huff's refusal to take a gunshot residue test, and the second involves a question to Mabry Williams as to whether Huff mentioned his parents during a conversation about what had happened. The trial court correctly found that these claims were procedurally barred (M 396). Alleged error regarding evidence of the refusal to take a gunshot residue test was specifically raised in Point XVII on appeal, and any claim regarding the question to Mabry Williams could and should have been raised on direct appeal. Issues raised and rejected on direct appeal are not properly raised in a motion to vacate. *Brown v. State, 596* So.2d 1026 (Fla. 1992).

Even if the claims were cognizable, relief is not warranted. As to the gunshot residue test, appellee would first point out that the authority presented to this court, *Herring v. State,* 501 So.2d 19 (Fla. 3d DCA 1986), was never argued to the trial court, so to the extent that the argument on appeal differs than that presented to the trial court, there is an additional procedural bar.[5] *Doyle, supra.* See also *Brown, supra* (raising a

[5] In his motion for postconviction relief, Huff alleged that the

different argument in a motion to vacate sentence in order to relitigate issues raised and rejected on direct appeal is improper). Further, as Justice Grimes pointed out in his concurring opinion in *Occhicone v. State,* 570 So.2d 902, 907-08 (Fla. 1990), *Herring* is based on erroneous premise, as refusal to take a hand-swab test is not protected by the constitutional privilege that no one may be compelled to testify against himself. *See also, Wilson v. State,* 596 *So.* 2d 775, 778 (Fla. 1st DCA 1992) ("There being no constitutional privilege against taking a test, such as providing a handwriting sample, it follows that there is significant probative value in a refusal to take such a test).

Huff's claim regarding the questioning of Investigator Mabry is likewise without merit. The question was asked on redirect; on cross examination defense counsel had questioned Mabry about conversations with Huff regarding descriptions of the persons who allegedly killed his parents, that his mother had been driving the car, and that Huff was hysterical at the crime scene (R 1269-74). Mabry was also asked about Huff telling him that he had been hit on the head (R 1276). On redirect, the prosecutor asked questions about what Huff said about being hit on the head, whether he asked to see a doctor or complained about his head hurting, what Huff said to Sheriff Johnson, Huff's description of the assailant's, and how Huff acted (R 1347-50).

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admission of his refusal to take the test violated the Fifth Amendment (M 60-62, 378-79). As Huff acknowledges, the issue raised in Herring, *supra* was probativeness.

Only those comments which are "fairly susceptible" of being interpreted as a comment on silence will be treated as such, *State v. Diguilio,* 491 So.2d 1129 (Fla. 1986). Huff's failure to ask about his parents was not susceptible to the interpretation that Huff had chosen to exercise his right to silence, but rather was an omission in what he told the officers. As in *Watson v. State,* *504* So.2d 1267 (Fla. 1st DCA 1986), the fact that Huff had not inquired about his parents could not be construed as a comment on his right to silence where he had not invoked that right and was talking with the officer. Huff did not exercise his right to silence or decline to answer any questions. Rather, the question to the investigator was whether he had ever mentioned his parents, not whether he declined to answer questions about their condition.

The case cited by Huff, *Peterson v. State, 405* So.2d 997 (Fla. 3d DCA 1981), is inapplicable. In that case, the arresting officer testified that Peterson said he would answer some questions, but would stop when he did not want to answer any more. The officer also said that Peterson made a partial explanation about the gloves he was wearing, but would not explain the time of day. The court held that the first statement was an improper reference to Peterson's assertion of the right to decline questioning, and the second statement exacerbated the effect of the first statement and was an improper reference to the exercise of the privilege to decline to answer further questions. As stated, Huff did not exercise his right to silence or decline to answer any questions.

Even if the claim is cognizable, and the question was erroneous, any error is harmless. *Diguilio, supra.* Appellee would first point out that defense counsel first brought this issue to the jury's attention when he asked Officer Overly if Huff was concerned about his parents (R 918), so Huff should not be heard to complain that the prosecutor asked a different officer the same question. Further, such comment certainly did not affect the verdict in light of all of the other evidence presented, particularly where the jury heard that Huff had expressed concern for his parents.

POINT 6

HUFF'S CLAIMS THAT THIS COURT ERRED IN REVIEWING HIS SENTENCES OF DEATH ON DIRECT APPEAL ARE NOT COGNIZABLE IN A MOTION FOR POSTCONVICTION RELIEF.

Huff claims that his sentences and their affirmance violates *Sochor v. Florida,* 112 S.Ct. 2114 (1992); *Clemons v. Mississippi, 494 U.S. 738* (1990), and *Hitchcock v. Dugger,* 481 U.S. 393 (1987). Huff contends: (1) the striking of mitigation was based on a misreading of the record; (2) this court did not undertake a meaningful harmless error analysis after striking an aggravating factor; (3) this court's resolution of the "lack of remorse issue" was improper; (4) the application of the heinous, atrocious, or cruel aggravating factor warrants reconsideration in light of *Sochor, supra;* and, (5) the cold, calculated and premeditated aggravating factor is not supported by the evidence. The only one of these claims that was presented to the trial court was that this court improperly struck the mitigating factor of no significant prior criminal history, and the trial court found that the issue was not cognizable in a 3.850 proceeding (R 396). This ruling is correct since a motion to vacate under Florida Rule of Criminal Procedure 3.850 must be directed to the judgment and sentence of the trial court and under no interpretation of this rule can any action of the Florida Supreme Court be reviewed. *Foster v. State,* 400 So.2d 1 (Fla. 1981).

Huff's remaining claims, that were never presented to the trial court, are not cognizable an appeal. *Doyle, supra.* Further, since all of the allegations are directed to this court's actions, they are not cognizable in a 3.850 proceeding. *Foster,*

supra. Finally, they are procedurally barred since they involve matters which were or could have been raised on direct appeal.

POINT 7

HUFF'S CLAIM THAT THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES VIOLATED HIS RIGHTS IS PROCEDURALLY BARRED; COUNSEL RENDERED EFFECTIVE ASSISTANCE.

Huff claims that the prosecutor's use of peremptory challenges systematically excluded all potential jurors who indicated even a question regarding the death penalty and left a jury prone to convict and impose death. This was presented in Claim X of Huff's original motion for postconviction relief (M 62-80). The trial court properly found that this claim was procedurally barred (R 396). Jury selection issues should be raised on direct appeal and are procedurally barred in post conviction proceedings. *Roberts v. State, 568* So.2d 1255 (Fla. 1990). Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal. *Medina v. State, 573* So.2d 293 (Fla. 1990). In any event, the claim is without merit as this issue does not involve challenges for cause, as was the case in *Witherspoon v. Illinois, 391* U.S. 510 (1968), but rather the exercise of peremptory challenges.

Huff's conclusory allegations that counsel was ineffective are insufficient on their face, and neither an evidentiary hearing nor relief was warranted, *Roberts v. State, 568* So. 2d 1255 (Fla. 1990); *Kennedy v. State,* 547 So.2d 912 (Fla. 1989). Huff simply alleged that trial counsel was ineffective for failing to object to this process, but did not allege why this constituted deficient performance or how he was prejudiced. In any event, counsel's performance was not deficient and prejudice cannot be

demonstrated, As stated, this is not a *Witherspoon* issue, and counsel cannot be deemed ineffective for not raising claims that are without merit. Further, the United States Supreme Court has rejected the suggestion that *Witherspoon* has broad application outside the context of capital sentencing, and since Huff waived the advisory jury, the jury had no role in sentencing, so *Witherspoon* is inapplicable. *Lockhart v. McCree, 476* U.S. 162 (1986).

POINT 8

COUNSEL RENDERED EFFECTIVE ASSISTANCE,

Huff contends that counsel provided ineffective assistance with regard to his waiver of an advisory jury. Huff alleges that: (1) counsel had not investigated mitigation and prepared for sentencing so could not meaningfully discuss what Huff was foregoing; (2) counsel did not request sufficient time to discuss the situation with Huff; and, (3) that counsel rendered ineffective assistance in not seeking a mental health evaluation as Huff was "obviously distraught at the time of the waiver" and this condition undermined a valid waiver. Huff also claims that the "waiver colloquy" was insufficient since the trial court never asked counsel what mitigation he had prepared. This was raised in Claim V of Huff's original motion for postconviction relief (M 49-54), and in Claim E of his supplemental motion (M 368-72).

The trial court found that Huff was not denied effective assistance of counsel when no continuance was requested; that Huff voluntarily waived the advisory recommendation; that Huff failed to allege how the outcome of the proceedings would have been different; and, that even if the testimony had been presented, the outcome of the proceeding would not have been different (R 395). Huff has failed to demonstrate error in the trial court's ruling, and no evidentiary hearing was required,

Appellee first contends that Huff's claim that the "waiver colloquy" was insufficient is procedurally barred since it could have been raised on direct appeal. Further, even though Huff did not specifically raise this claim, this court found:

> It must be noted at the outset that appellant explicitly, knowingly, voluntarily and intelligently waived his right to an advisory sentencing jury recommendation. This waiver was against the advice of appellant's own counsel and over the state's objection. We have previously held that such a waiver is permissible.

Huff v. State, 495 So.2d 145, 150 (Fla. 1986). This court recently set for-th a rule to be applied in situations where a defendant waives the presentation of mitigating evidence, and specifically stated that it was to be applied prospectively. *Koon v. Dugger*, 17 F.L.W. 337 (Fla. June 4, 1992). See also, *Durocher v. State*, 17 F.L.W. 542 (Fla. July 23, 1992). Consequently, the trial court was correct in finding the instant claim procedurally barred. [6] *See Muhammad v. State*, 17 F.L.W. 359 (Fla. June 11, 1992).

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[6] Appellee would also point out that this rule applies to a defendant's waiver of the presentation of mitigating evidence, and not to the waiver of an advisory jury. Since Huff's claim is that counsel rendered ineffective assistance with regard to the waiver of the advisory recommendation, this rule would not even be applicable to the instant situation. Further, the colloquy in the instant case was clearly sufficient. Huff signed a written waiver, wherein he stated that he had been given ample time to reflect upon the matter, had thoroughly discussed the matter with his attorney, and was acting against counsel's advice (R 3096, 3777). The trial court inquired about Huff's education, mental and emotianal state, and whether he was under the influence of any drugs (R 3098). It was defense counsel's opinion that Huff was not under the influence of drugs or alcohol, and that Huff knew what he was doing and was in full control of his mental faculties and the waiver was being made with complete and full knowledge (R 3096). Upon questioning from the prosecutor, Huff acknowledged that he had discussed with counsel that he could present witnesses and mitigating evidence, both statutory and nonstatutory; that the jury could return a recommendation of mercy that would be entitled to strong weight and consideration; that the request, if no reversible error was found on appeal, could well lead to execution and counsel had thoroughly advised him on that point; and that counsel had witnesses present in the courtroom that morning who were willing to testify; and, that counsel had advised him against the procedure (R 3099-3101).

Huff's remaining claims that counsel rendered ineffective assistance are without merit. In order to prevail on a claim of ineffectiveness, a defendant must show that counsel's performance was deficient and that there is a reasonable probability that the result of the proceeding would have been different absent the deficient performance. *Strickland v. Washington, 466* U . S . 6 6 8 (Fla . 1986). Huff demonstrated neither.

It must first be remembered that Huff was proceeding against counsel's advice, after being informed that he had the right to present statutory and nonstatutory mitigating evidence, that if the jury recommended life it would be entitled to great weight, and that there were witnesses present who were willing to testify on Huff's behalf. Further, Huff had already been through one penalty phase, and as he himself stated when the trial court advised him to further discuss the waiver with his attorneys, "I've had four years to think about it" (R 3095).

Huff first alleged that counsel had not reasonably prepared for sentencing and had not investigated mitigation, so could not meaningfully discuss what Huff was foregoing. The record demonstrates that counsel had witnesses present in the courtroom who were willing to testify on Huff's behalf. Huff also acknowledged that *counsel* had discussed with him the consequences of his waiver, his right to present statutory and nonstatutory mitigating evidence, and his right to a jury recommendation that would be entitled to great weight, This is not a situation where counsel "latched onto" the defendant's instruction and failed to investigate penalty phase matters. *Compare, Koon, supra* at *3 3 8,*

with *Blanco v. Singletary,* 943 F.2d 1477 (11th Cir. 1991). Counsel is not ineffective when a defendant prevents him from proceeding. *Henderson v. Dugger, 522* So.2d 835 (Fla. 1988); *Eutzy v.* State, 536 So.2d 1014 (Fla. 1988). As Huff acknowledged in his motion, the accused has the ultimate authority to make certain fundamental decisions (M 51). *Wainwright v. Sykes, 433* U.S. 72 (1980). A defendant cannot preempt his attorney's strategy then claim ineffectiveness. *Mitchell v. Kemp, 762* F.2d 886, 889 (11th Cir. 1985). Huff was not acting without reasoned advice; he simply refused to take that advice. Acceding to the wishes of a competent client should not be construed as ineffectiveness years after the fact. *Stano v. State,* 520 So.2d 278 (Fla. 1988). Huff has failed to demonstrate that counsel's performance was deficient.

Likewise, Huff has failed to demonstrate prejudice, i.e., that but for counsel's assistance, he would not have waived a penalty phase jury, and the jury would have returned life recommendations that either would not have been overridden or if overridden reversed for life sentences on appeal. In his motion, Huff sets forth his brother's testimony from the first penalty phase, which did not result in life recommendations. Huff also alleges that evidence of his lack of prior criminal history could have been presented, but again, this did not result in life sentences after the first proceeding. Finally, Huff set forth a post conviction evaluation done by Dr. Krop (M 51-53). Huff simply alleged that the report "is an indication of the type of mitigation that could have been presented on Mr. Huff's behalf"

(M 52), but did not set forth any specific mitigating circumstances, statutory or nonstatutory, that would have resulted from it, and appellee contends that such allegation is insufficient to demonstrate prejudice. In any event, Dr. Krop's report shows that Huff has no significant emotional disorder, violent propensities or antisocial tendencies, and there is no evidence of oxganicity. Dr. Kxop could not provide any definitive opinions regarding Huff's mental status at the time of the offense or his competency ta waive the sentencing proceedings. There simply is no reasonable possibility, even considering the now pxoffered evidence, that the outcome of the proceeding would have been any different.

Huff next alleges that counsel did not discuss the waiver meaningfully with him. This was not alleged below, and appellee contends that it is not cognizable on appeal. *Doyle, supra* . In any event, this claim is refuted by the record. As previously demonstrated, Huff's written waiver, the colloquies conducted by the trial court and prosecutor, and defense counsel's statements all show that the matter was thoroughly discussed with counsel. Huff does not allege what additional matters should have been discussed, so the claim is not even sufficiently pled. Relief is not warranted.

Huff also alleges that counsel did not seek a mental health evaluation of him, and he was distraught and this condition undermined a knowing and intelligent waiver, Huff did not allege below and does not allege now how the outcome would have been affected had an evaluation been done, so the claim is

insufficiently pled. In fact, Dr. Krop was unable to render any opinion on this issue, so neither an evidentiary hearing nor relief was warranted, Further, the record specifically refutes any claim that Huff was distraught. He stated that he had thought about this for four years, and his attorney stated that he believed Huff was in full control of his mental faculties.

CONCLUSION

Based on the foregoing arguments and authorities, appellee requests this court affirm the order of the trial court denying Huff's motion for postconviction relief in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Billy H. Nolas, P.O. Box 4905, Ocala, FL 32678-4905, this 8th day of October, 1992.

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