IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,028

TERRELL M. JOHNSON,

Petitioner,

v.

HARRY K. SINGLETARY, JR.,
Secretary, Florida Department of Corrections,

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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A.

TIME BAR

Respondent asserts that *all* claims raised in the instant petition are **TIME BARRED**. Fla. R. Crim. P. *3.850* (1985), which was applicable to petitions for habeas corpus, was amended to provide that defendants whose judgments and sentences became final prior to January 1, 1985, shall have until January 1, 1987, to file a motion for post-conviction relief. See In re Rule 3.850 of Florida Rules of Criminal Procedure, 481 So. 2d 480 (Fla. 1985). Johnson falls in this time frame, as his judgment and sentence became final in 1984 when the United States Supreme Court denied certiorari review. Johnson v. Florida, 446 U.S. 963, 104 S.Ct. 2181, 80 L.Ed.2d 563 (1984). Therefore, the instant petition should have been filed by January 1, 1987, and it is *untimely by eight years*.

Initially, Johnson filed a Motion to Vacate Judgment and Sentence on June 18, 1985, through volunteer private counsels, owing to an impending death warrant, which was stayed. (M.335-449)[1] On June 19, 1985, private counsels moved the trial court to appoint a capital collateral representative to represent Johnson. (M.445) On August 15, 1985, the trial court granted their motion to afford them relief under the Capital Collateral Representation Act. (M.455-456) This order was filed upon the

[1] The symbol "Ex." refers to various exhibits in the appendix. Cites to the record on direct appeal are designated as "R". Cites to the record on collateral proceedings (Motion to Vacate Judgment and Sentence) are designated as "M". The symbol "p" designates pages of named documents. All emphasis is supplied unless otherwise indicated.

Office of the Capital Collateral Representative (henceforth CCR) on November 22, 1985.

On October 6, 1986, CCR filed its post-conviction motion to vacate on behalf of Johnson, (M.980-1465) *At that time, the entire record had been reviewed, and collateral counsel should have known the facts currently underlying the current petition*. Pursuant to Adams v. State, 543 so. 2d 1244 (Fla. 1989), all post-conviction relief motions filed after June 30, 1989, and based on new facts or a significant change in the law must be made within two years from the date *the facts became known or the change was announced.* See Henderson v. Singletary, 617 So. 2d 313, 316 (Fla. 1993), cert. denied 113 S.Ct. 1891 (1993). Given this precedent, and the fact that collateral counsel should have known the facts underlying the current petition in October of 1986, all claims raised in the instant petition, filed *eight* years later, are **time barred.**

ABUSE OF PROCESS

In 1987, Justice Shaw wrote, on behalf of this Court:

> It is clear . . . that this eleventh hour petition is *an abuse of process. We point out again to the office of collateral counsel that habeas corpus is not a vehicle for obtaining appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which. could have, should have, or have been, raised in rule 3.850 proceedings.* (citations omitted)

White v. Dugger, 511 So. 2d 554, 555 (Fla. 1987).

Besides the obvious time bar to the instant petition, the very nature of the petition itself, *197 pages long with 23 claims,* exhibits collateral counsel has exceeded the bounds of zealous

representation.[2] Rather, both the **time bar** and the mammoth petition itself, clearly demonstrate abuse of *process.* To fully understand the basis for this assertion, it is necessary to understand the manner in which this petition came to this Honorable Court.

On or about May 5, 1992, Johnson filed a federal Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida, in which he alleged sixteen grounds for relief, and subsequently filed a supplemental petition, which included a seventeenth claim. In its initial Response, the State waived exhaustion as to his sixth claim, but did not as to his supplemental seventeenth claim.[3] It was claims *VI and XVII* in Johnson's federal petition that caused the instant petition to be filed in this Court. **(Ex.A)**

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[2] As of the writing of this Response, there is currently pending before this Court a "Motion to Require the Filing of an Amended Petition for Writ of Habeas Corpus." In that motion, Respondent did not request a tolling of time, and that is why this Response is being filed. However, it does not constitute a waiver of that motion.

[3] In Johnson's "Motion to Strike Response to Motion for an Order Rescinding this Court's Grant of an Extension of Time to Respondent in which to Reply to Pending Petition for Writ of Habeas Corpus," he alleged that "counsel for Respondent opposed the Motion for Summary Judgment and *did not waive the previously asserted claim that the issues were not exhausted.* " (p.2, para (3)) He subesequently represented: "Under federal law exhaustion is waivable by the State, but where it is not waived the federal court must dismiss the habeas petition. Rose v. Lundy, **455** U.S. 509 (1982)." Actually, according to Rose v. Lundy, if the State elects to stand on its defense of failure to exhaust and not waive it, the burden is upon the defendant to elect whether he wants to *"amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims. By invoking this procedure, however, the prisoner would risk forfeiting consideration of his unexhausted claims in federal court. "* Id. *at 521 (O'Connor, J.)*

The Middle District dismissed the federal petition without prejudice ". . .to the right of [Johnson] to present *Claim VI and Claim XVII* to the state courts and to refile the habeas petition after the state courts have made a determination as to these claims." (**Ex.B:3-4**) As regards *Claims VI and XVII,* it found:

> It appears that neither *Claim VI nor Claim XVII* was raised in the state courts and that these claims have not been exhausted. If exhaustion of these claims would be futile, then there would be a procedural bar in the absence of a showing of cause and prejudice. See *Engle v. Isaac, 456* U.S. 107, 129 (1982) ("when a procedural default bars state litigation of a court claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and actual prejudice.") *However, Petitioner states that, with regard to these claims, "he can return to state court on a petition for a writ of habeas corpus" and that he "still has* a *means of representing the claim[s] to the Florida Supreme Court."*
>
> *It appears, based on Petitioner's representations that these claims still may be raised in the state courts, that further resort to the state courts with regard to Claims VI and XVII will not be futile.* Consequently, the Court will allow Petitioner to present Claim VI and Claim XVII to the state courts. Of course, the Court is not making a determination as to whether either claim is procedurally barred in the state courts or as to whether the merits of either claim should be addressed in the state courts; the state courts may find that either (or both) of these claims is procedurally barred and, as a result, may not address the merits of either (or both) of these claims. However, Petitioner will be allowed to present these claims to the state courts. (**Ex.B:2-3**)
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> claims would be futile, then there would be a procedural bar in the absence of a showing of cause and prejudice. See *Engle v. Isaac, 456* U.S. 107, 129 (1982) ("when a procedural default bars state litigation of **a** court claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and actual prejudice.") *However, Pe ti timer states that, with regard to these claims, "he can return to state court on a petition for a writ **of** habeas corpus" and that he "still has a means **of** representing the claim[s] to the Florida Supreme Court."*
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Johnson's representation to the Middle District that his sixth and seventeenth claims could still be raised in this Court was erroneous in light of the fact that they are **time barred.** See Harris **v.** Reed, 489 U.S. 255, 263 **n.9** (1989); Engle **v. Isaac, 456** U.S. 107, 125 n.28 (1982). Nonetheless, Johnson was allowed to seek exhaustion of these claims by the federal court **at his** election. Claims II and III in the instant petition are the unexhausted claims.

However, Johnson has used his failure to exhaust two claims raised in federal court as a pretext to gain an additional appeal of *twenty-one (21)* other claims, which besides being **time barred** are procedurally barred on other grounds as well. See Davis v. State, 589 So. 2d 896, 898 (Fla. 1991) The instant petition is a blatant attempt to circumvent the rule that habeas corpus proceedings do not provide a second or substitute appeal. Blanco v. Wainwright, **507 so.** 2d 1377, 1384 (**Fla.** 1987); Medina v. State, **573 so.** 2d 293 (Fla. 1990). Therein lies the abuse of process, which should not be condoned.

PROCEDURAL HISTORY

Respondent does not accept Johnson's Procedural History in the instant petition, for the same reasons Appellee did not accept his Statement of the Case and Facts in his initial brief on the appeal of the denial of his motion for post-conviction relief. It contains few record cites, and is argumentative. Respondent's rendition of the Procedural History of this cause, *with appropriate record cites,* follows :

This Honorable Court's factual findings on Johnson's direct appeal were as follows:

> On December 4, 1979, Terre11 Johnson went to Lola's Tavern in Orange County to redeem a pistol he had pawned to James Dodson, the bartender/owner of the tavern. Although Dodson had given Johnson fifty dollars when the gun was pawned he demanded one hundred dollars to return it. Before paying for the gun, Johnson asked to be allowed to test fire it and took the gun to an open field across the road from the bar where he fired several shots. While returning to the bar, Johnson, irate at what he considered to be Dodson's unreasonable demand, decided to rob the tavern. Johnson told police that he took Dodson and a customer, Charles Himes, into the men's room at the end of the bar, intending to tie them up with electrical cord. The customer lunged at Johnson and he began firing wildly, shooting both men. He then returned to the bar and cleaned out the cash drawer, also taking Dodson's gun, which was kept under the bar. As he was wiping the bar surfaces to remove fingerprints, Johnson heard movement from the back room and returned to find the customer still alive. Johnson shot him again, not, according to Johnson, "to see him dead," but to "stop his suffering."

> Several weeks later Johnson was arrested in Oregon for an unrelated crime. He still had Dodson's gun. He had sold the murder weapon to an acquaintance in Florida and thus was linked to the Florida murders based on information from the National Crime Information Center.
>
> Johnson v. State, 442 So. 2d 193, 194-195 (Fla. 1983)

Johnson was indicted on two counts of first degree murder on May 23, 1980. (R.625) On September 26, 1980, Johnson was convicted of first degree murder on one count and second degree murder on the other. (R.738-740) The jury recommended a death sentence for the first degree murder. (R.744) Johnson was sentenced to death on October 3, 1980. (R.804-808) The trial court found five aggravating factors:

(1)under sentence of imprisonment;

(2)prior violent felony;

(3)during commission of robbery/pecuniary gain;

(4)avoid arrest;

(5)cold, calculated and premeditated.

(R.804-807)

The trial court rejected the statutory mitigating circumstances and found nonstatutory mitigation as follows:

(1)the defendant has a significant prior history of criminal activity;

(2)although the defendant told one or more of the officers he was angry with the victim bar owner he was not under the influence of extreme mental or emotional disturbance;

(3)the victim was not a participant:

(4)the defendant was the sole perpetrator;

(5)the defendant did not act under extreme duress:.

(6)although the defendant told one of the officers he "had been drinking" at the time of the murder, and he had been diagnosed by a psychologist as an "impulsive personality with depressive features" (a personality disorder) with a secondary diagnosis of alcoholism and drug abuse, the evidence affirmatively showed that the defendant had capacity to appreciate the criminality of his conduct. The evidence did not show that his capacity to conform his conduct to the requirements of law was substantially impaired;

(7)the defendant was 33 years of age at the time of the murder;

(8)other evidence relating to the character of the defendant was offered as a mitigating circumstance: his traumatic childhood; his periodic separation from and neglect by his alcoholic parents; the somewhat recent loss of his mother and brother over which he had feelings of guilt and depression; his recognition of need for treatment; his completion of a treatment program and return for aftercare; his gentle, considerate nature when not drinking or when he was not reacting to being "put down" by other persons.

(R.804-807)

The trial court found that the aggravating circumstances outweighed the matters offered as a mitigating circumstance in (8) supra. (R.804-807) On November 23, 1983, this Honorable Court affirmed the convictions and sentences. Johnson v. State, supra.[4] The United States Supreme Court denied certiorari.

[4] The issues raised on direct appeal were: (1) transcript was not reliable or complete; (2) the trial court erred in admitting

Johnson v. Florida, 446 U.S. 963 (1984). On May 31, 1985, the Governor of Florida denied clemency and signed a death warrant. Execution was scheduled for June 24, 1985. On June 19, 1985, a stay of execution was issued in the Circuit Court for the Ninth Judicial Circuit, Orange County, Florida. (M.454-456) Judge Komanski conducted an evidentiary hearing on the motion to vacate on December 22, 1986. (M.1-332)

Post-conviction relief was denied by an order filed June 12, 1989. (M.1761-1770) Rehearing was denied July 25, 1989. (M.1782) Johnson appealed to this Honorable Court.[5] This Court

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the results of a ballistics test; (3) the trial court erred in excusing two jurors for cause; (4) the trial court erred in failing to dismiss the indictment because the state violated the Interstate Agreement on Detainers; (5) the trial court erred by admitting involuntary statements; (6) the trial court erred in finding the murder was cold, calculated and premeditated and was committed to avoid arrest; (7) the trial court erred in applying the death penalty as if it was mandatory; (8) the trial court erred in finding prior violent felony and in instructing the jury attempted murder and attempted robbery were violent felonies; (9) the trial court erred in allowing the jury to consider nonstatutory aggravating circumstances; (10) the Florida capital sentencing statute is unconstitutional.

[5] The issues raised in the appeal from denial of the Motion to Vacate were: (1) counsel was ineffective for failing to investigate mitigation; (2) the trial court erred in instructing the jury that a majority vote was required for a life recommendation; (3) Johnson was denied competent mental health assistance; (4) counsel was ineffective for failing to use evidence of voluntary intoxication; (5) counsel was ineffective for failing to rebut ballistics testimony; (6) the State withheld information regarding a ballistics test; (7) Johnson's statements were unconstitutionally obtained and the State withheld evidence; (8) Johnson was denied a full and fair hearing on reconstructing the record and reconstruction was inadequate; (9) the trial court relied on a mistake in the sentencing vote; (10) counsel was ineffective for failing to assert the defendant's rights under the Interstate Agreement on Detainers; (11) the jury was misled as to its sentencing responsibility; and (12) the trial court erred in applying the Florida death penalty statute.

affirmed the denial of relief. Johnson v. State, 593 So. 2d 206 (Fla. 1992).

On or about May 5, 1992, Johnson filed a federal Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida, in which he alleged sixteen grounds for relief, and subsequently filed a supplemental petition, which included a seventeenth claim.[6] The Middle District dismissed the federal petition without prejudice "...to the right of [Johnson] to present *Claim VI and Claim XVII* to the state courts and to refile the habeas petition after the state courts have made a determination as to these claims." (Ex.B:3-4)

The instant petition and supplemental petition, totalling 197 pages, with 23 claims, follows.

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[6] Johnson's federal claims were: (1) inadequate reconstructed record denying him effective assistance of counsel, full review by this Court or a full and fair hearing on reconstruction; (2) improper jury instruction preventing jury from recommending life sentence **and** ineffective assistance of counsel; (3) ineffective assistance of trial counsel in failing to properly investigate and present mitigating evidence; (4) incompetent mental health assitance and ineffective assistance of counsel; (5) prosecutorial improper sentencing argument and ineffective assistance of counsel; *(6) improper jury instructions cm aggravating circumstances* ; (7) improper findings of aggravating circumstances by trial court; (8) involuntary statements and ineffective assistance of counsel; (9) ineffective assistance of trial counsel in rejecting defense of voluntary intoxication; (10) ineffective assistance of trial counsel in treatment of ballistics evidence; (11) ineffective assistance of counsel for failing to move for discharge under the interstate agreement on detainers; (12) trial court erred in excluding two jurors; (13) Caldwell issue and ineffective assistance of counsel; (14) burden shifting and ineffective assistance of counsel; (15) state violated Brady v. Maryland and presented misleading evidence; (16) trial court relied on a mistake of fact regarding the jury's sentencing vote; and *(17) jury instruction in violation* **of** *Cage v. Louisiana, and improper prosecutoriul comment.*

B.

CLAIM I

THIS HONORABLE COURT'S PAGE LIMITATION JOHNSON'S INITIAL BRIEF ON DIRECT APPEAL DID NOT RENDER HIS APPELLATE COUNSEL INEFFECTIVE, AND THE CLAIM IS PROCEDURALLY BARRED.

Habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal. Parker v. Dugger, 550 So. 2d 459 (Fla. 1989). An allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. Blanco v. Wainwright, -- 507 So. 2d 1377, 1384 (Fla. 1987). Medina v. State, 573 So. 2d 293 (Fla. 1990). It is clear that claims of ineffective assistance of counsel cannot be litigated on a piecemeal basis by filing successive post-conviction motions. Jones v. State, 591 So. 2d 911, 913 (Fla. 1991). A procedural bar cannot be avoided by simply couching otherwise barred claims in terms of ineffective assistance of counsel. Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990).

Johnson's first claim regarding the page limitation of his initial brief on direct appeal is raised for the first time in this proceeding. It is time barred. Further, on direct appeal, this Court recognized Johnson alleged an ineffective assistance of appellate counsel claim as follows:

> This revised transcript is also the subject of appellant's first point on appeal. He refers to inconsistencies between the original and the corrected transcripts, to the time elapsed between

> the trial and the reconstruction, and to possible omissions *which make effective assistance of appellate counsel and independent appellate review impossible.* However, he is unable to point to any omission, inconsistency or inaccuracy which prejudices the presentation of his case. The reconstruction and the evidentiary hearing were conducted pursuant to the order of this Court and in compliance with Florida Rule of Appellate Procedure 9.200(f). At the evidentiary hearing the trial judge, the court reporter and both trial attorneys testified to the substantial accuracy and completeness of the record in all material regards. In the absence of some clear allegation of prejudicial inaccuracy we see no worthwhile end to be achieved by remanding for new trial.[7] Id. at 195.

In the 8th footnote of his petition, Johnson alleges: *"Counsel was also handicapped by having to work with a transcript that was at best an approximation of what occurred at trial."* (p.14)

Clearly, Johnson is raising his ineffective assistance of appellate counsel claim in a piecemeal fashion. See Jones v. State, supra, at 913. He raised a "constructive" ineffective assistance of appellate counsel claim as to the record on direct appeal, but failed to raise at that time, that which he now alleges as another "constructive" ineffective assistance claim: page limitation. His failure to raise the current page limitation claim on direct appeal with his record claim constitutes a procedural bar.

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[7] Johnson reduntantly alleges he was prejudiced by an incomplete record throughout his petition. In that this matter has already been decided on the merits adversely to him on direct appeal, subsequent allegations are procedurally barred.

Even in the event Johnson's first claim is not procedurally barred, it cannot be credibly argued that his appellate counsel was rendered ineffective by this Court's page limitation. A comparison of the 94 page brief with the accepted 70 page brief, exhibits that they both *contain the* exact *same 10 points on appeal.* (**Ex.C, D**) In actuality, a comparison of the two briefs exhibits that Johnson's Appellate Counsel, decreased the size of his brief by decreasing the type size. He really lost nothing in content. Johnson's only specific claim of prejudice as to his first claim is that his "appellate counsel was forced to delete several passages," from his 94 page brief.. (p.17) He then includes, verbatim, Point X as it existed in his 94 page brief. (pp.17-19) However, a review of Point X of his 70 page brief exhibits that he raises the same claims as in Point X of the 94 page brief, but in abbreviated fashion. Johnson's claim is little more than form over substance. Even if Johnson's claim was viable, Johnson's appellate counsel was not ineffective.

This Honorable Court has delineated the standard of review for alleged claims of ineffective assistance of appellate counsel as follows:

> [W]hen entertaining a petition for writ of habeas corpus based on a challenge of ineffective assistance of appellate counsel, the issue before us is limited to "first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result."

Suarez v. Dugger, 527 So. 2d 190, 192-193 (Fla. 1988)(quoting Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986), cert. denied 480 U.S. 951 (1987).

The Committee Note to the 1977 Amendment to Fla. R. App. P. 9.2109(a) read in pertinent part:

> . ..A limit of 50 pages has been placed on the length of the initial and answer briefs . . . . Although the court may by order permit briefs longer than allowed by this rule, *the aduisory committee contemplates that extensions in length will not be readily granted by the courts under these rules. General experience has been that even briefs within the limits of the rule are usually excessively long.*

In Ruffin v. Wainwright, 461 So. 2d 109, 111 (Fla. 1984), this Honorable Court adopted the following position espoused by the United States Supreme Court in Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 3313-14, 77 L.Ed.2d 987 (1983), regarding appellate advocacy:

> There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts -- often to as little as 15 minutes -- and when page limits on briefs are widely imposed. See, e.g., Fed. Rules App. Proc. 28(g); McKinney's 1982 New York Ruled of Court §§ 670.17(g)(2), 670.22. Even in a court that imposes no time or page limits, however, the new *per se* rule laid down by the Court of Appeals is contrary to all experience and logic. A brief that raises every colorable issue runs the risk of burying good arguments -- those that, in the words of the great advocate John W. Davis, "go for the jugular," Davis *The Argument of an Appeal, 26*

> A.B.A.J. 895, 897 (1940) -- in a verbai mound made up of strong and weak contentions. See generally, e.g. Godbold, *Twenty Pages and Twenty Minutes -- Effective Advocacy on Appeal, 30* S.W.L.J. 801 (1976).
>
> ...For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disservice the very goal of vigorous and effective advocacy that underlies *Anders*. Nothing in the Constitution or our interpretation of that document requires such a standard. (Footnote omitted.) (Emphasis the Court's.)

The Supreme Court also opined in Jones: *"Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most a few key issues."* Id; See also, Cave v. State, 476 So. 2d 180 (Fla. 1985). Recently, this same position was more forcefully expressed by the United States Court of Appeals, Eleventh Circuit:

> Although the [federal] habeas rules require more than notice pleading, and some factual specificity will often be helpful, or even necessary, *a habeas petition should not resemble a treatise. Effective writing is concise writing.* Attorneys *who cannot discipline themselves to write concisely are not effective advocates, and they do a disservice not only to the courtsbut also to their clients.*
>
> Spaziano v. Singletary, 36 F.3d 1028, n. 2 1031 (11th Cir. 1994).

In view of this precedent,[8] Johnson's appellate counsel can hardly be found deficient for complying with this Honorable

[8] This precedent also supports Respondent's "Motion to Require the Filing of an Amended Petition for Writ of Habeas Corpus." Opposing counsel apparently believes that more is better.

Court's order that his enlarged brief be limited to 70 pages, which was 20 pages over the limit. Johnson alleges that this Honorable Court, in imposing a page limitation on his initial brief, "*. . . ruled to limit the number of issues which could effectively be raised.* "[9] (p.16) This Honorable Court limited the pages of Johnson's brief *not* the issues he could present. Again, the spuriousness of this assertion is demonstrated by the fact that *both briefs contain the exact same issues,* which clearly demonstrates that Johnson's first claim is devoid of merit.

Even if appellate counsel was deficient, owing to this Court's imposition of a page limitation on his initial brief, Johnson fails to demonstrate that the appellate process was compromised "...to such a degree as to undermine confidence in the correctness of the result." Pope v. Wainwright, supra, at 800. First, the page limitation did not affect the issues raised by appellate counsel. *The 94 page brief and the 70 page brief contain the exact same* ***points on appeal.***

Second, the only specific prejudice alleged in this claim concerns the "winnowing" of Point X of Johnson's original 94 page initial brief, which commenced with this concession:

> The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. *The issues are presented in a summary form in recognition that this court has specifically or impliedly rejected each of these challenges to the constitutionality*

[9] Respondent would alert this Honorable Court to the fact that this representation will go before the Middle District when he returns-to federal court.

> *of the Florida statute and thus detailed briefing would be futile. . . .*
>
> (p.17 of petition; p.92 of original initial brief.)

Point X, at page 68 of Johnson's 70 page initial brief commenced:

> The following issues are presented in summary form because *it is recognized that this Court has specifically or impliedly rejected each of the challenges to the constitutionality of the Florida death sentencing statute.*

Johnson then listed the same matters in his accepted brief that he raised in Point X of his 94 page brief, albeit in abbreviated form, demonstrating that he was not prejudiced by the page limitation.

In addition to the precedent previously cited regarding the presentation of an appellant's strongest arguments, appellate counsel is not deficient for failing to raise an issue where controlling case law is adverse to his position. See, Herring v. Dugger, 528 So. 2d 1176, 1177 (Fla. 1988). Further, the failure of appellate counsel to brief an issue which is without merit is not deficient performance which falls measurably outside the range of professionally acceptable performance. Suarez v. Dugger, supra; See also, Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986). Where a point has little merit, appellate counsel cannot be faulted for not raising it on appeal. Atkins v. Dugger, 541 So. 2d 1165, 1167 (Fla. 1989). If there is no chance of convincingly arguing a particular issue, then appellate counsel's failure to raise that issue is not a substantive, serious deficiency and the first prong of Strickland v.

Washington, 466 U.S. 668 (1984), is not met. Engle v. Isaac, 456 U.S. 107 (1982); Ruffin v. Wainwright, supra.

CLAIM II

JOHNSON'S APPELLATE COUNSEL WAS EFFECTIVE AS REGARDS AGGRAVATING CIRCUMSTANCES, AND THIS CLAIM IS PROCEDURALLY BARRED.

A. JURY INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES.

At no time has Johnson ever specifically challenged his penalty phase jury instructions on the aggravating circumstances 1. "cold, calculated and premeditated," 2. "heinous, atrocious and cruel," 3. "committed while engaged" in a robbery, or 6. "great risk of harm" and "disrupt or hinder," as he now presents to this Court in the instant petition. This claim, as it relates to these challenged jury instructions, is unequivocally procedurally barred because (1) no objection to the instructions as now presented to this court was ever presented at Johnson's trial (R.475-81, 529-34); (2) they were never challenged on direct appeal as they are now challenged; (3) they were never raised in his motion for post-conviction relief; and (4) they are time barred. See Adams v. State, 543 So. 2d 1244, 1249 (Fla. 1989). As regards the remainder of his challenged jury instructions they too are time barred, as well as procedurally barred on other grounds.

This was Johnson's *sixth* claim in federal court, which along with his *seventeenth* claim, he represented he could raise in this Court. An allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule **that**

habeas corpus proceedings do not provide a second or substitute appeal. Blanco v. Wainwright, supra, at 1384; Medina v. State, 5supra.

Incomplete Record

As regards Johnson's incomplete record argument under this claim, he alleged ineffective assistance of appellate counsel owing to an incomplete record on direct appeal. Johnson v. State, 442 So. 2d at 195. As with his first claim, he is raising his ineffective assistance of appellate counsel claim in a piecemeal fashion. Jones v. State, supra at 913. His footnote 14 again questions the completeness of the record, which of course is procedurally barred, as delineated in Claim I supra.

In footnote 17, he again complains of the incompleteness of the record, while adding a new twist: "...[A] reconstruction was held without the presence of Mr. Johnson or his then counsel." (p.30) Under Florida law, the defendant is required to be present at certain critical stages. Fla. R. Crim. P. 3.180. Record reconstruction is not a critical stage of the proceeding. See Provenzano v. State, 561 So. 2d 541, 547-548 (Fla. 1990). In this same footnote, he argues the transcript is not complete because bench conferences were unrecorded. Failure to record bench conferences does not violate a defendant's constitutional rights. See Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1984); Gaskin v. State, 591 So. 2d 917, 920 (Fla. 1991).

Respondent would also take exception to the following characterization by Johnson in that same footnote:

> Neither the judge, the prosecutor nor trial counsel, could be sure that Mr. Johnson's numerous objections and efforts to preserve claims of error were included in the correct [sic] record. (p.30)

His petition is ripe with such commentary, and to the extent it is critical of the record, this Court disposed of the record issue on the merits on direct appeal. The trial court's order following the reconstruction hearing says it all:

> The trial itself was short, and the evidence was not complicated. The judge and the attorneys in the case could indicate no significant or material fault in the corrected transcript. What corrections they offered, if accepted, would not materially change the transcript. *No relevant or substantial errors or omissions were revealed by witnesses or even appellate counsel that would prejudice Johnson's appeal.*
>
> A *number of bench, conferences were not recorded, because no one requested the court reporter to record them. This is quite common during a trial. There is no indication of relevant arguments or objections going unreported in the transcript.*
>
> The deposition of defendant, Terre11 Johnson, taken at Florida State Prison fails to recite any error of significance in the trial transcripts.
>
> The "expert testimony" of Dr. Elizabeth Loftus is nothing more than what common sense tells us: memories fade over time, and the ability to correctly remember events can be enhanced by being reminded of certain things about the events to be recalled.
>
> The "suspected errors" and "errors suspected from the context" raised by defense counsel turn out to be few, isolated instances in the record that, in context, are not any more unusual than other records of human dialogue.

> *Not even one prejudicial error or omission was shown. Neither defendant nor his counsel has offered even one correction or addition to the transcript after it was proofread and corrected by the court reporter.*
>
> (R.1930-1931; Ex.E)

This Honorable Court accepted these findings. Johnson v. State., *442* So. 2d 193, 195 (Fla. 1983). Besides being procedurally barred, Johnson's incomplete record aspect of his second **claim** is meritless.

Page Limitation

Respondent has already demonstrated in his argument to Johnson's first **claim** that his appellate counsel was not rendered ineffective by this Court's page limitation. See Respondent's argument on his first claim. As pointed out therein, the same 10 issues appear in both briefs. Even if this Court had accepted the 94 page initial brief, the jury instruction points would not have not have been properly presented on appeal pursuant to Henderson v. Dugger, 925 F.2d 1309, 1316-17 (11th Cir. 1991).

Appellate Counsel's Performance

In that no objection to the jury instructions on aggravating circumstances as now presented to this Court was ever presented at Johnson's trial, Johnson's appellate counsel cannot be found deficient for failing to raise claims on direct appeal which were not properly preserved. Suarez v. Dugger, supra, at 193.

With the explicit understanding that Johnson's present challenges to all ***of the*** *jury instructions on aggravating circumstances are procedurally barred, and without waiving procedural bar,* Respondent will address each of the individual jury instructions Johnson challenges.

1. "Cold, calculated and premeditated" aggravating circumstance.

a. Overbroad Aggravator.

Johnson's argument as to this matter *is procedurally burred.* On direct appeal, he argued this aggravating circumstance was not applicable to his case, in both his rejected and accepted initial brief. (See limited brief at p.53, rejected brief at p.69.) As previously delineated, even if this Court had accepted his 94 page initial brief on direct appeal, he still would not have presented a claim related to overbreadth as he now presents to this Court. Fla. R. Crim. P. 3.390(d); See Henderson v. Singletary, supra, at 315-316; Henderson v. Dugger, supra, at 1316-1317. Further, this statutory aggravating circumstance is constitutional. See Jackson v. State, 19 Fla. L. Weekly S215, S216 (Fla. April 21, 1994); Fennie v. State, 19 Fla. L. Weekly S370, 371 (Fla. July 7, 1994).

b. Jury Instruction.

Johnson's challenge to the cold, calculated and premeditated jury instruction is procedurally barred because (1) no objection to the instruction as now presented to this Court was ever presented at Johnson's trial (R.475-81, 529-34); (2) it was never challenged on direct appeal as it is now challenged; (3) it was never raised in his motion for post-conviction relief; and (4) it is time barred. See Adams v. State, supra, at 1249; Henderson v. Dugger, supra, at 1316-1317. The objection seen on page 31 of the petition, is insufficient to preserve a vagueness challenge, as it is a challenge to the sufficiency of the evidence

supporting the giving of the instruction, not as to the vagueness of the instruction itself. Id. Any additional argument on this instruction should have been raised on direct appeal. **Jones v. Dugger**, 565 So. 2d 290 (Fla.' 1988). "Claims that the instruction on the cold, calculated, and premeditated aggravator is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal." Jackson v. State, supra, at S217 (quoting James v. State, 615 So. 2d 668, 669 & n.3 (Fla. 1993)).

A procedural bar cannot be avoided by simply couching otherwise barred claims in terms of ineffective assistance of counsel. Kight v. Dugger, supra. An allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. Blanco v. Wainwright, supra. This Honorable court has ruled that Maynard v. Cartwright, 486 U.S. 356 (1988), is not applicable to the cold, calculated and premeditated factor, in that it is not such a fundamental change in the law as will provide post-conviction relief. Swafford v. Dugger, 569 So. 2d 1264, 1267 (Fla. 1990); Jones v. Dugger, 533 So. 2d 290 (Fla. 1988); Daugherty v. State, 533 so. 2d 287 (Fla. 1988). Johnson's appellate counsel cannot be deemed ineffective for failing to raise an argument, which was not properly preserved in the trial court. Suarez v. Dugger, supra, at 193.

Without conceding that his appellate counsel was ineffective, the evidence adduced at trial demonstrated that

there was an "execution style murder," which has been held sufficient to establish the cold, calculated and premeditated aggravating circumstance. See Fotopoulos v. State, 608 So. 2d 784, 792-93 (Fla. 1992); Maharaj v. State, 597 So. 2d 786 (Fla. 1992), cert. denied, 113 S.Ct. 1029 (1993). The trial court's sentencing order exhibits the following finding regarding the aggravator "avoiding or preventing a lawful arrest":

> ...[A]fter the robbery he marched the two men into the restroom at gun point; he *forced them to lie face down on the floor;* he shot the patron several times; *he shot the victim once through the head at close range;* he went out into the bar to wipe away his fingerprints; and then, when he heard moaning, went back to the restroom and shot the patron who was still alive one or more times. This is an aggravating circumstance.
>
> (R.806)

This finding establishes that there was an "execution style murder", which supports the giving of the instruction. The outcome of his penalty phase would not have been different given this "cold, calculated and premeditated" factor. That is, Dodson's murder was cold, calculated and premeditated under any instruction, and any error was harmless beyond a reasonable doubt. See Henderson v. Singletary, supra, at 315, 316-317.

2. "Heinous, atrocious or cruel" aggravating circumstance.

Johnson's argument as to this claim *is procedurally barred* because (1) no objection to the instruction as now presented to this Court was ever presented at Johnson's trial (R.475-81, 529-

34); (2) it was never challenged on direct appeal as it is now challenged; (3) it was never raised in his motion for post-conviction relief; and (4) it is time barred. See Adams v. State, supra, at 1249; Davis v. State, revised opinion, 20 Fla. L. Weekly S55, S56 (Fla. February 2, 1995); Koon v. Dugger, 619 So. 2d 246, 248 (Fla. 1993); Henderson v. Singletary, supra at 315-316; Remeta v. Dugger, 622 So. 2d 452, 456 (Fla. 1993), citing Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 2120, 119 L.Ed.2d 326 (1992) (similar argument regarding vagueness of jury instruction would not be heard by United States Supreme Court when found not to be properly preserved.) Even if this Court had accepted his 94 page initial brief on direct appeal, he still would not have presented a claim related to the "heinous, atrocious and cruel" jury instruction as he now presents to this Court. Fla. R. Crim. P. 3.390(d); See Henderson v. Singletary, supra, at 315-316; Henderson v. Dugger, supra, at 1316-1317.

Beyond that, Johnson's trial counsel argued to the jury:

> Now, the prosecutor would have you believe that Mr. Dodson, in the cruel, heinous, atrocious section, suffered. Certainly he suffered. And, I'm not here to minimize his actions or Mr. Johnson's actions or Mr. Dodson's suffering. I'm sure he heard the shots go off for whatever brief period of time before he was shot. But that, I submit to you, is not the type of circumstance that this aggravating circumstance is geared for. Rather, it's something along the lines of torturing. *Let me read you part of that,*
>
> *"Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile cruel means designed to inflict a high degree of pain: utter indifference to, or enjoyment of, the suffering of others, pitiless."*

> *There must be something that would set this apart from the norm. There must be a consciousless [sic] or pitiless crime which was unnecessarily torturous to the uic tim. Unnecessarily torturous to the uic tim. "*

(R.516-517)

Johnson's appellate counsel cannot be considered ineffective for failing to raise a claim which was not objected to at trial, and in fact was actually ratified by his trial counsel. Suarez v. Dugger, supra, at 193.

In addition, Johnson conceded in his petition: *"[T]he trial judge ruled that as a matter of law this aggravator was not present and did not apply to Mr. Johnson's case (R.806). "* (p.35) Where the murder is not found to be heinous, atrocious or cruel, this Court has found Maynard v. Cartwright, 486 U.S. 356 (3.988) to be inapplicable. Jones v. Dugger, 533 So 2d 290, 292 (Fla. 1958).

Further, the instruction on heinous, atrocious and cruel in this cause was proper as given under Proffit v. Florida, 428 U.S. 242 (1976) and Espinosa v. Florida, U.S. , 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), because it included the language: *"conscienceless or pitiless crime which is unnecessarily torturous to the victim. "* See Sochor, 112 S.Ct. at 2121.

The crux of Johnson's claim seems to be that the "heinousness" factor is invalid and the jury, which was instructed on it, weighed it. In his view, the error in such consideration renders the sentence infirm since the jury is a constituent part of the sentence. AS was the case in Sochor, 112 S.Ct. at 2122, however, because the jury does not reveal the

aggravating factors on which it relies, it cannot be known whether the jury relied on the heinousness factor. The same result as in Sochor should obtain: jury error should not be presumed when the instruction is proper, as a jury *"is indeed likely to disregard an option simply unsupported by evidence."* Sochor. 112 S.Ct. at 2122 (Justice Souter, delivering the opinion of the court). Recently, this Honorable Court has ruled in keeping with such an analysis. See Occhione v. Singletary, 618 so. 2d 730 (Fla. 1993); Johnson v. State, 608 So. 2d 4 (Fla. 1992), cert. denied, 113 S.Ct. 2366 (1993). In those opinions, this Court reasoned that the jury, although improperly instructed on the aggravator and although the evidence was legally insufficient to support it, would not have been led to make an improper finding of the aggravator, precisely because the evidence was insufficient.

Even if the claim had been properly preserved, the trial court had applied the instruction, and it was invalid, without conceding procedural bar as to this claim, this aggravator existed under any instruction. See Sochor; Remeta v. Dugger, supra at 456; Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1994). Therefore, even if the instruction was in error, which it wasn't, it was harmless beyond a reasonable doubt and did not affect Johnson's sentence. Id; Henderson v. Singletary, supra, at 315-316.

Finally, none of the cases cited by Johnson stand for the proposition that the trial judge must find this aggravator where the jury is instructed upon it. The trial court is the ultimate sentencer in Florida, as the United States Supreme Court recently

pointed out. Harris v. Alabama, S.Ct. , 1995 WL 68422 (U.S.Ala. February 22, 1995). To rule as Johnson suggests would be contrary to Florida's sentencing scheme, and would render the trial court no more than a rubber stamp for the jury.

3. "Committed while engaged" in a robbery aggravating circumstance.

As with Johnson's first two claims, his third claim is procedurally barred because (1) no objection to the instructions as now presented to this Court was ever presented at Johnson's trial (R.475-81, 529-34); (2) they were never challenged on direct appeal as they are now challenged; (3) they were never raised in his motion for post-conviction relief; and (4) it is time barred. See Adams v. State, 543 So. 2d 1244, 1249 (Fla. 1989); Henderson v. Singletary, supra, at 315-316; Bertolotti v. State, 534 So. 2d 386, 387 n. 3 (Fla. 1988). This issue cannot be raised on habeas corpus. Parker v. Dugger, 537 So. 2d 969, 973 (Fla. 1989). Even if this Court had accepted his 94 page initial brief on direct appeal, he still would not have presented a claim related to the "avoiding arrest" jury instruction as he now presents to this Court, Fla. R. Crim. P. 3.390(d); See Henderson v. Singletary, supra, at 315-316; Henderson v. Dugger, supra, at 1316-1317.

Even if it was not procedurally barred, Johnson's argument of an "automatic aggravator" with felony murder, was rejected in Lowenfield v. Phelps, 484 U.S. 231, 246 (1988): "...[T]he fact that the aggravating circumstance duplicated one of the elements

of the crime does not make this sentence constitutionally infirm." See Roberts v. State, 568 So. 2d 1255 (Fla. 1990); Smith v. Dugger, 565 So. 2d 849 (Fla. 1990); Correll v. Dugger, 558 So. 2d 422 (Fla. 1990); Duest v. Dugger, 555 So. 2d 849 (Fla. 1990). Appellate counsel cannot be deemed ineffective for failing to raise an unpreserved or meritless claim. Suarez v. Dugger, supra, at 193; Card v. State, supra, at 1177.

4. "Avoiding arrest" aggravating circumstance.

Besides being time barred, there was no objection to this aggravator at the conclusion of the penalty phase jury instructions. (R.475-81, 529-34) In that it was unpreserved, Johnson's appellate counsel could not have been faulted for failing to raise it. Suarez v. Dugger, supra, at 193. Even if this Court had accepted his 94 page initial brief on direct appeal, he still would not have presented a claim related to the "avoiding arrest" jury instruction as he now presents to this Court. Fla. R. Crim. P. 3.390(d); See Henderson v. Singletary, supra, at 315-316; Henderson v. Dugger, supra, at 1316-1317. Therefore, it is procedurally barred. See Blanco v. Wainwright, supra, at 1384; Jones v. Dugger, supra, at 292.

Even if it were not, the instruction as given was good and supported by the evidence, as the following finding by the trial court demonstrates:

> (E) The crime for which Defendant is to be sentenced was for the purpose of avoiding or preventing a lawful arrest, in that the evidence is clear that the Defendant intended to eliminate the bar

> owner victim and patron as witnesses by killing them so as to avoid detection and arrest. The evidence showed that the Defendant was known to the bar owner as "'Terry"; the Defendant test fired the revolver in an adjacent lot before the robbery; after the robbery he marched the two men into the restroom at gun point; he forced them to lie face down on the floor; he shot the patron several times; he shot the victim once through the head at close range; he went out into the bar to wipe away his fingerprints; and then, when he heard moaning, went back to the restroom and shot the patron who was still alive one or more times. This is an aggravating circumstance. (R.806)

See Fotopoulos v. State, supra, at 792; Henry v. State, 613 So. 2d 429 (Fla. 1992), cert. denied, 114 S.Ct. 699 (1994). Johnson's appellate counsel's performance cannot be deemed deficient simply for failing to convince this Court of his argument on direct appeal. Herring v. Dugger, supra, at 1177.

5. "Prior felony" aggravating circumstance.

There was no objection at the conclusion of the penalty phase jury instructions as to this aggravator. (R.475-81, 529-34) In that it was unpreserved, Johnson's appellate counsel could not have been faulted for failing to raise it. Suarez v. Dugger, supra, at 193. Even if this Court had accepted his 94 page initial brief on direct appeal, he still would not have presented a claim related to the "prior felony" jury instruction as he now presents to this Court. Fla. R. Crim. P. 3.390(d); See Henderson v. Singletary, supra, at 315-316; Henderson v. Dugger,, supra, at 1316-1317. Therefore, it is procedurally barred. See Blanco v. Wainwright, supra, at 1384; Jones v. Dugger, supra, at 292.

Again, Johnson is attempting to circumvent the rule that habeas corpus proceedings do not provide a second or substitute appeal. Blanco v. Wainwright, supra, at 1384. Again, Johnson's appellate counsel's performance cannot be deemed deficient simply for failing to convince this Court of his argument on direct appeal, particularly when it was unpreserved. Herring v. Dugger, supra.

6. Other aggravators

As with Johnson's first three aggravator claims, his sixth claim is procedurally barred because (1) no objection to the instructions as now presented to this Court was ever presented at Johnson's trial (R.475-81, 529-34); (2) they were never challenged on direct appeal; (3) they were never raised in his motion for post-conviction relief; and (4) it is time barred. See Adams v. State, 543 So. 2d 1244, 1249 (Fla. 1989); Henderson v. Singletary, supra, at 315-316; Bertolotti v. State, 534 So. 2d 386, 387 n. 3 (Fla. 1988). Even if this Court had accepted his 94 page initial brief on direct appeal, he still would not have presented a claim related to the "great risk of harm" and "disrupt or hinder" jury instructions as he now presents to this court. Fla. R. Crim. P. 3.390(d); See Henderson v. Singletary, supra, at 315-316; Henderson v. Dugger, supra, at 1316-1317. Therefore, it is procedurally barred. See Blanco v. Wainwright, supra, at 1384; Jones v. Dugger, supra, at 292. Johnson's appellate counsel was not deficient for failing to raise unpreserved claims. Suarez v. Dugger, supra, at 193.

7. Harmless error.

Respondent has demonstrated that under each of the aggravators improperly challenged in this habeas petition, there was either no error, or if there was, it was harmless. Under such circumstances, alternative allegations of ineffective assistance of appellate counsel also cannot prevail. See Henderson v. Singletary, supra, at 315, 316-317.

B. CONCLUSION

First, and foremost, each of the aggravator claims made by Johnson are *procedurally barred.* As previously discussed, Johnson's second claim is the quintessential example of a blatant attempt to circumvent the rule that habeas corpus proceedings do not provide a second appeal. He has abused the post-conviction process by couching otherwise barred claims in terms of ineffective assistance of appellate counsel. Kight v. Dugger, supra. He has litigated his ineffective assistance of counsel claims in piecemeal fashion. Jones v. Dugger, supra.

Just as Johnson's trial counsel could not be deemed ineffective for failing to advance an argument before a particular change of law was announced, Johnson's appellate counsel cannot be found to be deficient for failing to foresee "evolutionary refinements" in the criminal law. See Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Witt v. State, supra at 929. Nor can he be found deficient for failing to raise claims on direct appeal which were not properly preserved. Suarez v. Dugger, supra, at 193. As to those claims decided adversely to him an direct appeal, his appellate counsel cannot be deemed

deficient simply for failing to convince this Court of his argument. Herring v. Dugger, supra, at 1177 (Fla. 1988). Therefore, appellate counsel's performance fell well within the parameters of an objective standard of reasonableness, and Johnson has failed to satisfy the first prong of the Strickland two-part test.

Without conceding that he was, even if appellate counsel was deficient, Respondent's prior analysis as to each of the challenged aggravators should serve to demonstrate that the appellate outcome would not have been different. Suarez v. Dugger, supra, at 192-193.

CLAIM III

JOHNSON'S APPELLATE COUNSEL WAS EFFECTIVE AS REGARDS THE REASONABLE DOUBT INSTRUCTION, AND THIS CLAIM IS PROCEDURALLY BARRED.

Johnson's third claim is similar to his *seventeenth* claim raised in federal court. As with his sixth federal claim, Respondent argued it was procedurally defaulted. Respondent argues *it is procedurally barred in this proceeding* because (1) neither the guilt phase reasonable doubt instruction, or the prosecutor's alleged argument thereon, were specifically objected to at trial in the manner in which they are now challenged (R.318-19); (2) they were never specifically challenged on direct appeal: (3) they were never specifically raised in his motion for post-

conviction relief; and (4) they are time barred. See Adams v. State, 543 So. 2d 1244, 1249 (Fla. 1989); Henderson v. Singletary, supra, at 315-316.

Habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial. Parker v. Dugger, supra. Johnson's appellate counsel cannot be deemed ineffective for failing to raise a claim on direct appeal which was not properly preserved. Suarez v. Dugger, supra, t 193. Again, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second OK substitute appeal. Blanco v. Wainwright, supra at 1.384. Claims of ineffective assistance of counsel cannot be litigated on a piecemeal basis by filing successive post-conviction motions. Jones v. State, supra, at 913.

Page Limitation

To the extent that Johnson may claim that the direct appeal page limitation is an "external factor", that claim is meritless. See respondent's argument as to Claim I. In that claim, Johnson alleged the following portion of his 94 page brief was deleted in his 70 page brief:

> The trial court's defining "reasonable doubt" as "a doubt for which there is a reason" denies due process by shifting the burden of proof to the defendant to prove "a reason, (R308)" (p.94)

This is not the claim Johnson raises now. Further, Johnson's record cite pertains to the guilt phase reasonable doubt instruction, but he placed it under the following generic claim relating to capital sentencing:

POINT X

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED. (p.92)

Even if he had included the aforementioned claim on direct appeal, it would not have been available to him as a ground for relief because it was not preserved at trial. (R. 318-319)

Incomplete Record

The same reasoning applies to his incomplete record argument, which is duplicative of an issue raised on direct appeal, and which was rejected on the merits. Johnson v. State, 442 So. 2d 193, 195 (Fla. 1983). See respondent's argument as to Claim I. In fact, the record clearly demonstrates this claim is procedurally barred. (R.318-319). After the guilt phase jury instructions were given, "the *only two*" objections he had to the instructions as given, including the one on reasonable doubt, related to rejected self-defense and attempted first degree murder instructions. (R.312-319).

Cage v. Louisiana

Johnson's trial counsel could hardly be found deficient for failing to predict the holding in Cage v. Louisiana, 498 U.S. 39, 41, 111 S.Ct. 328, 329-30, 112 L.Ed. 2d 339 (3.990). As the United States Eleventh Circuit observed:

> Because Alabama courts had rejected similar claims and the Supreme Court had not yet decided Cage, trial counsel had no basis for objecting to the trial court's instruction on reasonable doubt. Trial counsel's.failure to object to the instruction was, therefore, reasonable. Because trial counsel acted reasonably, his representation in this regard was not deficient, and we need not address whether the alleged failure caused Walker prejudice. . . .
>
> Walker v. Jones, 10 Fed. 3d 1569, 1573 (11th Cir. 1994).

This reasoning is equally applicable to this cause.[10] Of course the same applies to any allegation of ineffective assistance of

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[10] A different standard "reasonable doubt" instruction became effective in 1981, a year after Johnson's trial. In re Standard Jury Instructions (Criminal), 431 So. 2d 594 (Fla.), as modified on other grounds, 431 So. 2d 599 (Fla. 1981). The instruction is used to this day and reads as follows:

> A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which waivers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.
>
> Brown v. State, 565 So. 2d 304, 307 n.8 (Fla. 1990).

Respondent was unable to find an opinion emanating from this Court interpreting the "moral certainty" portion of the "reasonable doubt" instruction given in Johnson's trial. There was one district court opinion however. In Thomas v. State, 220 so. 2d 650 (Fla. 3d DCA 1969), the Third District held in part "*. . . that failure to include phrase 'to a moral certainty' in charge an reasonable doubt did not destroy validi ty of charge inasmuch as phrases 'reasonable doubt ' and 'moral certainty' as used in such charges are interchangeable and synonymous.*

appellate counsel owing to an inability to foresee evolutionary changes in Florida's criminal law. See Stevens v. State, supra.

Alternatively, this claim would not entitle Johnson to relief even if it were not procedurally barred. Cage, as recently interpreted in Victor v. Nebraska, 114 s. ct. 1239 (1994), is not applicable to the standard instruction given in Johnson's trial, which was:

> Now, the defendant has pled not guilty. He is presumed to be innocent and this presumption stays with him throughout the trial unless and until each essential element of the charge is proved beyond and to the exclusion of every reasonable doubt.
>
> The burden rests always upon the State to prove the defendant's guilt. The defendant is not required to prove his innocence.
>
> Proof beyond a reasonable doubt means to a moral certainty. It does not mean to an absolute or mathematical certainty.
>
> A reasonable doubt is a substantial, honest, conscious doubt for which there is a reason. It must arise from the evidence or lack of evidence.
>
> A mere possible doubt, an imaginary or speculative doubt or one which comes from matters outside the evidence and applicable law is not a reasonable doubt.
>
> *The test you should use is this; if, after carefully considering the evidence, arguments of counsel and the instructions of the law giuen by the Court, you have a full, firm and abiding belief of the defendant's guilt of the offense charged, or of a lesser included offense, then there is no reasonable doubt and you should find the defendant guilty of the offense charged or of the lesser included offense.*

> If, on the other hand, after doing so, you do not believe the defendant is guilty, or your belief of his guilt is one which waivers and vacillates, then there is reasonable doubt and you should find him not guilty.
>
> *You are the sole judges of the weight and sufficiency of the evidence and of the credibility of the witness.*
>
> ...
>
> *You are to lay aside any personal feeling you may have in fauor or, or against, the state and in favor of, or against, the defendant. It is only human to have personal feeling or sympathy in matters of this kind, but any such personal feeling or sympathy has no place in the consideration of your verdict.*

(R.308-309, 313)

First, the language found most offensive in Cage, "grave uncertainty" is absent in Johnson's reasonable doubt instruction. See Gaskins v. McKellar, 111 S.Ct. 2277 (1991) (Stevens, J., on denial of certiorari). Second, as regards the "moral certainty" language, Justice O'Connor, in Victor, delivering the opinion of the entire Supreme Court, opined:

> But the moral certainty language cannot be sequestered from its surroundings. In the *Cage* instruction, the jurors were simply told that they had to be morally certain of the defendant's guilt: there was nothing else in the instruction to lend meaning to the phrases. Not so here. The jury in Sandoval's case was told that a reasonable doubt is "that state of the case which, *after the entire comparison and consideration of all the evidence,* leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of charge."

> Sandoval[11] App. 49 (emphasis added). The instruction thus explicitly told the jurors that their conclusion had to be based on the evidence in the case. Other instructions reinforced this message. The jury was told "to determine the facts of the case from the evidence received in the trial and not from any other source." *Id, at 38.* The judge continued that "you must not be influenced by pity for a defendant or by prejudice against him ... You must not be swayed by mere sentiment, conjecture, sympathy, passion prejudice, public opinion or public feeling." *Id, at 39.* Accordingly, there is no reasonable likelihood that the jury would have understood moral certainty to be disassociated from the evidence in the case.
>
> We do not think it is reasonably likely that the jury understood the words more certainly either as suggesting a standard of proof lower than due process requires or as allowing conviction on factors other than the government's proof. . . .
>
> Id. at 1.248.

A review of the emphasized portions of Johnson's instruction demonstrates that it was not "...reasonably likely that the jury understood the words moral certainty either as suggesting a standard of proof lower than due process requires or as allowing conviction on factors other than the government's proof." Id.

On the matter of "substantial doubt" in Victor's instruction, Justice O'Connor, joined by Rehnquist, C.J., and Stevens, Scalia, Kennedy, and Thomas, JJ., wrote: [12]

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[11] Victor was combined with another case, Sandoval v. California.

[12] Respondent was unable to find any Florida cases interpreting "substantial doubt" prior to the change in the standard instruction in 1981.

...Any ambiguity [as to "substantial doubt"], however, is removed by reading the phrase in the context of the sentence in which it appears: "A reasonable doubt is an actual and substantial doubt . . . *as distinguished from* a bare imagination, or from fanciful conjecture." Victor App. 11 (emphasis added).

This explicit distinction between a substantial doubt and a fanciful conjecture was not present in the Cage instruction. We did say in that case that "the words 'substantial' and 'grave', as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard". (citation omitted) But we did not hold that the reference to substantial doubt alone was sufficient to render the instruction unconstitutional. Cf. *Taylor v. Kentucky*, 436 U. S., at 488, 98 S.Ct., at 1936 (defining reasonable doubt as a substantial doubt, "though perhaps *not in itself reversible error*, often has been criticized as confusing") (emphasis added). Rather, we were concerned that the jury would interpret the term "substantial doubt" in parallel with the preceding reference to "grave uncertainty", leading to an overstatement of the doubt necessary to acquit. In the instruction given in Victor's case, the context makes clear that "substantial" is used in the sense of existence rather than magnitude of the doubt, so the same concern is not present.

In any event, the instruction provided an alternative definition of reasonable doubt: a doubt that would cause a reasonable person to hesitate to act. This is a formulation we have repeatedly approved, *Holland v. United States*, 348 U.S. at 140, 75 S.Ct. at 137; cf. *Hopt v. Utah*, 120 U.S., at 439-441, 7 S. Ct., at 613-620, and to the extent the word substantial denotes the quantum of doubt necessary for acquittal, the hesitate to act standard gives a common

> sense benchmark for just how substantial such a doubt must be. We therefore do not think it reasonably likely that the jury would have interpreted this instruction to indicate that the doubt must be anything other than a reasonable one.
>
> Id. 1250.

Johnson's' instruction included this language:

> *A reasonable doubt is a substantial, honest, conscious doubt for which there is a reason. It must arise from the evidence or lack of evidence.*
>
> *A mere possible doubt, an imaginary or speculative doubt, or one which comes from matters outside the evidence and applicable law is not a reasonable doubt.*
>
> *If, on the other hand, after doing so, you do not believe the defendant is guilty, or your belief of his guilt is one which waivers and vacillates, then there is reasonable doubt and you should find him not guilty.*
>
> (R.308-309)

In light of Victor, it is not "...reasonably likely that the jury would have interpreted this instruction to indicate that the doubt must be anything other than a reasonable one." Id.[13]

Thus, Johnson's trial counsel could hardly have been ineffective for failing to object to the standard jury instruction given at the time. Likewise, his appellate counsel was not ineffective for failing to raise a meritless claim. Suarez v. Dugger, supra; See also, Card v. State, supra, at 1177. Besides the fact that there is a triple layer of

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[13] This analysis renders the "retroactive effect" found by the 11th in Nutter v. White, 39 F.3d 1154 (11th Cir. 1994) moot, in that the merits of the claim in that cause were never reached.

procedural bar as to this claim, simply put, there was no Cage issue.

CLAIM IV

APPELLATE COUNSEL WAS EFFECTIVE REGARDING ALLEGED OF INADEQUATE MENTAL EXPERT ASSISTANCE, AND THIS CLAIM IS PROCEDURALLY BARRED.

This claim was raised in Johnson's motion for post-conviction relief, and he concedes (pp. 60-61) this Court found it procedurally barred. Johnson v. State, 593 So. 2d, 208 (Fla. 1992). A procedural bar cannot be avoided by simply couching otherwise barred claims in terms of ineffectiveness assistance of counsel. Kight v. Dugger, supra. Even if cognizable, it is devoid of merit.

A. Evaluation

Trial counsel had Johnson's prior evaluations from Memorial Hospital, from the psychiatrist in Oregon and three south Florida reports. Counsel talked with Dr. deBlij and it was her testimony that was presented. As seen in her report (M.762-63) and penalty phase testimony (R.449-463) she was well aware of Johnson's background back to 1972 and his family background back to childhood. Trial counsel additionally wanted a recent profile and asked Cassady. Cassady's profile was consistent with the other reports: deBlij's assessment of personality disorder and alcoholism (R.453); Dr. Ramayya's assessment of character disorder and alcoholic problems (M.574); Dr. Greener's assessment of antisocial personality disorder, alcohol and drug addictions

(M.582-85); Dr. Gardiner's assessment of personality disorder (M.612); Dr. Golwyn's assessment of antisocial personality (M.669); and Hollywood Pavilion report of history of antisocial behavior (M.730). Dr. McMahon said Johnson had a characterological disorder.

If Cassady's evaluation was incompetent, so was at least five other doctors' evaluations, including that of a current defense witness. The information provided at the post-conviction evidentiary hearing was cumulative to that presented in the penalty phase. Further, the jury was well aware of Johnson's background, alcoholism, the personality disorder, his good nature and his attempts at rehabilitation.

There was no reason for trial counsel to object to the use of Cassady's report since there was nothing in the report that was inconsistent with Dr. deBlij's testimony. She disagreed with the conclusion of antisocial personality, but she informed the jury that the Cassady report was not in evidence and was not reviewed by the jury. (See Index to Evidence in record on direct appeal.) The only time Cassady was mentioned by the prosecutor was during cross-examination of Dr. deBlij. Dr. deBlij agreed with most of Cassady's report. Jones did ask Dr. deBlij about statuary mitigation, and she testified Johnson was able to appreciate the criminality of his conduct.

The fact that counsel requested Cassady's testing a week before trial is not an indication of incompetency. Janes had requested all the other psychological information in June, He had Cassady's report before trial, Cassady did not need background information. He was simply to administer tests.

Whether Cassady's assistance was competent, did not prejudice Johnson since his evaluation was not relied on in the penalty phase. Although Johnson alleges the trial court used Cassady's report in imposing the death sentence, the trial court order does not mention anything found in that report. (R.804-807) The trial court order does relate to Dr. deBlij's testimony at the penalty phase. For example, the impulsive personality with depressive features, with a secondary diagnosis of alcoholism and drug abuse (R.805); corresponds to Dr. deBlij's testimony at the penalty phase. (R.453) Dr. deBlij testified Johnson could appreciate the criminality of his conduct. (R.459, 805) The information in the trial court order regarding nonstatutory mitigation was derived from the penalty testimony: traumatic childhood (R.462, 465); periodic separation from alcoholic parents (R.438-39, 446, 462, 465-66); loss of brother and mother (R.442-43, 470); recognition of need for treatment (R.447, 454, 471); completion of treatment program (R.445, 471); mature when not drinking or being put down (R.442, 445, 456).

Johnson's reliance on Ake v. Oklahoma, 470 U.S. 68, 105 S. ct. 1087 (1985), is misplaced. In Ake, the defense wished to raise an insanity defense, and was unable to do so during the guilt or sentencing phase. In this 'cause, there were no insanity or alcoholism defenses raised for the obvious reason that the facts refuted a possible diminished capacity defense. Johnson functioned in a rational manner at the time he committed the murders. A defendant's mental condition is not necessarily at issue in every criminal proceeding. Ake, 105 S.Ct. at 1096.

Absolutely no evidence existed at the time of the trial, nor is it now alleged, that Johnson lacked sufficient present ability to consult with and aid his attorney in the preparation of a defense with a reasonable degree of understanding.

Ake was not decided until 1985, and Johnson has not alleged that it should be applied retroactively. Since Ake was decided five years after the trial, Johnson's trial counsel cannot be ineffective for failing to anticipate this opinion. See Steven v. State, supra. The same applies to any claim against his appellate counsel. In any event, Johnson has failed to show that had Jones gotten *another* "independent" mental health expert, that it would have made the slightest difference, because he presented an independent mental health expert, Dr. deBlij. Johnson's appellate counsel cannot be faulted for raising a meritless claim. Suarez v. Dugger, supra, at 193; Card v. State, supra, at 1177.

B. Estelle v. Smith

Claims based upon Estelle v. Smith, 451 U.S. 454 (1981), are procedurally barred where that decision had been issued by the time of trial and there was no objection raised at trial and no argument of the issue on appeal. Preston v. State, 528 So. 2d 896, 899 (Fla. 1988). Johnson's trial was in 1980. Trial counsel cannot be deemed ineffective for failing to advance an argument before the decision was announced. Claims of ineffective assistance of counsel that place a duty upon defense lawyers to anticipate changes in the law are without merit. Stevens v. State, 552 So. 2d 1082.

His appellate counsel cannot be found deficient for failing to raise a claim which was not properly preserved. Suarez v. Duqqer, supra, at 193. Estelle was not a fundamental change in the law warranting review in spite of a procedural bar. Preston at 899.

Even if this claim were not barred, trial counsel was not deficient. Johnson's sanity was never seriously questioned, because there was no need to, given his behavior both during the time of the murders, and subsequently. He did not allow the Cassady report to go straight to the trial court. He had a recurrent problem and tried to solve it. In any event, the information in Cassady's report is similar to that which Johnson now wants to present in mitigation, i.e., that Johnson used large quantities of alcohol and drugs to reduce depression, anxiety and guilt; he is impulsive; [14] he is emotionally unstable; he has a broad range of disturbances, and is unable to cope. Given trial counsel's strategic, reasonable performance, his appellate counsel can hardly be found lacking for failing to challenge his performance based on Dr. Cassady. Suarez v. Duqqer, supra; Card v. State, supra.

Johnson's allegation that his trial counsel failed to protect his constitutional rights is meritless. Jones testified at the post-conviction evidentiary hearing that he instructed Johnson not to talk about the details of the murders. When Johnson was in Oregon, Dr. Gardiner advised him a mental

[14] Whether or not Johnson is "impulsive" is collateral at best under the facts of this case, which clearly established a cold, calculated and premeditated murder.

evaluation could be used against him in court. Again, his appellate counsel was not ineffective for failing to raise a meritless claim. Suarez v. Dugger, supra; Card v. State, supra.

C. Independent Evaluation

As previously delineated, Johnson's trial counsel had at least five different evaluations besides Cassady's, one of which came from his expert Dr. deBlij, who testified on his behalf at the penalty phase of his trial. His disingenuous argument that an "independent" expert had to be "loyal" to him has been repeatedly rejected. Martin v. Wainwright, 770 F. 2d 918 (11th Cir. 1990), cert. denied, 479 U.S. 909 (1986); Henderson v. Dugger, 925 F. 2d 1309 (11th Cir. 1991). Johnson's appellate counsel was not ineffective for failing to raise an unpreserved and meritless claim. Suarez v. Dugger, supra; Card v. State, supra.

CLAIM V

APPELLATE COUNSEL WAS EFFECTIVE REGARDING THE STATE'S BALLISTICS EVIDENCE, AND THIS CLAIM IS PROCEDURALLY BARRED.

To properly understand this claim, it is necessary to view the variations of the challenges Johnson has presented to this Court in assorted proceedings regarding the ballistics evidence used in his trial . This Court addressed Johnson's second point on direct appeal as follows:

> Appellant's second point on appeal merits particular attention because it relates to the issue of the admissibility of certain

evidence both as it was presented to the jury in support of the first-degree murder verdict and as it relates to the finding, as a statutory aggravating factor, that the murder was cold, calculated and premeditated. The state presented evidence that Dodson's death had been caused by a close-range execution style shot to the back of the head. This evidence consisted of testimony by the medical examiner about the pattern of stippling around the wound and testimony by police officer Park about the results of experminents he had conducted with the murder weapon. Park testified that he had fired the gun at white paper from various distances, and he described the marks made on the paper by the unexploded gunpowder discharged with the bullet. Park was not qualified as an expert witness and offered no opinion testimony. Neither did he attempt any comparison between the fatal wounds and the marks on the paper target.

Appellant cites *McClendon v. State*, 90 Fla. 272, 105 so. 406 (1925) for the proposition that admission of this evidence was prejudicial error. In *McClendon*, this Court ruled, on facts strikingly similar to those in the case at bar, that paper targets showing powder burns from shots fired at various ranges should not have been admitted into evidence on the issue of the range at which McClendon's alleged victim had been shot because it could not assume "that the effect of pistol fire upon human flesh and upon paper or cloth targets would be essentially similar, in respect to resulting powder burns or marks, when the requisite supporting proof is lacking." 90 Fla. at 280, 105 So. at 409.

> The rule of "essential similarity" between test conditions and actual conditions first enunciated in *Hisler v. State*, 52 Fla. 30, 42 So. 692 (1906), has been eroded as to other types of experimental evidence since that time. (citations omitted) We, therefore, recede from *McClendon*, insofar as it holds such evidence inadmissible, and we find no error on the record now before us.
>
> Johnson v. State, 442 So. 2d 193, 195-196 (Fla. 1983).

Nine years later, as this Court recognized in its opinion on his post-conviction appeal, the ballistics evidence claim evolved into two claims: ineffective assistance of trial counsel and a *Brady* violation:

> Of the fourteen claims (footnote omitted) presented in his 3.850 motion, Johnson seeks review of the trial court's rejection of the following twelve: . . .
>
> 5) that trial counsel was ineffective for failing to depose or impeach the State's ballistics witnesses, for failing to seek independent expert assistance, and for failing to rebut the State's ballistics evidence;
>
> 6) that the State violated *Brady* (footnote omitted) by intentionally withholding evidence of a ballistics test which was subsequently presented to the jury. . . .
>
> Johnson v. State, 593 so. 2d 206, 208 (Fla. 1992).

As to claim 6, *(Brady)* this Court found it was procedurally barred. Id. It addressed Claim 5 on the merits as follows:

> Johnson alleges that he was prejudiced by counsel's deficient

> performance in litigating the issue of the ballistics evidence and testimony (claim 5) because this testimony "constituted the primary evidence of premeditation and statutory aggravating circumstances." However, we note that the prejudicial inference which Johnson claims that the jury drew from this ballistics evidence could have been properly drawn from the medical examiners testimony. Moreover, the jury apparently was not influenced by the ballistics testimony in that they did not find premeditation in the customer's death. Thus, this claim fails to meet the *Strickland* prejudice requirement.
>
> Id. at 210.

In the habeas petition currently before this Court, it is obvious that Johnson wants not just a second bite of the apple, but a third one as well, The ballistics evidence issue has evolved into the failure of his appellate counsel to raise the matter of: "The State's intentional withholding of the fat-t it had conducted a ballistics 'test,' and the exhibits thereto, and presentation to the jury at both guilt and penalty phases." (p.73) Johnson's fifth claim in this proceeding, has become a combination of his fifth and sixth claims. rejected by this Court in his post-conviction appeal, which evolved from his second point on direct appeal.

Johnson commences his fifth claim with the following concession: "This Court has held that this claim should have been raised on direct appeal. Johnson v. State, 593 So. 2d 206, 208 (Fla. 1992)." (P.73) In fact, this Court only found his *Brady* claim procedurally barred, as the preceding procedural

history has demonstrated, This history also serves to demonstrate, however, that this Court has already addressed the merits of claims relating to the admission at trial of ballistics evidence ("stippling") and the ballistics test, which generated the evidence.

To the extent that those claims have already been ruled upon on the merits by this Court, Respondent will defer to this Court's findings therein. An allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987). Medina v. State, 573 So. 2d 293 (Fla. 1990). It is clear that claims of ineffective assistance of counsel cannot be litigated on a piecemeal basis by filing successive post-conviction motions, Jones v. State, 591 So. 2d 911, 913 (Fla. 1991). A procedural bar cannot be avoided by simply couching otherwise barred claims in terms of ineffectiveness assistance of counsel. Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990). This Honorable Court has refused to allow collateral attacks based upon the use of different arguments to relitigate the same issues which were decided on direct appeal. Quince v. State 477 So. 2d 535, 536 (Fla. 1985). Johnson's fifth claim, as it relates to the matters already decided on the merits by this Court is, unequivocally procedurally barred.

The alleged *Brady* claim.

Again, this Court found in Johnson's post-conviction appeal that this claim was procedurally barred. Johnson v. State, 593 So. 2d at 208. He attempts to circumvent this clear procedural bar by couching it in terms of ineffective assistance of appellate counsel. See Blanco v. Wainwright, supra, at 1384; Medina v. State, supra; Kight v. Dugger, supra.

There was no objection at trial, and this Court determined it was not necessary to address Johnson's trial counsel's performance in litigating the issue of ballistics evidence and testimony, because "...this claim fails to meet the *Strickland* prejudice requirement." Johnson, 593 so. 2d at 210. His appellate counsel's performance cannot be found wanting for failing to raise a claim which was not preserved. Suarez v. Dugger, supra, at 193. Nor can his appellate counsel be deemed ineffective for failing to argue a point which, even if correct, would amount to no more than harmless error, as this Court has already found as to this claim. Duest v. Dugger, supra.

Even if this Court had not found this claim procedurally barred, it is devoid of merit. United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989) isolated four requirements for a *Brady* violation:

> (1) the Government possessed evidence favorable to the defendant;
>
> (2) the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence;
>
> (3) the prosecution suppressed the favorable evidence; and

> (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

The powder pattern test was-not material or exculpatory, and the outcome would not have been different had defense counsel had the results of the test. Johnson's entire argument in this matter is based upon the opinions of Dr. DiMaio.

Although Dr. DiMaio did not testify at the evidentiary hearing, and his affidavits were not offered into evidence, they *were in the post-conviction record as exhibits filed in July, 1986, as well as being attached to Johnson's motion to vacate.* (M.1235-40) In addition, Johnson's trial counsel was examined from them at the post-conviction hearing. (M.246-250) Therefore, Dr. DiMaio's opinions, which Johnson repeats in the instant petition, were already before this Honorable Court in his post-conviction appeal. Obviously, this Court attributed little weight to DiMaio's opinions and for good reason. The record shows that what he said was testified to at trial by experts Greg Scala and Jerry Rathman (R.163-170, 178-189): that it is difficult to determine the range of residue and much depends on the weapon, type of ammunition, and angle of the gun.[15] *There is nothing in DiMaio's affidavits which would have changed the outcome* ***of*** *the trial.*

Furthermore, DiMaio's affidavit was rife with speculation such as, *if* Park had used .38 cartridges, when the actual cartridges were .357, then the test patterns were not valid. And

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[15] Scala was an expert on gunshot residue, while Rathman was an expert in the field of firearm examination.

if he used flake powder instead of ball powder, the patterns would not be valid. In DiMaio's opinion, flake powder can produce tattooing for one to two feet and ball powder for one to four feet. However, Park was not qualified as a ballistics expert, and offered no opinion testimony, which this Court recognized in its opinion on his ballistics issue on direct appeal: Johnson v. State, 442 so. 2d at 196. Nor could Johnson's trial counsel be deemed deficient for questioning Dr. Kessler's observations given his expertise.[16]

Even if Johnson's trial counsel had brought in an expert to say the gun might have been three to four feet from Dodson's head, instead of seven inches, there is no likelihood the outcome would have been different.[17] The fatal bullet was strategically aimed into the head. Further, the test was consistent with Johnson's own statement that he fired at close range.

Even if DiMaio's opinion presented contradictory evidence, he did not testify at the evidentiary hearing, and was not subject to cross-examination. Therefore, his opinions were simply that, opinions. Affidavits from a person given years after the murders, who never saw the actual murder weapon, viewed the murder scene, autopsied the victims, or subjected himself to

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[16] Dr. Kessler testified he had performed 1800 autopsies and had been involved in 4,000. He was board eligible on the American Board of Pathology and Board of Forensic Pathology. He had been involved in 1,000 autopsies involving gunshot wounds, and was the Medical Examiner for Orange County. (R.36-39)

[17] This argument is in response to the testimony of Jones at the post-conviction hearing regarding a series of "what if" questions regarding DiMaio's opinions. (pp.79-81)

cross--examination at an evidentiary hearing, can hardly be the basis for habeas relief.

Johnson presented nothing to demonstrate the testimony of Park, Scala, Dr. Kessler and Rathman was incorrect. Therefore, even if defense counsel had the powder pattern tests, Johnson has failed to establish they were invalid, or what difference it would have made even if they were invalid.

It must be noted that the testimony about the test came from a nonexpert (Park) who only testified he performed the test, not as to any conclusions. Contrary to Johnson's assertions, the testimony was *not* an important factor in obtaining a conviction. Johnson's own statements described the murders, and that he *decided* to commit robbery. He sold the murder weapon shortly after the incident, and it was easily traced back to him. There was testimony he deliberated before he shot the bartender. We also know now that he had to reload, which demonstrates the murder was cold, calculated and premeditated. See Swafford v. State, 533 So. 2d 270 (Fla. 1988)

Even without the tests, there was ample evidence of cold calculation. It can be easily inferred that a shot to the head is intended to be lethal. Even accepting Johnson's theory that he shot the customer because he lunged at him, that does not explain why he coldly murdered the bartender lying on the bathroom floor. The close quarters of the bathroom, which Johnson acknowleged in his statements, and the fact the bartender was lying face down on the floor, demonstrate the shooting was at close range. It is obvious that the bartender's murder was done in a cold, calculated manner and to eliminate a witness.

Johnson's claim that the State presented false and misleading testimony has no merit. Park testified he did the tests, that's all. The State experts, Rathman and Scala, testified about the difficulty of determining the exact distance which was also dependent on the ammunition used. Johnson has not shown that anything Park or Dr. Kessler said was false or misleading, because he has not proven the tests were inaccurate. DiMaio's opinion, as previously shown, is certainly not conclusive, and his affidavits are filled with speculation. Although Johnson claims the State knew the evidence was misleading and refers to an alleged expert in Sanford, he provides absolutely no record support or explanation for this conclusory allegation. The State did not withhold impeachment evidence. The fact Park conducted a powder pattern test doesn't impeach anyone or anything. Johnson claims the state withheld relevant, exculpatory and material evidence but fails to establish how or why.

Johnson claims the prosecutor repeatedly referred to the tests, and made them the central feature of his argument. (p.81) The record demonstrates the only arguments which related to the "stippling" were that the jury could *infer* a close range shot. (R.287, 294) Johnson, himself, admitted he shot both victims at close range. Defense counsel objected to similar argument during the penalty phase, but was overruled. (R.501-502)

Even if there was a *Brady* violation, which Respondent does not concede there was, this Court found there was no prejudice regarding the ballistics evidence and testimony. Johnson's

appellate counsel cannot be faulted for failing to argue a point which, even if correct, would amount to no more than harmless error. Duest v. Dugger, supra.

CLAIM VI

APPELLATE COUNSEL WAS EFFECTIVE AS REGARDS JOHNSON'S STATEMENTS, AND THIS CLAIM IS PROCEDURALLY BARRED.

This is the third time Johnson has challenged the introduction of his statements at trial. It is ***procedurally barred.*** In his post-conviction appeal, this Court ruled:

> ...Claim 7 (statements by defendant) ... [was] also raised on direct appeal and summarily rejected by this Court because "we find no support for appellant's other points on appeal and see nothing to be gained by discussing them." Id. at 197.
>
> Johnson v. State, 593 So. 2d at 208.

In fact, a review of this Court's rendition of the facts in its opinion on direct appeal, exhibits that a large portion of it comes from Johnson's statements, which demonstrates Johnson's sixth claim is meritless as well as being procedurally barred. Johnson v. State, 442 So. 2d at 194-195.

Habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal. Parker v. Dugger, supra. An allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. Blanco v. Wainwright, 507 So. 2d at 1384; Medina v. State, 573 So. 2d 293. It is clear

that claims of ineffective assistance of counsel cannot be litigated on a piecemeal basis by filing successive postconviction motions. Jones v. State, 591 So. at 913. A procedural bar cannot be avoided by simply couching otherwise barred claims in terms of ineffective assistance of counsel. Kight v. Dugger, 574 So. 2d 1066. This Honorable Court has refused to allow collateral attacks based upon the use of different arguments to relitigate the same issues which were decided on direct appeal. Quince v. State 477 So. 2d 535, 536 (Fla. 1985).

Johnson admits the issue of his statements "...was raised and argued by both parties on direct appeal." (p.85) However, he "...asks this Court to reconsider the issue because this Court had an incomplete record and imposed an arbitrary page limit which rendered appellate counsel ineffective." (p.86) Respondent adopts its previous argument as to Johnson's first claim relating to the page limitation, and reiterates that his appellate counsel was not rendered ineffective thereby.

As to Johnson's incomplete record argument, this Court decided this issue on the merits on direct appeal. Johnson v. State, 442 So. 2d at 195. He attacked it again in his appeal from the denial of his post-conviction motion to vacate. Johnson v. State, 593 So. 2d at 208. He is raising it a third time in the instant petition, and besides being procedurally barred, it is devoid of merit. (See Claim II this Response) Respondent will briefly address Johnson's various headings under this claim.

A. Silence

Johnson raised this identical claim, found meritless by this Court, in his direct appeal and his appeal from the denial of his post-conviction motion to vacate sentence. Johnson v. State, 442 so. 2d at 197; Johnson v. State, 593 So. 2d at 208. (See Johnson's initial brief on direct appeal at pp.48-50 and his initial brief on post-conviction appeal at p.72.) An allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. Blanco v. Wainwriqht, 507 so. 2d at 1384; Medina v. State, 573 So. 2d 293. A procedural bar cannot be avoided by simply couching otherwise barred claims in terms of ineffective assistance of counsel. Kiqht v. Duqqer, 574 so. 2d 1066. Johnson's appellate counsel is not deficient for failing to convince enough members of the court on direct appeal of his argument, particularly where this Court has found it to be devoid of merit. Herring v. Duqqer, supra, at 1177.

B. Psychological Manipulation

This claim was also argued by Johnson on both direct appeal, and his appeal from the denial of his post-conviction motion. Johnson v. State, 442 So. 2d at 197; Johnson v. State, 593 So. 2d at 208. (See Johnson's initial brief on direct appeal at pp.48-50 and his initial brief on post-conviction appeal at pp.73-86.) It, too, was found meritless. Id. The trial court found at the conclusion of Johnson's post-conviction evidentiary hearing regarding the issue of alleged police coercion:

> This Court after reviewing the record does not find that the Defendant's confession was

> unlawfully obtained, or that there was anything that the State concealed. The police officers may have been exceptionally nice to the Defendant in order to help obtain the confession, however being nice does not constitute coercion or unlawful inducement.
>
> As to the Defendant's argument that his state of mind (due to his previous alcoholism), prevented him from giving a voluntary waiver of rights for the purpose of the confession, is not substantiated by the record.
>
> Also, the Defendant's argument that trial counsel was prejudicially ineffective in not obtaining a suppression of the statments is without merit. Trial counsel went to Oregon to depose the Police Officers involved, and reviewed the psychological report that was completed at the time of the confession. The trial counsel made a reasonable attempt at suppressing the statement, and failed. Present counsel does not provide anymore convincing of an argument.
>
> (M.1769)

This Court's rejection of this claim implicitly accepted that these findings were supported by sufficient competent evidence, and upheld them. See Henderson v. Dugger, 522 So. 2d 835, 838 (Fla. 1988).

Again, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. Blanco v. Wainwright, supra at 1384; Medina v. State, 573 So. 2d 293. A procedural bar cannot be avoided by simply couching otherwise barred claims in terms of ineffective

assistance of counsel. Kight v. Dugger, 574 so. 2d 1066. Johnson's appellate counsel is not deficient for failing to convince enough members of the court on direct appeal of his argument, particularly where this Court has found it to be devoid of merit. Herring v. Dugger, supra, at 1177.

C. Alleged *Brady/Giglio* Violation

This is a new claim, and Johnson has not provided justification for failing to raise this claim in his post-conviction motion to vacate sentence. It is, therefore, procedurally barred. See Foster v. State, revised opinion, 18 Fla. L. Weekly S215 (Fla. April 1, 1993). It was not preserved, and his appellate counsel cannot be deemed deficient for failing to raise an unpreserved claim. Suarez v. Dugger, supra, at 193.

Even if it was presently cognizable, Johnson has not shown a Brady violation. See Foster v. State, supra, at S216. His claim is premised upon Giglio v. United States, 405 U.S. 150 (1972), and for him to prevail he must demonstrate: (1) the testimony was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. See Routly v. State, 590 So. 2d 397, 400 (Fla. 1991).

Johnson's conclusory allegations do not satisfy any of the criteria outlined in Routly. He did not demonstrate the testimony of the police officers was false, other than stating that it "...is inconsistent with the content of the police reports." (pp.104-105) (1) Nowhere does he establish which officers he was speaking of; what there testimony was that was false; which police reports; or what specific portions of said

reports the testimony was inconsistent with. (2) He provides absolutely no evidence that the prosecutor knew the testimony was false, because there wasn't any false testimony to begin with. (3) Without providing a specific statement, he can't demonstrate that the statement was material. Johnson's *Brady/Giglio* claim is as meritless as the others herein alleged.

CLAIM VII

APPELLATE COUNSEL WAS EFFECTIVE REGARDING THE RECORD, AND THIS CLAIM IS PROCEDURALLY BARRED.

As previously delineated in Respondent's argument as to Claims I and II supra, Johnson alleged an ineffective assistance Of appellate counsel claim on direct appeal. Johnson v. State, *442 So.* 2d at 195. In the interest of brevity, Respondent would refer this Court to pages 12 and 21 through 22 of this Response for the findings of both this Court and the trial court on this matter. Johnson raised it again in the appeal of the denial of his post-conviction motion to vacate, and this Court found: "Claim 8 (reconstruction of record) was raised on direct appeal and specifically rejected by this Court." Johnson v. State, 593 so. 2d at 208. He now raises this claim a third time despite this Court's unequivocal ruling that it is procedurally barred, Johnson's seventh claim is *procedurally barred,* and explicitly demonstrates abuse of process as argued by Respondent at the outset of his response. With the clear understanding that his seventh claim is *procedurally barred,* Respondent will address his assorted sub-claims.

A. Full and Fair Hearing on Reconstruction of the Record

Johnson challenged the "THE PROCEEDINGS ON REMAND" in his first point on direct appeal relating to the record, which he argued rendered his appellate counsel ineffective. (p.5-8 of accepted 70 page brief.) As previously delineated, this Court rejected his argument as to the record on the merits. Johnson v. State, **442 So.** 2d at 195. **He** challenged the Reconstruction

hearing again in his motion for post-conviction relief, and on appeal this Court found the matter of reconstruction of the record ". . .was raised on direct appeal and specifically rejected by this Court." (pp.86-87, Johnson's initial brief) Johnson v. State, 593 So. 2d at 208.

He now raises the record claim for a third time in this habeas proceeding, and blatantly attempts to circumvent the rule that habeas proceedings do not provide a second or substitute appeal. Blanco v. Wainwright, supra at 1384; Medina v. State, 573 So. 2d 293. A procedural bar cannot be avoided by simply couching otherwise barred claims in terms of ineffective assistance of counsel. Kight v. Dugger, 574 SO" 2d 1066. Johnson's appellate counsel is not deficient for failing to convince enough members of the court on direct appeal of his argument, particularly where this Court has found it to be devoid of merit. Herring v. Dugger, supra, at 1177.

Respondent sees no sense in addressing the merits of a claim already addressed on the merits by this Court; rejected as procedurally barred on the appeal of the denial of his motion for post-conviction relief; and raised a third time in a blatant circumvention of the rule on habeas proceedings. However, in so far as Johnson attacks the propriety of Judge Powell's actions at the time of reconstruction, the record needs to be set straight.

Fla. R. App. P. 9.200(b)(3) (1977),[18] related to the procedure for reconstructing the record at the time it was done in this cause, and read as follows:

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[18] Fla. R. App. P. 9.200 was amended in 1987 and (b)(3) became

> (4) If no report of the proceedings was made, or if a transcript is unavailabe, the appellant may prepare a statment of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days of service. Thereafter, the statement *and any objections or proposed amendments shall be submitted to the lower tribunal for settlement and approval* . As settled and approved, the statement shall be included by the clerk of the lower tribunal in the record.

There is nothing in this rule that contemplates recusal of the trial judge. Rather, the rule contemplates that "...the statement and any objections or proposed amendments shall be *submitted to the lower tribunal for settlement and approval.* "

This Court ordered on May 14, 1981 that Johnson's motion to relinquish jurisdiction was granted, and that jurisdiction of the case was relinquished to the lower tribunal "...to hold an evidentiary hearing for the purpose of supplementing and reconstructing the record on appeal . . . ." (R.1743) In response to this order, the Public Defender for Orange County moved to disqualify Judge Powell. (R.1744-1746)

However, merely because this Court spoke of an evidentiary hearing, did not mean that Fla. R. App. P. 9.200(b)(3), clearly established for circumstances such as arose in this cause, was not in effect. Again, that rule said nothing of recusal, and in fact contemplated the trial judge's inclusion in the process of

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(b)(4), while retaining identical language. The Florida Bar re Amends to F.R.A.P., 509 So. 2d 276 (Fla. 1987).

reconstruction, not as a witness, but to resolve the two parties versions of the reconstructed record. This was precisely the interpretation Judge Baker had of the reconstruction proceeding as exhibited in a correspondence he addressed to Judge Powell on March 30, 1982:

> An order relinquishing jurisdiction to this circuit court was [sic] entered by the Florida Supreme Court was recevied on May 18, 1981, in the referenced case (State v. Terre11 M. Johnson). I interpret that order as one calling for a settlement and approval of the transcript of the trial under Fla. R. App. P. 9.200(b)(3).
>
> As *I read the cited appellate rule, the settlement and approval of the transcript should be made by the judge who presided at the trial.* That was you. However, the assistant public defender handling the appeal preferred that the settlement and approval of the transcript should be by a judge other than the presiding judge, and he moved to disqualify you because he intended to call you as a witness to testify as to the accuracy of Rose Wheeler's transcript.
>
> I believe that your order disqualifing [sic] yourself was wise, since the motion seeking your disqualification alleged that you would be a witness, but I have now heard all of the motions and I can only conclude that you will not be a witness. My conclusion is based on my determination that the public defender's motion is directed to relief under rule 9.200(b)(3) where you I and only you, should be the presiding judge.
>
> (R.1795)

Judge Baker concluded his letter to Judge Powell by requesting that the latter "rescind [his] order of disqualification . . . and that [he] undertake the settlement and approval of the transcript under the applicable rule." (R.1796) The day before Judge Baker's letter, the prosecutor had moved to set aside Judge Powell's recusal, and "approve the trial record. " (R.1794)

Nonetheless, Judge Powell, in an abundance of caution, did not rescind his order, although he was well within his discretion to do so given Fla. R. App. P. 9.200(b)(3) and the correct interpretation of said rule by Judge Baker. It was said interpretation that prompted Judge Baker's repeated remarks at the reconstruction hearing, which Johnson cites to in his argument to this claim, and nothing more. (p.107)

Johnson's allegation that Judge Powell's return letter to Judge Baker was somehow inappropriate, is spurious given the fact, as Judge Baker correctly pointed out, that as the trial judge, Judge Powell had the ultimate authority to "settle and approve" the reconstructed transcript. (R.1808-1809) Besides, that letter is nothing more than advice to Judge Baker on how to proceed at the reconstruction hearing, which he had every right to conduct himself, but did not at the Public Defender's request. (R.1808-1809)

Johnson alleges an *ex parte* session took place because neither he or his counsel was present. First, and foremost, this session was not ex parts as Johnson's trial attorney, Gerald Jones, was present as he admits. (p.108) Pursuant to Fla. R. Crim. P. 3.180, a defendant is required to be present at certain critical

stages, of which " record reconstruction" is not one. See Provenzano v. State, 561 So. 2d 541, 547-48 (Fla. 1990). So, the fact that Johnson was not present at either hearing is simply not relevant. Besides, Johnson's deposition regarding the reconstructed transcript was taken and place in the court file, at the trial judges advisement. (R.1994, 1690-1701) Johnson had nothing significant to add, as the trial court's order reflected: "The deposition of defendant, Terre11 Johnson, taken at Florida State Prison fails to recite any error of significance in the trial transcripts." (R.1930-1931)

As far as Johnson's appellate counsel not being present, so what? Appellate counsel was not present at the trial, so how could he contribute to reconstruction of an event he was not present at? He couldn't. Besides, that initial session involving Judge Powell, **Jones**, the trial prosecutor, and the court reporter was in complete accord with Fla. R. App. P. 9.200(b)(3). In any event, appellate counsel was present at the reconstruction evidentiary hearing before Judge Baker, as he admits in his petition. (p.109)

B. This Court Found the Reconstructed Transcript Reliable,

This Court found on direct appeal regarding this claim:

> ...At the evidentiary hearing the trial judge, the court reporter and both trial attorneys testified to the substantial accuracy and completeness of the record in all material regards. In the absence of some clear allegation of prejudicial inaccuracy we see no worthwhile end to be achieved by remanding for new trial.

Johnson v. State, 442 So. 2d at 195.

Twelve years later, Johnson appears to be attempting to provide allegations of prejudicial. inaccuracy. Unfortunately, he is procedurally barred from so doing, as this Court has already determined. Johnson v. State, 593 So. 2d at 208. He can't avoid procedural bar by couching his barred claim in terms of ineffective assistance of appellate counsel. Kight v. Dugger, supra. Anyway, as Judge Baker found in his order on the reconstruction hearing:

> The judge and the attorneys in the case could indicate no significant or material fault in the corrected transcript. What corrections they offered, if accepted, would not materially change the transcript. *No relevant or substantial errors or omissions were revealed by witnesses or even appellate counsel that would prejudice Johnson's appeal.* . . .
>
> The "suspected errors" and "errors suspected from the context" raised by defense counsel turn out to be few, isolated instances in the record that, in context, are not any more unusual than other records of human dialogue. Not even one prejudicial error or omission was shown. *Neither defendant nor his counsel has offered even one correction or addition to the transcript after it was proofread* **and** *corrected by the court reporter.*
>
> (R.1930-1931)

1. Alleged Unreported Bench Conferences

Johnson argued this on direct appeal, and again in the appeal of the denial of his motion for post-conviction relief. It is *procedurally barred.* Blanco v. Wainwright, supra at 1384;

Medina v. State, 573 Sa. 2d 293. A procedural bar cannot be avoided by simply couching otherwise barred claims in terms of ineffective assistance of counsel. Kight v. Dugger, 574 So. 2d 1066. On this matter, Judge Baker found:

> *A number of bench conferences were not recorded, because no one requested the court reporter to record them. This is quite common during a trial. There is no indication of relevant arguments or objections going unreported in the transcript.*
>
> (R.1930-1931)

2. Alleged Other Errors and Omissions

It is doubly *procedurally barred*. Again, Johnson is taking this opportunity to circumvent the rule that habeas proceedings do not provide a substitute appeal. Blanco v. Wainwright, supra at 1384; Medina v. State, 573 so. 2d 293. He can't allege prejudicial errors 12 years after the fact. As regards the authorized and considered deposition of Dr. Loftus (p.119), Judge Baker found:

> The "expert testimony" of Dr. Elizabeth Loftus is nothing more than what common sense tells us: memories fade over time, and the ability to correctly remember events can be enhanced by being reminded of certain things about the events to be recalled.
>
> (R.1930-1931)

AS regards Justice Shaw's dissent (pp.120-122), Johnson fails to mention that Justice Shaw was Chief Justice at the time of the entire Court's affirmance of the denial of post-conviction relief where this claim was raised a second time. Johnson v. State, 593 So. 2d at 208. Johnson's appellate counsel can't be deemed

deficient for failing to convince enough members of this Court of his argument in any event. Herring v. Dugger, supra, at 1177.

C. Court Reporter

This Court ruled on the merits of this claim on direct appeal, and found it procedurally barred in the appeal of the denial of Johnson's motion for post-conviction relief. Johnson v. State, 442 So. 2d at 195; Johnson v. State, 593 So. 2d at 208. Therefore, Respondent stands on its previous arguments as they relate to Johnson's arguments in sub-headings 1, 2, 3, and 4. (pp.124-126)

D. Effective Assistance of Appellate and Post-Conviction Counsel

Again, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. Blanco v. Wainwright, supra at 1384; Medina v. State, 573 So. 2d 293. A procedural bar cannot be avoided by simply couching otherwise barred claims in terms of ineffective assistance of counsel. Right v. Dugger, 574 so. 2d 1066. Johnson's appellate counsel is not deficient for failing to convince enough members of the court on direct appeal of his argument as to the record, particularly where this Court has found it to be devoid of merit. Herring v. Dugger, supra, at 1177. The same is equally applicable to his post-conviction counsel.

E. Full Review

Respondent wonders how Johnson can argue lack of full review given his acknowledgment early in his petition that this Honorable Court "conducts an independent review in all capital appeals in order to consider whether any reversible error is present." (pp.15, 19-20) Johnson has been given a full review, *twice*.

F. Conclusion

Johnson's seventh claim is nothing less than an abuse of *process.* It was rejected on the merits on direct appeal, and rejected on procedural bar grounds in the appeal of the denial of his motion for post-conviction relief.

CLAIM VIII

APPELLATE COUNSEL WAS EFFECTIVE REGARDING JUDGE BAKER, AND THIS CLAIM IS PROCEDURALLY BARRED.

Johnson continues to raise his ineffective assistance of appellate counsel claim in a piecemeal manner. See Jones v. State, supra, at 913. This challenge to the reconstructed record presents a new twist, and for that very reason it is procedurally barred, in that this is the first time it has been raised. Parker v. Dugger, supra. Again, he is attempting to avoid a procedural bar by simply couching an otherwise barred claim in terms of ineffective assistance of counsel. Kight v. Dugger, supra. He is also attempting to circumvent the rule that habeas proceedings do not provide a second or substitute appeal. Blanco v. Wainwright, supra at 1384; Medina v. State, 573 So. 2d 293.

Finally, this claim is *time burred.* Adams v. State, supra, at 1249; Henderson v. Singletary, supra, at 315-316.

Respondent has already addressed this matter in his argument as to the recusal of Judge Powell in Johnson's prior claim. Johnson's entire argument hinges on the erroneous assumption that Judge Powell had to recuse himself. As Respondent already argued, Judge Powell had no duty to recuse himself, but did so at the request of the Public Defender. Pursuant to Fla. R. App. P. 9.200(b)(3) Judge Powell, as the trial judge, had a duty to "settle and approve" the reconstructed transcript, not to recuse himself. In fact, Judge Baker's correspondence to Judge Powell requesting the latter to rescind his order of disqualification states:

> As I read the cited appellate rule, the settlement and approval of the transcript should be made by the judge who presided at the trial. That was you. *However, the assistant public defender handling the appeal preferred that the settlement and approval of the transcript should be by a judge other than the presiding judge, and he moved to disqualify you because he intended to call you as a witness to testify as to the accuracy of Rose Wheeler's transcript.*

(R.1795)

Johnson now argues that not only did Judge Powell have to recuse himself, contrary to the aforementioned rule on reconstruction, but so to did Judge Baker. A moment's reflection soon unravels this circuitous argument. As Judge Baker, correctly and repeatedly pointed out, Judge Powell should never have recused himself, because pursuant to Fla. R. App. P.

9.200(b)(3) it was the latter's responsibility to settle and approve the reconstructed record. Instead, at the bequest of the *the assistant public defender handling the appeal*, Judge Powell recused himself. Now, post-conviction counsel wants this Court to find appellate counsel ineffective, because he did not move to recuse Judge Baker, who was only presiding over the reconstruction because he requested another judge.

His justification for this absurd result involves Judge Powell's correspondence in answer to Judge Baker's letter requesting him to rescind his order of disqualification. (R.1808-1809) First of all, Judge Baker should not have been involved at all, but only was because appellate counsel requested as much. Second, pursuant to Fla. R. App. P. 9.200(b)(3), it was Judge Powell's responsibility to settle and approve the reconstructed record. Therefore, his instructions to Judge Baker on how to proceed comports with his role in the process of reconstruction. How can Johnson's appellate counsel be ineffective for failing to recuse a judge, who he requested and who had no part to play in the process to begin with? He can't.1 Said counsel cannot be found deficient for failing ta raise a meritless issue. Suarez v. Duqqer, supra, at 193; Card v. State, supra, at 1177; Ruffin v. Wainwright, supra, at 111.

CLAIM IX

RECORD RECONSTRUCTION IS NOT A CRITICAL STAGE OF CRIMINAL PROCEEDINGS; PROCEDURALLY BARRED.

Johnson alleges his appellate counsel was ineffective for failing ". . .to directly raise [his] absence in appropriate constitutional context on direct appeal." (p.139) However, record reconstruction is not a critical stage of the criminal proceedings. See Provenzano v. State, supra, 561 So. 2d at 547-48. Therefore, Johnson's appellate counsel was not deficient in failing to raise a meritless claim. Suarez v. Dugger, supra, at 193; Card v. State, supra, at 1177; Ruffin v. Wainwright, supra, at 111. Besides, Johnson's deposition was considered by Judge Baker, who found: "The deposition of defendant, Terrell Johnson, taken at Florida State Prison fails to recite any error of significance in the trial transcripts." (R.1930-1931)

Further, although this meritless claim was not raised by Johnson's appellate counsel, it was raised by his post-conviction counsel. (See initial brief, p.86) This Court found on the appeal of the denial of Johnson's motion for post-conviction relief that "Claim 8 (reconstruction of record) was raised on direct appeal and specifically rejected by this Court." Johnson v. State, 593 so. 2d at 208. Johnson can't avoid a procedural bar by simply couching a barred claim in terms of ineffective assistance of counsel. Kight v. Dugger, supra. He is also raising his ineffective assistance of counsel claim in piecemeal fashion. See Jones v. State, supra, at 913.

CLAIM X

APPELLATE COUNSEL EFFECTIVE REGARDING JOHNSON'S PRESENCE AT BENCH CONFERENCES DURING JURY SELECTION; PROCEDURALLY BARRED.

Johnson's tenth claim is *procedurally barred* because his alleged absence at bench conferences during voir dire was never (1) specifically objected to at trial (R.879-1349); (2) specifically challenged on direct appeal; or (3) specifically raised in his motion for post-conviction relief; and (4) it is time barred. See Adams v. State, 543 So. 2d 1244, 1249 (Fla. 1989); Henderson v. Singletary, supra, at 315-316. He continues to raise his ineffective assistance of counsel claim in piecemeal fashion. See Jones v. State, supra, at 913. He attempts to circumvent the rule that habeas proceedings do not provide a second or substitute appeal. Blanco v. Wainwright, supra at 1384; Medina v. State, 573 So. 2d 293. Johnson's incomplete record and page limitation arguments have already repeatedly been addressed by Respondent, and his arguments thereto are equally applicable here.

The alleged facts supporting this claim appear to be presented in footnote 35 of his petition. (p.140) First, he makes a conclusory allegation, without record support, that the "...bench conferences were not reported due to the court reporter's personal problems." The transcript of the voir dire proceedings, exhibits that the court reporter's presence at these bench conferences was never requested by Johnson's trial counsel. (R.879-1349) Thus, the court reporter's absence was not attributable to her "personal problems," but to trial counsel's election not to include her, which is common trial practice. (See Judge Baker's findings infra, R.1930-1931)

The next two sentences in this footnote are Johnson's only alleged support for this claim, again without record support: "No one else remembers **what** occurred at these conferences. *However, the trial attorney testified he remembered thinking it was important stuff.*" (p.140) For this mere conjecture, totally unsupported by any facts, he believes the writ should issue?

In fact, Judge Powell noted that the court reporter did not transcribe bench conferences. (R.1405) However, his impression was that there was "not much important of a legal nature that was discussed" at the bench conferences that didn't later appear at some place in the record. (R.1410-1411) During the course of the trial, there were no objections or motions made at bench conferences that were unreported. (R.1411) Other instances were not significant. (R.1422) Johnson's trial attorney, Mr. Jones, went through the corrections and could point to nothing in the record which would have comprised an issue on appeal. (R.1483) Finally, Judge Baker's finding on the matter of bench conferences, which of course is clothed in a presumption of correctness, as well as this Court's implicit acceptance of said finding, was:

> *A number of bench conferences were not recorded, because no one requested the court reporter to record them... This is quite common during a trial. There is no indication of relevan t arguments or objec tions going unreported in the transcript.*
>
> (R.1930-1931)

If there is no chance of convincingly arguing a particular issue, then appellate counsel's failure to raise that issue is

not a substantive and serious deficiency and the first prong of Strickland is not met. Engle v. Issac, supra; Ruffin v. Wainwright, supra. Johnson's appellate counsel cannot be found deficient for failing to raise an unpreserved and meritless claim. Suarez v. Dugger, supra, at 193.

CLAIM XI

APPELLATE COUNSEL EFFECTIVE REGARDING *NEIL/SLAPPY* CLAIMS, AS THEY WERE NONEXISTENT AT THAT TIME AND ARE NOW PROCEDURALLY BARRED.

The same argument made by Respondent to Johnson's tenth claim is equally applicable here, both procedurally and on the merits. His eleventh claim is *procedurally barred* because his alleged absence at bench conferences during voir dire was never (1) specifically objected to at trial (R.879-1349); (2) specifically challenged on direct appeal; or (3) specifically raised in his motion for post-conviction relief; and (4) it is time barred. See Adams v. State, 543 So. 2d 1244, 1249 (Fla. 1989); Henderson v. Singletary, supra, at 315-316. He continues to raise his ineffective assistance of counsel claim in piecemeal fashion. See Jones v. State, supra, at 913. He attempts to circumvent the rule that habeas proceedings do not provide a second or substitute appeal. Blanco v. Wainwright, supra at 1384; Medina v. State, 573 So. 2d 293. Johnson's incomplete record and page limitation arguments have already repeatedly been addressed by Respondent, and his arguments thereto are equally applicable here.

Johnson's challenge to the exclusion of two prospective jurors on the basis of their views about the death penalty, does not overcome the lack of specific objections to peremptory challenges of any prospective juror potentially based upon race. (R.879-1349) The procedure for preserving claims pursuant to State v. Neil, 457 So. 2d 481 (Fla. 1984), and State v. Slappy, 522 So. 2d 18 (Fla.), cert. denied, 487 U.S. 1219 (1988), has been clearly established by this Court as follows:

> . ..The defense must make a prima facie showing that there has been a strong likelihood that the jurors have been challenged because of their race. If the judge makes that finding, the burden shifts to the prosection to show valid nonracial reasons why the individual minority jurors were struck. *Neil.*
>
> Reed v. State, 560 So. 2d 203, 205 (Fla. 1990).

Not only did Johnson's trial counsel not make a prima facie case, he did not even object. However, said counsel had no basis for objecting, because Neil and Slappy were decided long after his trial. See, Stevens v. State, supra; Walker v. Jones, 10 F.3d at 1573. Johnson's appellate counsel likewise cannot be deemed deficient for failing to raise a claim which did not exist.

CLAIM XII

NO RECORD SUPPORT FOR JOHNSON'S CONCLUSORY ALLEGATION THAT NEITHER HE OR HIS COUNSEL WERE PRESENT FOR THE TRIAL COURT'S RESPONSE TO A JURY REQUEST DURING THE GUILT PHASE; PROCEDURALLY BARRED.

Johnson's twelth claim is *procedurally barred* because it was never (1) specifically objected to by Johnson at the reconstruction hearing; (2) specifically challenged on direct appeal; OK (3) specifically raised in his motion for post-conviction relief; and (4) it is time barred. See Adams v. State, 543 so. 2d 1244, 1249 (Fla. 1989); Henderson v. Singletary, supra, at 315-316. He continues to raise his ineffective assistance of counsel claim in piecemeal fashion. See Jones v. State, supra, at 913. He attempts to circumvent the rule that habeas proceedings do not provide a second or substitute appeal. Blanco v. Wainwright, supra at 1384; Medina v. State, 573 So. 2d 293. Johnson's incomplete record and page limitation arguments have already repeatedly been addressed by Respondent, and his arguments thereto are equally applicable here.

On direct appeal, this Court addressed the matter of the record as follows:

> . ..At the evidentiary hearing the trial judge, the court reporter and both trial attorneys testified to the substantial accuracy and completeness of the record in all material regards. In the absence of some clear allegation of prejudicial inaccuracy we see no worthwhile end to be achieved by remanding for new trial.
>
> Johnson v. State, 442 So. 2d at 195.

If Johnson and his counsel were not present at the time post-conviction counsel says they were in this claim (R.327), Johnson's counsel would have made this known at the

reconstruction hearing. The absurdity of post-conviction counsel's interpretation of the record is blatantly obvious when one considers he was neither present at the trial or at the reconstruction hearing. Said interpretation, made 15 years after the fact, is preposterous. Johnson's appellate counsel was not ineffective for not raising an unpreserved, nonexistent, and meritless claim. Suarez v. Dugger, supra, at 193.

CLAIM XIII

THE CLAIM THAT PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AS A RESULT OF STATE ATTACKS ON HIS CREDIBILITY IS PROCEDURALLY BARRED.

New, collateral counsel essentially contends that Johnson's appellate counsel was rendered ineffective due to interfering argument by the state on appeal.

This claim is time barred and procedurally barred. It was argued on direct appeal that effective assistance of appellate counsel was impossible due to inconsistencies between the original and corrected transcripts, to the time elapsed between the trial and the reconstruction, and to possible omissions. Johnson v. State, 442 So. 2d at 195. Had counsel perceived his performance as lacking due to any "credibility" attacks by opposing counsel, this issue, as well, could have been and should have been raised on direct appeal. See, Blanco v. Wainwright, supra, at 1384. Evidently, appellate counsel did not view his performance as deficient, as subsequent collateral counsel does, several years later. No appellate ineffectiveness

claim lies. This court affirmed the judgment and sentence based on the facts of the case, not personal exchanges between lawyers. To the extent state counsel's behavior is belatedly called into question, then the decision'of this court is implicated as well. The court has previously held that attacks and criticisms of the decision of the Supreme Court of Florida on direct appeal can be summarily rejected. Eutzy v. State, 536 So. 2d 1014 (Fla. 1988).

Since this case will eventually wend its way again to federal court, this court may want to consider a purely alternate ruling, which indicates its decision was in no way tempered by extraneous or personal arguments of counsel.

CLAIM XIV

NON-STATUTORY AGGRAVATING CIRCUMSTANCE CLAIM IS PROCEDURALLY BARRED.

On pp. 152-155 of the petition, Johnson argues that an eighth amendment violation occurred at the penalty phase of his capital trial because the judge and jury improperly considered non-statutory aggravating circumstances based, apparently, on selected out-of-context quotations from the state's closing argument at the penalty phase of Johnson's capital trial. Johnson also raises a claim of ineffectiveness of appellate counsel, and continues the theme of complaints concerning this court's page limitation at the initial brief stage, as well as the re-concurrent complaint regarding the claimed inaccuracy of the transcript.

With regard to this claim and its subsidiary components set out above, each component of this claim is time barred, because none of those claims were raised on OK before January 1, 1987, in accordance with this court's ruling In re Rule 3.850 of the Florida Rules of Criminal Procedure, 481 So. 2d 480 (Fla. 1985). Johnson did not raise this claim in a timely fashion, and his failure to do so bars this claim from review. Johnson's inclusion of this claim, when it has never before been raised in any proceeding, and is presented to this court after Johnson convinced the Federal Habeas Court to allow him to return to State Court for the purpose of exhausting two unrelated claims, is an abuse of process which is uncalled for, inappropriate, and inexcusable.

It is also procedurally barred because it could have been, but was not raised at trial and on direct appeal. See, Parker v. Dugger, supra; Henderson v. Singletary, supra, at 315-16; Davis v. State, supra at S56; Koon v. Dugger, 619 So. 2d 246, 248 (Fla. 1993). Moreover, Florida law is well settled that a habeas petition may not be used to raise an issue that should have been raised on direct appeal. See, Parker, supra. Florida law is also clear that a claim of ineffective assistance of counsel may not be used to circumvent the rule which precludes the use of habeas as a second appeal, Medina v. State, supra; Blanco v. Wainwright, supra, at 1384; nor can a procedural bar be avoided by pleading a barred claim in terms of ineffectiveness of counsel, Kight v. Dugger, supra.

The substantive claim, and all of its derivatives are time barred, and should be denied on that basis. Insofar as the substantive claim is concerned, that claim is also procedurally barred because it was not properly presented in a 3.850 motion. Johnson's failure to properly present this claim is a procedural bar which precludes either review or relief. See, White v. Dugger, 511 So. 2d 544 (Fla. 1987); Kight v. Dugger, supra; Swafford v. Dugger, 569 So. 2d 1264 (Fla. 1990).

Insofar as Johnson presents a claim concerning the accuracy of the transcript, his overlength initial brief contained no complaint whatsoever concerning the accuracy of the transcription of closing arguments, even though direct appeal counsel was not reluctant to complain regarding the transcript itself. This claim is time barred as well as being procedurally barred. Those are independently adequate reasons for the denial of relief, and the state submits that this court need not reach the merits of this claim because it is clearly procedurally barred and time barred. While the procedural defenses set out above are adequate and independent grounds for denial of relief, alternatively and secondarily, this claim lacks merit for the reasons set out below.

Johnson's claim, as set out in the petition, is that a federal constitutional violation occurred as a result of the state's allegedly improper closing arguments at the penalty phase of Johnson's capital trial. Johnson seems to argue that the state's closing argument improperly made reference to the other murder victim (Himes), and because that was done, the jury

improperly considered a non-statutory aggravating factor. This claim is spurious based upon the following reasoning.

First, what Johnson attempts to label as improper consideration of non-statutory aggravation was, in fact, nothing more than a proper closing argument based upon the evidence and the inferences from that evidence. The jury was instructed that arguments of counsel are not evidence, and was specifically instructed that only the statutorily enumerated aggravating circumstances could be considered by them. (R.6) Juries are presumed to follow their instructions, and it is axiomatic that judges are presumed to follow the law, as well as their own jury instructions. Walton v. Arizona, 110 S.Ct. 3047 (1990). Johnson has not overcome this presumption, and indeed has not demonstrated that either judge or jury considered anything other than the stautorily enumerated aggravating factors. In fact, the court's sentencing order could not be more specific in its express indication that only the statutory aggravators were considered. (R.804-807).

There is no support for this claim and, because it has no basis in law or fact, it cannot supply a basis for collateral relief. The state's closing argument with regard to the "cold, calculated and premeditated aggravator," as well as the "avoiding arrest" aggravator, were proper, and those arguments by counsel did not cause the jury to consider anything that could arguably be considered non-statutory aggravation.[19] In any event, the

[19] Inconsistently, Johnson complains in a subsequent issue in his petition because the prosecutor told the jury that the state could only present statutory aggravation. (Petition at 160-161).

prosecutor's argument concerning the circumstances surrounding the Himes murder was relevant to establish Johnson's state of mind, intent, and motive for the murder of Dodson. The argument itself was based upon the evidence and the reasonable inferences flowing from that evidence, and it strains puerility to suggest that this argument caused the judge or jury to consider any matter that could arguably be considered non-statutory aggravation.

To the extent that Johnson claims that he was acquitted of felony murder (petition at 153), and that there is some unspecified error regarding the state's argument concerning the "during the course of a felony" aggravator, that claim is spurious. As this court found on direct appeal, Johnson's own statement established that the murder occurred in the course of a robbery, and upheld this aggravating circumstance. Johnson v. State, 442 So. 2d at 197. Of course, "during the course of a felony" is a statutorily enumerated aggravating circumstance, and argument concerning that aggravator cannot approach non-statutory aggravation.

Insofar as the ineffectiveness of appellate counsel claim is concerned, Point IV on appeal was a claim concerning the alleged improper consideration of non-statutory aggravation. Appellate counsel was obviously well aware of the existence of a non-statutory aggravation claim as potential grounds for relief because he did in fact press such a claim based upon a different theory. Of course, it is long-settled that the hallmark of effective appellate advocacy is the elimination of weaker issues

so that stronger issues can be presented. (See Claim I supra.) While it would not have been ineffective for appellate counsel to have raised the claim set out in the habeas petition, it does not follow that the decision not to press this claim amounts to ineffectiveness of counsel. Choices must be made and issues included and eliminated based upon their perceived chance of success, and, it is unfair and uncalled for to accuse appellate counsel of ineffective assistance of counsel for not raising the claims set out in Johnson's petition.

The claim itself is devoid of merit, and appellate counsel cannot have been ineffective for not raising a meritless claim. Suarez v. Dugger, supra, at 193. Moreover, the claim pleaded in Johnson's habeas petition is predicated solely upon Federal constitutional grounds. At the time of direct appeal, and at this time, there was, and is, no Federal constitutional prohibition against the use of non-statutory aggravation. See, e.g., Zant v. Stevens, 462 U.S. 863, 887-88 (1983), See also, Lindsay v. Smith, 820 F.2d 1137, 1154 (11th Cir. 1987). Even if counsel had raised the claim set out in the petition, it would not have been successful because controlling precedent is directly contrary to the position Johnson has taken. See Herring v. Dugger, supra at 1177. Johnson has claimed only a violation of the Federal Constitution and, when counsel's performance is evaluated based upon the state of the law at the time Johnson's initial brief was filed (and even up to this date) it is readily apparent it was not deficient performance on the part of appellate counsel to elect not to include this issue. There is

no basis for relief to be found anywhere in Claim XIV to the petition, and it is due to be denied.

CLAIM XV

THE CLAIM THAT THE DEATH SENTENCE VIOLATES DOUBLE JEOPARDY AND THE EIGHTH AMENDMENT AND THAT APPELLATE COUNSEL WAS INEFFECTIVE IS PROCEDURALLY BARRED.

Johnson complains that in finding the "avoiding arrest" aggravator, as to the murder of the bar owner Dodson, the sentencing judge erroneously found that "the evidence was clear that the Defendant intended to **eliminate** the bar owner and patron as witnesses by killing them so as to avoid detection and arrest." He argues this was error because he was found guilty of the second degree murder of the patron and was acquitted of premeditated as well as felony murder of the patron.

Besides being time barred, this claim should have been raised on direct appeal or at the least, and latest, in the rule 3.850 motion. Habeas corpus is not a vehicle for additional appeals of questions which should have been raised on appeal or in a rule 3.850 motion. Parker v. Dugger, supra. Shiro v. Farley, 114 S.Ct. 783 (1994), is not a change in the law as to this case so as to excuse procedural bars. The Shiro Court actually rejected the argument that a sentencing proceeding amounted to a successive prosecution for intentional murder in violation of the Double Jeopardy Clause. Id. at 789. Aggravators are not treated as elements of the offense. Walton v. Arizona, 110 S.Ct. 3047 (1990). Statutory aggravators are

neither separate penalties nor crimes, but standards to guide sentencing discretion. Therefore, a judge's finding of any particular aggravating factor does not "convict" the defendant by requiring the death penalty. Poland v. Arizona, 476 U.S. 147 (1986).

Moreover, the aggravator was properly found as to the owner. The bartender/owner knew Johnson as "Terry" and Johnson test fired the revolver before the robbery. (R.806) By Johnson's own admission, the homicide was committed during a robbery. Johnson v. State, 442 So. 2d at 197. He marched the two men into the restroom at gun point, and forced them to lie face down on the floor. He shot the bar owner "execution style", once at close range through the head. So, even though the patron may have provoked his being shot by lunging at Johnson, the bartender was dispatched in a much cooler, deliberate manner. Johnson then wiped down his prints. (R.806) Even if this claim had been raised, relief would not have been warranted, therefore, appellate counsel cannot be faulted for not having raised it. Suarez v. Dugger, supra at 193.

CLAIMXVI

THE PENALTY PHASE PROSECUTORIAL ARGUMENT CLAIM IS TIME BARRED AND PROCEDURALLY BARRED.

On pp. 158-167 of the habeas petition, Johnson argues that he is entitled to relief based upon purportedly improper penalty phase closing argument. Johnson also argues that the perceived deficiencies in the record deprived him of "meaningful review".

In a remarkably misleading piece of appellate advocacy, Johnson makes the sweeping assertion that this issue was raised on direct appeal, while never identifying the portion of his direct appeal brief where that issue is to be found. Moreover, Johnson continues his complaint about the transcript, even though direct appeal counsel raised no complaint regarding any perceived deficiency in the closing argument transcript, and even though the record from which the instant petition was written is the same record that was used by appellate counsel.[20]

The first reason this claim is procedurally barred is that it is barred by the two-year time limitation set out in Fl.R.Crim.P. 3.850. See, In re Rule 3.850 of the Florida Rule of Criminal Procedure, 481 So. 2d 480 (Fla. 1985). Johnson's case was final in 1984, and, under the rule, this issue should have been raised no later than January 1, 1987. Johnson did not do that, choosing instead to wait eight more years before presenting this claim. That delay renders this claim untimely.

The second reason this claim is procedurally barred is because it could have been, but was not raised at trial and on direct appeal. See, Parker v. Duqqer, supra. A review of the penalty phase closing argument (which is claimed to be inaccurate but is nonetheless quoted at length) reveals only three objections by defense counsel during the entire argument. Of those objections, only two of them are mentioned in the habeas petition. (See, petition at 162; R.498, 510.) Neither of those

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[20] Footnote 39 at page 159 of the petition is remarkably uninformative -- of course, unsupported assertions of counsel prove nothing.

objections were sufficient to preserve the issue for appellate review, because neither objection was followed by a timely motion for mistrial. See, Clark v. State, 363 So. 2d 331 (Fla. 1978); Songer v. State, 322 So. 2d 481 (Fla. 1975). This claim is procedurally barred because it could have been, but was not raised at trial and on direct appeal. That double layer of procedural bar precludes consideration of this claim in this petition.

It is true that Johnson raised an issue on direct appeal which contained, inter alia, a citation to the argument found at record pages 498 and 510. (See, Initial Brief at Point IX.) It is also true that the direct appeal issue was a claim that the jury was improperly allowed to consider non-statutory aggravators, rather than a claim of prosecutorial misconduct, which is the claim Johnson now presents. That is a procedural bar to review of this claim under settled Florida law. See Parker v. Dugger, supra. Even should this court disagree and find these two components of this claim to have been raised on direct appeal, that does not overcome the trial level default which was the state's primary defense on direct appeal. (See answer brief at 41.) While Johnson claims, on p. 159 of the petition, that this court decided this claim on the merits during direct appeal, the state does not concede that is an accurate description of this court's statement. What this court stated was that there was "no support for appellant's other points on appeal." Johnson, 442 So. 2d at 197. The state submits that statement by this court is equally susceptible to an interpretation that the claim was not preserved for review.

Because Johnson will likely raise this issue (or some variation of it) in a later Federal Habeas petition, the state suggests that this court should expressly hold this claim to be time barred as well as procedurally barred, because it was not raised at trial or on direct appeal.

The third reason this claim is procedurally barred is that it should have been, but was not presented by means of a 3.850 motion. Johnson's failure to properly present this claim is a procedural bar which precludes either review or relief. See, White v. Dugger, 511 so. 2d 554 (Fla. 1987); Kight v. Dugger, supra; Swafford v. Dugger, supra; Medina v. State, supra, (applying the procedural bar rules to a prosecutorial argument claim contained in a 3.850 motion); Atkins v. Dugger, 541 So. 2d 1165 (Fla. 1990) (same).

While this claim is not only time barred, but procedurally barred as well, and those are separately independent and adequate reasons for denial of relief, this claim is alternatively and secondarily without merit. The state's closing argument, when read in context, is clearly legitimate rhetoric in support of a sentence of death. Of course, the state's argument concerning Johnson's criminal history, which included a prior murder, was clearly proper. See, Kennedy v. State, 455 So. 2d. 351 (Fla. 1984). Likewise, the state's closing argument, concerning mitigation, intent, reasonable doubt, and the aggravating circumstances was not improper, but rather was legitimate argument based upon the evidence. There is no reversible error present. See, Walton v. State, 547 So. 2d 622 (1989).

Of course, the absence of objection at trial tends to suggest "that the argument as it played in the courtroom was less pointed that it now reads in the transcript." Sawyer v. Butler, 881 F.2d 1273, 1287 (5th Cir. 1989) (en banc).[21] Of course, the jury in this case was instructed that the arguments of counsel are not evidence, and it is axiomatic that juries are presumed to follow their instructions. The state's closing argument was not improper when considered in its entirety. It would provide no basis for relief even if properly preserved and properly before this court. This court should hold the prosecutorial argument claim to be both time barred and procedurally barred for the reasons set out above.

CLAIM XVII

JOHNSON'S CLAIMS CONCERNING THE MITIGATING CIRCUMSTANCES, AND THE DERIVATIVE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ARE TIME BARRED AND PROCEDURALLY BARRED.

On pp. 168-173 of his petition, Johnson argues that he is entitled to relief because, he claims, the "established mitigation" was not properly weighed by the sentencing court. Further, in a tacit concession to the existence of a procedural bar, Johnson argues that appellate counsel was ineffective for

[21] Johnson raises no claim of ineffectiveness of trial counsel in relation to this claim, either in this petition, or in his prior 3.850 motion. See, e.g., Johnson v. State, 593 So. 2d 206 (Fla. 1992).

not raising this claim on direct appeal. For the reasons set out below, these claims are time barred.

Insofar as both parts of this claim are concerned, those components *were* not raised on direct appeal, in Johnson's 1986 3.850 proceeding, or in the 1992 Federal habeas corpus proceeding. See Parker v. Dugger, supra. The derivative appellate ineffectiveness claim is raised for the first time in this pleading. Under settled law, both parts of this claim should have been presented no later than January 1, 1987, and Johnson's failure to raise this claim until 8 years after that deadline is a clear time bar to this claim. See, e.g., In re Rule 3.850 of Florida Rules of Criminal Procedure, 481 So. 2d 480 (Fla. 1985).

Besides Johnson's failure to timely raise this claim barring it from review, the State suggests that the inclusion of this claim at this late stage of litigation is yet another example of sharp practice by Johnson's present attorneys. This claim has never before been raised in any proceeding, and Johnson's attempt to present it in this proceeding, after convincing the Federal habeas court to allow him to return to State court for the stated purpose of exhausting two unrelated claims, is an abuse of process which is uncalled for, inappropriate, and inexcusable. At best, Johnson violated his express representation to the Federal court, and is now attempting to take advantage of that breach by burdening this court with a brand new claim that has never before been pleaded in State or Federal court. That is an abuse of process that should not be tolerated and need not be

endured. The substantive claim is time barred, and should be denied on that basis.

The second reason that this claim is not a basis for relief is that even if the sentencing order requirements set out in Campbell v. State, 571 So. 2d 415 (Fla. 1990), are considered to be a "significant change in the law", and the State does not concede that is the case, Johnson is *still* time barred. Under settled law, all post-conviction motions filed after June 30, 1989, which are based upon new facts or a significant change in the law, must be filed within two years from the date the facts became known or the change was announced. Henderson v. Singletary, supra at 316; Adams v. State, supra. Campbell v. State, supra, is not a fundamental change in the law that is retroactively applicable to this case, Gilliam v. State, 582 So. 2d 610, 612 (Fla. 1991).

The third procedural bar to consideration of this claim rests upon Johnson's failure to raise this claim on direct appeal. That is a procedural bar under settled Florida law. See, Parker v. Dugger, supra; Davis v. State, supra, at S56; Koon v. Dugger, supra, at 248; Henderson v. Singletary, supra, at 315-316. Florida law is settled that a habeas petition is not properly used to raise issues that should have been raised on direct appeal. Parker, supra. Likewise, Florida law is clear than a claim of ineffective assistance of counsel is not allowed to circumvent the rule precluding the uses of habeas as a second appeal, Medina v. State, supra; Blanco v. Wainwright, supra, at 1384; nor can a procedural bar be avoided by pleading a barred

claim couched in ineffective assistance of counsel terms, Right v. Dugger, supra. This Court should hold the substantive claim to be time barred and procedurally barred, and should hold the derivative ineffective assistance of appellate counsel claim time barred and procedurally barred, because it is pleaded to use the proceeding as a second appeal. Kight v. Dugger, supra.

Alternatively and secondarily, this claim lacks merit. Respondent strongly urges this Court to resolve this claim only on procedural bar and time bar grounds. In the event that this Court wishes to express any opinion on the merits of this claim, Respondent respectfully suggests that any decision on the merits be clearly denominated as alternative and secondary in nature. He further suggests that the procedural bar/time bar grounds are clearly stated ta be the primary basis for denial of relief which are sufficient for disposition of this claim.

Even though Johnson raised no claim concerning the adequacy of the trial court's sentencing order in his 3.850 motion, this Court had occasion to address the weighing of the aggravating and mitigating circumstances in the context of another claim raised on appeal from the denial of 3.850 relief. In upholding the denial of 3.850 relief, this Court stated "[t]he record also shows that the judge conducted an independent review of the aggravating and mitigating circumstances in determining" that Johnson should be sentenced to death. Johnson, 593 so. 2d at 209. That finding of fact by this Court establishes the sufficiency of the sentencing order, and likewise disposes of Johnson's Campbell claim because it establishes that the trial court (contrary to

Johnson's suggestion) found that the aggravators outweighed the mitigators. In any event, the sentencing order is sufficient under Campbell, and is, if anything, a more detailed order than the one upheld by this Court in Downs v. State, 572 So. 2d 895, 901 (Fla. 1990). Even if this claim was not procedurally barred and time barred, it would not be a basis for relief, because the decision of this Court upon which Johnson relies is not retroactively available to him, and because the claim is meritless.

To the extent that Johnson argues that appellate counsel was ineffective for not raising this issue on direct appeal, that claim is the quintessential example of evaluating the performance of counsel through hindsight. Such an evaluation is flatly prohibited by Strickland v. Washington, 466 U.S. 688, 689 (1984) and its progeny. See, Atkins v. Singletary, 965 Fed. 952, 958 (11th Cir. 1992), Johnson v. Dugger, 523 So. 2d 161 (Fla. 1988). Of course, "...' Nothing is so easy as to be wise after the event"', and in this case, the "event" is the 1990 decision of this Court in Campbell. See, Atkins, supra. The decision in this case was rendered in 1983, some six years before Campbell. It is unfair to criticize appellate counsel for not being able to look into the future and predict the Campbell decision. See, Stevens v. Sate, supra.

Johnson's seemingly obligatory attack on appellate counsel's performance is specious. Moreover, there is no merit to Johnson's claim and consequently there can be no merit to the ineffective assistance of counsel claim. Respondent contends

that both components of this **claim** are both time barred and procedurally barred. The foregoing merits decision is alternatively and secondary in nature to the procedural defenses, which are adequate grounds for denial of relief.

CLAIM XVIII

THE CLAIM THAT THE BURDEN WAS SHIFTED TO PETITIONER TO PROVE DEATH WAS AN IN APPROPRIATE SENTENCE IS PROCEDURALLY BARRED.

The claim that the burden was shifted to the defendant in penalty phase instructions to establish that mitigating circumstances outweigh aggravating. circumstances, was neither raised on direct appeal nor petitioner's rule 3.850 motion and appeal therefrom. The claim is, therefore, procedurally barred. Henderson v. Dugger, 522 So. 2d 835, 836 (Fla. 1988). It is barred under the two-year rule limitation, Adams v. State, supra, as well, which would also preclude any appellate ineffectiveness claim since the claim is based on the 1988 case of Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), and should have been raised in habeas by 1990.

Habeas Corpus petitions are not to be used for additional appeals on questions which should have been raised on appeal or in a rule 3.850 motion, OK on matters that were not objected to at trial. Parker v. Dugger, supra. This claim is meritless, in any event. Preston v. State, 531 So. 2d 154, 160 (Fla. 1988); Boyde v. California, 110 S.Ct. 1078 (1990). No basis was provided to and appellate counsel was not ineffective for not raising this issue.

CLAIM XIX

THE CLAIM THAT THE JURY'S SENSE OF RESPONSIBILITY FOR SENTENCING WAS DIMINISHED BY INSTRUCTIONS AND ARGUMENT IS PROCEDURALLY BARRED.

The claim that the trial court impermissibly diminished the jury's role in sentencing contrary to Caldwell v. Mississippi, 472 U.S. 320 (1985), was not raised on direct appeal but was raised previously on a F.R.Crim.P. 3.850 motion. On appeal therefrom, this court found that the claim was not cognizable as it could have been raised on direct appeal. Johnson v. State, 593 so. 2d 206, 208 (Fla. 1982). See, Henderson v. Singletary, supra. This court has deemed the record adequate and two evidentiary hearings were had in this case to ensure the completeness and adequacy of the record.

Appellate counsel cannot be deemed ineffective for failing to raise a Caldwell claim where there was no objection below to properly preserve the claim. See, Suarez v. Dugger, supra, at 193; King v. Dugger, 555 So. 2d 355 (Fla. 1990). The Caldwell decision did not issue until 1985, after direct appeal in any event. Nor will an allegation of ineffective counsel be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. Blanco v. Wainwright, supra, at 1384. This court has held, in any event, that Caldwell is not such a change in the law as to provide relief in post-conviction proceedings, Foster v. Smith, 518 So. 2d 901 (Fla. 1987), so the inquiry as to appellate counsel's effectiveness is a superfluous one in the first place, the claim having been rejected collaterally by the court on the 3.850 appeal. In Sawyer v. Smith, 497 U.S. 227, 241 (1990), the Supreme Court also held that defendants whose convictions become final prior to the Caldwell decision are not entitled to federal habeas corpus relief.

This court has previously indicated, in any event, that advising the jury that its sentencing recommendation is advisory only, and that the ultimate decision rests with the trial judge, is an accurate statement of Florida law. Cave v. State, 529 So. 2d 293, 296 (Fla. 1988), Grossman v. State, 525 So. 2d 833 (Fla. 1988); Combs v. State, 525 So. 2d 853, 857-58 (Fla. 1988). To the extent Espinosa v. Florida, 112 S.Ct. 2926 (1992), is invoked as either a change in law or to overcome procedural bars, it should be noted that the Espinosa decision issued in 1992 and pursuant to Adams v. State, supra, the claim should have been raised within two years of the Espinosa decision.

The Espinosa opinion, in any event, inaccurately describes the jury/judge role under Florida law, the death penalty statute, and the decisions of this court. Respondent respectfully suggests this court take the opportunity the state was denied in the summarily decided Espinosa case, and make clear that the jury is not a co-sentencer before Espinosa is invoked and implicated in every facet of the penalty phase.

CLAIM xx

THE CLAIM THAT THE WRITTEN SENTENCING ORDER WAS INADEQUATE, AS WAS THIS COURT'S REVIEW ON DIRECT APPEAL, IS PROCEDURALLY BARRED; THE CLAIM APPELLATE COUNSEL WAS INEFFECTIVE IS FRIVOLOUS.

Petitioner claims that the trial judge failed to make specific findings of fact, particularly in regard to the cold,

calculated, and premeditated aggravating factor; this Court on direct appeal simply found that all the aggravators relied upon by the trial court were proper, and didn't conduct a meaningful review on direct appeal, citing Parker v. Dugger, 111 S.Ct. 731 (1991), and even though this court was required to conduct a review of the application of the aggravating circumstances, appellate counsel was ineffective in failing to raise this issue on appeal.

Any claim that the sentencing order was inadequate could have been raised on direct appeal. Habeas Corpus is not a vehicle for obtaining a second appeal of issues which should have been raised on direct appeal. Blanco v. Wainwright, supra, at 1384.

The issue whether Parker is a retroactive change in the law, so as to be collaterally applied, need not even been reached because the Parker decision is inapposite. In Parker, the Court reversed this court's affirmance of a death sentence because this court failed to consider mitigating circumstances, of which there was evidence in the record, even though the trial judge did not explicitly discuss nonstatutory mitigating circumstances in his sentencing order when reweighing the evidence. The square peg of Parker simply will not fit in the round hole of this case, despite the many attempts to make Parker an all-purpose decision. There is no violation of the death penalty statute or Van Royal v. State, 497 so. 2d 625 (Fla. 1986), as sufficient written findings were made in the sentencing order. Petitioner simply demands that the same supporting facts be repetitiously set out as to each aggravating circumstance.

It is clear that the facts applied to the "avoiding arrest" aggravator set out below pertain to and encompass, as well, the "cold, calculated and premeditated" aggravator, and both factors were argued together on direct appeal, based on the same facts. Johnson v. State, 442 So. 2d 193, 197 (Fla. 1983).

> The crime for which Defendant is to be sentenced was for the purpose of avoiding or preventing a lawful arrest, in that the evidence is clear that the Defendant intended to eliminate the bar owner victim and patron as witnesses by killing them so as to avoid detection and arrest. The evidence showed that the Defendant was known to the bar owner as "Terry"; the Defendant test fired the revolver in an adjacent lot before the robbery; after the robbery he marched the two men into the restroom at gun point; he forced them to lie face down on the floor; he shot the patron several times; he shot the victim once through the head at close range; he went out into the bar to wipe away his fingerprints; and then, when he heard moaning, went back to the restroom and shot the patron who was still alive one or more times. This is an aggravating circumstance. (R 806)

Moreover, the finding of the actual CCP factor was challenged on appeal and this court, in its independent review function, found it to have been properly found, and the facts of the case support such conclusion. Parker provides no basis to entertain this procedurally barred claim. Even if Parker was on point, the claim is time barred, as it should have been raised within two years of the 1991 Parker decision and is barred under Adams v. State, supra.

CLAIM XXI

THE CLAIM THAT THE TRIAL JUDGE APPLIED THE FLORIDA CAPITAL SENTENCING STATUTE AS IF IT REQUIRED A MANDATORY DEATH SENTENCE IS PROCEDURALLY BARRED.

The present claim, that the trial court erroneously applied the Florida death penalty as if it were mandatory and mercy could not be applied, has been previously raised both on direct appeal and on appeal from the denial of post-conviction relief, and has been summarily rejected by this court. See, Johnson v. State, 442 at 197; Johnson v. State, 593 So. 2d. at 208. Habeas Corpus is not a vehicle for obtaining additional appeals of issues which were raised on direct appeal or in a rule 3.850 motion. King v. Dugger, supra; Parker v. Dugger, supra. No retroactive change in law is even cited as infusing viability into this meritless claim. And, it is time barred.

Alternatively, even if this barred claim could be entertained, no relief is warranted. It is not unconstitutional to base a sentencing decision on factors presented at trial, rather than emotional responses that are not rooted in the aggravating and mitigating evidence in the first place. See, California v. Brown, 479 U.S. 538, 542 (1987). In Boyde v. California, 494 U.S. 370 (1990), the Court upheld a statute mandating the imposition of the death penalty when aggravating circumstances outweigh mitigating circumstances. "Mercy" is largely considered an irrelevant sentencing consideration, standing alone. See, Lusk v. Singletary, 965 F.2d 946, 951 (11th Cir.) *withdrawn in part,* 976 F.2d 631 (1992) (per curiam). The

statute was hardly considered as mandating a death sentence by the judge, in any event. His sentencing order simply indicated, in general, that application of the evidence to the law called for a death sentence. (R.805-807) There is no evidence at all the judge engaged in mere numerical tabulation, as opposed to having rendered a considered decision.

CLAIM XXII

JOHNSON'S TRIAL AND APPELLATE COURT PROCEEDINGS WERE NOT FRAUGHT WITH ERRORS SO AS TO SUPPORT A CUMULATIVE ERROR ARGUMENT.

Johnson complains that "the process itself failed him because of the sheer number and types of errors involved in his trial and appeal which, considered as a whole, dictated the sentence he received." In support of his "cumulative" error claim, Johnson relies on Jones v. State, 569 So. 2d 1234 (Fla. 1990). In Jones, this court stated:

> In summary, we have found that the trial court erred by instructing the jury that the murder was especially heinous, atrocious, or cruel; by admitting testimony in violation of *Booth;* by preventing the jury from considering the potential sentence of imprisonment; and by permitting the state to introduce evidence of lack of remorse. We conclude that these penalty phase errors require a new sentencing hearing before a new sentencing jury.
>
> 569 So. 2d. at 1240.

It is apparent from the opinion preceding this paragraph, however, that this court felt that each error, considered separately, was reversible and not harmless. 569 So. 2d. 1238-

40. This case does not support an argument based on cumulative error, simply because all reversible errors were catalogued in one summary paragraph. Johnson does not even claim any similarity in error. Moreover, unlike the Jones case in which it was determined on direct appeal that a new sentencing hearing was required, this case has withstood attacks both on direct appeal and collaterally. The challenges herein are either repetitive or procedurally barred and time barred.

Unlike the situation in Jackson v. State, 575 So. 2d. 181, 188 (Fla. 1991), in which this court did consider the cumulative effect of multiple errors, Johnson has pointed to no errors that were fundamental or went to the heart of the state's case, largely because petitioner's claims are procedurally barred. The only claim Johnson specifically makes *in a footnote,* is the claim that the jury originally deadlocked six-to-six at the penalty phase and were instructed that their recommendation had to be by a majority vote. (petition at p. 189 n.43.) This claim was disposed of by this court on appeal from the denial of post-conviction relief, where the court determined that there was nothing in the jury foreman's deposition to even indicate an actual jury deadlock. Johnson v. State, supra, at 210.

CLAIM XXIII

APPELLATE COUNSEL WAS EFFECTIVE AS REGARDS THE ROBBERY INSTRUCTION, AND THIS CLAIM IS PROCEDURALLY BARRED.

Johnson's twenty-third claim is *procedurally barred* because it was never (1) specifically objected to by Johnson at the reconstruction hearing; (2) specifically challenged on direct

appeal; or (3) specifically raised in his motion for post-conviction relief; and (4) it is time barred. See Adams v. State, supra, at 1249; Henderson v. Singletary, supra, at 315-316. He ends as he began, by continuing to raise his ineffective assistance of counsel **claim** in piecemeal fashion. See Jones v. State, supra, at 913. He attempts to circumvent the rule that habeas proceedings do not provide a second or substitute appeal. Blanco v. Wainwright, supra at 1384; Medina v. State, 573 So. 2d **293.** Johnson's incomplete record and page limitation arguments have already repeatedly been addressed by Respondent, and his arguments thereto are equally applicable here.

State v. Jones, 377 So. 2d 1163 (Fla. 1979) and Franklin v. State, 403 so. 2d 975 (Fla. 1979) do not stand for the proposition that the "failure to instruct fully and accurately on the elements of felony murder, including the underlying felony, is fundamental error." (p.1, Johnson's supplemental Claim 23.) Rather, those two cases "...found the ***complete failure*** to give any instruction on an underlying felony to be fundamental error." Franklin at 976. In fact this Court opined in that cause:

> While it is not necessary to instruct on the elements of an underlying felony with the particularity required if that felony were the primary case charged, the elements must be sufficiently defined to assure the defendant a fair trial. (citations omitted)

Id.

Further, in Franklin, this Court applied a harmless error analysis to the ***complete failure*** to give a robbery underlying felony instruction. It found:

> In this case the killing resulted from an exchange of bullets when Franklin allegedly sought to rob the victim's liquor store. The primary thrust of the state's case was felony murder. In closing argument felony murder was the dominant theme, and, indeed, the facts demonstrate felony murder more clearly than premeditation. It is at least as likely as not that the jury based its verdict on felony murder. The failure to instruct on the underlying felony cannot be considered harmless error in this case.

Id.

Clearly, Franklin is distinguishable on the facts from this cause, where Johnson murdered the bar owner in cold blood, and then went and robbed the cash register. Of course, it is also distinguishable because an underlying felony instruction was given which read:

> Robbery is the taking of money or other property of any value whatsoever from the person or custody of another by force, violence, assault or putting in fear.

(R.304)

Given that "...it is not necessary to instruct on the elements of an underlying felony with the particularity required if that felony were the primary case charged," the underlying felony instruction here was adequate. If it was not, any error was harmless beyond a reasonable doubt given the "execution style" murder of Dodson. Id. Johnson's appellate counsel was not ineffective for failing to argue a point which, even if correct, would amount to no more than harmless error. Duest v. Dugger, supra; King v. Dugger, supra.

SUPPLEMENTAL ARGUMENT TO CLAIM II

Upon completion of this response, undersigned counsel was handed the slip opinion of Kight v. Singletary, slip op. 92-2935 (11th Cir. March 15, 1995), which is attached as an exhibit hereto (Ex. A1). Respondent would refer this Court to pages 8-13 of that opinion as it relates to Kight's claim that "the trial court did not give the jury a narrowing instruction for the 'heinous, atrocious or cruel"' aggravator. Respondent adopts that portion of the opinion as argument to Johnson's claim related to the "heinous, atrocious, and cruel" aggravator, and to all of the aggravators under that claim. He further adopts the remainder of said opinion to the extent it relates to any of Johnson's myriad claims.

CONCLUSION

Based upon the foregoing facts, authorities and reasoning, the Respondent respectfully submits the petition be denied.

Respectfully submitted,

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