IN THE SUPREME COURT OF FLORIDA

MICHAEL T. RIVERA,

Appellant,

vs. Case No. 86, 528

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, MICHAEL T. RIVERA, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the record in this appeal will be by the symbol "R," reference to the record from the direct appeal will be by the symbol "ROA," followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Rivera's first witness was Dr. Fred Berlin, a psychiatrist. Dr. Berlin evaluated Rivera on two separate occasions. (R 379--380). He reviewed police reports, psychological reports and statements of various witnesses. (R 380-381). Berlin was asked to evaluate Rivera to determine to see if he had a psychotic disorder relevant to sexual fantasies. He was also asked to determine if Rivera's admissions to raping and killing Staci Jazvac were true or mere fantasies. (R 381). Rivera suffers from a paraphilia disorder which entails abnormal sexual urges and fantasies towards children. (R 385). Rivera also suffers from chronic substance abuse. (R 383). Appellant is not psychotic. (R 384).

Rivera told Berlin that he fantasized about engaging in sex acts with Staci Jazvac. He also admitted that he fantasized about harming her as well. (R 387). Berlin explained that the only way to tell if a statement is fantasy or truth is to determine whether the admission conforms to a previously documented pattern of behavior. (R 387). With that frame of reference, Berlin stated that he was leaning towards finding that Rivera's statements were true. (R 388). Rivera's admitted past includes convictions for very similar attacks on a child and a young adult. (R 389-391). Berlin stated that although he initially opined that the statements were true, he could not definitely make that conclusion for the

following reason. At the time Rivera was in jail another murder occurred in the same general area where Staci Jazvaca was found. The crime involved the rape and murder of a young woman. (R 391-392).

On cross-examination Berlin stated that Rivera's disorder included obsessions with exhibitionism, voyeurism, pedophilia, and transvestism. (R 397-398). He could not say if Rivera's statements to others regarding the murder of Staci Jazvac were actual admissions or simply fantasy. (R 398, 411). Berlin acknowledged Rivera's extensive criminal sexual past and admitted that Rivera's past evidences an escalating pattern of violent behavior. (R 401-411). Berlin admitted that if Rivera had not killed Staci Jazvac that he was definently headed in that direction. (R 411). Rivera made that same prediction to Berlin. (R 411-414).

The defense next called Dr. Burglass, an expert in addiction medicine and psychiatry. (R 450). He was asked to evaluate Rivera regarding substance abuse history. (R 455). Burglass reviewed Rivera's school records, past psychological reports, prison records and trial testimony. (R 457). Burglass opined that Rivera has a history of some drug dependency and some drug addiction. (R 452). He started doing cocaine in 1975. (R 465). By 1985 he was addicted to cocaine. (R 466).

Rivera told the doctor that he drank a lot and did a large quantity of cocaine the day before the murder. (R 473). His drug consumption continued the next day. (R 474). Rivera steadfastly denied committing the crime. (R 474). Yet he did admit to committing many other sexual criminal acts. (R 483, 489). However given the amount of drugs and alcohol injected on January 29th and 30th, it is possible that Rivera could not form the specific intent to commit the crime. (R 475). His drug use would drive his sexual fantasies to the point where Rivera's ability to appreciate the criminality of his actions was impaired. However, Burglass stated that he could not be very forceful on this point given the fact that in this point in time we are far removed from the actual event. (R 480). Furthermore the drug use would also interfere with the ability to conform his conduct to the essential requirements of the law. (R 476-477). Rivera's compulsive sexual tendencies mixed with cocaine would trigger a compulsion to carry out the sexual fantasies. (R 482-483). Based on his evaluation Burglass stated that there was a possibility that Rivera committed this crime while intoxicated, even though he has never reported a history of blackouts. (R 491-493).

Miriam Rivera, appellant's sister testified next. She stated that Michael Rivera used drugs since he was fifteen. (R 432). He started using cocaine at the age of twenty. (R 434). He would

steal money from his family. Because of Rivera's stealing Miriam began locking her bedroom door. (R 434-435). Eventually this caused her to move out of her parents home. (R 435). She could not say if her brother was high on drugs on the day of the crime. (R 438-439).

Peter Rivera, appellant's brother was next to testify. Appellant started doing drugs around the age of fourteen. (R 440). Appellant stole money from his family. (R 442). Peter did not see appellant after 1:00 A.M. the morning of the murder. (R 445).

Mark Peters was the next defense witness. (R 498). He and Rivera did drugs together. (R 499). Peters let Rivera borrow his van on January 30, 1986. (R 500). Rivera took Peters to work at 8:00 A.M. and picked him up between 6:00 P.M. and 6:30 P.M. (R 501). Peters then dropped appellant off at his house and then went home. (R 502). Peters talked to the police on a number of occasions. He also testified before the grand jury. (R 503, 507). Peters moved to Orlando with his mother and sister before the case went to trial. (R 504). He had thought about moving before the murder. The notoriety associated with the case and the police prompted him to finally move. (R 504). He did not tell the police that he was moving. (R508). The police originally viewed Peters as a suspect. (R 504).

Rivera appeared normal and relaxed on January 30th. (He did not look like he was under the influence of any drugs. (R 504-506). Peters would be able to tell if Rivera was high that day. (R 506).

Peters told police that Rivera picked him up between 5:00 P.M. and 6:00 P.M. on January 30. (R 506). By the time he dropped Rivera off, Perter **was** headed home sometime between 6:15 P.m. and 7:00 P.M. (R 512). His recollection of the events was better at the time he gave the statement to police than it is now. (R 512).

The defense next called Rivera's trial attorney Edward Malavenda. (R 514). Malavenda was already representing Rivera in the Jennifer Geotz case at the time he was appointed on these charges. (R 518, 536).

He and Rivera probably discussed drug use as a defense at some point. (R 520-521). However intoxication was not a useful defense given that Rivera maintained his innocence. (R 523, 545). Intoxication would not have been helpful at the penalty phase either given it's inconsistency with the guilt phase defense. (R 526, 529, 546, 548).

Malavenda elicited the services of Dr. Ceros-Linvingston for the penalty phase. (R 538). He could not use her at the guilt phase because that would have opened the door to Rivera's extensive and very damaging past. (R 540-541, 554). Malavenda wanted to

show that Rivera's statements regarding the crime were nothing more than fantasy. He was able to do that through cross-examination of the state's witnesses. (R 539, 555). He could not use Linvingston for that purpose because of Rivera's damaging past and because Livingston would not say that Rivera's admissions were fantasy. (R 541).

Malavenda did not want to pursue voluntary intoxication at the penalty phase because it was inconsistent with the guilt phase defense of innocence. (R 549).

Malavenda tried to develop an alibi defense but was unable to find any witnesses. (R 550-553). It was discussed at length but most of the witnesses were carnival people who were very difficult to locate. The only witness that may have been available, Mark Peters left the area without notifying anyone of his whereabouts. (R 550-53).

The state called John Canada, Director of the Office of Budget and Management Policy for Broward County, who testified that there were separate accounts for "SPD" expenditures (special public defenders and expert witnesses) judicial administration. (R 663, 665-666). Money was never taken out of the "SPD" account for other expenditures. (R 661-662). Moreover, if the "SPD" account was overdrawn there was a special account for such contingencies. (R 681). At some point or another money may have been taken from the

judicial administration account to fund an overdraw in the "SPD" account. However, that would only have happened if there were a surplus in the judicial administration account. (R 665). Judges were not deprived of any equipment in order to fund the "SPD" account. (R 664). No ramifications befell a judge if the "SPD" was overdrawn. (R 680). Nor were judges forced to appoint an attorney from the "SPD" list. (R 680).

No evidence was presented that the "SPD" account was overdrawn during the years 1986 and 1987, during which Rivera was tried. Nor was there any evidence to establish that money from the capital improvement account was deposited in the "SPD" account during that time. (R 680).

The state then called fromer prosecutor, Kelly Hancock. Mr.Hancock testified that Zuccarello did not receive any deal for his testimony, (R 686, 692-695). The letter was written by Hancock five months after the trial. In it the state merely requested that Zuccarello be allowed to participate in an incentive program. (R 687-688). The letter does not reference any deals or promises between the state and Zuccarello. (R 685-695).

SUMMARY OF ARGUMENT

Issue I. The trial court properly denied as legally insufficient all three motions to disqualify the judge.

Issue II. The trial court properly determined that the failure to present an alibi defense was not the result of any deficient performance by defense counsel or any wrongdoing by the state.

Issue III. The trial court properly denied relief as Rivera could not establish that defense counsel had any evidence to support his claim of improper pre-indictment deal.

Issue IV. The trial court properly denied Rivera's claim of ineffective assistance of counsel for not presenting more mitigating evidence since the evidence proffered in postconviction proceedings was cumulative or insignificant.

Issue V. The trial court properly denied relief as Rivera failed to establish at the evidentiary hearing that there was evidence of an intoxication defense.

Issue VI. The trial court's summary denial of Rivera's claim that the jury heard inaccurate evidence was proper as this issue could have been raised on direct appeal. In the alternative, the jury was not exposed to any inaccurate information.

Issue VII. The trial court properly found this claim to be procedurally barred given that the issue was rejected on direct appeal.

Issue VIII. The trial court properly found this claim to be procedurally barred as any challenge to evidentiary rulings should have been raised on direct appeal. Rivera's legally insufficient claim of ineffective assistance of counsel does not overcome the procedural bar.

Issue IX. The trial court properly denied Rivera's challenges to evidentiary rulings as procedurally barred for failing to raise the claims on direct appeal. In the alternative, the issue is legally insufficient, therefore summary denial was appropriate.

Issue X. The trial court properly denied relief after an evidentiary hearing regarding Rivera's allegation that counsel was ineffective for failing to challenge the accuracy of his admissions to various people. The reminder of the claim **was** properly denied as procedurally barred.

Issue XI. The trial court properly found Rivera's challenge to the penalty phase jury instructions procedurally barred.

Issue XII. The trial court properly found procedurally barred Rivera's challenge to the trial court's findings regarding mitigation.

Issue XIII. The trial court properly denied as procedurally barred, Rivera's challenge to Florida's sentencing scheme.

Issue XIV. The trial court's summary denial of Rivera's allegation that the trial court relied upon non record evidence was correct correct as the claim was procedurally barred or in the alternative legally insufficient.

Issue XV. The trial court properly denied as procedurally barred Rivera's claim that the judge relied upon an improper standard in assessing mitigation.

Issue XVI. The trial court properly found Rivera's challenge to the penalty phase jury instructions procedurally barred.

Issue XVII. The trial court properly found that the state did not withhold any information.

Issue XVIII. The trial court properly denied relief on Rivera's claim that the judge was operating under a conflict of interest. Rivera failed to present any evidence to prove his claim.

Issue XIX. The trial court properly found Rivera's challenge to the admissibility of collateral crime evidence to be procedurally barred.

Issue XX. The trial court properly denied relief to Rivera's claim of cumulative error as the issue was procedurally barred.

ARGUMENT

ISSUE I

APPELLANT CANNOT ESTABLISH THAT HE WAS DEPRIVED OF A FULL AND FAIR HEARING BY AN IMPARTIAL JUDGE DURING THE EXTENDED LITIGATION OF HIS POSTCONVICTION MOTION.

Appellant claims that the trial court committed reversible error by failing to grant any one of his several motions to disqualify the presiding judge. The motions were all denied because they were legally insufficient. Rivera's challenge to those rulings are without merit.

Rivera filed three separate motions to disqualify the Court. The first motion was filed simultaneously with the original motion for postconviction relief on October 31, 1991. Therein, Rivera raised four separate claims which allegedly gave rise to a well grounded fear that Judge Ferris was biased. First, he alleged that prior to the capital trial Judge Ferris presided over Rivera's trial for the attempted murder of Jennifer Goetz.[1] The court's participation in the Goetz trial exposed Judge Ferris to evidence that was not admitted at the capital trial. Such evidence could

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[1] Rivera had been convicted of aggravated child abuse, aggravated battery, kidnaping and attempted murder. The district court reversed the convictions for aggravated child abuse and aggravated battery based on double jeopardy. Rivera v. State, 547 So. 2d 147, 152 (Fla. 4th DCA 1987). The attack on Jennifer Goetz was admitted as collateral crime evidence at trial and formed the basis for the "prior violent felony" aggravating factor. Rivea v. State, 561 So. 2d 536 (Fla. 1990).

not be expunged from the judge's mind, and therefore biased the judge against Rivera at his capital trial. Second, Rivera alleged that Judge Ferris wrote a letter to the Florida Parole Commission expressing his opinion that Rivera should not be granted clemency. Third, he alleged that during trial Judge Ferris complimented defense counsel on his representation of Rivera, which showed that he would be biased in favor of counsel when reviewing Rivera's claims of ineffective assistance of counsel. Finally, Rivera alleged that Judge Ferris was a close personal friend of Sheriff Navaro. (R 739-749). Following the state's response, the trial court denied the motion as legally insufficient. (R 762-776, 783).

When reviewing a motion for disqualification, a trial court must adhere to the following principles:

> The function of a trial court when faced with a motion to disqualify himself is solely to determine if the affidavits present legally sufficient reasons for disqualification. Fla. R. Crim. P. 3.230(d). The test for legal sufficiency is whether the party making the motion has a well grounded fear that he will not receive a fair trial at the hands of the judge.

Dragovich v. State, 492 So. 2d 350, 352 (Fla. 1986). A review of the specific reasons set forth for disqualification demonstrate that Rivera's motion was legally insufficient.

Rivera's accusation that the judge relied upon evidence from the Goetz case to support the imposition of death is wholly

conclusory in nature. Rivera does not state with any particularity what impermissible evidence was relied upon by Judge Ferris. Nor does Rivera present any facts to justify his 'well-founded fear" that the judge relied upon any evidence other than that which was outlined in the sentencing order. This bare allegation cannot form the basis for a valid motion to disqualify. See Dragovich, 492 So. 2d at 353; Barwick v State, 660 So. 2d 685, 693 (Fla. 1995) (finding motion to disqualify legally insufficient where it was based upon rumors or gossip involving unidentified people at unidentified times and under unidentified circumstances). Moreover, simply because Judge Ferris presided over Rivera's prior noncapital trial does not disqualify him from presiding over Rivera's capital trial or subsequent collateral proceedings. See Jackson v. State, 599 so. 2d 103, 107 (Fla. 1992) (finding disqualification unwarranted because judge previously heard evidence or made adverse rulings); McGauley v. State, 653 So. 2d 1108, 1109 (Fla. 4th DCA 1995) (finding legally insufficient claim that trial court's sentencing of defendant in unrelated case which ultimately is reversed presents well grounded fear of bias by judge in subsequent cases). The motion, on this basis, was properly denied.

Also legally insufficient to warrant recusal is Rivera's claim that a letter written to the Parole Commission regarding the

appropriateness vel non of clemency demonstrates bias on the part of the judge. In Suarez v. Dugger, 527 So. 2d 190, 191-92 (Fla. 1988), this Court rejected an identical allegation.

Equally without merit is appellant's allegation that Judge Ferris gratuitously complimented trial counsel on his representation of Rivera, thereby precluding an unbiased assessment of counsel's effectiveness. The court properly denied this claim as legally insufficient. See Dragovich, 492 So. 2d at 352; Jones v. State, 446 So. 2d 1059 (Fla. 1984) (finding recusal unwarranted where immediately after sentencing defendant to death trial court commented that evidence was "almost overwhelming" and that "trial counsel 'did a remarkable job . . . the best you possible could"').

Similarly, the trial court properly denied Rivera's final claim that its friendship with Sheriff Navaro represented a well-founded fear that it could not be impartial. This Court has recognized that

> [t]here are countless factors which may cause some members of the community to think that a judge would be biased in favor of a litigant or counsel for a litigant, e.g., friendship. . . . However, such allegations have been found legally insufficient when asserted in a motion for disqualification,

MacKenzie v. Super Kids Bargain Store, 565 So. 2d 1332, 1338 (Fla. 1990). Since this claim was legally insufficient on its face, it was properly denied.

Rivera filed his second motion to disqualify on August 13, 1992.[2] (R 1024-1036). In it he renewed all of his original allegations and added two more. The first additional ground was based on remarks attributed to Judge Ferris during Rivera's sentencing in the Goetz case that appeared in the Sun Sentinel on November 21, 1986. (R 1026). The second additional ground was based on Rivera's belief that Judge Ferris would become a material witness during the postconviction proceedings regarding numerous allegations made in claim XVIII. (R 1113-1114). In that claim, Rivera alleged that Judge Ferris was operating under a conflict of interest at the time Edward Malavenda was appointed to represent him, because the money used to pay for special public defenders and expert witnesses came from the same fund used to pay for judicial capital improvements. (R 1113-1114). According to Rivera, Judge Ferris bargained for lower legal fees and witness fees in an effort to save money for capital improvements.

Without a response from the state, the trial court denied the motion as legally insufficient. (R 1143). That ruling was proper. Rivera's first allegation regarding the newspaper article was both legally insufficient and grossly untimely. As conceded by Rivera, the judge's remarks appear in a newspaper article published five

[2] He also filed a supplementation on February 22, 1994. (R 1113-1142).

months before his capital trial in 1986. A motion to disqualify must be made within ten days after discovery of the facts constituting the grounds for the motion. Fla. R. Jud. Admin. 2.160(e). Having waited six years to bring this to the trial court's attention precludes review. See Jones v. State, 411 So. 2d 165, 167 (Fla. 1982) (upholding dismissal of motion to disqualify judge when facts upon which motion is predicated were known well in advance of ten-day rule); Steinhorst v. State, 636 So. 2d 498, 500 (Fla. 1994) (finding waiver of right to recuse judge were facts underlying motion were reasonably available well before motion was filed).

The motion was also properly denied as legally insufficient. The quote from Judge Ferris was made in reference to the upward departure sentence that the court had imposed on Rivera in the Goetz trial. See attached exhibit A.[3] A review of the hearing transcripts unquestionably illustrates that the remarks attributed to the judge in the newspaper simply paraphrased the court's departure reasons. As noted previously, a judge's participation in a separate or additional trial of a defendant is not a legally sufficient reason to have him disqualified from subsequent cases

[3] Attached is a transcript of the sentencing hearing in Rivera's Goetz case, which reflect Judge Ferris' remarks as they appear in the newspaper article. (Hrg. at 653). Under section 90.202(6), Fla. Stat. (1995), this Court may take judicial notice of any official records of any court in the state.

involving the same defendant, See Jackson, 599 So. 2d at 107; McGauley, 653 So. 2d at 1109; Brown v. Pate, 577 So. 2d 645, 647 (Fla. 1st DCA 1991) (finding no reasonable basis for recusal based on judge's opinions and mental impressions regarding presentation of evidence already presented).

The second additional ground raised in the successive motion for recusal--Judge Ferris' status as a potential witness--was also properly denied as legally insufficient.[4] See Suarez, 527 So. 2d at 191-92 (rejecting claim as basis for recusal that trial judge would be material witness in postconviction proceeding). Before Rivera could depose Judge Ferris, or call him as a witness, he had to show that the testimony was "absolutely necessary to establish factual circumstances not in the record." State v. Lewis, 656 So. 2d 1248, 1250 (Fla. 1994). He could not, under any circumstances, inquire into the judge's thought processes. Id. Rivera, however, failed to meet his burden under Lewis. Judge Ferris' motivation in appointing Malavenda was totally irrelevant to any claim cognizable in a postconviction proceeding." The relevant issue should be

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[4] At the time the motion for recusal was filed, Rivera also filed a motion to depose Judge Ferris in connection with this claim.

[5] Mr. Malavenda was first appointed to represent Rivera for the attempted murder of Jennifer Goetz. He was then appointed in the instant case because he was already representing Rivera. (R 165-166). Ironically, both appointments were made by then-Circuit Judge Barry Stone. Consequently, Judge Ferris could not possibly

whether Malavenda provided effective representation, The reason why a particular attorney was appointed is immaterial to an inquiry regarding the attorney's performance. Moreover, inquiry into what considerations the trial court entertained when appointing Malavenda is improper, since the responses to that question would involve an examination into the judge's thought process. Such an inquiry is precluded under Lewis. Given Rivera's inability to demonstrate the requisite "absolute necessity to establish factual circumstances not in the record" regarding Malavenda's appointment, the trial court properly denied the motion to depose. Likewise, the court was correct in denying Rivera's motion to disqualify.[6]

Throughout all three motions, Rivera also alleged that Judge Ferris would be a necessary witness to establish whether he was aware of and considered nonrecord evidence when he sentenced Rivera to death, whether he improperly permitted juror Thorton to sit on the jury even though Thorton was a supporter of Sheriff Navaro and Judge Ferris had previously represented Thorton', whether he

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be a material witness regarding this claim.

[6] On April 18, 1995, Rivera filed his third motion to recuse Judge Ferris. The allegations made in the successive motion were identical to the allegations just discussed. (R 1604-1617). Since Rivera had not included any additional facts, that motion was again properly denied for legal insufficiency.

[7] Any claim regarding Judge Ferris' previous representation of Juror Thorton is not properly before this Court. This claim was not raised in any of the motions to disqualify Judge Ferris.

impermissibly allowed the courtroom to be packed with school children who were the approximate **age** of the victim, whether he allowed the presentation of impermissible victim impact, and whether his opinion that Mr. Malavenda was a competent attorney inhibited his ability to rule on Rivera's claim that counsel was ineffective. As noted previously, the court properly denied all the motions for recusal based on legal insufficiency. Rivera's attempt to circumvent those rulings by additionally claiming that Judge Ferris would be a necessary witness for a variety of those claims was also properly denied. See Suarex, 527 So. 2d at 191-92.

Rivera made no showing that Judge Ferris would be a necessary and material witness regarding any of the claims. Despite this Court's directive in Lewis, 656 So. 2d at 1250 n.3, which warns

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Consequently, review is precluded. Occhicone v. State, 570 So. 2d 902, 905-906 (Fla. 1990). Furthermore, during voir dire Judge Ferris brought to everyone's attention the fact that he had represented Mr. Thorton's restaurant, the Mai Kai, along with a car rental agency in a civil suit. (ROA 305-306). No inquiry was made by either party regarding the trial court's revelation. As a matter of fact, at some point after this exchange, the trial court made inquiry of Rivera regarding the voir dire process. Rivera responded that he was satisfied with the voir dire process and that he actively participated with counsel in the process. (ROA 686-687). Finally, review of this allegation is preluded because the claim is untimely. Judge Ferris's "relationship" with Thorton was known during voir dire. Consequently, any motion to disqualify based on that fact is untimely. Walker v. State, 552 So. 2d 333, 334 (Fla. 4th DCA 1989); Jones v. State 411 So. 2d 165, 167 (Fla. 1983); cf. Lambrix v. State, 559 So. 2d 1137, 1138 (Fla. 1990) (finding claim regarding juror incompetence procedurally barred where basis of claim appeared in record on direct appeal).

against misuse of limited discovery in postconviction litigation, Rivera improperly sought to prevent the judge who presided over his trial from presiding over his postconviction proceeding. See Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983) (stating that the purpose of the disqualification rule is "to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge-shopping, delay, or some other reason not related to providing for the fairness and impartiality of the proceeding."); see also Fischer v. Knuck, 497 So. 2d 240 (Fla. 1986) (finding the allegations "frivolous and . . . designed to frustrate the process by which petitioner suffered an adverse ruling); Deren v. Williams, 521 So. 2d 150 (Fla. 5th DCA 1988) (finding that "a motion to disqualify should be denied for untimeliness . . . when its allowance will delay the orderly progress of the case or it is being used as a disruptive or delaying tactic), Rivera also ignored the requirements set forth in Davis v. State, 624 So. 2d 282, 284 (Fla. 3rd DCA 1993), and Lewis regarding the threshold requirements to justify the extraordinary request, Thus, the trial court's denial of the motions for recusal based on the conclusory allegations that the court would be a necessary witness were proper. See Lewis, 656 So.

2d at 1250 & n.3; Davis, 624 So. 2d at 284. This issue should be denied.

ISSUE IX

RIVERA HAS FAILED TO ESTABLISH THAT THE FAILURE TO PRESENT THE ALLEGED ALIBI DEFENSE WAS THE RESULT OF ANY CONSTITUTIONAL VIOLATION

Rivera alleges that the jury was unaware of critical evidence from an alibi witness, Mark Peters. It is alleged that the substance of his testimony at trial would have established that Rivera was with Peters at the time of the offense. This critical evidence **was** not presented to the jury for one of three reasons: (1) trial counsel was ineffective for failing to present it; (2) the state withheld the evidence; (3) Peters' testimony constitutes newly discovered evidence. The trial court granted an evidentiary hearing on this claim, but ultimately denied relief, finding that Peters' own actions prevented him from testifying at trial. (R 1718-1720). The trial court's ruling was correct.

The United States Supreme Court set out the following standard to prove a claim of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland v. Washinston, 466 U.S. 668, 687 (1984). The Court explained further what it meant by "deficient":

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 689 (citation omitted).

Under this standard, Rivera cannot demonstrate that Malavenda was ineffective for failing to present the testimony of Mark Peters. Both in his affidavit and in his testimony at the evidentiary hearing, Peters stated that Rivera picked him up from work in Peters' van between 5:00 p.m. and 6:00 p.m. on the night of January 30, 1986. (R 512-513). The time was more accurately between 5:00 and 6:00 p.m., than between 6:00 and 7:00 p.m. (R 513). After he dropped Rivera off at his home, Peters was driving home sometime between 6:15 and 7:00 p.m. (R 512). The entire ride from the time Rivera picked Peters up at work until the time he arrived home was around 35 minutes. (R 502). He admitted, however,

that his memory was better when he gave his statement to the police than it would be now. (R 512).

Peters also testified that he gave this information to the police. He spoke to the police on several occasions and also testified before the grand jury. (R 503, 507). He only felt harassed by the police in the very beginning of the investigation because they originally viewed him as a suspect. (R 504). He had been thinking about moving to Orlando with his mother and sister before the murder of Staci Jazvac had occurred. (R 510-511). He did not tell the police he was moving to Orlando, nor did he remember telling Mr. Malavenda that he was leaving. (R 506).

Malavenda testified that he wanted to develop an alibi defense, but he could not locate any of the witnesses. (R 550). He took the deposition of Peters, but Peters moved to Orlando without notifying him. (R 550-551) . The whole situation was frustrating because he was unable to get anyone to testify regarding the alibi defense. When discussing his inability to find witnesses Malavenda stated,

> MALAVENDA: [o]h, okay. I certainly tried as hard as I could to get you an alibi, and we weren't able to locate any of the witnesses.
>
> QUESTION: What did you do in order to -to locate any alibi witnesses?
>
> MALAVENDA: Because most if the witnesses **that we were talking about were carneys or**

carnival workers, a lot of them disappeared. I just couldn't find **any** of the people that he had talked about, and the only person that I came up with I believe **was** your brother, Peter, concerning an alibi.

(R 550). Shortly thereafter, Malavenda testified,

MALAVENDA: I'm sorry, I misspoke, that was a deposition I'm referring to. Mr. Peters just appeared before us, he was apparently the one who had loaned the defendant his van.

ANSWER: The van.

QUESTION: He testified earlier and stated that he had moved to Orlando before the trial went on.

ANSWER: Okay.

QUESTION: But he also said that he didn't know whether he notified you of that or not.

ANSWER: He didn't. Very frustrating situation. I wanted more than anybody else to get these people in here to say that Mike was not there on that particular day, and every time I tried to find somebody, that person would disappear. I mean to the point where I thought, you know, somebody was making them disappear which is-- you know, I don't have anything to substantiate that, but I felt strongly about them, real strong.

(R 551-552).

The trial court ruled that Malavenda could not be ineffective for failing to present an alibi defense since Peters' unavailability could not be attributed to Malavenda. (R 1718). The trial court's ruling was correct. Cf. Roberts, 568

So. 2d 1255, 1259 (Fla. 1990) (rejecting claim that trial counsel was ineffective for failing to present evidence when it is alleged that such evidence has been withheld by the state); Jones v. State, 528 So. 2d 1171, 1174 (Fla. 1988) (finding no deficient performance by defense counsel for not presenting certain witness where defense counsel testified at evidentiary hearing that he was not provided with last name of potential witness).

Even if counsel's performance were deficient, Rivera failed to establish prejudice. Simply because Rivera was with Peters at approximately 6:00 p.m. does not, by itself, establish an alibi. The murder of Staci Jazvac occurred after 7:00 p.m. Rivera v. State, 561 So. 2d 536 537 (Fla. 1990) . There is no reasonable probability that the outcome of the proceedings would have been different had the jury heard Peters' testimony. Cf. Duest v. State, 555 So. 2d 849, 850 (Fla. 1990) (finding evidence that defendant traveled from Boston to Fort Lauderdale, where murder occurred, forty-nine days after the murder irrelevant to defendant's whereabouts at time of murder); Mitchell v. State, 595 So. 2d 938, 941 (Fla. 1992) (failing to present expert testimony on hair samples not prejudicial given that such evidence would only be useful to determine whether hair is consistent with or different from suspect's hair).

Equally without merit are Rivera's alternative theories of alleged error. He claims either that the state withheld Peters' testimony in violation of Brady v. Marvland, 373 U.S. 83 (1963), or that the testimony is newly discovered evidence. In order to prevail on a Brady claim, a defendant must establish the following:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Mendvk v. State, 592 So. 2d 1076, 1079 (Fla. 1992); Heawood v. State, 575 So. 2d 170, 172 (1991) (quoting United States v. Meros, 866 F.2d 1304, 1308 (11th Cir.), cert. denied, 493 U.S. 932 (1989)). Rivera cannot establish that the state withheld anything. Peters testified before the grand jury and gave a deposition to defense counsel. The fact that he simply left the area without providing his whereabouts to anyone does not amount to misconduct by the state. Nor does it establish prejudice. As explained above, Peters' testimony does not prove that Rivera could not have killed Staci Jazvac after 7:30 p.m. See Duest v. State, 555 So. 2d 849, 850 (Fla. 1990).

Finally, Rivera cannot establish that Peters' testimony constitutes newly discovered evidence. First, as noted previously, it was not 'new." Malavenda was well aware of Peters' testimony at the time of trial; he simply could not find Peters by the time of trial. Second, for a defendant to obtain relief based on newly discovered evidence, the evidence must be of such a nature that it would probably produce an acquittal on retrial. Jones v. State, 591 So. 2d 911, 915 (Fla.1991). For the reasons explained above, as well as the overwhelming evidence against Rivera which included his admissions to various people, Peters' testimony would not produce an acquittal on retrial. Rivera, 561 So. 2d at 537-538.

ISSUE III

RIVERA CANNOT ESTABLISH THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AN ALLEGATION OF PREJUDICIAL PRE-INDICTMENT DELAY.

Rivera was arrested in February 1986 on unrelated charges, but was not indicted for the murder of Staci Jazvac until August 1986. In his motion for postconviction relief, Rivera claimed that trial counsel was ineffective for failing to file a motion to dismiss the charges based on the six month pre-indictment "delay." He claimed that his incarceration for approximately six months prior to his indictment deprived him of due process because the 'delay" somehow precluded presentation of an alibi defense. The state argued that the substantive issue, i.e., the alleged pre-indictment delay was procedurally barred. However, as for the ineffectiveness portion of the claim, it argued that an evidentiary hearing was not required because Rivera did not allege sufficient facts to prove prejudice, and thus the claim should be denied on the merits. (R 1195-1198). The trial court found this claim procedurally barred. (R 1203). Though based on erroneous reasoning, the trial court's ruling should nevertheless be affirmed. See Caso v. State, 524 So. 2d 422, 424 (Fla. 1988) ("A conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it."); see also McBride v. State, 524 So. 2d 1113 (Fla. 4th DCA 1988) (affirming

denial of 3.850 motion as improper, successive request for relief, although denied improperly by trial court as untimely); Rita v. State, 470 So. 2d 80, 83 (Fla. 1st DCA 1985) (noting that order denying 3.850 motion "must be affirmed if the record reveals other competent grounds for doing so").

When reviewing a claim of ineffective assistance of counsel regarding a substantive issue that is procedurally barred, this Court has explained the proper inquiry as follows:

> The issue before us is, first, whether the decision not to make the argument or the simple omission to do so constitutes a serious error or substantial deficiency and, second, whether the failure of counsel undermines confidence in the correctness of the outcome. Although the petition argues that relief should be granted because the omitted point of appeal, had it been argued, would have been found meritorious by this Court, the merits of that legal point is not before us. It is a matter cognizable only by means of specific objection at trial and presentation on appeal and we will not allow this habeas corpus proceeding to become a direct vehicle for belated appellate review. The question of the merits of the legal point petitioner says should have been argued on appeal is a mere abstraction here, the only concrete issues before us being those pertaining directly to the claim of ineffectiveness of counsel.

Johnson v. Wainwright, 463 So. 2d 207, 209-210 (Fla. 1985); see also Chandler v. Dugger, 634 So. 2d 1066, 1067 n.2 (Fla. 1994) (same).

As already noted, even if Peters and Wade were available to testify at trial regarding Rivera's general whereabouts on the night of the murder, there is no reasonable probability that the outcome of the proceedings would have been different. Consequently, relief was properly denied without an evidentiary hearing. See Kennedy v. State, 547 So. 2d 912 (Fla. 1989)(finding that relief is properly denied without an evidentiary hearing where no prejudice occurred from the alleged error).

At trial, Julius Minery testified that he saw Rivera the day of the murder between 4:30 and 5:00 p.m. (ROA 1124) .[8] Mark Peters testified at the evidentiary hearing that Rivera picked him up from work on January 30, 1986, between 5:00 and 6:00 p.m., but closer to 6:00 p.m. He also stated that the time was more accurately between 5:00 and 6:00 p.m., and not between 6:00 and 7:00 p.m. (R 513). He further stated that he was headed home after dropping Rivera off anywhere from 6:15 to 7:00 p.m. The entire ride from the time Rivera picked Peters up at work until the time Peters arrived at his home was around 35 minutes. (R 502). According to Rivera Anthony Wade told the police that he saw Rivera at the carnival around 7:30 p.m. the night of the murder.

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[8] On cross-examination, Minery was impeached with a prior statement he had made that the time he saw Rivera was between 6:00 and 7:00 p.m. Minery insisted, however, that he saw Rivera between 4:30 and 5:00. (ROA 1138-1139).

This information does not establish an alibi. Staci Jazvac disappeared somewhere between 6:00 p.m. and 7:30 p.m. (ROA 734, 760-761, 779). The carnival was in close proximity to where Staci had been abducted. (ROA 1119). A coin shop owner testified for the state that Rivera was in his shop that night around the time of the murder. The shop is also in close proximity to where Staci disappeared. (ROA 978-983). Mark Peters could have dropped Rivera off at his home sometime around 6:00 p.m., and Anthony Wade could have seen Rivera later around 7:30 p.m. Rivera could have abducted and killed Staci between those times. In fact, the statements of Peters and Wade would have corroborated the state's theory that Rivera was in the vicinity of the abduction. (ROA 978-983). Consequently, Rivera cannot establish that a valid alibi defense existed. See Duest v. State, 555 So. 2d 849, 850 (Fla. 1990) (finding evidence that defendant traveled from Boston to Fort Lauderdale, where murder occurred, forty-nine days after the murder irrelevant to defendant's whereabouts at time of murder); Mitchell v. State, 595 So. 2d 938, 941 (Fla. 1992) (failing to present expert testimony on hair samples not prejudicial given that such evidence would only be useful to determine whether hair is consistent with or different from suspect's hair).

Absent a valid alibi defense, Rivera cannot demonstrate that Malavenda would have succeeded in getting the charges dismissed due

to any "delay." In order to prevail on such a claim, the defendant bears the following burden:

> When a defendant asserts a due process violation based on preindictment delay, he bears the initial burden of showing actual prejudice. Rogers has not met this burden through the speculative allegations made here of faded memories or the purported disappearance of alibi witnesses whose significance or existence was doubtful. See Howell, 418 So. 2d at 1170. If the defendant meets this initial burden, the court then must balance the demonstrable reasons for delay against the gravity of the particular prejudice on a case-by-case basis. The outcome turns on whether the delay violates the fundamental conception of justice, decency and fair play embodied in the Bill of Rights and fourteenth amendment. See Townley, 665 F.2d at 581-82.

Rogers v. State, 511 So. 2d 526, 531 (Fla.1987) (quoting Townlev).,

Rivera cannot meet that burden. In support of his position, Rivera relies on Scott v. State, 581 So. 2d 887 (Fla. 1991). The facts of Scott are very dissimilar to the facts of the instant case. This Court found a due process violation based on preindictment delay for the following reasons:

> Scott has established in this record that there was actual prejudice to him brought about by the seven-year, seven-month delay in the prosecution of this action. The record establishes that Scott is no longer able to corroborate his alibi that initially was checked out by law enforcement officials; that he was unable to present certain witnesses in his defense because the witnesses had died in the interim; that investigative

> reports, statements, and evidence that may have been helpful to Scott were lost as a result of the delay and because of changes in law enforcement personnel and administrations; and, finally, that the reliability of the hair comparison evidence was adversely affected by the delay and the manner in which the comparison was made.

Id. at 892-893. First, Rivera cites to no authority for the proposition that six months constitutes a delay of constitutional proportions. Six months is diminimus compared to the seven years and seven months in Scott. Second, Rivera suffered no prejudice. As stated above, there was no valid alibi defense. Consequently, Rivera cannot establish any prejudice, let alone the type of due process violation that occurred in Scott. Relief was properly denied on this issue. See Rogers, 511 So. 2d at 531.

Although the trial court did not grant an evidentiary hearing on this claim, Rivera was granted an evidentiary hearing on the claim that Mr. Malavenda was ineffective for failing to present the alibi defense. (R 1205, 1718). At the evidentiary hearing, Rivera presented the testimony of Mark Peters, one of the two alibi witnesses he claims he was "precluded" from calling at trial. Aside from the substance of his "alibi" statement, Mark Peters testified that he gave this information to the police, whom he had spoken to on several occasions. Peters also testified before the grand jury. (R 503, 507). Rivera's counsel asked Peters if he

felt he was being harassed by the police. He stated that the only time he felt that way was in the very beginning of the investigation because he believed that the police originally viewed him as a suspect, (R 504). Peters was also asked about his reasons for moving to Orlando. He stated that he had been thinking about moving to Orlando with his mother and sister before the murder of Staci Jazvac had occurred. (R 510-511). The case's notoriety, along with his involvement with the police, hastened the move. (R 504, 510-511). He did not tell the police he was moving to Orlando, nor did he remember telling Mr. Malavenda that he was leaving. (R 506). Malavenda testified for the state that he wanted to develop an alibi defense, but he could not locate any of the witnesses. (R 550). He took the deposition of Peters, but Peters moved to Orlando without notifying him. (R 550-551). The whole situation was frustrating to Malavenda because he was unable to get anyone to testify to the alleged alibi defense because the witnesses were all carnival people. (R 550).

Rivera was given the opportunity to establish this claim. Whether he was granted a hearing on counsel's ineffectiveness for failing to pursue an alibi defense, and not on counsel's ineffectiveness for failing to challenge the preindictment delay which affected his ability to present an alibi defense, is of no moment. The gravamen of the inquiry under either issue is

identical, i.e., whether there **was** a valid alibi defense available at trial. To the extent either witness could have offered any additional relevant evidence regarding the potential alibi defense and the reasons why it was not presented, collateral counsel failed to elicit same when he had the opportunity to do so.[9] Consequently, to the extent Rivera was entitled to an evidentiary hearing on this claim, any error in failing to grant one must be considered harmless, Cf. Gibson v. State, 661 So. 2d 288, 291 (Fla. 1995) (finding erroneous limitation of cross-examination harmless where defendant afforded opportunity to elicit same information through other means); Morgan v. State, 415 So. 2d 610 (Fla. 1982) (disallowing evidence can be harmless when same matters are presented through other testimony or witnesses).

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[9] Rivera has not provided this Court with any affidavits/factual support for his claim that the state's misconduct in creating unnecessary delay. His conclusory allegations absent factual support justify the denial of his request for an evidentiary hearing. Engle v. State, 574 So. 2d 696, 700 (Fla. 1991).

ISSUE IV

APPELLANT WAS PROPERLY DENIED AN EVIDENTIARY HEARING REGARDING HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE SINCE RESOLUTION OF THIS ISSUE COULD BE DENIED FROM THE EXISTING RECORD.

Appellant alleges that trial counsel failed to investigate and present substantial mitigating evidence at the penalty phase of his trial. In support of his claim he relies on this Court's opinions in Rose v. State, 675 So. 2d 567 (Fla. 1995); Hildwin v. State, 654 So. 2d 107 (Fla. 1995), and Deaton v. State, 635 So. 2d 4 (Fla. 1994). He further argues that the trial court erred in ruling that this claim was procedurally barred. Although the claim was not procedurally barred, it was properly denied without an evidentiary hearing since the evidence proffered in mitigation is at best cumulative or insignificant. Given that the trial court's ruling reached the correct result, it should be affirmed. See Caso v. State, 524 So. 2d 422, 424 (Fla. 1988); McBride v. State, 524 So. 2d 1113 (Fla. 4th DCA 1988); Rita v. State, 470 So. 2d 80, 83 (Fla. 1st DCA 1985).

In his motion for post conviction relief, Rivera alleged that a mental health expert contacted for purposes of the motion stated that Rivera suffers from a combination of mental disorders. Through counsel's deficient performance, this information allegedly

was not uncovered or presented to the jury. Trial counsel also failed to present sufficient mitigating evidence regarding petitioner's childhood ailments, corporal punishment in school, his father's excessive drinking, his father's inability to show affection, Rivera's drug abuse, love by his family, and extensive sexual problems.

The proper standard for determining ineffectiveness of trial counsel is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 668, 687 (1984). The Court explained further what it meant by "deficient":

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the

> evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 689 (citation omitted)

In reviewing a claim of ineffectiveness, the trial court need not hold an evidentiary hearing if the motion and the record demonstrate no prejudice resulted from the alleged errors. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). Under this standard, Rivera was properly denied an evidentiary hearing, and ultimately relief. Although Rivera claims that counsel did not adequately investigate for the penalty phase, a review of the penalty phase transcript proves otherwise. As a matter of fact, most of the evidence offered in the postconviction motion was presented through the testimony of petitioner's three siblings, his mother, his girlfriend, his brother's fiance and a clinical psychologist. (R 1937-2102). Furthermore, the trial court found the existence of the mitigating factor that Rivera was under the influence of an extreme mental or emotional disturbance. Rivera v. State, 561 So. 2d 536, 540 (Fla. 1990). Thus, any additional evidence relating to this mitigating factor would have been cumulative and unnecessary.

The jury heard extensive testimony from Dr. Ceros-Livingston, who detailed Rivera's psychological development with a great emphasis on his sexual disorders. (R 1990-2049). Rivera, 561 So.

2d at 538. Dr. Livingston saw petitioner for a total of seven and one-half hours over a three-day period. Contrary to suggestions that Livingston did nothing more than interview Rivera, the record demonstrates that she administered three psychological tests. (R 1993, 2033, 2039). She detailed petitioner's sexual problems, which included chronic indecent exposures (R 2012-2017), and his unsuccessful therapy for his sexual problems. While on probation for indecent exposure, petitioner committed another such episode and was sent to prison for five years. (R 2009-2012). He began exposing himself two weeks out of prison. (R 2017). Within six months of his prison release he committed an attempted rape (R 2018-2020), and then the attempted murder of Jennifer Goetz (R 2021). During this time he made hundreds of obscene phone calls. Rivera had oral sex with a man, Mr. Donovan, at the age of thirteen. Rivera stated that he enjoyed it. (R 2013). Petitioner enjoyed sex in prison and continued a relationship with Donovan up until the time of this murder. (R 2013-2014).

Based on her findings, Dr. Livingston diagnosed Rivera as suffering from a borderline personality disorder between neurosis and psychosis. He may also be suffering from schizophrenia. (R 2033-2047). Rivera's extensive abusive past has caused him to suffer from identity problems in terms of sexual behavior, exhibitionism, voyeurism and transvestism. (R 2033-2035). She

also opined that Rivera was under the substantial domination of his alternate personality "Tony"; and that he lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. (R 2046-2048, 2083).

Rivera's family testified that he had been molested at an early age. And that ever since that experience he became very isolated. His family all expressed love and concern for him. (R 1939, 1942, 1945, 1965, 1966). A former girlfriend testified that Rivera must have a split personality to be capable of committing such crimes because she has experienced only his kind side. (R 1966).

A comparison of what was actually presented at trial with the proffered mitigation presented in the postconviction motion reveals no additional significant information. The mental disorders listed by Rivera in his brief **(initial brief at 27-28)** are identical to what was actually presented at trial. Rivera fails to show how this "new" information differs from Dr. Livingston's diagnosis. (R 2033-2045). Given that the evidence is merely cumulative to what was already presented. Rivera failed to establish deficient performance. Witt v. State, 465 So. 2d 510, 512 (Fla. 1985); Glock v. Dugger, 537 So. 2d 99,102 (Fla. 1989).

As for the remainder of the evidence proffered, Rivera failed to establish that Malavenda was deficient in failing to present it.

Simply because Rivera finds an expert that would conclude that his age of twenty-four should have been found as a statutory mitigator is of no moment. Mills v. State, 603 So. 2d 482, 485 (Fla. 1992) (rejecting allegation that trial counsel was deficient simply because current counsel could find mental mitigation not presented at trial). Furthermore, Rivera does not proffer any relevant evidence to establish that his age constitutes a mitigating factor. As this Court has explained, "[a]ge is simply a fact, every murderer has one." Echols v. State, 484 So. 2d 568, 575 (Fla. 1985). Rivera does not offer any evidence to suggest some relevant causal connection between his age and his actions. See Peek v. State, 395 so. 2d 492 (1980) (finding no per se rule for determining when age constitutes an mitigating factor, as such findings are dependent upon evidence presented).

Equally uncompelling is Rivera's claim that Malavenda should have provided Livingston with statements of others who knew of the existence of "Tony." Rivera assumes that such information would have established the mitigator of "substantial domination by anotperson." Simply because Rivera may be able to provide additional information does not establish that Malavenda's performance was deficient. See Mills, 603 So. 2d at 485. Moreover, Rivera cites to no case law that supports his theory that

a defendant's alternate personality is the type of evidence that would establish this mitigating factor.

To the extent that some of this proffered evidence is new, Rivera cannot establish prejudice. The only evidence that could be considered "new" would be that his father **was** a heavy drinker and not affectionate, Rivera was subjected to corporal punishment in school, and he suffered various childhood ailments. This new evidence, however, would not have changed the outcome of the proceedings. Consequently, the trial court properly denied an evidentiary hearing and relief. Mendvk v. State, 592 So. 2d 1076, 1080 (Fla. 1992) (rejecting claim of ineffective assistance of counsel at penalty phase where evidence of abuse and alcoholism did not necessarily distinguish case from norm of children from broken homes which would warrant a different result in the proceedings); Francis v. State, 529 So. 2d 670, 673 (Fla. 1988) (rejecting claim that prejudice resulted from trial counsel's failure to present evidence that defendant lost mother at early age and was raised in poverty).

In conclusion, a more detailed postconviction account regarding life **as** a child and abuse by his father is either cumulative or nonprejudicial since there is no reasonable probability that it would have changed the outcome of the sentencing proceedings. See Chandler v. State, 634 So. 2d 1066,

1069 (Fla. 1994) (rejecting claim that presentation of more evidence at penalty would have changed the outcome of the sentencing proceeding given the strength of the aggravating factors and the cumulative nature of the evidence); Francis, 529 So. 2d at 672-673; Hill v. State, 515 So. 2d 176, 178 (Fla. 1987). Mendyk, 592 so. 2d at 1080.

ISSUE V

RELIEF WAS PROPERLY DENIED SINCE RIVERA FAILED TO ESTABLISH THAT ANY EVIDENCE EXISTED TO SUPPORT A VOLUNTARY INTOXICATION DEFENSE; FURTHERMORE, SUCH A DEFENSE WAS IN DIRECT CONTRADICTION TO HIS CLAIM OF INNOCENCE.

Rivera alleges that trial counsel should have pursued a voluntary intoxication defense, and that such information would have been beneficial at both stages of the trial. Rivera claims that several witnesses could have established that he was intoxicated at the time of the crime. The trial court granted Rivera's request for an evidentiary hearing in order to present these witnesses. Ultimately, the trial court denied the claim, finding no evidence to support a voluntary intoxication defense, especially in light of Rivera's insistence that he was innocent. Given the lack of evidence, along with Rivera's claims of innocence, it found that trial counsel's actions amounted to sound and reasonable strategic decisions. (T 1718-1719).

In support of this claim, Rivera presented the testimony of his brother, Peter Rivera, and his sister, Miriam Rivera. Both were able to document Rivera's history of drug use since the age of fifteen. (R 432-435, 440-441). However neither was able to offer any evidence regarding alleged intoxication on the day of the murder. Peter testified that he and his brother were drinking and smoking cocaine the day before the murder. (R 440-441). Peter

Rivera was not with his brother on the day of the murder. (R 445). Miriam was unable to testify about any of the defendant's actions on the day of the murder. (R 438-439).

Dr. Berglass also testified for the defendant at the evidentiary hearing. His testimony/expertise centered on Rivera's general consumption/history of drug abuse. (R 455-456). Berglass reviewed Rivera's medical and psychological history, evidence from the trial, Rivera's statements to others about the crime and Dr. Livingston's report. (R 456-476). He also interviewed Rivera for three hours the day before the evidentiary hearing. (R 488). Berglass was unable to offer an opinion regarding Rivera's alleged cocaine use at the time of the incident. During the doctor's interview with Rivera, the defendant maintained his innocence. (R 490-495).

The defense also presented the testimony of trial attorney Mr. Malavenda. He explained that he did not pursue a voluntary intoxication defense because Rivera maintained that he did not commit the crime. (R 523, 526, 545, 548, 549). Malavenda also testified that he did not want to argue voluntary intoxication as mitigation at the penalty phase because it was inconsistent with his trial strategy. (R 526, 549-550).

Rivera failed to meet his burden and prove his claim that there was sufficient evidence of intoxication to warrant its

presentation at either phase of the trial.[10] Given the total lack of evidence to establish a defense of voluntary intoxication, Malavenda's performance at both phases was constitutionally sound. Rivera cannot establish that Malavenda's tactical decision was unreasonable. Johnston v. Dugger, 583 So. 2d 657, 661 (Fla 1991) (trial counsel not ineffective for not presenting defense which was contradicted by the evidence); Remeta v. Dugger, 622 So. 2d 452, 455 (Fla. 1993) (trial counsel not ineffective for failing to pursue intoxication defense when defendant claims that he did not commit the crime); Koon v. Dugger, 619 So. 2d 246, 249 (Fla. 1993); Jones v. State, 528 So. 2d 1171, 1175 (finding that strategic decision not to pursue intoxication defense at penalty based on inconsistency with defense of innocence at guilt phase was reasonable tactical decision).

[10] Another defense witness, Mark Peters, testified that he was with Rivera on the day of the murder around 8: 00 A.M. and then again around 6:00 P.M.. Rivera borrowed Peters' van. He testified that Rivera was relaxed and normal. According to Peters, there was no indication that Rivera was under the influence of any drugs. (R 135-136) .

ISSUE VI

THE TRIAL COURT PROPERLY FOUND THIS CLAIM TO BE PROCEDURALLY BARRED SINCE THE BASIS FOR SAME WAS KNOWN BEFORE THE DIRECT APPEAL WAS FINAL; IN THE ALTERNATIVE, THE JURY WAS NOT EXPOSED TO INACCURATE INFORMATION.

Rivera claims that the jury was misled and heard inaccurate information regarding two prior violent felonies, in violation of Johnson v. Mississippi, 108 S. Ct. 1981 (1988). In finding the 'prior violent felony"[11] aggravating factor, the trial court relied upon Rivera's convictions for the kidnaping, attempted first degree murder, aggravated child abuse, and aggravated battery of Jennifer Goetz, and burglary with intent to commit battery and indecent assault upon a female child, committed in 1980. (ROA 2309). Rivera v. State, 561 So. 2d 536, 538 n.3 (Fla. 1990). In 1989, while Rivera's murder case was pending in this Court on appeal, the Fourth District Court of Appeal reversed Rivera's convictions for the aggravated battery and aggravated child abuse of Goetz based on a violation of **Carawan** v. State, 515 so. 2d 161 (Fla. 1987). Rivera v. State, 547 So. 2d 140, 142 (Fla. 4th DCA 1989). In his appeal in the present case, Rivera had conceded the validity of the 'prior violent felony" factor. Id. at 540 n.lO. In the year between the Fourth District's opinion in the Goetz case and this Court's opinion in his murder case, Rivera made no attempt to

[11] § 921.141(5)(b), Fla. Stat. (1985).

challenge his 'prior violent felony" aggravator based on the reversal of two of the convictions. Because he could have, but did not, this claim is procedurally barred. See Owen v. State, 596 So. 2d 985, 989 (Fla. 1992) (reviewing supplemental Johnson v. Mississippi claim after conviction used to satisfy aggravating factor was reversed during pendency of direct appeal); Henderson v. Dugger, 617 So. 2d 313, 316 (Fla. 1993) (finding potential Johnson claim procedurally barred since issue not presented within two years of becoming aware of its existence).

In any event, Rivera cannot establish any reversible error. The fact that petitioner's convictions for aggravated battery and aggravated child abuse were vacated do not amount to a violation of Johnson. Those charges were vacated based upon a legal principle that the single act of violence against Jennifer Goetz cannot form the basis for three separate crimes. Rivera, 547 So. 2d at 142. In no way did this undermine, however, the accuracy and reliability of Rivera's criminal actions against Jennifer Goetz. The jury heard the testimony of Jennifer Goetz, wherein she described what Rivera to her. (ROA 1451-1461). Rivera has repeatedly admitted the attack at trial and in postconviction proceedings. (ROA 1516 R GET BERLIN). Whether his actions legally form the basis for three crimes or one, his convictions for kidnaping and attempted murder remain valid. Rivera, 547 So. 2d at 142. The jury was not

exposed to any factual information that was otherwise inadmissible.[12] Without the convictions for battery and child abuse, Jennifer Goetz's testimony would have been the same. And Rivera's admission would still be the same. There is no error.

If this Court finds, however, that there is a violation of Johnson, it must consider any error harmless given that there remains three prior violent felonies to satisfy the aggravator. Rivera, 561 So. 2d at 538 n.3. See Bundy v. State, 538 So. 2d 445 (Fla. 1990) (finding Johnson v. Mississippi error harmless where there were other prior violent felonies to sustain the aggravator); Daughtery v. State, 533 So. 2d 287 (Fla. 1988) (same).

[12] The fact that petitioner admitted to the crime must dispel any contention that the crime was not committed. There is no violation of Johnson v. Mississinni, 108 S. Ct. 1981 (1988).

ISSUE VII

THE TRIAL COURT PROPERLY REJECTED RIVERA'S RELIANCE ON STRINGER V. BLACK, ESPINOSA V. FLORIDA, AND SOCHOR V. FLORIDA TO OVERCOME THE IRREVOCABLE PROCEDURAL BAR TO HIS CHALLENGE TO THE SENTENCING PROCEDURE.

On direct appeal, this Court struck the 'cold, calculated and premeditated" aggravating factor. Rivera v. State, 561 SO. 2d 536, 541 (Fla. 1990). Relying on Espinosa v. Florida, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); **and** Stringer V. Black, 112 S. Ct. 1130 (1992), Rivera claimed in the trial court that he deserved additional review of his sentence because this Court failed to assess/correct the error attached to the jury's impermissible reliance on the "CCP" factor. The trial court properly found this claim procedurally barred. See also Sims v. State, 622 So. 2d 980, 981 (Fla. 1993) (rejecting claim that Stringer and Espinosa warranted additional review of sentence after aggravator was struck on direct appeal).

In any event, this Court made it clear that absent the "CCP" factor Rivera's death sentence was still valid:

> We are left with three aggravating circumstances, which include previous convictions for violent crimes and a finding that the murder was heinous, atrocious or cruel. On this record, we are persuaded that the one mitigating factor weighed against the magnitude of the aggravating factors would render the same result in the trial court

below, absent the single invalidated aggravating circumstance.

Rivera, 561 So. 2d at 541. This claim should be denied.

ISSUE VIII

THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED RIVERA'S CLAIM THAT HE WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL.

In his postconviction motion, Rivera combined several allegations of trial court error to claim that the individual or cumulative effect of such errors resulted in the denial of due process. Specifically, Rivera alleged that (a) the trial court improperly denied motions for change of venue; (b) the trial court erroneously denied objections to the courtroom being packed with children in an attempt to elicit sympathy for Staci Jazvac's family; and © the trial court erroneously denied defense counsel's motion for mistrial regarding alleged improper actions of juror Thorton. In a single conclusory sentence at the end of the argument, Rivera also claimed that, to the extent defense counsel failed to argue or object to the above alleged errors, his performance was deficient. The trial court found all these claims procedurally barred. (R 1203).

There can be no question that the substance of each of these claims, and the cumulative effect of them, could have been raised on direct appeal. Thus, they were properly rejected as procedurally barred. See Kelly v. State, 569 So. 2d 754, 756 (Fla.

1990) (holding that trial errors apparat from the record are not cognizable postconviction motion).

Even were they not procedurally barred, they are either factually or legally insufficient on their face. Initially, Rivera makes general complaints about various members of the venire, as well as one reference to six jurors whom he alleges improperly sat. He contends that those people, who are not identified by name, stated that they had some familiarity with the case. This claim **as** presented is legally insufficient on its face.

> The mere existence of extensive pretrial publicity is not enough to raise the presumption of unfairness of a constitutional magnitude. In Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975), . . . the United States Supreme Court recognized that qualified jurors need not be 'totally ignorant of the facts and issues involved in a case. The mere existence of a preconceived notion as to guilt or innocence is insufficient to rebut the presumption of a prospective jurors' [sic] impartiality. It is sufficient if the juror can lay aside his opinion or impression and render a verdict based on the evidence presented in court.

Bundy v. State, 471 So. 2d 9, 19-20 (Fla. 1985). Rivera fails to show that any of the unnamed jurors could not render an impartial verdict despite their general familiarity with the case.

Equally unavailing is Rivera's claim that a class of students observing the trial somehow impermissibly influenced the jury. Rivera does not reference any portion of the record which supports

his conclusory allegation. Nor can Rivera cite to any case which would justify relief on this claim. This claim lacks merit on its face. See Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990) ("The second and third claims are devoid of adequate factual allegations and therefore are insufficient on their face.").

Also without merit is Rivera's claim regarding juror Thorton. Rivera argues that Thorton should have been excused for giving false information regarding his relationship/affiliation with Sheriff Navaro.[13] Defense counsel brought this to the court's attention and inquiry was made. (ROA 310, 1233-1234,, 1237-1239). After some discussion, it was agreed that Mr. Thorton did not lie to the court and answered questions honestly. (ROA 310, 1233, 1237). The court invited defense counsel to check into the situation more thoroughly and advise the judge accordingly. (ROA 1237-1239). Rivera does not allege any new facts in this motion that would call the previous determination into question. Therefore, this claim is without merit.

Equally without merit is Rivera's claim that the trial court erred in failing to excuse juror Thorton for an alleged comment he made regarding Rivera's guilt. The record demonstrates that no one

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[13] Thorton at one time belonged to a Broward Sheriff's advisory counsel. A focus of the group was to rid the community of drugs. The group was not a part of the Sheriff's Office. (ROA 1235-1236).

but Rivera heard the alleged remark, including his own counsel.[14] The trial court properly denied the motion for a mistrial. (ROA 1114-1116). See Bundy, 471 So. 2d at 20 ("The mere existence of a preconceived notion as to guilt or innocence is insufficient to rebut the presumption of a prospective jurors' [sic] impartiality.").

Rivera attempted to overcome the procedural bar attached to this claim by alleging in the alternative that trial counsel was ineffective. First, Rivera's single-sentence conclusory statement, without any supporting argument or authority, is legally insufficient to support such a claim. See Kennedy v. State, 547 so. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing."); Roberts, 568 So. 2d at 1258 ("The second and third claims are devoid of adequate factual allegations and therefore are insufficient on their face."). Moreover, it is wholly improper to recast a claim as one of ineffective assistance of counsel in an attempt to circumvent a procedural bar. See Medina v. State, 573 So. 2d 293 (Fla. 1990)

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[14] The court inquired of the jury two subsequent times regarding this claim. No one on the jury heard Thorton's alleged comment. The jury was admonished not to discuss the case among themselves. (ROA 1077, 1114-1115).

("Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal."); Harvey v. State, 656 So. 2d 1253, 1256 (Fla. 1995) ('It is also not appropriate to use a different argument to relitigate the same issue."). Regardless, the record reveals that in all three instances of alleged trial court error defense counsel made the requisite objection/motion. Simply because an attorney's strategy is unsuccessful does not render counsel's performance ineffective. Bush v. Wainwriaht, 505 So. 2d 409, 411 (Fla. 1985). This claim should be denied.

ISSUE IX

RIVERA HAS FAILED TO OVERCOME THE PROCEDURAL BAR TO THIS CLAIM; IN THE ALTERNATIVE THE ISSUE PRESENTED IS FACIALLY INSUFFICIENT

Rivera attacked numerous rulings of the trial court which he claimed to have the cumulative effect of denying him a fair trial. The trial court properly found all the claims to be procedurally barred. (R 1203). Issues involving trial errors are not cognizable in a motion for postconviciton relief. See Atkins v. State, 541 So. 2d 1165, 1166 n.1 (Fla. 1989); Kelly v. State, 569 so. 2d 754, 756 (Fla. 1990). Rivera makes no attempt to overcome that the procedural defect except to say that the combined effect of all the errors was to deprive him of a fair trial. Rivera's argument is without merit. See Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984) ('In spite of Zeigler's novel, though not convincing, argument that all nineteen points should be viewed as a pattern which could not have been seen until after the trial, we hold that all but two of the points raised either were, or could have been, presented at trial or on direct appeal. Therefore, they are not cognizable under rule 3.850."), sentence vacated on other grounds, 524 So. 2d 419 (Fla. 1988) .

Even were they not procedurally barred, Rivera's claims are facially insufficient. A motion is facially insufficient if it does not include identification of the prospective witness, the

substance of the testimony and an explanation of how this omission was prejudicial. Highsmith v. State, 617 So. 2d 825, 826 (Fla. 1993); Engle v. State, 576 So. 2d 698, 700 (Fla. 1992) (ruling that motion is legally insufficient absent factual support for allegations). See also Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing."); Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990) ("The second and third claims are devoid of adequate factual allegations and therefore are insufficient on their face."). There are no record cites, no factual explanations regarding what transpired at trial regarding the alleged error, and no legal argument or authority to support the requested remedy. See Duest v. State, 555 So. 2d 849, 851 (Fla. 1990) (precluding review of issues that merely make reference to arguments in postconviction motion since purpose of brief is to present specific legal points for review); Roberts v. State, 568 So. 2d 1255, 1260 (Fla. 1990) (same). Summary review of this issue was proper.

ISSUE X

RIVERA HAS FAILED TO ESTABLISH THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL.

Rivera raised numerous instances of alleged ineffective assistance of counsel. Although claims of ineffective assistance are generally cognizable in a motion for postconviction relief, that is not always the case. See Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (ruling that allegations of ineffective assistance of counsel should not be used to circumvent rule that postconviction proceedings are not second appeal); Harvey v. Dugger, 656 So. 2d 1253, 1255 (Fla. 1995) (finding procedurally barred claims cast as ineffectiveness claims inappropriate). In the instant case, the trial court granted an evidentiary hearing on claim X.B. However, the court found the remaining claims in this issue to be procedurally barred. (R 1203). The trial court's summary denial of relief was proper. A review of the claims indicate that they were either facially insufficient, refuted by the record, nonprejudicial, or procedurally barred claims recast as ineffectiveness claims to circumvent the procedural bar.

When assessing a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance was both deficient and prejudicial. Strickland v. Washington, 466 U.S. 668 (1984). When assessing the first prong, reviewing courts must make

every effort to eliminate the distorting effects of hindsight and indulge a strong presumption that counsel's performance was effective., Id. at 689. Counsel's performance must be evaluated from counsel's perspective at the time of the trial. Lusk v. State, 498 So. 2d 902 (Fla.), cert. denied, 107 S. Ct. 1912 (1986). Prejudice is demonstrated if the deficient performance was sufficient to render the result unreliable. Mendvk v. State, 592 so. 2d 1076 (Fla. 1992). Prejudice requires a showing that a reasonable possibility exists that the result of the proceedings would have been different absent the deficient performance. Routly v. State, 590 So. 2d 397, 401 (Fla. 1991). Relief may properly be denied absent an evidentiary hearing when the record either refutes the claim or when the defendant fails to establish the requisite prejudice. See Kennedy v. State, 547 So. 2d 912 (Fla. 1989) (finding that claim of ineffective assistance of counsel may be denied without an evidentiary hearing when defendant is unable to establish the requisite prejudice or the claim is refuted from the record). As will be demonstrated below all of the alleged errors were nothing more than trial tactics and strategy. Rivera cannot establish that Malavenda's performance fell outside the "wide range of professionally competent assistance." Strickland, 466 U.S. at 690. In Fersuson v. State, 593 So. 2d 508, 511 (Fla. 1992), this Court counseled against the dangers of speculating in

hindsight regarding counsel's performance. Simply because another attorney may choose different strategies and tactics does not establish deficient performance. Rivera's contentions are nothing more than such speculation. This claim was properly denied.

In subclaim A[15] Rivera claims that defense counsel was ineffective in allowing the jury to hear testimony from three "jailhouse snitches." All three statements, however, were admissible as an admission by a party-opponent. § 90.803(18), Fla. Stat. (1985); Swafford v. State, 533 So. 2d 270, 27.4 (Fla. 1988). These three men, Frank Zuccarello, William Moyer, and Peter Salerno were subject to cross-examination. The jury was made aware of the criminal records of all three men as well as the fact that all three had pending motions to mitigate their sentences. (ROA 1409-20, 1474-82, 1574). The jury heard evidence that Salerno had testified for the prosecution on at least eleven other occasions. (ROA 1580-83). In addition, defense counsel presented the testimony of John Meham during his case-in-chief. (ROA 1752-67). Meham, also an inmate with Rivera, testified that William Moyer attempted to get Rivera to talk to him in exchange for a deal. (ROA 1752-67). During closing argument, defense counsel again reminded the jury about the credibility concerns they should have

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[15] This claim was presented in the motion for postconviciton relief under II E.

regarding all three witnesses. (ROA 1819-1838, 1847-50, 1859, 1861, 1862). Rivera has failed to allege, let alone demonstrate, what more defense counsel could have done to minimize the effect of the statements, which were legally admissible.

In subclaim B, Rivera asserted that trial counsel was ineffective for failing to elicit specific evidence/testimony from a mental health professional centering on Rivera's sexual fantasies. He claimed that such testimony would have established that his admissions to Starr Peck and Amanda Green concerning the death of Staci Jazvac were nothing more than **sexual** fantasies fabricated from news reports. As noted **above,** Rivera was granted an evidentiary hearing on this claim. Therein, he presented the testimony of Dr. Frederick Berlin and Mr. Malavenda. The trial court found that Malavenda's decision not to introduce evidence of Rivera's past sexual disorders was a sound tactical strategy. (R 1718-1720). Furthermore, Dr. Berlin could not conclude that Rivera's statement to Peck and Green were merely sexual fantasies. (R 397-398, 411-412). The trial court's factual findings were supported by the record, and the legal conclusions were correct. (R 1718).

At the evidentiary hearing, Malavenda testified that he elicited the services of a well-known mental health expert, Dr. Livingston. Dr. Livingston examined Rivera and concluded that

Rivera's statements to the two women were not merely sexual fantasies. (R 539, 540). Consequently, Livingston would not have been helpful during the guilt phase. Furthermore, Malavenda was concerned that putting her on the stand would open the door to Rivera's very damaging sexual and criminal past on cross-examination. The jury would have also heard **the details of** Rivera's well-documented sexual deviancy and prior incarcerations for sexually related offenses, and overall very poor prognosis for recovery. (R 411-412). Instead, Malavenda brought the sexual fantasy theory to the jury through the cross-examination of other witnesses. (R 540, 554-555). The advantage of this strategy was that the jury could consider Rivera's theory without having to subject a mental health expert to rigorous cross-examination. (R 540-541). Such a strategy was reasonable. See Ferguson v. State, 593 so. 2d 508, 510 (Fla. 1992) (trial counsel's actions of presenting theory through nonexpert reasonable strategy in light of negative aspects sure to come out through expert testimony on cross-examination).

Rivera called Dr. Berlin as a witness at the evidentiary hearing to establish that Rivera's admissions to Starr Peck and Amanda Green were merely sexual fantasies. Dr. Berlin, however, could not offer that conclusion

PROSECUTOR: Then it is not your opinion that Mr. Rivera's statements regarding the murder of Staci Jazvac was merely a sexual fantasy fabricated on media reports of the case?

DR. BERLIN: I cannot come to that conclusion. As I mentioned, the one thing that prohibits it a good deal is that there was a similar crime right in the same area that clearly could not have been committed by him.

In the absence of that, I was leaning towards the idea that what he was describing really does fit his prior pattern.

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DR. BERLIN: I could not conclude whether what he described on the telephone was fantasy or imagination.

I would have been leaning heavily towards the idea because of the things you've raised that indeed this sounds like it could be real, but the--the monkey wrench in all this is that there's then another crime that he couldn't possibly have committed that's so similar.

If I'm in a sense going to hold it against him with a pattern, I have to be fair and equal and say there's a pattern suggesting it might not have been, that can't be ignored either. So I simply could not decide because I had conflicting information available to me regarding that issue.

(R 397-98, 411-412).

Dr. Berlin simply could not support Rivera's claim that Rivera's statement to Peck and Green were merely fantasies. Contrary to the assertions sworn to in his motion for

postconviction relief, Rivera was failed to produce any evidence which calls into question the veracity of his statements to Peck and Green. Rivera has not established that Mr. Malavenda's performance was deficient with respect to those statements, Cf. Henderson v. Dugger, 522 So. 2d 835, 838 (Fla. 1988) (trial counsel's failure to raise insanity defense or voluntary intoxication defense not deficient performance given that the record is devoid of any factual support for either defense); Ferguson, 593 So. 2d at 510 (same); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991) (same).

Furthermore, Berlin's equivocal opinion would have been subject to fierce attack on cross-examination, just as Livingston's would have been. At the evidentiary hearing, Berlin admitted during cross-examination that Rivera's escalating pattern of violent behavior would eventually lead to murder. (R 410-412). Berlin also stated that Rivera had admitted to him that he would ultimately end up killing someone. Rivera has failed to establish that a valid defense of 'sexual fantasy" existed. Furthermore, Rivera cannot establish that Malavenda's tactical decision not to risk the admission of Rivera's extensive sexual/violent past was unreasonable. Fersuson, 593 So. 2d at 510; Parker v. State, 476 so. 2d 134, 139 (Fla. 1984) (finding it proper to inquire into

facts and circumstances surrounding an expert's opinion). Therefore, this subclaim was properly denied.

In subclaim C,[16] Rivera alleged that the jury was never told that Rivera lacked the specific intent to kill because defense counsel failed to present a voluntary intoxication defense, which would have shown Rivera's inability to form specific intent and his inability to waive Miranda warnings. The decision not to present a voluntary intoxication defense and challenge Rivera's ability to form specific intent **was** fully litigated at the evidentiary hearing. See issue V. There simply was no evidence to establish such a defense. Furthermore, such a defense was contrary to Rivera's claim of innocence.

The lack of factual support for the defense would also have precluded any argument that Rivera was unable to waive his Miranda rights. Rivera does not explain how Malavenda could successfully have refuted the testimony of three officers who stated that Rivera was given his Miranda warnings and signed **a** consent form to submit to a polygraph examination. (ROA 1012-1214, 1023, 1330, 1512).

Rivera's reliance on the trial court's finding of the 'extreme mental or emotional disturbance" mitigating factor was unpersuasive. Mitigating evidence is relevant to the extent it may

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[16] This claim was presented in the postconviction motion under issue II G.

extenuate or reduce a defendant's moral culpability. Wickham v. State, 593 So. 2d 191, 193 (Fla. 1991). The finding of a mental mitigating factor does not in any way negate an element of first degree murder. Gaskin v. State, 591 So. 2d 917 (Fla. 1991); Holmes v. State, 429 So. 2d 297 (Fla. 1983). Rivera failed to establish that Malavenda's performance was in any way deficient. See Ferguson v. State, 593 So.2d 508 (Fla. 1992).

In subclaim D, Rivera contends that Malavenda was ineffective for failing to argue to the jury that if a sexual battery occurred it occurred after death. He relies on Owen v. State, 560 So. 2d 207 (Fla. 1990), and Jones v. State, 569 So. 2d 1234 (Fla. 1990), to support this contention. Owen and Jones? are inapposite, however, because both cases deal with the sufficiency of the evidence for a conviction for sexual battery. Owen, 560 So. 2d at 212; Jones, 569 SO. 2d at 1239. Rivera was never charged with sexual battery. Rivera v. State, 561 So. 2d 536, 537 (Fla. 1990). Consequently, reliance on those cases is misplaced.

Nor would this argument have undermined his conviction for first degree felony murder since the underlying felony need not be charged in order to sustain a conviction. See Sochor v. State, 619 So. 2d 285, 292 (Fla. 1993) (upholding conviction for first degree felony murder even though underlying charge of sexual battery was

never charged); Urganus v. State, 451 So. 2d 815 (Fla. 1984) (same).

Nor would this argument affect the aggravating factors.[17] The trial court found that the murder was committed during the commission of the offense or the attempt to commit a sexual battery.[18] (R 2310). There is no requirement that a sexual battery be completed in order to sustain this aggravating factor. Sochor, 619 So. 2d at 292. Furthermore, this aggravator was also established by the finding that the murder **was** committed during the course of a kidnaping. (R 2310). Rivera fails to demonstrate that Malavenda's performance was either deficient or that it adversely affected his trial.

In subclaim E, Rivera claims that Malavenda was ineffective for failing to properly prepare defense witness, Dr. Fatteh. Rivera claims that the lack of preparation was the direct result of the trial court's failure to grant Malavenda a continuance. This claim is procedurally barred. Although couched in terms of ineffective assistance of counsel, it is really an attempt to litigate the alleged denial of a continuance at trial. The trial

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[17] Rivera conceded on direct appeal that there was sufficient evidence to sustain the aggravating factor that the crime was committed during the course of an enumerated felony. Rivera, 541 so. 2d at 540.

[18] § 921.141(5)(d), Fla. Stat. (1985).

court properly found this claim to be procedurally barred. See Harvey, 656 So. 2d at 1255 (ruling that allegations of ineffective assistance of counsel may not be used to circumvent the rule that postconviction proceedings may not be used for a second appeal).

Even if this claim should have been addressed on the merits, relief was properly denied, In its case-in-chief, the state presented the testimony of Jennifer Goetz and the medical examiner, Dr. Wright, regarding Rivera's prior convictions for the attempted murder and sexual battery of Ms. Goetz. Rivera, 541 So. 2d at 538-539. Dr. Fatteh was called by the defense to rebut that testimony. Fatteh testified that in his opinion Ms. Geotz was never close to death during Rivera's attack upon her.[19] Although he stated that he did not remember all the facts surrounding the Geotz attack because he was subpoenaed to testify the day before, he also testified that he spent at least six hours reviewing the facts of the Goetz case prior to this case. (ROA 1685-90). In any event, Rivera fails to allege what Fatteh should have or would have stated even if he had more time to review his old notes. Given Rivera's failure to explain how this alleged error adversely impacted his trial, the trial court's summary denial was proper. See Kennedy, 547 So. 2d at 913-914.

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[19] Fatteh also testified to this same opinion at Rivera's trial for the attempted murder of Jennifer Geotz.

F. Rivera claims that counsel failed to object to the state's description of the character of the victim. (ROA 702-718). A review of the prosecutor's opening remarks indicated that he was simply outlining the evidence that would be presented regarding the disappearance and eventual murder of Staci Jazvac. The prosecutor's comments did not include any reference to comments made by the victim's family about the crime, the defendant, or the appropriate sentence. The remarks that were made were permissible. Consequently an objection would have been futile. See Hodses v. State, 595 So. 2d 929, 933 (Fla. 1992).

Rivera claims that trial counsel should have objected to Officer Milford's hearsay testimony. Milford testified the Mr. McDowell, the person who found the body of Staci Jazvac, told the officer that he smelled a foul odor before he found the body. (ROA 897). Milford's statement was not hearsay. The officer was explaining why he did what he did after speaking with Mr. McDowell. Consequently, it was not being offered for the truth of the matter asserted; rather, it was being offered to show what the officer did in response to the statement. Cf. Harris v. State, 544 So. 2d 322 (Fla. 4th DCA 1989). In any event, even if it was error it must be considered harmless given that McDowell had already testified that he smelled a foul odor and ultimately found Staci's body. (ROA 811). See State v. Baird, 572 So. 2d 904 (Fla. 1990) (hearsay

statement improperly admitted is harmless when information will ultimately be admitted at another time); Engle v. State, 576 So. 2d 696, 700 (Fla. 1991) (inadmissible hearsay evidence harmless when evidence is cumulative to admissible testimony).

Rivera next alleges that counsel should have objected to Detective Haarer's fingerprint identification of Staci Jazvac, because Haarer was not an expert in that particular area. (ROA 933). Even assuming error Rivera cannot establish prejudice. Staci had already been properly identified through dental records. (ROA 932). Cumulative identification of the victim, especially in light of the fact that her identity was not an issue, is simply not prejudicial.

Counsel should have objected to Detective Scheff's statement regarding his opinion that the condition of the victim's clothing suggested that sexual activity had occurred. Rivera claims that such an opinion was beyond the scope of Scheff's area of expertise. An objection to similar testimony from Officer Haarer had previously been overruled. (ROA 909-910). Consequently, another objection would have been futile. However on cross-examination Malavenda **was** able to bring Scheff's lack of expertise in this area before the jury. (ROA 1043-1044). Malavenda also brought to the

jury's attention the fact that the medical examiner [20] could not tell if the victim had been sexually molested. (ROA 856, 873). Finally, any improper suggestion of sexual molestation is insignificant given that Rivera told at least six people that he sexually assaulted Staci Jazvac. Rivera, 561 So. 2d at 537-38. Any error must be considered harmless.

Counsel's failure to object to the admission of the videotape of the scene was also not deficient performance. The video was cumulative as to the pictures already in evidence. There is no indication that the video is in any way unduly gruesome or graphic. Furthermore, given its cumulative nature, Rivera cannot establish what prejudice resulted from its admission. Baird v. State, 572 so. 2d

Rivera challenges trial counsel's failure to object to Officer Hutchinson's 'hearsay" testimony regarding the fact that Rivera identified phone numbers that were used to make obscene phone calls. Again, Rivera cannot demonstrate either deficient performance or prejudice from the admission of Hutchinson's statement. The statement is not hearsay as it is an admission against a party opponent. §90.803(13), Fla. Stat. (1985); Swafford v. State, 533 So. 2d 270, 274 (Fla. 1988).

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[20] Officer Haarer was also impeached regarding his opinion. (R 940-42).

Furthermore, the statement is cumulative as Rivera confessed to police that he made obscene phone calls to Star Peck. (ROA 1513, 1015). Star Peck also testified that Rivera made obscene phone calls to her. Consequently, any error must be considered harmless. (ROA 1081-93). Engle v. State, 576 So. 2d 696, 700 (Fla. 1991).

Equally without merit is Rivera's claim that counsel should have requested a curative instruction regarding Detective Scheff's improper characterization of Rivera's room as "sinister." Again Rivera simply cannot establish any prejudice. Scheff's remark was not sufficiently egregious. Cf. Jones v. State, 612 So. 2d 1370, 1374 (Fla. 1993) (determining that standard required to reverse conviction based on improper prosecutorial comments "is whether the error committed was so prejudicial as to vitiate the entire trial").

Rivera also states that counsel was ineffective for failing to object to state expert Howard Seiden's testimony that a hair found in Rivera's van belonged to Staci Jazvac. (ROA 1305). A review of Seiden's complete testimony reveals that at most he could only say that the hair "could have originated from Staci." (ROA 1305). He further explained that hair identification, unlike fingerprint identification, could not prove to be a positive match. (ROA 1305). Malavenda emphasized the point during cross-examination

and closing argument. (ROA 1821-23, 1313-17). Rivera cannot establish that **Malavenda's performance was deficient.**

Rivera next argues that counsel was deficient in failing to **request a** curative instruction regarding hearsay testimony of Detective Asher. Asher testified that Dr. Wright told him that Jennifer Goetz was near death during Rivera's attack upon her. (ROA 1376). Rivera cannot establish any prejudice in light of the fact that Dr. Wright also testified to the same thing. (ROA 1467-69) .

Rivera also objects to counsel's failure to object to a photograph of Jennifer Goetz used during Wright's testimony. Since Dr. Wright was not present when the photograph was taken he could not testify that it was an accurate depiction of the injuries. Rivera claims that the doctor's testimony should have been excluded on this basis. Rivera is in error. The photos were identified by the police as having been taken of Jennifer Goetz the day of her attack. (ROA 1375-77). Curiously enough, Rivera's **own expert, Dr.** Fatteh, relied upon the same photos during his direct testimony. (ROA 1682-83). Rivera cannot establish any prejudice. Had Malavenda successfully precluded the photos and Wright's testimony Rivera's conviction for the attempted murder of Jennifer Goetz would still have been properly admitted at trial.. Rivera, 541 so. 2d at 538-540.

Rivera alleges that counsel was ineffective for failing to object to a reference that a state witness, William Moyer, was willing to take a polygraph test. (ROA 1496). Rivera cannot establish that absent that remark the result of the proceedings would have been different. Unlike the facts in Crawford, 321 So, 2d 559 (Fla. 4th DCA 1975), approved, 339 So. 2d 214 (Fla. 1976), relied upon by Rivera, any error must be considered harmless. There were five other people that Rivera confessed to regarding the murder.

Trial counsel's failure to object to Detective Amabile's hearsay testimony regarding what Jennifer Goetz told him regarding Rivera's attack upon her was harmless error. Jennifer Goetz testified to the very same facts. Rivera, 561 So. 2d at 539. Consequently any inadmissible hearsay regarding the facts of the collateral crime are cumulative and therefore harmless. Baird, 572 So. 2d 904, 906 (Fla. 1990); Engle, 576 So. 2d 696, 700 (Fla. 1990)

Counsel also failed to object to alleged hearsay statements from Detective Amabile regarding what another officer said to Rivera. A review of the record indicates that Officer Carney told Rivera that fingerprints can be lifted from the body. The statement was admitted not for the truth of the matter but to explain Rivera's reaction to the statement. Immediately upon hearing the statement Rivera became nervous and interested in what

was being said. (ROA 1526-27). Rivera then stated that he felt the police did have fingerprints. (ROA 1527). Consequently Amabile's statement was not hearsay. In any event, the exact same statement was elicited from the declarant Sergeant Carney. Consequently, any error in admitting Amabile's statement was harmless. (ROA 1264-66). Engle, 576 So. 2d at 700; Baird, 572 So. 2d at 906.

Rivera also claims that trial counsel failed to object on hearsay grounds to Detective Amabile's testimony regarding a conversation Rivera had with someone named Larry Nelson. Rivera told Nelson that he may have met Staci before. (ROA 1528). However even if admission of Amabile's statement **was** error it was harmless **as** Sergeant Carney testified that Rivera made that exact same statement to him. (ROA 1264). Baird; Engle.

Next, Rivera claims that counsel failed to object to Amabile's description of Peter Rivera's work records. (ROA 1531). However even if Amabile's statement was erroneously admitted, it was harmless error as the jury heard the same information from two other witnesses.

Initially River claimed that he had been with his brother the night of the murder because his brother was off from work on that day. However Rivera's alibi did not check out because employee records of Peter Rivera reveal that he was working the night of the

murder. Both Peter Rivera and Sergeant Carney testified to this at trial. (ROA 1266-67, 1739-1740, **1750, 1757).** Consequently to the extent Amabile's testimony was error, Rivera cannot establish prejudice. Engle.

Rivera claims that counsel was deficient for failing to object to Amabile's "gratuitous" statement that he admitted to other people that he killed Staci Jazvac. Rivera misrepresents the record, as the statement was not gratuitous. When asked by defense counsel on cross-examination whether Rivera admitted the killing to anyone else, Amabile responded affirmatively. (ROA 1552-53). When asked whether Rivera ever admitted it to law enforcement officers, Amabile responded negatively. (ROA 1553). On redirect, after Rivera's counsel opened the door, Amabile named the people to whom Rivera admitted the crime. Defense counsel's tactics was within the range of professional strategy. The jury knew that Rivera had admitted the crime to others, as they testified at trial. Rivera, 561 So. 2d at 537-538. Malavenda was pointing out to the jury that Rivera has never confessed to the police.

Rivera alleges that trial counsel failed to object to repeated hearsay statements by Amabile. Amabile relayed his conversation with Detective Georgevich wherein Georgevich told Amabvile about Rivera's admissisions to Starr Peck. A review of the record reveals that Amabile referenced his conversation with Detective

Georgevich's not for the truth of the matter contained in the statement, but for what Amabile did in response to that information, i.e., he then contacted Star Peck. (ROA 1509). Rather than object to the statements Malavenda asked Amabile questions on cross-examination in an attempt to demonstrate that Rivera's phone call to Peck was nothing more than a fantasy and not a confession. (ROA 1553-56). Rivera cannot demonstrate that Malavenda's strategy was unreasonable. Ferguson, 593 So. 2d at . Nor can Rivera establish prejudice as Star Peck had already testified about the content of Riviera's statements to her. Finally Rivera admitted to making the statements to Peck. Rivera, 561 So. 2d at 537.

Next Rivera claims that trial counsel failed to object to state witness Gail Mastando's testimony that Rivera looked like the singer John Oates. (ROA 1594). Mastando testified on direct examination that she received obscene phone calls while she was working the late shift at Denny's. (R ROA 1586-1588). The caller said his name was 'Tony" and told her that he looked like the singer John Oates. (ROA 1588). When the witness began to state that the defendant looked like John Oates, defense counsel objected. (ROA 1293-1294). The objection was sustained. (ROA 1294). On cross-examination, Ms. Mastando admitted that she has never seen Rivera, she does not know Rivera and he has never hurt

her. (ROA 1596). Rivera fails to establish that Malavenda's actions were in any deficient.

Rivera claims that counsel was not present during the testimony of Meham, but later says that he was not present during the testimony of Moyer. The record does not support this claim. Counsel was present and cross-examined Moyer. (R 1480-94, 1499). Counsel was obviously present for direct examination of Meham, his own witness. (R 1758-63).

Rivera next contends that defense counsel failed to effectively cross-examine Walter Moyer. However a review of the record indicates that Mr. Malavenda did impeach Moyer. The jury heard that Moyer was in jail on four counts of sexual, battery on a child. Three of the charges were dropped. (ROA 1489). Although he could have received a life sentence, he was sentenced to thirteen years. (ROA 1490). Rivera cannot not demonstrate how Malavenda's performance was deficient regarding the cross-examination of Moyer.

In conclusion, Rivera has failed to establish that trial counsel's actions were not within the wide range of sound trail strategy. Furthermore, Rivera could not establish that absent the alleged errors of Malavenda, the result of the proceedings would have been different.

ISSUE XI

RIVERA'S CHALLENGE TO THE STANDARD JURY INSTRUCTING REGARDING THE JURY'S ROLE IN SENTENCING IS PROCEDURALLY BARRED

Rivera claims that the penalty phase jury instructions impermissibly diminished the jury's role in Florida's sentencing scheme. The trial court properly found this claim to be procedurally barred for failing to raise it on direct appeal. (R 1203). See Atkins v. State, 541 So. 2d 1165, 1166 (Fla. 1989); Daushtery v. State, 533 So. 2d 287, 288 (Fla. 1988); Combs v. State, 525 So. 2d 853 (Fla. 1988). In any event the jury instructions adequately advise the jury of its responsibity in Florida's sentencing scheme. Turner v. Dugger, 614 So. 2d 1075, 1079 (Fla. 1992).

ISSUE XII

RIVERA'S CHALLENGE TO THE TRIAL COURT'S FINDINGS IN MITIGATION ARE PROCEDURALLY BARRED.

In his postconviction motion Rivera attacked the trial court's findings regarding mitigating evidence. Rivera also argued that to the extent counsel failed to properly argue and present such mitigation his performance was deficient. The trial court summarily denied this claim as procedurally barred. (R 1203).

In sentencing Rivera to death, the trial court found the existence of one statutory mitigating factor,[21] and discussed other nonstatutory mitigation. (ROA 2311-2312). On direct appeal Rivera challenged the trial court's rejection of two other statutory mitigating factors.[22] The trial court's findings were upheld by this Court. Rivera v. State, 561 So. 2d 536, 540-541 (Fla. 1990). Rivera is precluded from relitigating this issue. See Roberts v. State, 568 So. 2d 1255, 1257 (Fla. 1990); Chandler v. State, 634 So. 2d 1066, 1068 (Fla. 1994). Rivera's attempt to overcome the procedural bar by alleging ineffective assistance of counsel was also properly rejected by the trial court. See Harvey v. State, 656 So. 2d 1253, 1255 (Fla 1995).

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[21] 921.141(6) (b).

[22] 921.141(6)(e) & (f), Fla. Stat. (1987).

ISSUE XIII

RIVERA'S CLAIM THAT THE PENALTY PHASE INSTRUCTIONS IMPROPERLY SHIFTED THE BURDEN TO HIM TO PROVE THAT DEATH WAS NOT THE APPROPRIATE PENALTY WAS PROPERLY DENIED AS PROCEDURALLY BARRED.

Rivera claimed that the standard jury instructions at the penalty phase improperly shifted the burden to him to prove that death was not the appropriate penalty. This claim was denied as procedurally barred since Rivera could have and should have raised it on direct appeal. See Chandler v. State, 634 So. 2d 1066, 1068 (Fla. 1994).

In an attempt to again challenge the trial court's findings regarding his sentence, Rivera claims that the trial court employed the wrong standard when assessing the evidence and that defense counsel was ineffective for failing to object. Rivera is precluded from relitigating this issue. See Roberts v. State, 568 So. 2d 1255, 1257 (Fla. 1990); Chandler v. State, 634 So. 2d 1066, 1068 (Fla. 1994). See Harvey v. State, 656 So. 2d 1253, 1256 (Fla. 1995).

In any event the penalty phase jury instructions do not impermissibly shift the burden of proof to the defendant. See Blystone v. Pennsylvania, 110 s. ct. 1078 (1990); Boyd v. California, 110 S. Ct. 1190 (1990).

ISSUE XIV

RIVERA'S CLAIM THAT THE JUDGE RELIED ON FACTS NOT OF RECORD IN SENTENCING HIM TO DEATH WAS PROPERLY DENIED AS PROCEDURALLY BARRED.

Rivera claimed that the trial judge relied on non record facts in sentencing him to death. In support of this contention, Rivera relied on comments made by Judge Ferris' at Rivera's sentencing hearing in the Geotz trial. See issue I. Rivera did not specify in his motion the nature of the impermissible evidence. The trial court's summary denial was proper given the fact that claim was legally insufficient and procedurally barred.

A motion is legally insufficient if it does not include identification of the prospective witness, the substance of the testimony and an explanation of how this omission was prejudicial. Highsmith v. State, 617 So. 2d 825, 826 (Fla. 1993); Ensle v. State, 576 So. 2d 698, 700 (Fla. 1992) (ruling that motion is legally insufficient absent factual support for allegations). See also Kennedy v. State, 547 so. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing."); Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990) ("The second and third claims are devoid of adequate factual allegations and therefore are insufficient on their face. As we noted in Kennedy,

mere conclusory allegations that trial counsel was ineffective do not warrant an evidentiary hearing."). Furthermore it could have been raised on direct appeal. See Kelly v. State, 569 So. 2d 754, 756 (Fla. 1990); Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994).

ISSUE XV

RIVERA'S CLAIM THAT THE TRIAL COURT IMPOSED AN UNCONSTITUTIONAL BURDEN UPON HIM TO PROVE THE EXISTENCE OF MITIGATING EVIDENCE IS PROCEDURALLY BARRED.

Rivera claimed that the trial court imposed an unconstitutional burden upon him to prove the existence of his mitigating evidence. This claim was properly denied as procedurally barred, since it could have and should have been raised on direct appeal. See Kelly v. State, 569 So. 2d 754, 756 (Fla. 1990). To the extent this claim was raised on direct appeal via Rivera's challenge to the trial court's findings regarding his sentence, the claim is also barred as relitigation is precluded. See Francis v. Barton, 581 So. 2d 583 (Fla.), cert. denied, 111 S. Ct. 2879 (1991). Regardless, the trial court properly instructed the jury regarding the standard of proof, and the sentencing order reflects the same. (ROA 2134-2136, 2311-2312).

ISSUE XVI

RIVERA'S CHALLENGE TO THE STANDARD JURY INSTRUCTIONS REGARDING THE PENALTY PHASE INSTRUCTIONS IS PROCEDURALLY BARRED.

Rivera challenges the instructions regarding the aggravating factors that were considered by the judge and jury. This claim was properly denied by the trial court as procedurally barred. (R 1203). See Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla 1994)(finding procedurally barred challenge to jury instructions on the aggravating factors).

In any event, Rivera claim is without merit. See Dougan v. State, 595 So. 2d 1, 4 (Fla 1992)(finding that Florida's death penalty statute, jury instructions and recommendation forms based on it, set out a clear and objective standard for channeling the jury's discretion); Johnson v. State, 612 So. 2d 575 (Fla 1993) (finding that Florida has adopted a narrowing construction of its heinous, atrocious, or cruel factor); Thompson v. State, 619 So. 2d 261, 267 (Fla. 1993)(finding that Florida's death penalty is unconstitutional is without merit),

Furthermore Rivera conceded on direct appeal that there was sufficient evidence to establish two of the factors he is now challengingi.e., the crime was committed during the course of a

felony[23] and prior violent felony[24]. Rivera, 561 So. 2d 536, 540 n. 10 (Fla. 1990). Given there was sufficient evidence to establish these factors any error in the instructions must be considered harmless. Thompson, 619 SO. 2d at 276.

This Court has already that there was sufficient evidence to establish the aggravating factor of "HAC". Rivera's attack on all of the instructions relating to his sentencing is without merit

[23] §921.141(5)(d) Fla. Stat. (1985)

[24] §921.141(5)(b) Fla. Stat, (1985).

ISSUE XVII

RIVERA'S ALLEGATIONS THAT THE STATE WITHHELD MATERIAL AND EXCULPATORY EVIDENCE IS WITHOUT MERIT. THE REMAINDER OF THE CLIAM IS PROCEDURALLY BARRED

Rivera alleges that the state withheld impeachment evidence regarding state witness Frank Zuccarello in violation of Brady v. Maryland, 373 U.S. 83 (1963). Rivera claims that a letter written by the prosecutor, Kelly Hancock, reveals that a deal was made between the state and Zuccarello for his testimony. Rivera requested an evidentiary hearing but again failed to call any witnesses. The state called the former prosecutor, Mr. Hancock. (R 685). The trial court denied relief finding that the state did not make any deals with Zucarello regarding his testimony. (R 1718-1719).

At the evidentiary hearing Hancock testified that Zuccarello did not receive any deal for his testimony. (R 686, 692-695). The letter relied upon in support of his claim was written by Hancock five months after the trial. In it the state merely requested that Rivera be allowed to participate in an incentive program. (R 687-688). There is no mention or admission that any a promises or deals were made to Zuccarello. (R 685-695). Rivera did not even attempt to bring forth any evidence to the contrary. This claim

was properly denied by the trial court. Cf. Phillips v. State, 608 So. 2d 778, 781 (Fla. 1992) (rejecting claim that state used jailhouse informant to elicit information from defendant where defendant failed to establish claim at evidentiary hearing).

In the second alleged Brady violation Rivera asserts that the state in someway impermissibly precluded his presentation of reverse Williams rule evidence. In reality Rivera is attempting to relitigate an issue already decided on direct appeal, i.e., admissibility of the murder of Linda Kalitan. Rivera v. State, 561 so. 2d 536, 540 (Fla. 1990). Using different grounds to reargue same issue is improper. Francis v. Barton, 581 SO. 2d 583 (Fla. 1992); Harvery v. Dugger, 656 So. 2d 1253 (Fla. 1995).

ISSUE XVIII

RIVERA HAS FAILED TO PROVE HIS ALLEGATION THAT SPECIAL PUBLIC DEFENDERS AND EXPERT WITNESSES ARE FUNDED FORM THE SAME ACCOUNT THAT PAYS FOR JUDICIAL ADMINISTRATION OF THE COURT HOUSE, CONSEQUENTLY HE HAS FAILED TO ESTABLISH THAT A CONFLICT OF INTEREST EXISTS FOR JUDGES.

~~In this claim~~, Rivera alleged that Judge Ferris had a conflict of interest because the money used to appoint special public defenders and expert witnesses was paid out of the same fund from which circuit court judges receive funding for judicial administration and capital improvements. Rivera requested and was granted an evidentiary hearing on this claim, but failed to present any witnesses. The state called John Canada, Director of the Office of Budget and Management Policy for Broward County, who testified that there were separate accounts for "SPD" expenditures (special public defenders and expert witnesses) judicial administration. (R 663, 665-666) . Money was never taken out of the "SPD" account for other expenditures. (R 661-662). Moreover, if the "SPD" account was overdrawn there was a special account for such contingencies. (R 681). At some point or another money may have been taken from the judicial administration account to fund an overdraw in the 'SPD" account. However, that would only have happened if there were a surplus in the judicial administration account. (R 665). Judges were not deprived of any equipment in

order to fund the "SPD" account. (R 664). No ramifications befell a judge if the "SPD" was overdrawn. (R 680). Nor were judges forced to appoint an attorney from the "SPD" list. (R 680). No evidence was presented that the "SPD" account was overdrawn during the years 1986 and 1987, during which Rivera was tried. Nor was there any evidence to establish that money from the capital improvement account was deposited in the "SPD" account during that time. (R 680).

This claim was properly denied, as there was not one shred of evidence to support Rivera's general allegation that a conflict of interest existed. The evidence adduced at the evidentiary hearing totally refuted Rivera's claim that expenditures for "SPD" and capital funding came from the same account. (R 658-680). Furthermore, no evidence was presented that any accounting procedures in place at the time of his trial deprived Rivera of any constitutional right. This claim was properly by the trial court (R 1719), and was subsequently found to be meritless on its face in Rose v. State, 675 So. 2d 567, 569 n.2 (Fla. 199.6) ('We find the claim that Rose was prejudiced by an alleged conflict of interest based on Broward County's budgeting for capital improvements and special assistant public defenders meritless on its face.").

ISSUE XIX

RIVERA'S CLAIM REGARDING THE ADMISSION OF SIMILAR FACT EVIDENCE IS PROCEDURALLY BARRED

Rivera claims that the similar fact evidence regarding Rivera's convictions for attempted first degree murder and kidnaping was impermissible. This claim was adversely decided against Rivera on direct appeal. Rivera v. State, 561 SO. 2d 536, 538-539 (Fla. 1990). Using different grounds to reargue same issue is improper. Francis v. Barton, 581 So. 2d 583 (Fla. 1992); Harverv v. Dugger, 656 So. 2d 1253, 1255 (Fla. 1995). The trial court properly found the claim to be procedurally barred.

ISSUE XX

RIVERA CANNOT OVERCOME THE IRREVOCABLE PROCEDURAL BAR ATTACHED TO HIS CLAIMS. HE HAS FAILED TO ESTABLISH THAT ANY PREJUDICIAL ERROR OCCURRED THAT WOULD CALL INTO QUESTION HIS GUILT OR THE APPROPRIATENESS OF HIS SENTENCE

Rivera has failed to overcome that the procedural defects in his motion for postconviction relief except to say that the combined effect of all the errors was to deprive him of a fair trial. Rivera's argument is without merit. See Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984) ('In spite of Zeigler's novel, though not convincing, argument that all nineteen points should be viewed as a pattern which could not have been seen until after the trial, we hold that all but two of the points raised either were, or could have been, presented at trial or on direct appeal. Therefore, they are not cognizable under rule 3.850."), sentence vacated on other grounds, 524 So. 2d 419 (Fla. 1988).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Gail Anderson, Esquire, Assistant CCR, Office of the Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this 28th day of April, 1996.

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