IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,203

MANUEL VALLE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Manuel Valle was charged by indictment with first degree murder, for the 1978 killing of police officer Luis Pena, with a firearm; attempted first degree murder, for the attempted killing of police officer Gary Spell, with a firearm; possession of a firearm by a convicted felon; and automobile theft. (R. 1-4).[1]

At his first trial, Valle was convicted of first degree murder, attempted murder, and possession of a firearm. Valle v. State, 394 So. 2d 1004 (Fla. 1981) (Valle I), Valle had pled guilty to the severed charge of automobile theft. Id. The jury recommended the death penalty and the trial judge, the Honorable Ellen J. Morphonios, imposed the death sentence. Id. On direct appeal, this Court reversed the convictions and sentences for the murder, attempted murder and possession of a firearm, and remanded the case for a new trial as defense counsel was not deemed to have had sufficient time to prepare for trial. Id.

At the retrial, in 1981, Valle was again convicted on the three counts. The new jury recommended the death penalty by a vote of 9 to 3, and the new trial judge, the Honorable James Jorgenson, again imposed the death sentence. (2R. 1045, 1057);[2] Valle v. State, 474 So. 2d 796 (Fla. 1981) (Valle II). For the attempted murder and possession of firearm convictions, Valle received consecutive sentences of 30 years and five years of imprisonment, Id.

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[1] The symbol "R" denotes the record on appeal in Florida Supreme Court Case No. 54,572.

[2] The symbol "2R" represents the record on appeal in Florida Supreme Court Case No, 6 1,176. The symbol "2T" represents the transcript of the trial court proceedings included in the record in Florida Supreme Court Case No. 6 1,176.

Valle appealed his convictions and sentences to this Court, in Case No. 61,176 (Valle II). On July 11,1985, this Court affirmed Valle's convictions and sentences. On September 17, 1985, rehearing was denied. Valle II, 474 So. 2d at 796. This Court set forth the following historical facts of the crimes:

> On April 2, 1978, Officer Louis Pena of the Coral Gables Police Department was on patrol when he stopped appellant and a companion for a traffic violation. The events that followed were witnessed by Officer Gary Spell, also of the Coral Gables Police Department. Officer Spell testified that when he arrived at the scene, appellant was sitting in the patrol car with Officer Pena. Shortly thereafter, Spell heard Pena use his radio to run a license check on the car appellant was driving. According to Spell, appellant then walked back to his car and reached into it, approached Officer Pena and fired a single shot at him, which resulted in his death. Appellant also fired two shots at Spell and then fled. He was picked up two days later in Deerfield Beach. Following his jury trial, appellant was also found guilty of the attempted first-degree murder of Spell and after a non-jury trial, he was found guilty of possession of a firearm by a convicted felon.

Valle II, 474 So. 2d at 798.

Valle then petitioned the Supreme Court of the United States for a writ of certiorari. On May 5, 1986, that Court granted the petition, vacated Valle's death sentence, and remanded the case to this Court for further consideration, in light of Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L. Ed. 2d 1 (1986), regarding the admissibility of model prisoner testimony. Valle v. Florida, 476 U.S. 1102, 106 S.Ct. 1943, 90 L.Ed.2d 353 (1986). On January 5, 1987, this Court remanded the case for a new sentencing hearing, to be conducted before a new jury. Valle v. State, 502 So. 2d 1225 (Fla. 1987) (Valle III). This Court determined that although some model prisoner testimony had been presented at the re-trial, other such evidence had been excluded. This Court determined that the excluded model prisoner testimony was not cumulative, and that its exclusion

was not harmless error. Valle III, 502 So. 2d at 1225-6. Rehearing was denied on March 19, 1987. Id.

On February 3, 1988, the resentencing proceeding commenced before another new jury, and a new judge, the Honorable Norman Gerstein. On February 25, 1988, the jury recommended death by a vote of 8 to 4. (3R. 882).[3] The trial court conducted a further hearing on March 6, 1988. On March 16, 1988, the trial court imposed the death penalty for the first degree murder of Luis Pena. (3R. 897-908, 6189-93). The trial court found the existence of five aggravating factors: (1) Valle was previously convicted of a felony involving the use or threat of violence to the person; (2) the killing was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (3) the killing was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; (4) the killing was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; and, (5) the victim was a law enforcement officer engaged in the performance of his official duties. (3R. 900-903). The second, third and fifth reasons were merged and were not treated as separate factors. Id. The lower court found that there was no evidence of any statutory mitigating circumstances. (3R. 904-907). The court further found that the evidence did not establish any nonstatutory mitigating circumstances, or alternatively, that any such mitigating circumstances were outweighed by the aggravating factors. (3R. 906-907).

Valle appealed his sentence of death to this Court, raising the following issues:

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[3] The symbol "3R" represents the record on appeal in Florida Supreme court Case No. 72,328.

I. THE TRIAL COURT ERRED IN FAILING TO MARE A FULL INQUIRY INTO ALLEGATIONS THAT THE PROSECUTORS HAD UTILIZED THE STATE'S PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 16 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

II. THE TRIAL COURT ERRED IN REFUSING DEFENDANT AN OPPORTUNITY TO EXERCISE A PEREMPTORY CHALLENGE SUBSEQUENT TO THE SWEARING OF THE JURY BUT PRIOR TO THE TARING OF TESTIMONY, BASED UPON INFORMATION IMPARTED BY THE PROSECUTION AT THAT TIME, IN VIOLATION OF RULE 3.3 10 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE,

III. EGREGIOUS PROSECUTORIAL MISCONDUCT DENIED DEFENDANT A FAIR AND RELIABLE JURY SENTENCING HEARING, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. Overkill in the State's Case-in-Chief.

B. Prejudicial Reliance Upon Prior Death Sentence.

1. Prior Death Sentences As A Feature of the Resentencing Proceedings.
2. Tactical Advantages For Prosecution From Prior Death Sentences.

C. Unfair And Prejudicial Cross-Examination of Defense Witnesses And Denial of Opportunity For Rebuttal,

1. Unreliable Evidence To Challenge And Rebut Defendant's Potential For Favorable Prison Adjustment.
2. Denial of Opportunity to Challenge State's Cross-Examination And Rebuttal.

a. Redirect examination of defense witnesses.
b. Denial of surrebuttal.

3. Prejudicial Misuse Of Defendant's Prior Record.
4. Unlawful Aggravating Circumstances In The Guise Of Cross-Examination And Rebuttal.

a. Parole.
b. Lack of Remorse.

D. Unfair And Prejudicial Denigration of Statutory And Nonstatutory Mitigating Circumstances.

1. Unfair And Prejudicial Cross-Examination To Challenge Defendant's Mental-Status Mitigating Circumstances.

a. Unfounded character attack.
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2. Limitation On Mitigation To Defenses To Crime.

E. Unfair And Unconstitutional Application Of Aggravating Circumstances.

1. (5)(j) As Ex Post Facto Law.
2. "Tripling" of Aggravating Circumstances.

F. "Mandatory Death" Arguments.

IV. THE UNFAIR AND PREJUDICIAL USE OF "VICTIM IMPACT" TESTIMONY AND ARGUMENT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

V. THE TRIAL COURT'S IMPOSITION OF A DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. Overbroad Application of Section 92 1.14 1(5)(I), Florida Statutes (1987).
B. Restricted Consideration of Mitigating Factors.

See, Brief of Appellant, Case No, 72,328. On May 2, 1991, this Court affirmed Valle's death sentence. Rehearing was denied on July 5, 1991. Valle v. State, 581 So. 2d 40 (Fla. 1991) (Valle IV).

On October 1, 199 1, Valle filed a petition for writ of certiorari in the Supreme Court of the United States That petition was denied on December 2, 1991. Valle v. Florida, 502 U.S. 986, 112 S. Ct. 597, 116 L.Ed.2d 621 (1991).

On April 5, 1993, Valle filed his first Motion to Vacate Judgments of Conviction and Sentence. (PCR[Supp.]. 7-46).[4] While this original post-conviction motion contained 21 claims, most of the alleged claims were devoid of any factual allegations, and were accompanied by allegations that the claims could not be properly pled due to ongoing Chapter 119 requests. Id. This motion further alleged that it would "be amended as public records material is received and reviewed. . . ." (PCR[Supp.]. 13). The State filed a response to this motion, asserting that the motion was legally insufficient and should be summarily denied, noting that Valle had until December 2, 1993, to file a legally sufficient motion. (PCR[Supp.]. 61-81).

On August 4, 1993, the lower court held a hearing on the first motion for post-conviction relief, and denied the motion, without prejudice, to allow Valle to file a legally sufficient motion. (PCT. 1, 42-43).[5] On August 18, 1993, the lower court entered its written order, summarily denying the first motion for post-conviction relief, on the grounds that it was legally insufficient. (PCR[Supp]. 82). The defendant was given until December 2, 1993, in which to refile a legally sufficient motion. Id.

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[4] The symbol "PCR." represents the record on appeal in the instant case, the record from the post-conviction proceedings. The instant record consists of three volumes - the original record, the supplemental record, and the transcripts of the trial court proceedings.

[5] The symbol "PCT." represents the transcripts of the lower court proceedings which are included in the record on appeal in this case.

At the hearing on August 4, 1993, the parties had addressed the procedural bars with respect to issues that could have or were in fact raised in prior proceedings, and the sufficiency of other allegations (PCT. 4-30). The defendant then argued that the State had not complied with his public records request, pursuant to Chapter 119, Florida Statutes. (PCT. 30-39). At said hearing, the State responded that it had made its files available to CCR's investigator, and that CCR's investigator had spent four days going through the State Attorney's files, months prior to the August 4, 1993 hearing. (PCT. 32). CCR's investigator never returned after that and was not heard from again, even though the State's files remained available for any further review on a continuous basis. (PCT. 32). Valle's post-conviction counsel then asserted that the chapter 119 claim "does not involve Mr. Laeser [the assistant state attorney]." (PCT. 33). Valle's counsel acknowledged that no one from his office had been to the State Attorney's Office in the preceding months, and that "[w]e believe we have gotten copies of those [the State Attorney's files]." (PCT. 36). Thus, "As the State correctly pointed out, we haven't been there since Christmas. We have been there, we got them." (PCT. 36). As to any materials which the State Attorney's Office had withheld, on the basis of its claim that those materials, personal notes and rough drafts, are not covered by Chapter 119, the State offered to produce them to the lower Court judge for an in camera inspection. (PCT. 37-40).

Valle's counsel then asserted that there was also a problem with the files from the Metro Dade Police Department. (PCT. 38-39). The State responded that the police files requested by the defendant were contained within the State Attorney's files, which had been fully reviewed by CCR's investigators, (PCT. 39). The prosecutor further represented, as to the police department files, that when the State Attorney's Office received them, he reviewed them and did not remove anything from those tiles or add anything to them. (PCT. 41). The only materials which were removed from

the State Attorney's files were personal prosecutorial notes. (PCT. 41-42).

The final complaint in the above hearing, with respect to public records, was as to the Parole Commission and the Department of Corrections. (PCT. 35-6). As to the latter, counsel for Valle informed the court that the Department of Corrections had "made copies for us," but that counsel did not wish to pay for said services, and had thus not picked up the copies. Id. [6] There was no mention of any lawsuit having been filed. As to the Parole Commission, post-conviction counsel stated that, ""[W]e have filed a civil suit case in Leon County alleging that the parole commission and board of executive clemency are required to turn over Brady information." Id. Counsel informed the court that it had no jurisdiction over the latter two agencies, but that the trial court could hold the post-conviction proceedings in abeyance for a "reasonable time to get these things settled." (PCT. 36).

On December 1, 1993, the defendant then filed a second Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend. (PCR. 1-62). That motion raised twenty (20) claims, which are the subject of the instant appeal, as follows:

> I. ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. VALLE'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. MR. VALLE CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND BEEN AFFORDED DUE TIME TO REVIEW THOSE

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[6] As noted by counsel for the State, the Department of Corrections, had previously turned over its entire file to trial defense counsel of the 1988 re-sentencing hearing, and said files were utilized by both parties at said sentencing. (PCT. 37).

MATERIALS AND AMEND.

II. THE TRIAL COURT AND THE FLORIDA SUPREME COURT IMPROPERLY DENIED MR. VALLE'S PETITION FOR WRIT OF CORAM NOBIS. NEWLY DISCOVERED EVIDENCE REVEALS THAT MR. VALLE WAS PREJUDICED BY IMPROPER JURY AND PROSECUTORIAL CONDUCT.

III. THE JURY WAS IMPROPERLY INSTRUCTED ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR, IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

IV. MR. VALLE WAS DENIED A RELIABLE SENTENCING WHEN HIS JURY WAS IMPROPERLY INSTRUCTED THAT ONE SINGLE ACT SUPPORTED THREE SEPARATE AGGRAVATING FACTORS IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

V. FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN MR. VALLE'S CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE, AS A RESULT, MR. VALLE'S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR.

VI, COUNSEL FOR THE STATE ENGAGED IN EX PARTE COMMUNICATIONS WITH THE TRIAL JUDGE DURING THE PENDENCY OF MR. VALLE'S TRIAL. TRIAL COUNSEL KNEW OF THE COMMUNICATIONS AND FAILED TO REMOVE SAID TRIAL JUDGE. TRIAL COUNSEL HAD NO STRATEGIC REASON FOR THIS FAILURE. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT DOING SO. MR. VALLE WAS PREJUDICED THEREBY.

VII. THROUGHOUT MR. VALLE'S SENTENCING, THE STATE FILLED, OR ASSISTED IN FILLING, MR. VALLE'S COURTROOM WITH AN OVERWHELMING PRESENCE OF UNIFORMED POLICE OFFICERS. THESE POLICE OFFICERS INTIMIDATED BOTH THE TRIAL JUDGE AND JURY. WERE IT NOT FOR THE STATE'S ACTIONS, THE TRIAL JURY WOULD HAVE RECOMMENDED A LIFE SENTENCE AND THE TRIAL JUDGE WOULD HAVE IMPOSED THE SAME,

VIII. MR. VALLE WAS DENIED THE EFFECTIVE ASSISTANCE OF

COUNSEL AT HIS RESENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE ADDITIONAL MITIGATING EVIDENCE AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE. COUNSEL FAILED TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

IX. MR. VALLE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE DURING HIS RESENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL INEFFECTIVELY FAILED TO OBJECT TO THE STATE'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES. TRIAL COUNSEL FAILED TO DISCOVER AND REMOVE PREJUDICED JURORS. THE JURORS' PREJUDICES ADVERSELY AFFECTED THE OUTCOME OF BOTH THE GUILT AND PENALTY PHASES OF MR. VALLE'S TRIAL.

X. MR. VALLE'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO MR. VALLE TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING MR. VALLE TO DEATH.

XI. MR. VALLE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERTS WHO EVALUATED HIM DURING THE TRIAL COURT PROCEEDINGS FAILED TO CONDUCT PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATIONS, AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE. MR. VALLE'S RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION WERE DENIED.

XII. THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENT UPON NON-STATUTORY AGGRAVATING FACTORS RENDERED MR. VALLE'S DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. DEFENSE COUNSEL'S FAILURE TO ARGUE EFFECTIVELY CONSTITUTED DEFICIENT PERFORMANCE.

XIII, THE PROSECUTORS' MISCONDUCT DURING THE COURSE OF MR. VALLE'S CASE RENDERED MR. VALLE'S CONVICTION AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. THE STATE PRESENTED UNCHARGED COLLATERAL CRIMES IMPROPER ARGUMENT TO THE JURY. COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING. THE TRIAL COURT'S ACTIONS DID NOT PERMIT COUNSEL TO BE EFFECTIVE.

XIV. MR. VALLE WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE REFUSED TO FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS

XV. NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. VALLE'S CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

XVI. MR. VALLE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

XVII. MR. VALLE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MR. VALLE'S CASE IN CHALLENGE TO THE STATE'S CASE. A FULL ADVERSARIAL TESTING DID NOT OCCUR. THE COURT AND STATE RENDERED COUNSEL INEFFECTIVE. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, MR. VALLE'S CONVICTIONS AND DEATH SENTENCE ARE UNRELIABLE,

XVIII. MR. VALLE IS INNOCENT OF FIRST DEGREE MURDER AND WAS DENIED AN ADVERSARIAL TESTING,

XIX. MR. VALLE'S TRIAL OUTCOME WAS MATERIALLY UNRELIABLE DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL, THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, THE NEWLY DISCOVERED EVIDENCE, THE IMPROPER RULINGS OF THE

TRIAL COURT, OR ALL THE PRECEDING AT MR. VALLE'S TRIAL.

XX, MR. VALLE'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERROR DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

(PCR. 1-62).

The above pleading did not allege any civil public records lawsuits, other than the previously mentioned suit against the Parole Commission, having been filed. (PCR. 8).

In the interim, prior to the filing of the above motion, the State turned over its previously withheld notes to the trial judge, in open court, in the presence of the defendant's clemency attorney, for an in-camera inspection. (PCR. Supp. 89). On December 9, 1993, the lower court entered its written order finding the notes were not public records and did not contain exculpatory information:

2. After reviewing the papers submitted by the State, in camera, [the court] finds that the documents are not public records under Chapter 119, and contain no information which can be deemed discoverable material under Brady v. Maryland, 373 U.S. 83 (1963). Said documents are ordered sealed and to be made part of the record for purpose of any future appellate review.

(PCR. 63).

On May 1, 1994 the State filed a comprehensive Response to Second Motion to Vacate Judgments of Conviction and Sentence. (PCR. 69- 103). A Huff v. State, 622 So. 2d 982 (Fla. 1993), hearing on the second amended motion was held on August 26, 1994, (PCT. 45, et seq.). After hearing legal argument from counsel, and having inquired into the factual basis for the Appellant's

claims, the judge ruled that there were insufficient allegations to warrant any evidentiary hearing, and the motion was denied. (PCT. 80). The written order denying the motion, dated August 31, 1994 and filed September 2, 1994, after reciting its reliance upon the record, the motion to vacate, and the State's response thereto, stated the following reasons for denial:

> 1. That claims two, three, four, five, six, seven, ten, twelve, thirteen, fourteen, eighteen, and twenty are procedurally barred, as they are claims which either were, or could have, or should have been raised at trial, and if properly preserved either were, or could have, or should have been raised on direct appeal of the judgment and sentence.
>
> 2. That claim two is also legally insufficient, as are claims six, eight, nine, eleven, fifteen, sixteen, seventeen, and nineteen, in that they do not provide sufficient basis to require an evidentiary hearing. In particular, the claims involving ineffective assistance of counsel, as alleged, do not meet the standards of Strickland v. Washington, 466 U.S. 668 (1984).
>
> 3. That Claim I, the Chapter 119 Claim, as it relates to the files of the State Attorney's Office was previously ruled on by this Court in its order of December 9, 1993, and that this Court does not have jurisdiction over the other state agencies. See Parole Commission v. Lockett, 620 So. 2d 153 (Fla. 1993); Hoffman v. State, 613 So. 2d 405 (Fla. 1992).

(PCR. 105). Valle's Motion to Reconsider Order Denying Defendant's Motion for Post-Conviction Relief (PCR. 107) was heard and denied at a hearing on January 27, 1995 (PCT. 82-111, 121).

SUMMARY OF THE ARGUMENT

ARGUMENT I. The Appellant's initial argument is that the trial court improperly denied an evidentiary hearing on the motion to vacate. In the ensuing arguments, the State details, claim by claim, how each claim was either procedurally barred, inadequately pled, or conclusively refuted by the record. Under such circumstances, an evidentiary hearing was not required.

ARGUMENTS II and XV. On the public records claim, the record clearly reflects that the defense was provided with more than ample time in which to pursue his claims and to file any amendments to the motion to vacate. The record further reflects, that as to all matters which the defendant alludes, there were no public records violations. Contrary to the Appellant's argument, the State did furnish an adequate description of materials which it withheld. It is also clear that those matters, personal notes of prosecutors, are not subject to Chapter 119. For reasons delineated in this Argument, the request, in Argument XV, for additional time to amend various post-conviction claims, is likewise without merit.

ARGUMENTS III, V, VI, VII and IX. The claims presented in Arguments III, V, VI, VII and IX are procedurally barred because the claims either relate to matters for which there were no objections at the trial court level, or matters which were evident from the trial court record, but were not raised on direct appeal, even though they could have been so raised. The procedural bars are not averted by the effort to classify some of the claims as ineffective assistance claims.

ARGUMENT IV. The principal ineffective assistance claim, presented in Argument IV,

relates to the failure to present additional witnesses at the resentencing proceeding. It is clear from the motion to vacate and the trial court inquiry, during the resentencing proceedings, that the matters described in the motion to vacate relate to strategic decisions which were discussed with the defendant and with which the defendant concurred. It is also clear that the witnesses who were not called, additional family members, would have presented testimony which was, at best, cumulative testimony already presented to the jury, and was of de minimis significance. Under such circumstances, the ineffective assistance claim is without merit.

ARGUMENTS VIII, X, XI, XII, XIII and XIV. The claims raised by the Appellant in these Arguments are issues which are procedurally barred, as they are explicit repetitions of claims argued and rejected in the previous direct appeal. These claims can not be relitigated under the guise of a claim of ineffective assistance of counsel, where the underlying arguments were already addressed and rejected on the merits and where there were no allegations as to what, if anything, trial counsel could have or should have done that would have in any way altered the outcome of the trial.

ARGUMENT

I.
THE LOWER COURT DID NOT ERR IN SUMMARILY DENYING THE MOTION TO VACATE WITHOUT AN EVIDENTIARY HEARING.

The Appellant contends that the lower court erred in summarily denying the motion to vacate, without an evidentiary hearing, when the post-conviction judge refused to accept various factual assertions made in the motion to vacate. Each and every claim in the motion to vacate, to which the Appellant alludes in Argument I, is fully addressed in the ensuing Arguments contained in this Brief of Appellee, A review of each and every one of those Arguments clearly demonstrates the summary denial of the claims in the motion to vacate was proper, as the claims were either procedurally barred - e.g., could have or should have been raised on direct appeal and relitigated claims already addressed on direct appeal - or legally insufficient on their face - e.g., where the allegations, even if true, would not entitle the defendant to relief - or conclusively refuted by the record, Under such circumstances, there was no need to conduct an evidentiary hearing. See, Kennedy v. State, 547 So. 2d 912, 913-14 (Fla. 1989); Engle v. Dugger, 576 So. 2d 696, 699-700 (Fla. 199 1).

As a preliminary matter, however, the State would note that the Appellant's assertions with respect to the trial court's "refus[al] to accept specific factual allegations" is entirely without merit. The record in the instant case reflects that it was the Appellant who sought to trivialize the post-conviction process by engaging in semantic gamesmanship, The Appellant's position in the court below was that he was not required to specify his factual allegations or divulge the basis for same, unless and until he received an evidentiary hearing. The Appellant's position was, "We'll produce

witnesses should we be given an evidentiary hearing to substantiate that allegation." (PCT. 56); "[N]ow the specific facts don't need to be - affidavits don't need to be attached, names of witnesses don't need to be attached, nothing." (PCT. 67).

For example, the defendant's amended motion for post-conviction relief alleged that the trial court had "ex-parte communications with members of the prosecution team. Witnesses observed the state and the judge emerging from his chambers during trial discussing, what appeared to be, matters of some importance." (PCR. 21). The foregoing was the sum total of the "factual" allegations with respect to the claim. As noted by the State at the Huff hearing, conducted 16 months after the initial motion for post-conviction relief was filed and eight (8) months after the Appellant had been given an eight month period to amend the initial motion, the defendant had not set forth the substance of the alleged communication such that a legal determination could be made. (PCT.61). The defendant's position was that regardless of the substance of the communication, that is even if, for example, the judge had merely asked about "the Marlins' game last night," "the law is clear that will require an evidentiary hearing." (PCT. 62-63). The trial judge's repeated attempts to ascertain a factual basis were thwarted by the defendant's mischaracterization of the law:

> **THE COURT:** Let's just be hypothetical. We are conducting a sentencing here after somebody has been convicted of first-degree murder. State is pushing for death; Defense is pushing for life. I am coming up the escalator. The families of the defendant and the victim are sitting outside my courtroom, And as I go from the escalator toward my office. the prosecutor stands. he says, "Good morning. Judge." I said. "Good morning. ma'am or sir."
>
> Now, the family of the defendant witnesses that conversation. They can't hear that conversation, but they see me. They know I said some& You're telling me that I got to have an evidentiary hearing based on that? Is that what the law of Florida requires? Ks that what the law of the United States require?

MR. KISSINGER: Which --

THE COURT: That's preposterous.

MR. KISSINGER: It's not.

THE COURT: That isn't the law.

MR. KISSINGER: It is the law. . . .

THE COURT: I am just wondering whether I was to have an evidentiary hearing on that issue?

MR. KISSINGER: Yes, because we have no way to present this claim other than to call these witnesses at trial. If indeed there was a provision for discovery as there is in a trial level -- which is part of the problem, we can't bring --

THE COURT: I think we beat that horse pretty good. Let me see if I have any other.

(PCT. 64-65). It should be noted that in the same claim based upon "ex-parte" communications, the defense motion also contained an allegation that, "[F]urther, defense counsel failed to move to disqualify Judge Gerstein as biased when the jury could observe Judge Gerstein socializing with the multitude of Coral Gables Police officers that were present daily in the courtroom, kissing the widow of the victim, and female police officers." (PCR. 21). Again, this was the sum total of the claim. At the Huff hearing, the trial court questioned the defense as to the factual basis for these allegations, and was informed that there was no obligation to divulge the source of these allegations unless and until an evidentiary hearing was granted:

THE COURT: . . . -- I made a note with regard to -- on page 21 of the pleadings where the motion talks about the Judge kissing the widow of the victim. Again, do you have any -- is there anything to support that at all?

MR. KISSINGER: We'll produce --

THE COURT: How is anybody to know that what you are alleging here is accurate?

MR. KISSINGER: We can produce witnesses. Well, the allegation has to be taken as true at this point. We'll produce witnesses should we be given an evidentiary hearing to substantiate that allegation.

THE COURT: That happened in front of a jury and you are above -- you represent, as an officer of the Court, that you can bring in jury members who are prepared to testify that they saw Judge Gerstein in their presence kissing the widow of the victim?

MR. KISSINGER: I believe the witnesses -- the witnesses that we would produce would not be jurors. They'll be --

(PCR. 56-57) (emphasis added). When the judge persisted in asking who would testify in support of the above allegation, defense counsel, notwithstanding the fact that this allegation had appeared in both the first and second motions to vacate, 16 months prior to the hearing, still could not provide the court with a direct answer, choosing to respond that, "my understanding is that it was either trial counsel [unnamed] or a member of Mr. Valle's family [unnamed], I am not certain." (PCT. 58).[7]

The trial judge then delved into the factual basis for other allegations, such as those accusing the prosecutors of intentionally filling the courtroom with police officers at the resentencing. (PCR. 22; PCT. 65-67). Defense counsel again informed the court that it could not ask the defense,"to go forward with our facts --." (PCT. 66-67):

THE COURT: . . .

Yet, you accused the State of taking some action to fill the seats. I mean, what evidence is there to support that? Is there an affidavit signed by any police officer to say that: "The only reason I was in Court that day is because some prosecutor told me to be there?"

MR. KISSINGER: Your Honor, I believe that it's -- again, we are getting in situations where the allegation has to be taken as true as the way it's stated. What the Court is doing at this point in this inquiry is asking us to go forward with our facts --

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[7] There were a total of four (4) defense counsel at the commencement of the resentencing; at least three (3) of these counsel remained throughout the resentencing.

THE CQURT: So you are -- what are you saying?

. . .

MR. KISSINGER: What I am saying is that the allegation, what the rule requires by its terms is that factual allegations have to be sufficient, if true, to support a claim for relief. Now. the specific facts don't need to be -- affidavits don't need to be attached. names of witnesses don't have to be attached. nothing.

(PCT. 66-67) (emphasis added).

The judge, as seen above, was clearly concerned about the lack of any specifics and the refusal of defense counsel, 1 ½ years after the commencement of post-conviction proceedings, to provide any. Thus, finally, the judge queried as to whether there was a requirement to grant an evidentiary hearing even where someone, without any basis, just "allege[s] something unscrupulous?" (PCT. 68). In response to such questions, the bottom line of defense counsel's theory emerged: without attributing any allegations in a motion to vacate to any named witness or source, one could prepare a motion to vacate, making false allegations, and those allegations, in turn, would have to result in an evidentiary hearing, Id.[8] The State respectfully submits that the defense position is not a correct statement of the law; conclusory and baseless allegations do not justify an evidentiary hearing in post-conviction proceedings. See, e.g., Kennedy, supra; Smith v. Dugger, 565 So.2d 1293, 1295 (Fla. 1990) (summary denial of claim that police had lied and withheld evidence of other suspects was proper, where the allegations were "insufficiently supported".); Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984)(Summary denial of post conviction claims without an evidentiary hearing was proper where, "there was no indication of the availability" of evidence to support the

[8] The State would note that this is not a case where the defense was relying upon any personal knowledge of facts by the defendant; defense counsel dismissed any such notion as "absurd." (PCT. 69).

allegations).

The Appellee would also note that, contrary to the Appellant's assertions in this Court, public record requests did not in any way contribute to the insufficiency of the allegations in the instant case. As will be seen in Argument II herein, the record reflects that the defense received and in fact acknowledged the receipt of all of the State Attorney's, Metro-Dade's and other Police Departments' files, prior to the filing of the first motion for post-conviction relief, and, approximately nine (9) months prior to the filing of the amended motion for post-conviction relief. (PCR. 101-102; PCR, Supp. 78-79; PCT. 32-33, 36, 39-40). With respect to other agencies complained of in this appeal, counsel for the defendant, again prior to filing the amended motion to vacate, acknowledged that the Department of Corrections, too, had complied with his public records request. The defense merely did not wish to pay for the copies requested, in violation of the public records law, (PCT. 35).[9] [10] The only pending public records law suit against an agency mentioned by the defense, at the preliminary August 4, 1993 hearing on this matter, where the defense sought and was granted additional time to pursue the suit, was one against the Parole Commission for clemency files and Brady information, filed in Leon County, (PCT. 34-35). At the subsequent hearing, conducted approximately one year later, defense counsel stated that the status of said suit was that, "the Florida Supreme Court accepted that matter on briefs and had issued a decision without oral argument." (PCT. 49). The Appellee notes that this Court denied the requested relief in that case. Asay v. Florida Parole Commission, 649 So. 2d 859 (Fla. 1994). For

[9] Pursuant to Fla. Stat. 119.07(1)(a) and (b), a person requesting copies of public records from an agency is in fact responsible for the costs thereof.

[10] As noted previously, the Department of Corrections files had also been turned over to trial defense counsel and in fact utilized at the 1988 resentencing.

the first time, however, at the final Huff hearing, defense counsel also made one reference that "FDLE" had a "circuit" pending against it. (PCT. 48).[11] There was no mention of what records were being sought, when the suit was initiated, or what its status was. The State would note, in any event, that in this Court, the Appellant has represented said action was "voluntarily dismissed." See, Brief of Appellant, p. 24, n. 3. To date, there is no explanation of relevance or significance to the post-conviction proceedings either. The Appellant's contention that he should have been allowed more time to pursue public records is thus entirely without merit,

Finally, the Appellant's contention that the trial court's order is reversible because it did not attach records is also without merit. The trial court in the instant case was furnished with all the records and files herein. (PCR. 105). The State filed a comprehensive response with specific record citations as to every claim. (PCR. 69- 103). Both parties extensively addressed all claims and the application of specific procedural bars, sufficiency of factual and legal allegations, and whether the record conclusively refuted same, at two hearings in the trial court. The lower court's ruling in turn specifically sets forth both its rationale - i.e. - whether a claim was procedurally barred, insufficient or conclusively refuted by the record - and its reliance upon the State's response, with respect to each individual claim.(PCR. 1 OS), The failure to attach records under these circumstances is not error, See, Mills v. State, 684 So. 2d 801, 804 (Fla. 1996) (summary denial of post-conviction relief, without attaching those portions of the record conclusively showing the defendant was not entitled to relief, was not error where the trial court provided an explanation for its ruling by specifically finding that the issues were, "procedurally barred as respecting matters which were or could have

[11] There were no allegations of any pending law suite against FDLE in either the initial or amended motion for post-conviction relief. The only mention of a pending law suit in said pleadings was that of the Asay, supra, action. (PCR. 7-8).

been raised previously for the reasons contained [in] the state's Response."); Hoffman v. State, 571 So. 2d 449,450 (Fla. 1990) (emphasis added) ("unless the trial court's order states a rationale based on the record, the Court is required to attach those specific parts of the record that directly refute each claim raised."); Bland v. State, 563 So. 2d 794, 795 (Fla. 1st DCA, 1990) (failure to attach portions of record not error, where the record reflects that the trial court, in summarily denying relief, took into consideration the transcript of the trial testimony); Crump v. State, 412 So. 2d 441 (Fla. 4th DCA 1982)(failure to attach portions of record not error, where the claims were procedurally barred or insufficient). As previously noted, the propriety of the trial court's ruling with respect to every individual claim is addressed in the ensuing arguments herein.

II.

THE LOWER COURT DID NOT ERR IN DENYING THE DEFENDANT'S PUBLIC RECORDS CLAIMS.

A. Sufficiency of Time to Pursue Hoffman Suits and Amend the Motion to Vacate

The Appellant initially claims that the lower court failed to give him sufficient time to pursue civil actions for public records against state agencies outside the jurisdiction of the trial court. This claim is clearly repudiated by the record. The record first reflects that the Appellant had ample time to file and pursue civil actions. Moreover, the suits complained about have been resolved against the Appellant.

The defendant filed his first motion to vacate on April 6, 1993. (PCR.[Supp.]. 7-46). In that motion, the defendant alleged that he was pursuing public records requests against various state agencies, and that many of the claims which the defendant was attempting to present in the motion

to vacate could not be completed until the records sought were received. Id. at 14-20, 35, 42, 45. The motion did not mention any civil law suits having been filed. In fact, the defendant alleged that he would "possibly" file civil suits (PCR.Supp. 16), and, that in the event he did so, the defense would then apprise the court of their existence and progress. (PCR.Supp. 10-11).

The State filed a preliminary response to the above first motion. With respect to the public records difficulties reported by the defense, the State represented that its files had been available for copying since the finality of the direct appeal proceedings in 199 1. (PCR.Supp. 78-79). The State also represented that the defense had in fact copied its files prior to the filing of the first motion for post-conviction relief. Id. The State noted that the various police agency files, complained about by the defense, were in fact contained within the state files and copied by the defense. Id. The State also gave notice that the only materials withheld from the provided files were, "personal notes or other work product such as rough drafts, notes, etc., which were not intended to perpetuate, communicate or formalize knowledge of the same [pursuant to] Shevin v. Byron. Harless. Schiffler. Reid and Associates. Inc., 379 So. 2d 633 (Fla. 1980)." (PCR. Supp. 78). Finally, the State's response also gave express notice that it was prepared to turn over to the trial court, "for an in camera review," said exempt portions of its files. (PCR. Supp. 79).

The hearing on the fist motion to vacate was not held until four months later, on August 4, 1993. (PCT. 1-44). The defendant's public records claims were addressed at this hearing. (PCT. 30, et seq.). At that time, the defendant made it clear that his public records complaints were no longer directed at the State Attorney's Office or various police agencies within the court's jurisdiction. (PCT. 33-36). The State, at this hearing, in accordance with its prior Response, again represented

that it had made its files available to CCR's investigators several months earlier, that the investigator spent several days going through them, that the investigators had not been heard from since, and that the files had remained continuously available at all times. (PCT. 32-37). The various police agencies' files were included with those made available to the defense at the State Attorney's Office. (PCT. 32-37; PCR. Supp. 78-70). Defense counsel then admitted, on the record, "As the State correctly pointed out, we haven't been there since Christmas [eight months earlier]. We have been there, we got them." (PCT. 36). As to the materials that the State Attorney's Office had withheld, the State again, in accordance with its Response, maintained that these were personal notes by the prosecutors which were not covered by the Public Records Act, but that the State would produce them to the judge for an in camera inspection. (PCT. 36-37, 41). There were no complaints or objections by the defense with respect to either any lack of specificity of exemptions, or, the fact that they would be produced for an in camera inspection.

At this juncture, there was one mention of a civil suit - the defendant had joined in a class action suit, in Leon County, against the Parole Commission, in pursuit of exculpatory information in clemency files. (PCT. 34-35); See, Asay v. Florida Parole Commission, supra. When the judge inquired, "How much time?", defense counsel refused to provide any estimate as to how much time would be needed. (PCT. 33-34). Rather, defense counsel responded that this Court, "said the court should give its time to resolving those in Court appropriately." (PCT. 34).

The only other public records difficulty mentioned at this time was in reference to the Department of Corrections (DOC). There was no mention of any civil suits having been filed against this agency. Counsel for the defendant acknowledged that DOC had already complied with his

public records request and had made copies for CCR to pick up, However, the defense complained that the agency was demanding payment for the copying and the defense was refusing to pay for copies (PCT. 35-36).[12] While defense counsel stated that the DOC matter had to be taken care of in Leon County, counsel did not state that a civil action had been filed, and defense counsel did not assert that there was any dispute with DOC other than the obligation to pay for the costs for photocopies. (PCT. 36). The State would note that the DOC files were in possession of the defense during the 1988 resentencing, as reflected by the extensive use of and reliance upon said records by the defense experts, as to Mr. Valle's rehabilitation prospects, at said proceeding. See. Valle IV, 581 So. 2d at 45-46.

On the basis of the foregoing arguments, the trial court dismissed the first motion to vacate, without prejudice, with leave to tile another motion to vacate by December 2, 1993, four (4) months from the date of the hearing, and eight (8) months since the filing of the first motion to vacate. (PCT. 43). Defense counsel did not assert that the time period allotted would be insufficient to pursue public records remedies. Id.

The second motion to vacate was then filed four months later, on December 2, 1993. (PCR. 1-62). Again, the only mention of any civil suit having been filed, or pending, at this juncture, was in reference to the Asay, Supra, suit against the Parole Commission. (PCR. 8). There was no mention of any other public records civil suits. Id.

[12] As noted previously, pursuant to Fla. Stat. 119.07(1)(a) and (b), a person requesting copies of public records from an agency is in fact responsible for the costs thereof.

The final Huff hearing on this second motion to vacate was then noticed for almost nine (9) months later, on August 26, 1994. At the Huff hearing, defense counsel represented the status of the Asay suit against the Parole Commission as: "the Florida Supreme Court accepted that matter on briefs and had issued a decision without oral argument. (PCT. 48). At this juncture, defense counsel also added that FDLE had a "circuit" pending against it. Id. There was no further mention of FDLE, nor any elaboration, as to when, where, or for what reason any civil suit had been filed against said agency.

Finally, it should be noted that after the second denial of the motion for post-conviction relief, the defense filed a Motion for Reconsideration. (PCR. 1007- 13). Again, there was no mention of any pending civil law suits, other than the Asay action, in either this pleading or the subsequent hearing thereon. (PCT. 95-97). With respect to the status of Asay, defense counsel represented that this Court had ruled against the defense but that the case was "still pending", because a motion for rehearing had not been ruled upon. (PCT. 97). The State's requests that defense counsel elaborate upon any other pending law suits were not heeded."

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[13] Thus, the State noted, at the conclusion of the hearing on the motion to reconsider:

> I want to clear something up about the public records. . . . We have no evidence in front of the court, for this court. Not one pleading or copy of a pleading filed in any circuit court outside of Dade County, showing there has been other civil law suits, have been public records. You have nothing.
>
> He wants you to grant an indefinite stay and there is nothing in front of you to do that on. You haven't gotten a copy -- nothing in front of you, I didn't file something in front of the court in Leon County to get the Department of Corrections records or something like that. I don't have that.
>
> If you remember he has been representing this since December 2, 1991. That is when the CCR initially took representation. Now we are here in January 27, 1995 and nothing has been done.

In view of the foregoing, the claim that the lower court did not furnish ample time for the Appellant to complete litigation on public records requests, i.e., pursue Hoffman suits, is utterly without merit. The Appellant had close to two years, from the filing of the first motion to vacate until the denial of the motion for rehearing on the second motion to vacate. That was in addition to the two years in which current counsel was representing the defendant prior to the filing of the first motion to vacate and subsequent to the finality of the direct appeal litigation. Moreover, the only Hoffman suit expressly relied upon in the lower court was the Tsavaris action. The court denied relief in Wasay and held that the defendant was not entitled to the documents requested. To the only other agency complained of in this appeal, FDLE, the record, as set forth above, is clear that defense counsel did not mention filing or relying upon any Hoffman suit against said agency in either the first or second motions for post-conviction relief. Furthermore, defense counsel did not see fit to apprise the trial court of any status with respect to this alleged suit, when it was first mentioned at the Huff hearing. The State would note that, in this Court, the Appellant has represented that he "voluntarily dismissed" this suit. See, Brief of Appellant, at p. 24, n. 3. However, even now there has been no effort to elaborate what if any documents were obtained and how the failure to amend based upon any such documents has adversely affected the defendant. In sum, the defendant received a sufficient opportunity to pursue his civil suits, and the Appellee fails to see why the defendant should have more time to amend based upon civil suits which have been resolved against him.

> I think they have a duty to make sure these things get through the court quicker They can't sit on them and come in here and say: Oh let's just wait until the Court in Tallahassee decides to do anything. . . . They have a duty to move faster and they haven't done this. . . .

(PCT. 106-107).

Cases relied upon by the Appellant do not compel any contrary conclusion. In Ventura v. State, 673 So. 2d 479 (Fla. 1996), the defendant not only pursued various public records claims, but, obtained court orders compelling the agencies to produce those records, which orders the agencies failed to comply with. The defendant followed up on the orders to compel and the agencies failed to produce the documents for several more months. Not only were the defendant's diligent efforts fully a matter of record before the post-conviction court, but, the agencies in question were obviously responsible for the delays, as they were the ones who were failing to comply with valid court orders. Thus, the post-conviction motion was prematurely denied. The defendant herein has not furnished either this Court or the lower court with any evidence of noncompliance by any state agency with any obligations under Chapter 119. Much as in Ventura, this Court, in Engle v. Dugger, 576 So. 2d 696,699 (Fla. 1991), relied upon by the Appellant, concluded that the State Attorney's Office had wrongfully failed to produce those portions of its files which were covered by Chapter 119. Thus, wrongful nondisclosure by a state agency was the reason for extending the time for amending the post-conviction claims. As the State Attorney's Office herein produced all of its records except those not covered by Chapter 119, no comparable reason for extending periods of time exists in the instant case. Likewise, in Provenzano v. Dugger, 561 So. 2d 541, 546-47 (Fla. 1990) and Jennings v. St&, 583 So. 2d 3 16, 3 19 (Fla. 1991), relied upon by the Appellant, the State Attorney's Offices had wrongfully failed to disclose substantial portions of their files, thus necessitating additional time periods for the submission of any amended or additional post-conviction claims. In the absence of any record demonstration of wrongful nondisclosure in the instant case, by any state agency, the cases cited by the Appellant do not warrant or mandate any additional time for the submission of new claims. Thus, the lower court did not commit any error in failing to provide any time above and beyond the lengthy time periods which the defendant already had obtained.

B. List of Exemptions

The Appellant also claims that the State Attorney's Office failed to comply with its obligations under Chapter 119, because, as to the materials which the State withheld and tendered to the judge for an in camera inspection, the State did not provide defense counsel with an explanation of the nature of the withheld materials and the statutory exemptions that the State was relying on. This claim, too, is refuted by the record herein.

As noted previously, on pp. 23-4 of the preceding argument, the State in its initial Response to the defendant's first motion to vacate, expressly gave notice that it had withheld "personal notes on other work product such as rough drafts, notes, etc., which were not intended to perpetuate, communicate or formalize knowledge of the same [pursuant to] Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So. 2d 633 (Fla. 1980)." (PCR. Supp. 78). The response also gave express notice that the State was prepared to turn over for "in-camera review", said withheld materials. (PCR. Supp. 79). Four (4) months later, at the initial hearing on the motion to vacate, the State, again in accordance with its written Response, announced that the withheld material were personal notes by the prosecutors which were not covered by the Public Records Act, but the State would produce these to the judge for an in-camera inspection. (PCT. 36-7, 41). There were no complaints or any objections by the defense with respect to either any lack of specificity of the withheld notes, or, the fact that they would be produced for an in-camera inspection.

In accordance with the above representations, the State, in open court, at a hearing scheduled by the defendant's clemency attorney, turned the withheld material over to the trial court for the in-

camera review. (PCR. Supp. 89).[14] The trial court subsequently reviewed the tendered notes and entered a written order finding said notes were not subject to the Public Records Act, and, that they did not contain any exculpatory information:

> After reviewing the papers submitted by the State, in camera, [the court] finds that the documents are not public records under Chapter 119, and contain no information which can be deemed discoverable material under Brady v. Maryland, 373 U.S. 83 (1963). Said documents are ordered sealed and to be made part of the record for purposes of any future appellate review.

(PCR. 63). The withheld notes have in fact been sealed and are part of the record on appeal herein.

Based on the explicit explanation of the nature of the materials - i.e., personal notes of prosecutors, made during the course of trial court litigation - several conclusions ensue. First, these materials are not "public records" at all, and, as such, they are not subject to any of Chapter 119's requirements, including any requirement to furnish a detailed list of the notes. Since the materials are not subject to Chapter 119, their nondisclosure is not pursuant to any statutory exemption at all. See. Shevin v. Byron. Harless, 379 So. 2d 633,640 (Fla. 1980) (Chapter 119 applied only to "public records," and, "[t]o be contrasted with 'public records' are materials prepared as drafts or notes, which constitute mere precursors of governmental 'records' and are not, in themselves, intended as final evidence of the knowledge to be recorded. . . ."). Likewise, this Court, in State v. Kokal, 562 So. 2d 324, 327 (Fla. 1990), observed that "not all trial preparation materials are public records." This Court agreed with the Fifth District Court of Appeals opinion, in Orange County v. Florida Land Co., 450 So. 2d 341,344 (Fla. 5th DCA 1984), holding that pretrial prosecutorial notes from

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[14] The tender took place approximately two months after the initial hearing, because, the State Attorney's office was in the process of moving to a different location and the notes could not be retrieved prior to the move. (PCR. Supp. 89).

attorneys for preparing for questioning witnesses, were not intended by the Legislature to be "include[d] within the term 'public records' . . . ." Sorkin, 562 So, 2d at 327. Roberts, supra, 668 So, 2d at 582 (prosecutor's decision regarding which, if any, handwritten notes should be disclosed is fmal, absent a showing by defense counsel that the State withheld exculpatory evidence).

This Court, in its recent opinion in Lopez v. State, 22 Fla. L. Weekly S279, (Fla. May 15, 1997), No. 78,228, has rejected an identical claim, finding no error in failing to furnish a detailed list of withheld notes, where it was clear from the record that the state attorney was claiming that the materials constituted work product and were not public records. Thus, the only issue that remained was for this Court to corroborate that the withheld materials were, in fact, work product, and, this Court proceeded to confirm that the handwritten notes were work product and, as such, were not public records. The same principles are fully applicable in the instant case.

III.

THE LOWER COURT DID NOT ERR IN DENYING THE CLAIM REGARDING ALLEGED EX PARTE COMMUNICATIONS WHERE THE CLAIM WAS PROCEDURALLY BARRED, AS IT COULD HAVE OR SHOULD HAVE BEEN RAISED ON DIRECT APPEAL, AND, ALTERNATIVELY, THE ALLEGATIONS WERE INSUFFICIENT TO REQUIRE EITHER AN EVIDENTIARY HEARING OR ANY RELIEF.

In Claim VI of the Second Motion for Post-Conviction Relief, the defendant alleged that the trial judge engaged in ex parte communications with counsel for the State. (PCR. 20). The full factual allegations contained in this claim are as follows:

> Here, Judge Gerstein engaged in ex parte communications with members of the prosecution team. Witnesses observed the state and the judge emerging from his chambers during trial discussing, what appeared to be matters of some importance. Further, defense counsel failed to move to disqualify Judge Gerstein as biased when the jury could observe Judge Gerstein socializing with the multitude of Coral Gables police officers that were present daily in the courtroom, kissing the widow of the victim, and female police officers.

(PCR. 21) (emphasis added). No further factual allegations were set forth regarding this claim. The motion did not append any affidavits from any of the alleged witnesses; nor did the motion identify any of the alleged witnesses. During the hearing on the motion to vacate, when the judge asked defense counsel for specifics as to who the witnesses were, defense counsel begged the question, simply stating, "We can produce witnesses," without ever identifying any of those witnesses. (PCT. 56-57). Defense counsel, after further questioning from the judge, acknowledged that he was unable to furnish the name of any particular witness who would provide any details on these allegations:

> Your Honor, my understanding is that it was either trial counsel or a member of Mr. Valle's family, I am not certain.

(PCT. 58).

The contents or substance of the alleged communication was not set forth either. Indeed, the record reflects that the lower court judge proceeded to question Valle's counsel regarding hypothetical examples, in which a trial judge innocuously says "good morning" to either an attorney; in the absence of opposing counsel, or to victims' family members while passing one another on the courthouse escalator. (PCT. 63-64). Valle's post-conviction counsel steadfastly persisted with the contention that such a situation would also necessitate an evidentiary hearing, and that he was not required to set forth the substance of the judge's communication. (PCT. 64).

As the motion to vacate alleges that trial counsel knew of the alleged communications during the course of the trial,[15] the substantive claim regarding the ex parte communications is procedurally barred, as it could have or should have been raised at trial and then presented on appeal. When facts are alleged to have been known to trial counsel, during the course of trial, but trial counsel did not pursue any relief on the basis of the known facts during the trial, any claims arising out of such facts are procedurally barred on post-conviction relief. Jennings v. State, 583 So. 2d 3 16,321 (Fla. 1991). In Jennings, the defendant claimed, in a motion for post-conviction relief, that the State Attorney's Office that prosecuted him had a conflict of interest, as the State Attorney had been a public defender when the Office of the Public Defender had previously represented him. It was thus evident that the pertinent facts were known during the course of the trial proceedings. As "Jennings did not move to disqualify the state attorney's office based on any alleged conflict prior to the trial upon which his current conviction rests," the claim was procedurally barred. Id. So, too, since the motion for post-conviction relief alleges that trial counsel, during the trial, knew the facts upon which the current disqualification claim is being asserted, the fact that trial counsel did not pursue any motion for disqualification constitutes a procedural bar to the assertion of the claim on post-conviction relief. See also, Engle v. Dugger, 576 So. 2d 696 (Fla. 1991) (c aims for which trial counsel could have objected at trial but failed to do so, were barred from assertion on post-conviction relief); Zeigler at 452 So. 2d 539 (post-conviction allegations of judicial bias which involved facts and circumstances known at the close of trial could have been addressed on direct appeal and were not cognizable under rule 3.850.). The procedural bar cannot be avoided by couching the claim in terms of ineffective assistance of counsel. See, Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990); Blanco v. Wainwright, 507

[15] The motion specifically alleges that "Mr. Valle's trial counsel knew of these communications, yet inexplicably failed to remove Judge Gerstein from Mr. Valle's case." (PCR. 21).

So. 2d 1377 (Fla. 1987).

Furthermore, the allegations set forth herein were insufficient, either as to the alleged ex parte communications themselves, or as to the alleged ineffectiveness of trial counsel for failing to move to disqualify the judge, to warrant either an evidentiary hearing or any other relief. If a motion does not contain sufficient factual allegations, further inquiry by the trial court is not required and the court may summarily deny a motion for post-conviction relief. Engle, supra; Kennedy v. State, 547 So. 2d 912 (Fla. 1989); Steinhorst v. State, 498 So. 2d 414,415 (Fla. 1986); Tedder v. State, 495 So. 2d 276,277 (Fla. 5th DCA 1986).

Conversations by a judge, with one of the parties in the absence of the other party, are not per se, a ground for disqualification. Nassetta v. Kaplan, 557 So. 2d 919,921 (Fla. 4th DCA 1990); Parnell v. State, 627 So. 2d 1246, 1247 (Fla. 3d DCA 1993); Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992). See also, Rose v. State, 601 So. 2d 118 1, 1183 (Fla. 1992) (". . . a judge should not engage in *any* conversation about a pending case with only one of the parties participating in that conversation Obviously, we understand that this would not include *strictly* administrative matters not dealing in any way with the merits of the case."); Barwick v. State, 660 So. 2d 685,692 (Fla. 1995) (". . . we find that the conclusory allegation in Barwick's motion for disqualification was not sufficient to allege that such an ex parte communication occurred, Nor did the allegation establish that any ex parte communication that might have occurred was a legally sufficient basis for granting the motion for disqualification."); Hardwick . Dugger, 648 So. 2d 100, 103- 104 (Fla. 1994) (ex parte communication in which judge requested prosecutor to change date on proposed order did not furnish basis for any relief). Allegations regarding ex parte communications must be set forth with

Specificity before any relief could ever be granted, and those allegations must evince prejudice on the part of the judge. Nassetta, 557 So. 2d at 92. The allegations set forth in the motion for post-conviction relief, which are utterly lacking in any specificity regarding the nature of the alleged conversations of the trial judge with the prosecutor would not have provided the basis for any relief had they been similarly alleged in a motion for disqualification. As the instant allegations would not have sufficed for any relief had a motion to disqualify been filed, it necessarily follows that trial counsel was not ineffective for failing to file a motion containing such allegations. One of the requirements of a claim of ineffective assistance of counsel is that the claimant must demonstrate that counsel's performance prejudiced the defense to the extent that a different result would have probably have ensued in the trial court proceedings but for counsel's deficiency. Strickland v. Washington, 466 **U.S.** 668,694, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). As the instant allegations would likewise have been insufficient had they been alleged in a trial court motion to disqualify, prejudice has not been established.[16] Thus, in the absence of any specific factual allegations as to

[16] Moreover, the ultimate question is not whether the defendant would have prevailed on a motion to disqualify had counsel presented such a motion in the trial court proceedings. The prejudice prong of ineffective assistance analysis is based, not on the results of what a "mini-proceeding" within the trial (such as a motion for mistrial, motion to suppress or motion to disqualify) would have been. The question is whether the outcome of the trial (or sentencing proceeding) itself, would probably have been different. State v. Stirrup, 469 So. 2d 845, 848 (Fla. 3d DCA 1985) ("We reject the contention that the likelihood of a different outcome in a 'mini-proceeding' (e.g., motion for mistrial), other than a proceeding which makes an ultimate disposition, is what is contemplated by the term 'proceeding' as used in *Strickland* and *Knight v. State, 394 So.* 2d 997 (Fla. 1981). Furthermore, the likelihood that on a timely objection and motion, the trial would have started anew, or that a ruling on a nondispositive motion, if timely made, would have been favorable, or that an objection to an improper question might have been sustained, is not sufficient to meet the test for prejudice outlined in *Strickland* because the court's consideration of such motions or objections is not a 'proceeding' as that term is used in *Strickland*. Examples of proceedings, as used in the context of the *Strickland* test for prejudice, are those which determine guilt . . . or which determine in an adversarial hearing what sentence is to be imposed. . . . Even if a successful motion for mistrial had been made, there is a reasonable probability that the outcome of a new trial would not have been any different in light of the overwhelming weight of the evidence.").

the contents of any alleged communications, the motion was insufficient as to both the substantive claim based on ex parte communications and the interrelated claim of ineffective assistance of trial counsel.

Similarly, the allegations of the judge having fraternized with the victim's widow and police officers at the time of resentencing before the jury are also procedurally barred." If, as post-conviction counsel seemingly contended, the factual basis was known at the time of resentencing, then this issue could and should have been raised on direct appeal. See Zeigler, at 452 So, 2d 539 (where several allegations on the issue of bias on the part of the trial judge involved facts and circumstances known at the close of the trial, "those issues could have been addressed on direct appeal and are not cognizable under Rule 3.850.").

More importantly, however, as seen in point I, at pp. 18-29, post conviction counsel, despite repeated requests from the court below, was unable to even name with certainty any witnesses who could support such allegations; no sworn allegations nor any affidavits were ever proffered or provided. Compare, Zeigler, at 452 So. 2d 539-40 (the only allegation of judicial bias requiring an evidentiary hearing was one where not only the factual basis was not known until after trial, but which was also supported by a "sworn statement" of a witness who had actually seen and heard the trial judge allegedly make biased statements). The State would note that at the time of the resentencing herein, in order for the trial counsel to have moved to disqualify the judge for bias, as current post-conviction counsel faults the defense for having failed to do, "two or more affidavits

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17 The State would note that allegations that the trial judge appeared to be adverse to the defendant and exhibited unusual courtesies to the victim's family are insufficient to demonstrate prejudice of the trial judge. Haddock v. State, I92 So. 802, 807 (Fla. 1939).

setting forth facts relied upon to show the grounds for disqualification, and a certificate of counsel of record that the motion is made in good faith", were required.[18] See Fla.R.Crim.P. 3.230(b) (1988); See also Heinev v. State, 447 So. 2d 210,214 (Fla. 1984)(motion to disqualify trial judge held to be "legally insufficient", where it was not accompanied by two affidavits setting forth the facts and counsel had not filed a certificate of good faith). Trial counsel cannot be deemed deficient or ineffective for having failed to do that which post-conviction counsel have been unable to produce - i.e. any sworn statements or affidavits supporting facts which demonstrate bias by the trial judge.

In view of the foregoing, the lower court properly concluded that this claim was both procedurally barred and insufficiently alleged.

IV.

THE LOWER COURT DID NOT ERR IN DENYING THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WHERE IT WAS CONCLUSIVELY REFUTED BY THE RECORD AND INSUFFICIENT TO DEMONSTRATE PREJUDICE.

In Claim VIII of the second motion to vacate, the defendant alleged that trial counsel was ineffective in three distinct manners: a) failing to seek the removal of an allegedly biased judge; b) unreasonably presenting model prisoner evidence as part of Valle's mitigating evidence; and c) failing to investigate and present more family members to corroborate expert witnesses' testimony

[18] Current Fla.R.Judicial Administration 2.160(c) similarly requires that a motion to disqualify shall, "'specifically allege the facts and reasons relied on to show the grounds for disqualification and should be sworn to by the party by signing the motion under oath or by a separate affidavit. The attorney for the party shall also separately certify that the motion and the client's statements are made in good faith."

as to family background. (PCR. 23-3 1). Those claims are reasserted in Argument IV of the Brief of Appellant. The lower court denied those claims, on the grounds that the allegations were insufficient and did not meet the requirements in Strickland v. Washington, Supra. (PCR. 105).

A* Failure to Seek Removal of Allegedly Biased Judge

This portion of the ineffective assistance of counsel claim is identical to the claim presented by the Appellant in Argument III of the Brief of Appellant, and the State has fully responded to that claim in its Argument III of this Brief of Appellee, at pp. 35-38, supra. The State readopts the argument set forth therein.

B. Unreasonable Presentation of Prison Behavior Evidence

The defendant alleged that two of his trial attorneys, Mr. Scherker and Ms. Georgi,[19] were ineffective because they disagreed with one of Valle's other attorneys, Mr. Zelman, over the presentation of prison behavior evidence. (PCR. 26-7). According to the post-conviction allegations, "Mr. Zelman decided that the presentation of evidence relative to Mr. Valle's behavior in person would open the door for the State to present a vast amount of damaging evidence relevant to the same subject," that such evidence should not be presented, and, that Mr. Zelman informed co-counsels of this decision. (PCR, 26). According to the post-conviction allegations, however, co-counsel made it clear that they would in fact present prison behavior related evidence, and,

> This decision [to present prison behavior] was so far out of the broad spectrum of reasonable strategic decisions that Mr. Zelman informed the court and his co-counsel that he simply could not participate in its execution. He then, even as hearing was beginning, walked out of the

[19] The defendant had a third attorney, Karen Gottlieb, representing him throughout the resentencing proceedings.

court room.

(PCR.26). The record, however, reflects that the defendant was present prior to the resentencing, when the trial judge ruled that the State's rebuttal evidence to good prison behavior was admissible. The record then reflects that the circumstances and reasons for the subsequent disagreement of defense counsels as to presenting prison behavior evidence and Mr. Zelman's resulting departure from the resentencing proceedings, were fully discussed with the defendant, who agreed with the remaining co-counsels' strategy. Indeed, the record reflects that defense counsels had "hours of discussions" with the defendant, explained the "pros and cons", that the defendant understood "all the ramifications", and, was fully in agreement and satisfied with the remaining counsels' strategy. (3R. 2334-38). Defense counsel can not be deemed deficient where the record fully demonstrates that the strategy was explained and understood by the defendant who was in agreement with it. Moreover, no prejudice has been demonstrated. The resentencing at issue herein is the third time where different juries and judges have recommended and imposed the sentence of death, respectively. At the prior retrial of the defendant, where minimal good prison behavior testimony, without any rebuttal by the State, was presented along with the same family background evidence introduced at the instant resentencing, the jury recommended the sentence of death by a vote of 9 to 3. The retrial judge imposed the sentence of death, and this Court affirmed said sentence. The only reason this Court subsequently remanded for resentencing was that the additional prison behavior at issue herein was not presented at the retrial. Valle, at 502 So. 2d 122526. The instant case thus involves a situation where a prior valid sentence of death was in fact obtained without the use of the prison behavior evidence at issue herein. Thus, no probability of a different outcome has been demonstrated even if the current allegations as to the improper use of prison behavior evidence

are accepted. The lower court thus properly denied relief, as neither prong of the Strickland test has been satisfied in the instant case.

In the appeal from Valle's 1981 retrial, this Court initially affirmed the sentence of death. Valle II, 474 So. 2d, 796. Remand of the case from the Supreme Court of the United States, this Court then reversed the death sentence and remanded for resentencing proceedings, concluding that model prisoner evidence had been improperly excluded from the 198 1 sentencing proceeding, in light of the decision in Skinner v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed. 2d 1 (1986). See, Valle III, 502 So. 2d at 1225-26:

> A rehabilitation officer testified in the instant case that Valle had been a model prisoner and was rehabilitated during his prior imprisonment. The trial court excluded the expert testimony of a clinical psychologist and two corrections consultants which was proffered in proof of Valle's claim that, if given a sentence of life imprisonment rather than death, he would be a model prisoner. The United States Supreme Court in Skipper found that evidence of probable future conduct in prison is relevant mitigating evidence.
>
> . . .
>
> When we first considered this matter, 474 So. 2d at 804, we found that this proffered "model prisoner" testimony was cumulative and properly excluded. We are now persuaded that the excluded testimony of these experts differed in quality and substance from that of the rehabilitation officer. The expert testimony was proffered in proof of the probability that Valle would be a model prisoner in the future. It cannot be said that this evidence was cumulative in light of the rehabilitation officer's testimony that he could only vouch for Valle's behavior while previously imprisoned and that he had no opinion as to Valle's ability to adjust, in the future, to prison life.

Prior to the ensuing 1988 resentencing trial, defense counsels, including Mr. Zelman, in the presence of defendant, then presented extensive legal arguments in an effort to preclude the State

from rebutting the defendant's model prisoner testimony with evidence of the defendant's attempted prison escape and other prison incidents for which the defendant was disciplined, which had occurred after the 1981 retrial. (3R. 1168, et seq.). The lower court, again in the presence of the defendant, ruled that such evidence was admissible as rebuttal evidence. (3R. 1221).[20]

Subsequently, at the commencement of resentencing, during the voir dire, one of Valle's attorneys announced that there would be a "rearrangement of who will be sitting a counsel table," stating that co-counsel Zelman would no longer be there. (3R. 2333-34). As noted by post-conviction counsel, Mr. Zelman was departing as a result of disagreement with the defense decision to present model prisoner testimony. The record reflects, however, that the judge then conducted a full inquiry to determine what was transpiring, and it clearly emerges from this colloquy that there had been extensive discussions between Zelman and the other attorneys regarding the trial strategy, that there had been a disagreement between counsel, that Valle had been consulted and advised by counsel of the disagreement, and that Valle concurred with the decision to proceed with remaining counsel and without Zelman:

> **THE COURT:** Mr. Zelman, what's your participation going to be, so I can have a crystal-clear record.
>
> **MR. ZELMAN:** I understand it will be none.
>
> **THE COURT:** You no longer want to be participating at all?
>
> **MR. ZELMAN:** That's correct.
>
> **THE COURT:** Mr. Valle?
>
> **THE DEFENDANT: Yes,** sir.

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[20] That ruling was affirmed on appeal. Valle IV, 581 So. 2d at 46.

THE COURT: You discussed this with Miss Georgi, Miss Gottlieb and Mr. Scherker and Mr. Zelman?

THE DEFENDANT: Yes, I have.

THE COURT: Now, I know this is your trial. I know you are getting used to trial procedures and you understand how these things go about. Is this absolutely what you want to do?

THE DEFENDANT: Yes, sir.

THE COURT: You understand you have right to have Mr. Zelman here?

THE DEFENDANT: Yes, I do.

THE COURT: That when Mr. Zelman leaves you no longer have the benefit of his experience or his knowledge in discussing the case with the other three attorneys, or anybody else who knows about the case. I know he's helped you up to this time but he won't be here in court, and that you want him to leave. He'll be no longer able to help you later on. So it's clear for this record, if you go ahead and try to appeal the fact that Mr Zelman was not here, you're not going to be able to do that because we had this long discussion about it and it was clear that you knowingly wanted him to go, and the Court asked you about it and you said, "Yes, I want him to leave," is that correct

THE DEFENDANT: I understand.

THE COURT: Is that absolutely what you want him to do?

THE DEFENDANT: Yes.

MR. LAESER [assistant state attorney]: I realize I'm a very distant third wheel in this situation. I want to have Mr. Zelman make it crystal clear this is not something he decided on, that he didn't want to participate,' but that it was his client's choice and perhaps against his advice or against his recommendation.

THE COURT: Mr. Zelman, this is Mr. Valle's decision or -- we need to clear it up.

MR. ZELMAN: I don't think it's appropriate for me to indicate any of the internal discussions that are attorney/client privilege. There may be sometime in the future when the attorney/client privilege will be deemed waived, but at this point --

THE COURT: You have discussed with him the pros and cons of you being here?

MR. ZELMAN: Yes.

THE COURT: At long lengths?

MR. ZELMAN: What I would consider to be sufficient.

THE COURT: To the degree that you felt he understood the pros and cons of your discussions? I'm not asking you to violate the privilege.

MR. ZELMAN: I think that question does.

THE COURT: Does he understand?

MR ZELMAN: What his understanding was, I think, would. What mine are --

THE COURT: Let me say this to you: I don't have a clear understanding. You will be in here, in court whether he wants you to be here or not, whether you want to be here or not. You don't want to discuss that with me, don't, but then you're going to stay here because that's my way of protecting my record. You will be here available for his advice whenever he wants it. If he doesn't want it, then you will be sitting here in the courtroom for the rest of this week and next week for nothing. So, I mean, unless I know for sure that he understood all the aspects, that's the only alternative that I know I have.

MR. ZELMAN: I'm not at liberty to divulge attorney/client matters at this time.

THE COURT: Back on the record. Miss Georgi, you have discussed this with Mr. Valle?

MS. GEORGI: Yes, Your Honor,

THE COURT: There is no question in your mind that he understands all the ramifications and that he is satisfied and wishes that you and Mr. Scherker and Miss Gottlieb continue to represent him without Mr. Zelman?

THE DEFENDANT: Yes, sir.

MS. GEORGI: Yes, Your Honor..

THE COURT: And Mr. Valle agrees to that and you all agree he understands and that's what he wants to do?

MS. GEORGI: Yes, Your Honor.

THE COURT: You do understand at some later time you will end up giving up your right to complain that Mr. Zelman was not here?

THE DEFENDANT: I understand.

THE COURT: Are there any questions you want to ask me about that, Mr. Valle?

THE DEFENDANT: No.

THE COURT: Anything at all you don't understand?

THE DEFENDANT: No, I understand it,

MS. GEORGI: We have had hours of discussions about this.

(3R. 2334-38). From the foregoing, it is clear that the decision to pursue the strategy recommended by the remaining attorneys - i.e.; the model prisoner defense - was one which was fully discussed and debated between the attorneys, along with consultations with the defendant; that the defendant fully understood the choices that were being made; that he agreed with them; and that this was clearly a strategic decision, At the hearing on the motion to vacate, the lower court specifically found, from the record, that this was a strategic decision. (PCT, 76). As it is clear that this was a

well-reasoned strategic decision, agreed to by the defendant, it is one which is not subject to questioning on hindsight, in post-conviction proceedings. Pope v. State, 569 So. 2d 1241, 1245 (Fla. 1990)("We read the finding that Pope knew of, understood, and concurred in the use of Dr. Weitz's testimony as a finding that the use of this defense was a strategic decision with which Pope concurred."); State v. Bolender, 503 So. 2d 1247, 1250 (Fla. 1987) ("Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected."); United States v. Teague, 953 F. 2d 1525, 1533 (11th Cir. 1992) (en banc) ("It is important to remember that while defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense."); Mulligan v. Kemp, 771 F. 2d 1436, 1442 (1 lth Cir. 1985) (Where defense counsel is, "commanded by his client to present a certain defense, and if he does thoroughly explain the potential problems with the suggested approach, then his ultimate decision to follow the client's will may not be lightly disturbed."); Strickland v. Washington, at 466 U.S. 691 ('"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.").

The foregoing conclusions are all the more true in light of the historical record that in Valle's 1981 retrial, with the exclusion of the 1988 model prisoner testimony, and, the presentation by attorney Zelman of mitigation based upon testimony of family members and friends regarding Valle's personal background, coupled with some evidence of Valle's good prison behavior, Valle had still received the death sentence, pursuant to a jury's recommendation of death by a 9-3 vote.[21]

[21] As the judge pointed out in the hearing on the motion to vacate, if defense counsel did not present the model prisoner testimony, the defendant would, in the aftermath of another death sentence, have been asserting that the failure to present such testimony constituted ineffective

The course pursued in the 1988 resentencing resulted in a closer vote than the strategy pursued by Mr. Zelman, in 1981, where the State had not introduced any evidence of Valle's misconduct in prison.

Lastly, apart from the obvious conclusion that this was a well-considered and thoroughly debated strategic decision, the defendant's post-conviction allegations failed to satisfy the prejudice prong of the ineffectiveness inquiry. There is no demonstration that the decision to forego the model prisoner theory would probably have resulted in a life sentence. In view of the 1981 proceedings, where the model prisoner testimony adduced was minimal, and where there was no evidence adduced by the State as to Valle's misconduct in prison, the fact that the jury recommended a death sentence by a 9-3 vote, and that the trial court imposed the death sentence, compels the conclusion that there is no reasonable likelihood that any contrary result would have ensued absent the model prisoner defense. This is all the more true in light of the substantial and compelling aggravating factors and the total absence of statutory or nonstatutory mitigation. In sum, the lower court properly denied relief as the Strickland v. Washington standards have not been met.

C. Failure to Investigate and Present Mitigation Witnesses

In the final portion of this point on appeal, the Appellant alleges that counsel provided ineffective assistance by failing to present additional background witnesses, such as the defendant's mother, his teachers and coaches, and his wife. Without setting fourth either the availability or the specific substance of each witness' testimony, the defendant alleges that these witnesses would have further corroborated the opinions of Dr. Toomer and Ms. Milledge, the psychologist and social

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assistance of counsel. (PCT. 74-76).

worker who testified at length as to the defendant's background, at the resentencing trial. The lower court summarily denied this claim, finding that it was insufficient and failed to satisfy the requirements of Strickland v. Washington.

First, the State would note that allegations that counsel should have presented more witnesses to present the same evidence actually presented at sentencing, as claimed by the defendant herein, are insufficient to establish ineffectiveness; counsel cannot be deemed ineffective for failing to present cumulative testimony. See Card v. State, 497 So. 2d 1169, 1176-77 (Fla. 1986) ("Card's allegation that counsel was ineffective for failing to present witnesses who would have testified about Card's difficult and impoverished upbringing is without merit. Dr. James A. Hold, a clinical psychologist testified extensively about Card's unfortunate childhood. We refuse to render counsel ineffective for failing to proffer testimony that would have been entirely cumulative,") (emphasis added).

Moreover, the record herein abundantly reflects that the 1988 sentencing presentation did include substantial background testimony corroborating that of the experts', from the defendant's twin sister, the defendant's father, three of the defendant's school friends, and, the defendant's employer. This Court, on direct appeal of the resentencing, set forth the following summary of the experts', Psychologist Toomer and Social Worker Millidge, testimony, whom post-conviction counsel now complain should have been corroborated:

> Next, Valle Contends that the judge did not properly consider the mitigating factors. Valle was found to have an IQ of 127, and his examining psychologist testified that there was no evidence of brain damage or major mental problems. He further said there was no indication of any addiction to drugs or alcohol. Nonetheless, he

> expressed the opinion that Valle was under the influence of extreme mental or emotional disturbance at the time of the crime and that his ability to conform his conduct to the requirements of law was substantially impaired. He based his opinion upon the stress occasioned by dysfunction within Valle's family as he grew up, his father's harsh discipline, and his own failure to live up to expectations.
>
> The judge referred to this testimony as well as that of a social worker on the subject but concluded that the two statutory mental mitigating factors did not exist.

Valle IV, 581 So, 2d 48. This Court then quoted the trial court's summary of the family members', friends', and employer's testimony, presented in corroboration of the above said background:

> . ..With respect to non statutory mitigating evidence, the judge stated in his order:
>
> ...
>
> The court heard testimony from his family including his sister Georgina, his father and his niece Ann. These witnesses testified concerning his life prior to the murder. This included his lack of love and attention by his parents, the methods his father used to discipline him and life during his teenage years. The Court also heard from witnesses who knew the defendant in high school. The Court additionally heard from the defendant outside the presence of the jury concerning his current remorse over the killing, wherein he accepts full responsibility for his actions.
>
> Considering all the evidence which the defense has presented concerning these circumstances, the court does not find these circumstances to be relevant mitigating circumstances. Even if they were established, the Court finds that they are outweighed by the aggravating factors.

Valle IV, 58 1 So. 2d 49. Thus, as seen above, the defendant's contention that defense counsel was deficient for failing to corroborate the experts' testimony is also without merit as it is refuted by the record.

The State would further note that the defendant has not set forth the substance of the additional witnesses' testimony. First, the "teachers and coaches" referred by the defendant were not even named. In any event, "teachers and coaches" presumably would testify as to the defendant's schooling and athletic abilities. Trial counsel, however, presented testimony from three (3) of the defendant's school friends: Juan Sastra, Robert Castillo, and Jose Ledon, all of whom testified that the defendant was a good student, that he was a good athlete, that he was friendly and caring, that he worked after school, and, that he did not engage in any fights while in school. (3R. 4989-95, 5282-92). The post-conviction allegations do not set forth what more could have been said.

With respect to Mr. Valle's former wife and his mother, it should be noted that both had testified in the prior 198 1 sentencing which had resulted in a sentence of death. (2R. 1449; 1466-68). In any event, the record demonstrates why defense counsel did not present Mrs. Valle as a witness; she had attempted to deliver a controlled substance to the defendant, while the latter was in prison after the 198 1 proceedings. Thus, at the commencement of resentencing, defense counsel, at a side bar, announced:

> MR. SCHERKER: . . . we have announced that we are not calling Mr. Valle's former wife as a witness. . . .
>
> . . .
>
> Mrs. Valle was arrested entering the Florida State Prison in 1982 or 1983, . . . she was searched and a small amount of marijuana was found on her person. She was prosecuted in Bradford County Court. She pled guilty, received probation and a withhold, ...we are going to object to the introduction of that conviction, actually, that withhold.

(3R. 3671-2). The incident at the State prison was not brought out, as Mrs. Valle was not presented as a witness. Her absence was, however, explained by the defense experts as being due to the

defendant's wishes to spare his family any trauma.

In any event, according to the post-conviction allegations, the defendant's wife would have testified to the defendant's "gambling habit, and the fact that he was a good father". (PCR. 29). The defendant's mother would have testified about going "from wealth to poverty and its impact on her family." The record as set forth below reflects that Dr. Toomer and Ms. Milledge both testified to these circumstances. Moreover, the defendant's twin sister, father and employer corroborated these circumstances.

Dr. Toomer testified that he evaluated the defendant in 198 1 and 1987 and spoke to family members and others as part of the evaluation. (3R. 53 17). Toomer emphasized the importance of a person's past experiences. (3R. 53 15). He concluded that Valle's behavior was the result of a culmination of a variety of "severe traumatic events," "stressors" that came together to influence his behavior. (3R. 53 13-19). Relevant factors included the quality and intensity of early family relationships with parents and others, and environmental factors. (3R. 5319). The early family relations were allegedly traumatic because they showed a "lack of quality" and "dysfunction" within the family, as reflected in the "abuse" by the father and moving from Cuba to Miami, to New York, and back to Miami. (3R. 53 19-21). In moving from Cuba to this country, the family had been "stripped of just about all of the resources that they had access to." (3R. 5320) The defendant, however, had a "normal high school life." (3R. 5321). Another "traumatic" event was that subsequent to high school, the defendant had a lack of "success of meeting expectations." (3R. 5322). He blamed himself for the death of his aunt in a plane crash, since he bought her ticket. (3R. 5324). This aunt had been a source of "positive reinforcement" for the defendant. (3R. 5323).

The defendant also had a propensity for gambling, which involved him in criminal activities, another stressor. (3R. 5325). The murder of Officer Pena, according to Toomer, was a single, unusual event, representing the cumulation of all the above "stressors" the defendant had been exposed to in his life. (3R. 5326). Thus, and based on the above, Toomer believed that Valle was acting under extreme emotional distress and that the defendant's ability to conform his conduct to the requirements of law was substantially impaired. (3R. 5327). Between 1981 and 1987, the defendant had become calmer, had a greater understanding of events, served as a translator in prison, read a lot, and continued his good relation with his wife and daughter, but initiated a divorce to spare them from his difficulties. (3R. 5345-47).

Toomer also testified that the defendant had no prior history of psychiatric treatment; that there were never any physical injuries from the alleged parental abuse; that the defendant's sisters did not have any problems with the law despite similar treatment. (R. 5360-66). The defendant's parents still made weekly trips from Miami to Raiford to visit him. (3R. 5367-68). The defendant's IQ, at 127, was well above average; there was no evidence of brain damage; no evidence of a major mental disorder and no evidence of hallucinations. (3R. 5368-73).

Evelyn Milledge, the coordinator of the Domestic Violence Protection Unit for the Circuit Court of Dade County, and a social worker, had testified that she interviewed the defendant, read his confession, some transcripts, some depositions and a 198 1 psychological report. (3R. 5017). She interviewed the defendant's relatives - his sister, ex-wife, daughter and both parents.(3R. 5017). Based upon these interviews, she related what she had learned of Valle's background. The defendant allegedly had no emotional ties with his father. (3R. 5021-22). The mother was not involved in the

children's lives and there was not a lot of love at home. (3R. 5024). Milledge believed all victims are affected by emotional and physical abuse. (3R. 5026). The "emotional abuse" was that there was no parental companionship.(3R. 5027). Milledge testified that the defendant was not given encouragement at home and had no male role model at home, other than his father. (3R. 5032-34). The defendant tried to please his father, but looked at himself as deficient. (3R. 5027). The "lack of communication" was indicative to Milledge of a "dysfunctional family." (3R. 5035). For example, the defendant's "play" activities were restricted; there were certain rooms that the children could not enter, (3R. 5040). The children were also subjected to punishment for receiving bad grades - they were made to lie down on a bed; they were hit with a belt; or they were made to kneel on dried ears or kernels of corn.(3R. 5020). Milledge stated that she was unaware of any incidents of abuse in which blood was drawn. (3R. 5 100). Moreover, these punishments stopped by the time the defendant was 10, 17 years before the murder of Officer Pena. (3R. 5 129-30). This witness also noted that the defendant's sisters, who were subjected to the same upbringing did not become involved in crime. (3R. 5 100).

Milledge also narrated the defendant's family history. The defendant was born in Cuba. (3R. 5018). The defendant's home in Cuba, until the age of 10, was a comfortable one. (3R. 5 119). The defendant's parents always provided shelter, support, clothing, etc. (3R. 5 127-28). This continued even under the difficult circumstances of the move to the United States. (3R. 5 127-28). The family came to Miami after Castro came to power. (3R. 5040). They remained there for a year, before moving to New York. (3R. 5041). The defendant then felt like he was born again, free from previous restrictions, (3R. 5041). The defendant learned English quickly and became athletic (3R. 5042). The parents were preoccupied with earning a living, (3R. 5042). There was still no parental

"sensitivity" or interest. (3R. 5044). The family's subsequent return to Miami, according to Milledge, was traumatic for the defendant, as New York had been good, but his father's business had folded. (3R. 5045). In Miami, the defendant was active in athletics, got a job while still in school, and graduated high school in 1968. (3R. 5042-49). He had met Orea, his wife, while in high school, but his father disapproved of her since she was Puerto Rican.(3R. 5050). While still in high school, the defendant met a man who interested him in the dog track. (R. 5051). Betting later became an addiction as the defendant stole payroll checks from his employer to cover his bets, and was caught. (3R. 5052). His Aunt Izelle then died in a plane crash. (3R. 5053-55). Milledge opined that this was a most devastating event for Valle. (3R. 5055). After her death, the defendant began to deteriorate. (3R. 5078). The years of 1975-78 were marked by the gambling addiction, and stages of depression, guilt and self-doubt. (3R. 5079). Milledge opined that Valle's criminal record was consistent with his gambling addiction. (3R. 582). Valle married Orea in 1973 and they had a daughter in 1975. (3R. 5079). The defendant was a devoted father and husband and tried to straighten himself out. (3R. 5080). His sister Georgina was close to him. (3R. 5080). The defendant was still close to his wife and daughter, but would not let them come to court, believing that he had caused them enough pain already. (3R. 5092-93). Milledge thus concluded that the defendant's "life circumstances" made him vulnerable and led to the murder. (3R. 5093-94).

Georgina Martinez, Valle's twin sister, testified in corroboration of the above background detailed by the experts. (3R. 5446, et seq.). Her testimony emphasized the beatings as a child and the lack of a good relationship and emotional ties with the father. (3R. 5450-67). She noted that in Cuba the family was well off, with a nice house, food, clothing and servants. (3R. 5448). She related the manner in which the father punished the children. (3R. 5450-57). Their father never rewarded

them for getting good grades; he always said they should do better, (3R. 5460). She related Valle's athletic skills, the good years in New York, and the depression over their Aunt Izelle's plane crash. (3R. 5459-67). They did not go to their high school graduation since the parents would not be there. (3R. 5462). At the funeral of Aunt Izelle, their father prevented the defendant from saying good bye to her by ordering a closed casket. (3R. 5465). Cross-examination noted that all of the children were disciplined by the father, but only Valle had trouble with the law. (3R. 5469).

Manuel Del Valle, the defendant's father, also testified. He recalled beating Valle with a belt when Valle was five or six. (3R. 5471). In Cuba, the family was wealthy, and the children could not play outside due to fears of kidnappers. (3R. 5472). Other forms of punishment, when Valle was a child, included making him wear a dress or forcing him to sit in a chair without sleeping for 1-2 hours (3R. 5473). On one occasion, Valle was also punished for bad grades; he was made to kneel with corns inside the knees of his trousers. (3R. 5474-75). All of the children were treated the same. (3R. 5475). Mr. Valle loved his son and daughters, tried to help them and believed that he was doing what was best. (3R. 5475-78). All the children were similarly disciplined; Mr. Valle did this out of love; he thought he was doing what was best. (3R. 5483-87). He gave his family the best house, clothing and food that he could; he also recounted the financial and work problems he encountered upon coming to this country. (3R. 5485-86). Mr. Valle would not let his son become a ball player because he expected more from him. (3R. 5476). Over the years, he has visited his son regularly in prison and has written often. (3R. 5482).

Finally, the defendant's employer, Mr. Coles, also testified. The defendant had worked for Coles, training dogs and was a "good worker", (3R. 5442-3). However, the defendant was

terminated when he forged ten checks, for approximately $2,300, from the business account, due to his gambling. (3R. 5443). Coles, however, was not mad at the defendant for the forgeries. (3R. 5444).

Based on the foregoing, it is clear that defense counsel, at the 1988 resentencing hearing, presented substantial family background evidence, from both relatives and friends of the defendant, for the purpose of corroborating the factual premises upon which the opinions of Toomer and Milledge were predicated. There are no allegations as to any specific matters of any consequence that any other family members, friends, etc., would have or could have testified to, that was not already covered by the in-court testimony. From the cursory and conclusory allegations presented both in the motion to vacate and in the instant appeal, it is also further evident that any witnesses and testimony to which the defendant is alluding in these post-conviction proceedings would be cumulative. Card. supra; See also, Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1994) (claim that sentencing phase counsel was deficient for not presenting evidence of defendant's impoverished childhood through testimony of family members and psychologist was without merit where the additional information "would have been merely cumulative and would not have produced a life sentence given the brutality of the murders and the valid aggravators. . . ."); Turner v. Dugger, 614 So. 2d 1075, 1078-79 (Fla. 1992) (claim that counsel was ineffective for failing to adequately investigate and present mitigating evidence was without merit, and properly summarily denied without evidentiary hearing, based upon a review of the family background evidence which was presented); Puiatti v. Dugger, 589 So. 2d 23 1 (Fla. 1991) (substantial family background mitigating evidence adduced at sentencing hearing sufficed to negate allegations that trial counsel was ineffective in failing to obtain and present further background evidence); Jennings v. State, 583 So.

2d 3 16 (Fla. 199 1) (no ineffectiveness where additional evidence that counsel did not present would have been cumulative to that already presented); Provenzano v. Dugger, 561 So. 2d 541, 545-46 (Fla. 1990) (summary denial as to ineffective assistance claim was proper as to alleged failure to call additional family witnesses in penalty phase, where defendant's sister had already furnished such testimony, and uncalled witnesses would have been cumulative); Maxwell v. Wainwright, 490 So. 2d 927,932 (Fla. 1986) ("The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient. It is almost always possible to imagine a more thorough job being done than was-actually done. Moreover, it is highly doubtful that more complete knowledge of appellant's childhood circumstances, mental and emotional problems, school and prison records, etc., would have influenced the jury to recommend or the judge to impose a sentence of life imprisonment rather than death."). Moreover, all of the evidence that the defendant is alluding to is in the broad nature of family background evidence, the defendant's childhood, etc. This is the type of testimony which this Court, in recent years, has deemed to be of minimal significance in the context of compelling aggravating factors. See, e.g., Breedlove v. State, 22 Fla. L. Weekly S130, 132 (Fla. Mar. 13, 1997); Tompkins v. Dugger, 549 So. 2d 1370, 1373 (Fla. 1989). Summary denial of the instant claim was thus proper.

V.

THE CLAIM REGARDING THE PRESENCE OF POLICE OFFICERS IN THE COURTROOM IS PROCEDURALLY BARRED.

In Claim VII of the motion to vacate, the defendant alleged that "the State arranged the attendance of an overwhelming number of uniformed police officers. Members of Mr. Valle's trial

counsel's staff were excluded from the courtroom by the state attorney's office so that more uniformed police officers could be present, thus depriving Mr. Valle of effective assistance of counsel." (PCR. 22). The lower court found that this claim was procedurally barred, as it could have or should have been raised on direct appeal, (PCR. 105).

Prior to the resentencing proceeding, the defendant filed a Motion to Prohibit Attendance of Uniformed Law Enforcement Officers. (3R.[Supp.]. 79-83). The State filed a response thereto, objecting to a premature blanket prohibition, and stating that the court could monitor the situation during the resentencing and issue any appropriate orders if in fact uniformed officers attended en masse. (3R.[Supp.]. 94-97). The trial court ruled that it would speak to the police department to make sure that there would be no problem, but if one occurred, the Court would deal with it. (3R. 1153-56). Defense counsel deferred to the court's judgment. (3R. 1156).

During the resentencing, the court, in accordance with the defense request that a "record was needed" (3R. 3704), consistently monitored the situation. Thus, at the conclusion of voir dire, defense counsel noted that there were three uniformed officers present in the courtroom, and the judge observed that the courtroom seats 64. (3R. 3704). A little later on the same day, the defense noted a fourth officer. (SR. 3740). However, the court noted it was an officer from a different police department who had briefly entered the courtroom and left. Id. During the State's case-in-chief, no officers were noted in the courtroom, The judge specifically noted that even as to the attempted murder victim who was testifying, Officer Spell, he had instructed the latter to wear civilian clothing and sit in the back row if he wished to attend the remainder of trial, (3R. 3973). Subsequently, during the midst of the defense's case-in-chief, defense counsel observed that there were six

uniformed motorcycle officers seated in the back row of the courtroom, but the judge counted just five, out of the 64 seats. (3R. 4413-14). The following day, it was noted that there were six uniformed officers present, along with some 30-40 other civilian observers; defense counsel's motion to exclude the officers was denied. (3R. 4707). Prior to closing arguments, defense counsel again brought up the issue of the uniformed officers' presence in the courtroom. (3R. 586 1-67). A count was taken, showing that there were 19 uniformed officers out of 64 persons in the audience. The jury was not present at this juncture. Id. After a brief side bar, the jury was then brought in, without any further mention or complaint about the presence of any officers. Id. (3R. 5867). It should further be noted that from the commencement of jury selection, until the rendition of the jury's advisory verdict, the resentencing trial proceeded, on a daily basis, in the same courtroom, for four weeks, and, with the exception of the few days noted above, there was no reference to any uniformed officers present in court.

As the facts regarding the presence of the officers were established in the record of the trial court proceedings, and as the defendant had raised the issue, in both a pretrial motion and during the resentencing, this is a claim which could have or should have been raised on direct appeal, and, as such, it is procedurally barred. See, Williamson v. Dugger, 651 So. 2d 84, 87 (Fla. 1994) (post-conviction claim that security measures undertaken in presence of jury prejudiced defendant could have and should have been raised on direct appeal); Kelly v. State, 569 So. 2d 754 (Fla. 1990) (where the basis for claim was contained in trial record, the issue should have been raised on direct appeal); Woods v. State, 490 So. 2d 24, 26-7 (Fla. 1986) (claims of prejudicial effect of officers' presence is a direct appeal issue,)

The Brief of Appellant alternatively argues that trial counsel was ineffective in arguing against "the State's actions," and in failing "to object to the State's conduct." Brief of Appellant, p. 32. This claim has never been presented to the trial court, and, thus can not be raised, for the first time, on appeal; it is thus not properly before this Court. See, Tillman v. State, 471 So. 2d 32, 24-35 (Fla. 1985); Doyle v. State, 526 So. 2d 909,911 (Fla. 1968). The motion, in the lower court, simply alleged that the presence of the police officers in the courtroom intimidated the jury and the judge. (PCR. 23). While the motion alleged that the presence of the officers "depriv[ed] Mr. Valle of effective assistance of counsel," (PCR. 22), the motion did not allege that trial counsel was deficient in any capacity. Indeed, the motion alleged that Valle's counsel "objected to the presence of these uniformed police officers. . . ." (PCR. 23). Under such circumstances, the current assertion, that counsel was deficient in failing to effectively argue about the presence of the officers is one which was not properly presented to the trial court and is thus improperly asserted on appeal.

Apart from the failure to preserve any ineffective assistance of counsel argument, there are insufficient factual allegations to demonstrate either a deficiency on the part of counsel or prejudice to the defendant. Kennedy, supra that the presence of the officers "intimidated" the jury and judge is merely conclusory, and is not supported by any further factual allegations, Under such circumstances, there are no allegations from which it could be concluded that any further action by trial counsel would probably have affected the outcome of the sentencing proceeding. Nor are there any allegations from which it could be concluded that the absence of the officers from the courtroom would probably have affected the outcome of the proceedings. Moreover, as noted in Turner v. Dugger, 6 14 So. 2d 1075, 1079 (Fla. 1992), post-conviction allegations of ineffectiveness for failure to object are meritless where the trial record reflects that the point was argued in a pretrial

motion. So, too, in the instant case, the defense raised the issue in a pretrial motion, during resentencing, and the number of the officers in court was reflected in the record. No deficiency has thus been shown.

VI.

THE LOWER COURT PROPERLY DENIED VALLE'S CLAIM REGARDING THE PETITION FOR WRIT OF ERROR CORAM NOBIS, WHERE THAT CLAIM COULD HAVE AND SHOULD HAVE BEEN RAISED ON DIRECT APPEAL, AND WHERE THE FACTUAL ALLEGATIONS WERE INSUFFICIENT.

In Claim II of the second Motion to Vacate, the defendant alleged that both the trial court and this Court erroneously denied the petition for writ of error coram nobis which he had filed during the resentencing proceeding, (PCR. 9). The resentencing jury had returned its advisory verdict on February 25, 1988. (3R. 882). Four days later, the defendant filed, in the trial court, a Petition for Writ of Error Coram Nobis and/or Motion for New Sentencing Hearing. (3R. 893-96). That petition was accompanied by an affidavit from one of the defense attorneys who had spoken to one of the jurors telephonically. The petition alleged that the jury had initially voted 7-5 for death, that a juror had requested a second vote due to the closeness of the vote, and that subsequent discussions among the jurors included the possibility of parole if Valle received a life sentence as well as Valle's attempted prison escape. (3R. 889). On March 7, 1988, the trial court, prior to the imposition of sentence, denied the petition for writ of error coram nobis, along with a separately filed motion to interview jurors. (3R. 6053-56, 891).

As seen above, this issue was raised before the trial court, during resentencing proceedings, prior to the imposition of the sentence. As such, it is an issue which could have been raised on direct appeal, but was not. Contrary to the Appellant's allegations, this Court did not deny the defendant's petition The defendant did not raise the issue on direct appeal; nor was there any separately filed appeal seeking review of the denial of the petition. The claim is therefore procedurally barred. See, e.g., Engel v. Dugger, supra; Kelly v. State, supra.

Moreover, neither the post-conviction motion nor the petition for writ of error coram nobis alleged any facts upon which relief could be granted. As to the allegation regarding the jury taking multiple votes, there is nothing improper with a sentencing jury's decision to take preliminary votes, or more than one vote. See, e.g., Derrick v. State, 641 So. 2d 378, 380 (Fla. 1994). As to the allegations that the jury, during the deliberations on the second vote, considered Valle's eligibility for parole and the attempted prison escape, it must be noted that in Valle's prior direct appeal from the resentencing, Valle unsuccessfully argued that evidence of those matters was not properly before the jury and the State, in turn, argued that evidence as to those matters was proper. See, Brief of Appellant, Case No. 72,328, pp. 58-62; Brief of Appellee, Case No. 72,328, pp. 70-74, 55-56. This Court held that the evidence was properly presented. Valle IV, 58 1 So. 2d at 46 (defense opened the door for purpose of permitting the State to cross-examine defense expert witnesses regarding incidents in prison for which Valle had not been convicted; judge did not err in allowing State to cross-examine defense witness regarding opinion as to Valle's future prison behavior if Valle were eligible for parole in 15 years - state was introducing such evidence to negate defense expert's

opinion regarding conduct of "lifers" in prison).[22]

It is axiomatic that a jury may properly consider any evidence which is properly before the jury. As the evidence before the jury was properly introduced into evidence, the allegations regarding consideration of that evidence do not amount to allegations of misconduct by the jury. Moreover, the original petition for writ of error coram nobis was based on matters which inhere in the jury's verdict, and does not provide any basis for attacking a jury's verdict. See, Songer v. State, 463 So, 2d 229, 23 1 (Fla. 1985); Sims v. State, 444 So. 2d 922,925 (Fla. 1983). As the allegations did not relate to improper overt acts which might have prejudicially affected the jury, State v. Hamilton, 574 So. 2d 124,128 (Fla. 199 1), juror affidavits and/or testimony regarding matters which were both considered by the jury and properly considered by the jury, are clearly incompetent. trial court "must base its decision [on a petition for writ of error coram nobis] on *competent* evidence." State v. Nussdorf, 575 So. 2d 1320, 1321 (Fla. 4th DCA 1991), rev. denied, 575 So. 2d 1036 (Fla. 1991). See also, Russ v. State, 95 So. 2d 594,600 (Fla. 1957) ("testimony or affidavits of jurors impeaching a verdict rendered by them will not be received and considered where the facts shown therein are such as inhere in the verdict."). The motion to vacate was therefore predicated upon incompetent evidence, and, furthermore, failed to allege anything that amounted to misconduct by the jurors.

With respect to allegations of "newly discovered" evidence that the sentencing judge, the

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[22] There were never any allegations that the jury considered the parole evidence for any improper purpose, as for an aggravating factor, as opposed to the proper purpose for which it was introduced, the negation of the defense expert witness's opinion regarding the significance of prison "'lifers."

Honorable Judge Gerstein, has admitted that he would have sentenced the defendant to life imprisonment, if the jury's recommendation of death was by a 7-5 vote, same are also without merit. First, like other allegations by the defense, this one is entirely unsubstantiated by any sworn statements or affidavits. At the hearing in the court below, post-conviction counsel merely stated that Judge Gerstein had made such a statement to "a witness." (PCT. 50). Upon further questioning by the lower court, post-conviction counsel stated that he "believe[d]" the witness was one of Mr. Valle's sisters. (PCT. 50-51). Apart from being unsubstantiated, no reason, legal or otherwise, is given for the alleged reliance upon the numerical vote. Compare, Scott v. Dugger, 604 So. 2d 465 (Fla. 1992) (sentencing judge made a written statement, that based upon the co-defendant's sentence which was not known to the judge at the time of sentencing, she would have sentenced the defendant to life as both defendant and codefendant were "equally culpable.").

More importantly, this claim is conclusively refuted by the record. The allegations of a preliminary 7-5 vote for a death sentence were included in the petition which was filed and ruled upon prior to sentencing by Judge Gerstein. Judge Gerstein, obviously fully aware of the allegations, nonetheless imposed a sentence of death upon the defendant. Indeed, the initial numerical breakdown was discussed at the sentencing hearing before the judge, (3R. 6141-42). The judge, however, expressly stated his understanding that he was required to "independently" consider all factors, "independent of the juror's decision" (3R. 6 161), and added:

> . . . we all have our personal opinions here and they're all very strong, but when you walk through the door I want -- through this door over here we leave our personal opinions, all that stuff outside the room.
>
> And I would do my best to make the decision [sentencing] totally legal, totally based on the evidence and facts that I have found and not be persuaded by the claims that may be outside the court.

(3R. 6170-71). Likewise, in his subsequent sentencing order, the judge stated the following:

> The jury recommended to the Court that it impose the death penalty upon the defendant The Court has also independently reviewed and weighed the evidence presented before the jury and to the Court itself. The Court feels that after considering the findings made above and exercising its reasoned judgment, there are more than sufficient aggravating circumstances proven beyond and to the exclusion of every reasonable doubt to justify the imposition of the sentence of death. The Court further finds that there are no mitigating circumstances, either statutory or non-statutory, which apply in this case to a degree which would cause it to mitigate the crime or the sentence, In conclusion, the Court having reviewed the testimony and evidence presented during this resentencing: hearing, finds that there are sufficient aggravating circumstances to justify the sentence of death which outweigh mitigating circumstances that may be present. The Court, therefore, agrees and concurs with the advisory sentence and recommendation entered by the resentencing jury.

(3R. 907) (emphasis added). The judge's own statements and the imposition of the death sentence, which are in accordance with the law of this State and which were made after knowledge of the allegations about the preliminary jury vote, are the clearest record evidence refuting the unsubstantiated allegations herein See also, Stewart v. State, 632 So. 2d 59 (Fla. 1994) (defendant's post-conviction claim that his prosecutors had "rethought their prior positions on the propriety and efficiency of the death penalty" did not constitute newly discovered evidence such that the probability of the outcome was affected).

VII.

THE CLAIM REGARDING ALLEGED IMPROPRIETIES IN THE COLD, CALCULATED AND PREMEDITATED JURY INSTRUCTION WAS PROPERLY HELD BY THE LOWER COURT TO BE PROCEDURALLY BARRED.

Claim III of the Second Motion to Vacate alleged that the jury instruction on the cold, calculated and premeditated aggravating factor was unconstitutionally vague and overbroad. (PCR. 9). The lower court found that this claim was procedurally barred. (PCR. 105). That conclusion is fully supported by the record, which reflects that a claim of unconstitutional jury instruction was not raised at the resentencing, and was not pursued on appeal thereof.

During the charge conference, the defense submitted proposed instructions regarding this aggravating factor. (3R. 5731-51; 3R[Supp.]. 223; 3R. 734).[23] At this time, defense counsel made clear the sole concern of the defense: since this was a resentencing proceeding before a new jury, which had not heard the guilt-phase instructions, and thus did not hear the first degree murder instructions as to premeditation, the resentencing jury, absent further instructions comparing premeditation for first degree murder with premeditation for the CCP aggravating factor, would not comprehend the difference between the two, and would not be able to discern what "heightened" premeditation for CCP was, in comparison to the premeditation which was needed for the guilt-phase conviction. (3R. 5732, 5746).[24] That was the basis of the defendant's trial court argument.

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[23] "3R.[Supp.]." refers to the Supplemental Record on Appeal from the direct appeal in the resentencing proceedings, Florida Supreme Court Case No. 72,328.

[24] Thus, defense counsel stated, "because the jury didn't try the first phase, they have no idea what premeditation is. . . ." (R. 573 1). Similarly, defense counsel added: "We do want a definition of premeditation being made clear to the jury being clear this is what is required for a

Defense counsel did not state that the standard CCP instructions were unconstitutionally vague or overbroad.

On the basis of defense counsel's stated concern, the court undertook to fashion an appropriate instruction for the jury, which would incorporate the guilt-phase definition of premeditation for first-degree murder, as well as the definition of premeditation for the CCP factor. The State, defense and judge then discussed appropriate modifications to defense counsel's requested instruction number 7 (3R.[Supp.]. 223), for the purpose of coming up with the final instruction. (3R. 5745-51). When the court fashioned the ultimate instruction to be given to the jury, defense counsel did not object to it. (3R. 5748-51).

The defendant's Requested Jury Instruction No. 7 had proposed:

> I further instruct you that the defendant's conviction for first-degree murder is insufficient, in and of itself, to require a finding that the homicide was cold, calculated and premeditated for the purposes of this aggravating circumstance. The law requires that there be heightened premeditation, that is, a cold-blooded intent to kill that is more contemplative, more methodical, and more controlled than the premeditation required for a conviction of first-degree murder, for this aggravating circumstance to apply.
>
> "Premeditation," within the meaning of the first-degree murder statute, requires proof that the homicide was committed after the defendant consciously decided to commit the act. For a defendant to be convicted of first-degree murder, the period of time between the conscious decision and the murder must only be long enough to allow for any reflection, however, brief, by the defendant prior to the act.
>
> As I have previously instructed you, this aggravating circumstance requires proof of a careful plan or prearranged design

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conviction and this aggravating circumstance requires more. So, the jury doesn't think he's been convicted of first degree murder and this aggravating circumstance applies." (3R. 5746).

> above and beyond the period of reflection required for a finding of guilt of premeditated murder. I instruct you that you must find such heightened premeditation, that is, a calculated and careful plan, before you can find this aggravating circumstance applicable to this case,

(3R.[Supp.]. 223).[25] The Court ultimately read the jury the instruction which, based on defense counsel's request number 7, had been drafted through the modifications negotiated during the charge conference:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> Now, I instructed you that the defendant's conviction for first degree murder is insufficient in and of itself to require a finding that the homicide was clod, calculated and premeditated for the purposes of this aggravating circumstance.
>
> Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of a premeditated intent to kill and the killing.
>
> The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing. I instruct you for this aggravating circumstance to apply, the law requires there be heightened premeditation, that is a deliberate intent to kill that is more contemplative, more methodical and more controlled than the premeditation required for a conviction of first degree murder.

(3R. 5994-95). Upon conclusion of the reading of the jury instructions, the court inquired whether

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[25] In a separately requested instruction, the defense sought to advise the jury that "the state must prove that there was a particularly lengthy, methodic, or involved series of atrocious events. . . ." (3R. 734). While such language can be found in the opinions in Preston v. State, 444 So. 2d 939, 946-47 (Fla. 1984) and Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987), the language was used solely to point out that the CCP factor had been found to exist in cases in which such facts were found. The language was never utilized as a requirement for proof in every CCP case. Thus, no such language appears in the language now utilized pursuant to Jackson, and requested defense instruction number 5 therefore did not propose appropriate language.

there were any further objections, and defense counsel simply stated, "[e]xcept as previously noted." (3R. 6006).

The foregoing background compels several conclusions. First, defense counsel never objected on the grounds that the standard CCP instruction was unconstitutionally vague or overbroad. The basis for defense counsel's argument was, as noted above, distinguishing between simple premeditation and heightened premeditation, since the sentencing jury did not hear the guilt phase murder instructions. Second, the instruction which was ultimately given, accomplished what defense counsel asked for and was, in fact, drawn from defense counsel's requested instruction, effectively conveying all that defense counsel sought in the requested instruction, while rearranging the sequence of the paragraphs and putting in some minor modifications.

While Jackson v. State, 648 So. 2d 85 (Fla. 1994), invalidated the previously used standard jury instruction on the CCP factor on the ground that it was unconstitutionally vague, claims predicated upon Jackson can be asserted in post-conviction relief proceedings only when the defendant has: a) contemporaneously objected to the instruction at trial on the particular ground that the standard instruction is unconstitutionally vague; b) requested a legally sufficient alternative instruction; and, c) raised the issue on direct appeal. See, James v, State, 6 15 So. 2d 668, 669 (Fla. 1993) (in aftermath of decision that instruction on heinous, atrocious, or cruel aggravator was unconstitutionally vague, collateral review of HAC instruction claims was "procedurally barred unless a specific objection on that ground is made at trial and pursued on appeal," adding that "[t]he same is true for challenges to the constitutionality of the instruction on the cold, calculated, and premeditated aggravator."); Hodges v. State, 619 So. 2d 272, 273 (Fla. 1993); Gaskin v. State, 615

So. 2d 679 (Fla. 1993); Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992); Chandler v. Dugger, 634 So.2d 1066, 1069 (Fla. 1994); Harvey v. Dugger, 656 So. 2d 1253, 1258 (Fla. 1995); Jones v. State, 22 Fla. L. Weekly S25, 26 (Fla. Dec. 26, 1996); Archer v. State, 673 So. 2d 17, 19 (Fla. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 197, 136 L.Ed. 2d 134 (1996); Bush v. State, 682 So. 2d 85, 88 (Fla. 1996).

Not only did the defendant not object to the CCP instructions in the trial court on the grounds of unconstitutional vagueness, but, it is clear from the record that the defendant obtained the very instruction that the defendant was seeking, and, in the aftermath of the structuring of that instruction, the defense did not posit any objection to the instruction as finally negotiated and drafted. Moreover, the instruction requested did not contain all of the definitions required in Jackson, supra; c h , the requested instruction was insufficient to satisfy Jackson, and the instant claim is further procedurally barred. See, Street v. State, 636 So. 2d 1297, 1303 (Fla. 1994) (claim of unconstitutionally vague jury instruction held to be not preserved and procedurally barred where the defense requested instructions were incomplete and thus also deficient); Harvey v. Dugger, 656 So. 2d at 1258 (claim of unconstitutionally vague CCP instructions held to be procedurally barred in post-conviction proceedings, where the defense had not requested "legally sufficient alternative instructions.").

Finally, the instant claim is also procedurally barred because no claim of unconstitutionally vague jury instructions was raised on direct appeal of the resentencing. Contrary to the Appellant's claim herein, the only issue raised on direct appeal was the applicability of the CCP factor; there was no mention of the jury instructions on this factor. See, Brief of Appellant, Case No. 72,328, at pp.

92-94. The direct appeal argument was solely limited to the sufficiency of the evidence for finding the CCP factor: "the evidence simply does not support findings [by the trial court] or application of the aggravating circumstances." Direct appeal Brief of Appellant, Case No. 72,328, at p. 92. Thus, even if the issue of constitutionality of the jury instructions on CCP is deemed to have been preserved at resentencing, the issue is still procedurally barred for failing to raise same on direct appeal. James, supra; Bush, 682 So. 2d at 88 (post-conviction claim of unconstitutional CCP jury instructions was found to be procedurally barred where, "[o]n appeal, [Bush] only argued that '[t]he aggravating circumstances in the Florida Capital Sentencing Statute have been applied in a vague and inconsistent manner,' and that the facts did not support a finding of this [CCP] aggravating circumstance in his case.").

Alternatively, the record in this case clearly reflects that any error in the CCP instructions was harmless beyond a reasonable doubt. See, e.g., Archer, supra; Jones, supra; Bush, supra. under any definition of CCP, including the most recent refinements in Jackson, this factor clearly exists in the instant case. After Valle was stopped, since he was driving a stolen car, he walked from the detaining officer, back to the stolen Camaro, where his companion, Felix Ruiz, was waiting. (3R. 4035-38). Valle got some cigarettes, and returned to Officer Pena's car. (3R. 4038). Valle then heard the radio dispatcher respond that the Camaro was registered to Willford Straun. (3R. 4039). Valle returned to the Camaro and told Ruiz that the police would find out that car was stolen and that they would be arrested. (3R. 4039). Valle said that he would have to blast the officer. (3R. 4039).[26] Ruiz responded, "Well, we have no choice." (3R. 4039). Valle returned to Pena's car, without any

[26] An interpreter, when asked to interpret this part of Valle's confession in the context of the entire confession, stated that the correct translation was, "Felix, he's looking into the car's license tag. I have to waste him, shoot him, do away with him, kill him." (3R. 4103-4).

gun, and Ruiz came over, but was told by Pena to go back to the Camaro. (3R. 4042). After Ruiz returned to the Camaro, Valle went back for another cigarette. (R. 4042-43). Ruiz said that he was going to make a call and he left. (R. 4043). Valle then took the gun from the Camaro, returned to Pena's car and shot Pena once. (R. 4043-45). Valle waited until he was about 3-4 feet away from Pena. (R. 4046). Valle then fired at the second officer and thought he had hit him, before he left the scene.. (3R. 4047). Valle admitted he had shot because he had violated his probation and did not want to be imprisoned, (3R. 4046).

All of the elements of CCP, as now defined in Jackson, clearly were shown to exist. First, the "killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit or rage." Jackson, 648 So. 2d at 89. This is shown by the conversation which the defendant admitted having with Ruiz, explaining the reason why he had to kill the officer. Second, "the defendant had a careful plan or prearranged design to commit the murder before the fatal incident." Id. This is shown by the actions of the defendant in response to the overheard dispatch report - i.e., returning to the Camaro for the express purpose of obtaining the gun to use in the shooting of the officer. Next, "the defendant exhibited heightened premeditation," Id. The reaction to the dispatch report, the effort to retrieve a weapon for the planned killing, and the communication of the plan to Ruiz, are all indicative of a heightened premeditation which goes above and beyond the premeditation required for first degree murder Lastly, there was no pretense of moral or legal justification. Id..[27]

[27] This Court, in Valle IV, the appeal from the resentencing proceeding, analyzed the claim regarding the sufficiency of evidence as to the CCP factor and found that it was properly found to exist. 581 So. 2d at 48.

The State would additionally note that, regardless of whether the CCP factor would have been found valid pursuant to Jackson, even in the absence of this factor, it is clear that the death sentence would still have been imposed and any error regarding the CCP instruction is still harmless. As summarized in the Statement of Case and Facts, supra, and in this Court's prior opinion, five aggravating factors were found to exist, with three of them being merged into a single factor. The defendant was convicted of a prior violent felony - the attempted murder of Officer Spell, The three merged factors related to the defendant's interference with the duties of a law enforcement officer, the disruption of the exercise of the enforcement of laws, and the effort to effect an escape or prevent an arrest. Not only are the remaining aggravating factors compelling, but, there were no statutory mitigating factors and no nonstatutory mitigating factors. As detailed in the Brief of Appellee from the resentencing appeal, the proffered mitigating evidence was repudiated by the record. Efforts to prove that the defendant would be a model prisoner if given a life sentence were negated by the record of prison discipline for improper conduct, including incidents involving violence and an escape attempt. Evidence of the defendant's family background reflected that he had a close-knit family and was well-provided for. All that the defense could establish was that the defendant's father occasionally disciplined him as a child, some 17 years prior to the commission of the instant crimes, in an effort to induce him to live up to his academic potential and succeed in life. This Court, in the resentencing appeal, agreed that the mitigating evidence was properly evaluated and rejected by the lower court. Valle IV, 581 So. 2d at 48-49. Thus, in the context of a CCP aggravating factor which clearly exists, two other aggravating factors which can not be challenged at this time, and a total absence of mitigating factors, any error with respect to the CCP jury instructions must be deemed harmless beyond a reasonable doubt.

VIII.

THE LOWER COURT PROPERLY FOUND THAT THE CLAIM REGARDING THE ALLEGED TRIPLING OF AGGRAVATING FACTORS WAS PROCEDURALLY BARRED, AS IT HAD BEEN FULLY ADDRESSED ON DIRECT APPEAL.

In Claim IV of the second motion to vacate, Valle argued that the imposition of the death penalty was improper because his sentencing jury was improperly instructed on three aggravating factors based upon a single act. (PCR. 12). This is identical to the claim which Valle raised in the direct appeal from the resentencing, in which he argued that it was improper to instruct the jury on the three aggravating factors, absent a limiting instruction to the jury. See, Brief of Appellant, Case No. 72,328, pp. 81-85; Brief of Appellee, Case No. 72,328, pp. 88-90; Valle IV, 581 So. 2d at 47, n. 9. The sentencing judge ultimately merged the three factors, treating them as a single factor in the sentencing order. (3R. 897-908). This Court held that the "trial judge did not err by not instructing the jury to merge the three factors when making their sentencing recommendation." Id. As this issue has been fully briefed, argued and ruled upon in the direct appeal, it is procedurally barred. See, Cherry v. State, 659 So. 2d 1069 (Fla. 1995) (defendant could not relitigate, in post-conviction motion, issue which was considered and rejected on direct appeal, even though defendant recharacterized the issue); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995) (same); Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992).

The Appellant asks this Court to revisit the issue, asserting that Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), constitutes new law compelling reconsideration. First, Espinosa involved an unconstitutionally vague jury instruction. at issue herein were not and are not claimed to have been vague. Moreover, this Court, post-Espinosa, has

held that while the limiting instructions requested herein are proper pursuant to Castro v. State, 597 So. 2d 259,261 (Fla. 1992), that holding is "prospective" only. Wuornos v. State, 644 So. 2d 1000, 1006 (Fla. 1994). The failure to give the requested limited instruction at the time of the instant resentencing was thus not error because, "at the time of the trial in this case, this issue was governed by Suarez v. State, 481 so. 2d 1201 (Fla. 1985), cert. denied, 476 US. 1178, 106 S.Ct. 2908, 90 L.Ed. 2d 984 (1986), in which we determined that the failure to instruct a jury on duplicative aggravating factors is not reversible error when the trial court does not give the factors double weight in its sentencing order." Armstrong v. State, 642 So. 2d 730,734 (Fla. 1994); see also. Jackson v. State, 648 So. 2d 85, 91-92 (Fla. 1994) (failure to give a merger jury instruction, with respect to the three aggravators of disrupting governmental function, avoiding arrest, and victim being a law enforcement, was not reversible error, where the trial judge either merges the factors into one or finds only one of the factors to apply).

The failure to give the requested limiting instruction in the instant case, in accordance with Suarez, thus does not constitute error. Moreover, any error must be deemed harmless. In this case was instructed that the "advisory sentence is not to be reached by merely counting up the aggravating and mitigating circumstances. You are required to use your reasoned judgment in determining whether the facts of this case under the aggravating and mitigating circumstances upon which I have instructed you can be satisfied by life imprisonment or require the imposition of a death sentence in light of the totality of the circumstances presented." (3R. 6004). The jury was thus told to give the factors proper weight, not merely to add them up. Furthermore, when the sentencing judge merges such factors into a single factor, this Court has concluded that no reversible error occurs. Valle IV, 581 So. 2d at 47, n. 9; Wuornos, supra: Armstrong. supra; Jackson v. State, supra.

IX.

THE CLAIM THAT FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONALLY VAGUE AS TO THE AGGRAVATING FACTORS WAS PROPERLY HELD TO BE PROCEDURALLY BARRED.

In Claim V of the Second Motion to Vacate, the defendant asserted that Florida's death penalty statute, s. 921.141(5), Florida Statutes, is unconstitutionally vague in its definition of the aggravating factors. (PCR, 16). The defendant did not challenge the constitutionality of section 921.141(5), Florida Statutes, either at trial or on direct appeal.[28] Nor did he challenge any of the jury instructions regarding the aggravating factors on the ground that the factor and/or the instructions were unconstitutionally vague, In view of the foregoing, the instant claim was properly held to be procedurally barred. See, e.g., Hodges, supra, 619 So. 2d at 273; Jones v. State, 22 Fla. L. Weekly S25 (Fla. Dec. 26, 1996) (where one pretrial motion alleged unconstitutional vagueness of CCP factor, but defendant did not present such argument in trial court, the claim was unpreserved and procedurally barred).[29]

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[28] While the defendant, prior to the 1981 trial, did file a motion attacking the constitutionality of section 92 1.14 1(5)'s aggravating factors (2R. 39 1-93), that motion did not, in any way attack the constitutionality of the CCP factor, which is the focus of Claim V of the motion to vacate and Argument IX of the instant appeal. See, Brief of Appellant, pp. 40-4 1. Furthermore, while Claim V of the motion to vacate argues that aggravating factors (e), (g) and (j) are unconstitutionally duplicative (PCR. 17), the 1981 motion presented a different argument - that factors (e) and (g) were unconstitutionally vague. (2R. 391-93). More importantly, however, the 198 1 motion was not renewed at the 1988 resentencing trial.

[29] Similarly, in the absence of any arguments before the court as to the alleged unconstitutional vagueness of the aggravating factors at issue herein, this claim is likewise procedurally barred, Prior to the 1988 resentencing trial, the defense argued that the doubling of aggravating factors (e) and (g) would be improper, not that the factors themselves are unconstitutionally vague. (3R. 1242-54). The defense also argued that the CCP factor violated the ex post factor clause of the Constitution, not that the CCP factor was vague, (3R. 1262-68).

Not only is the instant claim procedurally barred because it was never raised through a proper motion in the trial court proceedings, but, the claim of statutory vagueness is one which could have and should have been raised on direct appeal. See, e.g., Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1994) ("Chandler argues that both the instructions on the heinous, atrocious, or cruel and cold, calculated, and premeditated aggravators and the aggravators themselves are unconstitutionally vague. The latter argument is procedurally barred because it could have been raised on direct appeal. . . .").

As to the CCP factor itself, this Court has repeatedly rejected facial attacks as to the constitutionality of the factor. See. e.g., Jackson. supra, 648 So. 2d at 87; Fotopoulos v. State, 608 So. 2d 784,794 (Fla. 1992); Klokoc v. State, 589 So. 2d 219,222 (Fla. 1991). See also, Arave v. Creech, U.S. , 113 S.Ct. 1534, 113 L.Ed. 2d 188 (1993) (Idaho Supreme Court's interpretation of an aggravator as referring to a "cold blooded" murderer, does not violate the Eighth Amendment to the Federal constitution and is not vague); Walls v. State, 641 So. 2d 381,387, n. 3 (Fla. 1994) (". . . the limiting construction imposed by the Idaho Supreme Court [in Arave v. Creech] is in harmony with the [Florida Supreme Court's] requirements of Jackson;").

As to aggravating factors (e), (g) and (j), to whatever extent the motion to vacate argued that the factors are duplicative, that argument was fully considered and rejected in the prior appeal. Valle IV, 581 So. 2d at 47-48. While the heading to Claim V of the motion to vacate, as well as the heading to Argument IX of the Brief of Appellant herein asserts that the statute is facially vague and overbroad, the text of the argument, as to factors (e), (g) and (j) does not contain any argument as to vagueness, only a claim that they are duplicative. Thus, this claim was addressed in the prior

appeal and can not be revisited.

X.

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S USE OF PEREMPTORY CHALLENGES DURING VOIR DIRE IN THE RESENTENCING PROCEEDINGS.

In Claim IX of the second motion to vacate, Valle alleged that his trial counsel was ineffective at the resentencing trial, by failing to adequately object to the State's use of peremptory challenges pursuant to State v. Neil, 457 So. 2d 481 (Fla, 1984) and Slappy v. State, 522 So. 2d 18 (Fla. 1988). (PCR. 31). The lower court concluded that this claim was legally insufficient, as it failed to provide a sufficient basis for an evidentiary hearing and failed to meet the standards of Strickland v. Washington, supra. (PCR. 105).

In the direct appeal from the resentencing, Valle argued that the State's use of peremptory challenges violated Neil and Slappy. See, Brief of Appellant, Case No. 72,328, pp. 5- 10. The State responded that the defendant failed to make a proper objection under Neil, and that an inquiry was thus not required. The State further argued that even if a proper Neil objection had been raised by trial counsel, the record clearly reflected that the prima facie case needed as a prerequisite to any Neil inquiry did not exist.[30] See, Brief of Appellee, Case No. 72,328, pp. 24-38. The State, in its

[30] As the resentencing trial in this case occurred prior to the decision in State v. Johans, 613 So. 2d 13 19 (Fla. 1993), a Neil inquiry was required only if there was a showing of a strong likelihood that a venire member was being challenged solely because of race. Neil, supra; Johans, supra.

brief, went through all of the jurors at issue, and demonstrated that the prosecutor volunteered race-neutral reasons for those challenges. Id.

In the direct appeal opinion, this Court initially concluded that Valle "did not properly preserve this issue for appeal." Valle v. State, 581 So. 2d at 44. This Court also held, in the alternative, that:

> In any event, we do not believe that Valle showed that it is likely the challenges were used in a racially discriminatory manner. Two blacks served as jurors and a third served as an alternate. Further, the reasons volunteered by the prosecutor for exercising the peremptory challenges appear to be racially neutral. We further note that Valle, himself, is not black. *See Kibler* ***v. State, 546 So.*** 2d 710 (Fla. 1989).

581 So. 2d at 44, n. 4.

As previously noted, a defendant claiming ineffective assistance of counsel must demonstrate both a deficiency on the part of counsel and that any such deficiency prejudiced the defendant to the extent that it is probable that but for the deficiency the outcome of the trial (or sentencing proceeding) would have been different. Strickland, supra. In this Court's prior opinion, it is clear that no such probability can be demonstrated. Even if defense counsel had asserted an adequate objection, as this Court has already concluded, there was no strong likelihood that the peremptory challenges were discriminatory, and, furthermore, the volunteered reasons were sufficiently race-neutral to negate any objection by defense counsel. Thus, a sufficient objection would not have entitled the defendant to a Neil inquiry, and even if a sufficient objection would have entitled the defendant to such an inquiry, the volunteered reasons would have precluded the defense from having the State's peremptory challenges disallowed.

Moreover, as previously noted herein, the test for ineffective assistance of counsel claims is not whether a defendant would have prevailed on a mid-trial motion, such as a motion to suppress, motion for mistrial or motion/objection to state peremptory challenges. See, Stirrup, supra, and n. 16 herein; Martinez v. State, 655 So. 2d 166, 168 (Fla. 3d DCA 1995)[31]; Murray v. Groose, 106 F. 3d 8 12, 8 15 (8th Cir. 1997) (to prevail on claim that state's reasons for peremptory challenges were pretextual and that counsel was ineffective in failing to argue such pretexts, defendant had burden of alleging that outcome of trial would have been different had counsel so objected). In the instant case there was no allegation that had counsel adequately objected the outcome of the trial would probably have been different. (PCR. 3 1-32). The defense did not assert, let alone demonstrate, that the outcome of the sentencing hearing would have been different. Indeed, that is a burden which the defendant clearly can not demonstrate. As the jurors who did try the case were all presumptively fair and unbiased jurors, there is no reason to believe that a jury with any different members - i.e., the ones whom defense counsel presumably wished to have returned to the jury - would have rendered any different verdict, or that the sentencing judge would ultimately have rendered a different sentence.

In view of the foregoing, the lower court properly concluded that the claim, as asserted in the motion to vacate, was legally insufficient.

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31 "Martinez argues that had his counsel . . . objected to the state's use of peremptory challenges he would have prevailed. The test is not whether Martinez's counsel would have prevailed had he objected, but whether under the circumstances his counsel's failure to object was so prejudicial that he was denied a fair trial. *Knight [v. State,* 394 So. *2d* 997 *(Flu. 1981)].* Martinez makes no showing of prejudice in his counsel's failure to . . , object to state's exercise of peremptory challenges. In order to make a prima facie showing of ineffective assistance of counsel, Martinez must, at minimum, demonstrate some prejudice. . .' This he has not done." 655 So. 2d at 168.

XI.

THE APPELLANT'S CLAIM THAT PENALTY PHASE JURY INSTRUCTIONS IMPROPERLY SHIFTED THE BURDEN TO THE DEFENDANT WAS PROPERLY HELD TO BE PROCEDURALLY BARRED.

In Claim X of the second motion to vacate, the defendant argued, as he does on appeal, that the trial court's instruction to the jury, during the preliminary instructions, prior to opening arguments in the penalty phase, improperly shifted the burden of proof to the defendant, (3R. 370% 3709; PCR. 32-35). The defendant alleges, both in his brief in this Court (p. 47), and in the motion in the lower court (PCR. 34), that this objection was over the objection of defense counsel. The Appellant fails to provide any transcript reference for any such objection for a simple reason - none exists. After jury selection was completed, and prior to the preliminary penalty phase instructions to the sworn jury, the parties discussed the standard preliminary penalty phase instructions, (3R. 3655-59). At that time, defense counsel did not present any argument regarding the preliminary instruction at issue herein, or as to any matters related to a burden shifting argument. The sentencing judge then gave the standard preliminary instruction regarding the aggravating and mitigating factors. (R. 3708-3709).

Prior to the jury's deliberations, the final jury instructions were discussed, and the parties negotiated modifications to the standard language regarding the weight of the aggravating factors vis-a-vis the mitigating factors. (3R. 5715-21). At that time, defense counsel argued that language in the standard instruction, advising the jury to determine "whether there are mitigating circumstances suffkient to outweigh the aggravating circumstances. . .," constituted burden shifting. (3R. 5717). There were no complaints about the preliminary instructions at that time, and the final

instruction, which the court gave, and which defense counsel accepted (3R. 3720), deleted any reference to mitigating circumstances outweighing the aggravating circumstances, and simply advised. the jury that it had to determine "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether those aggravating circumstances outweigh any mitigating circumstances found to exist." (3R. 5993). No claim regarding burden shifting instructions was presented on direct appeal.

In view of the foregoing, several conclusions ensue. First, as the preliminary instruction at issue was not objected to, the claim was not preserved at trial and is thus procedurally barred in Rule 3,850 proceedings. Engel v. Dugger, supra. Second, insofar as any claim regarding the jury instruction could be determined from the face of the record, any such claim should have been presented on direct appeal. Id.; Williamson v. Dugger, supra; Kelly v. State, supra. s c l a i m has repeatedly been rejected, on the merits, by this Court. See, Johnson v. State, 660 So. 2d 637,647 (Fla. 1995); Robinson v. State, 574 So. 2d 108, 113 at n. 6 (Fla. 1991). Thus, the lower court properly denied this claim.

XII.

THE LOWER COURT PROPERLY REJECTED THE DEFENDANT'S CLAIM THAT TRIAL COUNSEL INEFFECTIVELY ARGUED AGAINST THE STATE'S INTRODUCTION OF EVIDENCE REGARDING PAROLE ELIGIBILITY AND LACK OF REMORSE.

During the course of resentencing, defense witness Buckley, in expressing his opinions

regarding the defendant's future prospects as a model prisoner, explained that he attached great significance to the fact that "lifers" had an interest in adhering to rules and avoiding disturbances. (3R. 4678). On cross-examination, the prosecution sought to question Buckley on his understanding of a life sentence in Florida, and whether his opinion, based on the significance of "lifers," would alter if the defendant was potentially eligible for parole in a specified number of years. (3R. 4678, 4710-12). After extensive legal argument outside the presence of the jury (3R. 4679-4707), the trial court found that the evidence was admissible. During the course of these legal arguments, the prosecution indicated that its information regarding Valle's parole eligibility date came from parole commissioners. No reference to these parole commissioners was made to the jury. On direct appeal, Valle argued that the trial court improperly permitted the State to cross-examine Buckley about the defendant's potential parole eligibility. See, Brief of Appellant, pp. 58-62, Case No. 72,328, This Court, addressing the issue on the merits, held that "[t]he state could properly cross-examine him as to whether his opinion would change given the possibility that Valle could be eligible for parole in fifteen years. The state was not trying to establish the possibility of parole as an aggravating factor, but was rebutting the defense's assertion of a mitigating factor." 581 So. 2d at 46.

In Claim XII of the second motion to vacate (PCR. 41), and in this appeal, the Appellant seeks to revisit this very same argument by merely adding the assertion that trial counsel "ineffectively argued" this matter in the trial court. It is clear that, notwithstanding the verbiage that trial counsel ineffectively argued this issue, this is a claim which was raised in the trial court and rejected, and raised in this Court and rejected. Claims which have already been adjudicated on direct appeal can not be relitigated on appeal. See, Harvey v. Dugger, 656 So, 2d 1253 (Fla. 1995); Cherry v. State, 659 So. 2d 1069 (Fla. 1995). Moreover, the procedural bar cannot be avoided by couching

the claim in terms of ineffective assistance of counsel. See, Kight v. Dugger, supra. Indeed, since this Court has already found that the State was entitled to question the defense witness about this matter to negate proffered mitigation, it is evident that there would not be any proper basis for defense objection, and, current counsel does not shed any light on what it is that any "superior" trial counsel could have, or should have, done, that would in any way have made a difference,

Under the guise of an ineffective assistance of counsel claim, the defendant also attempts to get this Court to revisit its prior ruling that the State's introduction of evidence of lack of remorse properly negated proffered mitigation. On direct appeal, Valle argued that the State improperly cross examined a state witness regarding Valle's lack of remorse. See, Brief of Appellant, pp. 62-65, Case No, 72,328. The Brief of Appellant highlighted several passages of witness examination and related prosecutorial comments. (3R. 4068-69, 5882, 5930). This Court addressed the issue on direct appeal, concluding that the State did commit error by prematurely presenting what the State could subsequently have introduced as rebuttal to Valle's mitigation evidence. 58 1 So. 2d at 46. The Court then proceeded to find that the error was harmless. Id. Although the State argued that the objection was not properly preserved, Brief of Appellee, p. 74, Case No. 72,328, this Court rejected that claim, as the Court addressed the issue on the merits.

In Claim XII of the second motion to vacate (PCR. 44-45), as well as in the argument in the Brief of Appellant herein, the defendant highlights the identical passages of witness examination and closing argument, merely adding the qualification that trial counsel "ineffectively argued" theses issues. As set forth in the State's Brief of Appellee from the direct appeal, defense counsel raised the lack of remorse issue in various pretrial objections, (PCR. 130, 123 1-40, 1336-70, 1404-10,

3965-67). Once again, the issue cannot be revisited simply by reclassifying it as an ineffective assistance issue. Kight, supra. Furthermore, the record conclusively refutes any such claim of ineffective assistance. Since the State's evidence, as noted by this Court, was simply introduced prematurely, the evidence was going to come in in the State's rebuttal case in any event. As the evidence was going to come in regardless, but at a different point in time, the jury was ultimately going to hear the same evidence and the same argument. Furthermore, since this Court has already concluded that the premature introduction of the evidence constituted harmless error, in light of the compelling nature of the aggravating factors and the minimal nature of the mitigating factors, it necessarily follows that successful trial court objections to the prematurely introduced evidence could not be deemed to have the probable likelihood of affecting the outcome of the proceedings.

XIII.

THE LOWER COURT PROPERLY DENIED DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, WHERE ALL OF THE COMPONENTS OF THE CLAIM HAVE ALREADY BEEN LITIGATED IN THE DIRECT APPEAL AND DECIDED ADVERSELY TO THE DEFENDANT.

In Claim XIII of the second motion to vacate, the defendant alleged that trial counsel was ineffective for failing to adequately object to various instances of alleged prosecutorial misconduct, (PCR. 46). The defendant alternatively alleged that those instances of prosecutorial misconduct denied him a fair trial, The matters alluded to in Claim XIII were extensively objected to by trial counsel and the alleged errors were raised on direct appeal. This Court addressed the issues on the merits and found that the evidence was admissible and the comments were proper. Under such

circumstances, this argument amounts to an improper effort to relitigate that which has already been decided, Kight supra; Lopez v. Singletary, 634 So. 2d 1054, 1056-57 (Fla. 1993).

The first aspect of this claim focuses on cross-examination of defense witnesses, during which the defendant alleges that the State improperly advised the jury of the prior 198 1 proceedings. The same instances of questioning which the defendant cites in the current Brief of Appellant (3R. 4286, 4674, 53 17, 5639), were fully alleged as improper questioning in the prior direct appeal brief. See, Brief of Appellant, Case No. 72,328, pp. 24-28. In the direct appeal brief, Valle's counsel pointed out that trial counsel had objected to such questioning. Id. The current Brief of Appellant reasserts that counsel had objected to such questioning. This Court, in its direct appeal opinion, reviewed the issue, on the merits, and concluded that "[t]he fact that the jury was aware of a sentencing proceeding in 198 1 did not lead to the conclusion that there was a second sentencing proceeding simply because the murder occurred in 1978." 581 So. 2d at 45-46. The Court also rejected the claim that "from the evidence the jury likely inferred that [Valle] also had been sentenced to death at an earlier time," 581 So. 2d at 45. Thus, the Appellant cannot relitigate the merits of a claim that was already fully addressed and rejected. And, since the matters were objected to by trial counsel, and the evidence was found to be admissible by this Court, there is no basis for asserting that counsel was in any way ineffective.

In a second, distinct component of this claim, the defendant asserts that the State improperly introduced evidence of the Detective Toledo incident, which formed the basis for Valle's probation revocation from an earlier conviction. Valle's direct appeal brief argued extensively that the State's use of the Detective Toledo incident was improper. See, Brief of Appellant, Case No. 72,328, pp.

51-58. This Court, in its direct appeal opinion, fully addressed that claim, referring to the Detective Toledo incident as the "1976 incident where Valle allegedly attempted to run over a police officer." 581 So. 2d at 46. The Court concluded that since the defense had presented expert opinions that the defendant would be a good prisoner, and that the experts had stated that they based their opinions on Valle's criminal record, including the transcript of the probation revocation hearing based on the Detective Toledo incident, "it was proper to cross-examine the experts concerning these incidents." 581 So. 2d at 46. Once again, as this issue was fully litigated on direct appeal, it cannot be relitigated now, either as a substantive issue or under the guise of an ineffective assistance of counsel claim, Indeed, insofar as the direct appeal record and briefs reflect that defense counsel objected extensively to the use of such evidence (3R. 4723-37, 5403-4, 5655-58), and insofar as the evidence was nevertheless deemed admissible, there is no basis for any claim of ineffective assistance.

In another aspect of this argument, the Appellant asserts that the State improperly cross-examined the defense witness, Ms. Milledge, the social worker who testified extensively about the defendant's personal life and problems, as to whether Valle ever described to her any "unlawful or improper methods of funding his gambling." (3R. 5105). The record reflects that there was no objection to this question, and that Ms. Milledge responded, "Well, yes. I already mentioned about stealing the checks from his employers when he was working at the kennel." Id. She also referred to Valle having borrowed $800 from a loan shark. Not only was there no objection to this questioning, but no issue regarding it was raised on direct appeal. As the matter is fully disclosed in the trial court record, it is clearly an issue which could have or should have been raised on direct appeal and is thus procedurally barred. Engel v. Dugger, supra. Furthermore, the failure to object to the questioning can not constitute ineffective assistance of counsel. As Ms. Milledge

acknowledged, she had previously referred to the unlawful or improper methods of funding the gambling. This occurred during defense counsel's own direct examination of her, as she explained that when Valle's betting became an addiction, he stole payroll checks from his employer and was caught. (R. 5052). Thus, defense counsel had already questioned her about this, the State's questioning was clearly within the scope of cross-examination as the defense had opened the door to this, and any objection by defense counsel, to the State's cross-examination, would therefore have been meritless.

The defendant next asserts that unspecified prosecutorial comments on Valle's lack of remorsefulness were improper. Brief of Appellant, p. 54. As previously noted herein, this issue was addressed on direct appeal and found to constitute harmless error, since the state's introduction of such evidence was premature and was going to come in on rebuttal. Moreover, any such error was deemed harmless in light of the compelling aggravating factors and minimal mitigation. 581 So. 2d at 46. Under such circumstances, the issue can not be relitigated on the merits and, for reasons previously set forth herein, there is no basis for a claim that counsel was ineffective.

The final component of this claim is that the State, in closing argument, made several comments which constituted improper victim impact evidence. Brief of Appellant, pp. 54-55. (3R. 5875-76, 5903, 5919, 5932-33). Objections to the comments were overruled. (3R. 5932, 5966-71, 6019, 6037-48). Each and every one of these comments was asserted as error on direct appeal. Brief of Appellant, Case No. 72,328, pp. 89-91. The State responded to all of those claims, in the direct appeal, on the merits, and this Court addressed the issue, on the merits, concluding that the comments were not "sufficiently prejudicial in their content and quantity to require reversal. They

were not comparable to the extensive victim impact evidence and arguments found in Booth and *Gathers."* 581 So. 2d at 48. Once again, there is no basis for revisiting this issue, either as a claim on the merits or one of ineffective assistance of counsel, as objections were made, the issues preserved, and the issues deemed to be either without merit or without prejudice.[32]

In conclusion, none of the incidents alluded to in the Appellant's argument can be raised at this time, as virtually all were expressly rejected on direct appeal. None constitute ineffective assistance of counsel, as they were objected to at trial and found meritless on appeal, or, alternatively, there was no basis for counsel to object. The lower court therefore properly rejected these claims,

XIV.

THE LOWER COURT PROPERLY DENIED THE DEFENDANT'S CLAIM REGARDING THE FAILURE OF THE COURT TO FIND MITIGATING FACTORS.

In Claim XIV of the second motion to vacate, the defendant alleged that the imposition of the death sentence was improper where the court failed to find any mitigating factors on the basis of the evidence presented during the defense's penalty phase case. That claim, as presented in the trial court, did not allege, in any capacity, that either trial or appellate counsel were in any way ineffective with respect to presenting arguments regarding mitigating factors. Id. On appeal, the defendant has taken that claim, reiterated the text of it, verbatim, in Argument XIV (Brief of

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[32] Any such claim, at this date, would be even less compelling, in view of the United States Supreme Court's decision to recede from Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed. 2d 440 (1987). See, Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed. 2d 720 *(1991).* Payne was decided seven weeks after this Court issued its opinion on Valle's direct appeal.

Appellant, pp. 56-59), but added, in the heading to this argument, that trial and appellate counsel were ineffective for failing to effectively argue that the sentence was unreliable due to the failure to find mitigating factors. Brief of Appellant, pp. 56-57.

The effort to interject the ineffective assistance of counsel claim at this stage is improper, as it was not presented below and differs from the grounds presented below. Doyle v. State, supra. Furthermore, a claim of ineffective assistance of appellate counsel is not cognizable in Rule 3.850 proceedings, and must be asserted in a petition for writ of habeas corpus in this Court. Knight v. State, 394 So. 2d 997 (Fla. 1981).

Moreover, the Appellant previously argued, on direct appeal, that the sentencing judge improperly failed to credit the evidence adduced by the defense as mitigating factors. See, Brief of Appellant, Case No. 72,328, pp. 95-99. This Court rejected the defendant's argument, the same one that is being advanced now. Valle IV, 581 So. 2d at 48-49. This issue can not be relitigated. Moreover, it can not be revisited under the guise of interjecting the phrase "ineffective assistance of counsel" in the heading to the argument. See, Knight, supra; Lopez, supra. a s i n g l e concrete allegation in the Appellant's argument as to what it was that trial counsel was supposed to argue that said counsel failed to argue. This argument was therefore properly deemed to be procedurally barred by the lower court. (PCR. 105).

XV.

THE LOWER COURT DID NOT ERR IN DENYING THE DEFENDANT'S REQUEST TO AMEND THE POST-CONVICTION MOTION WITH MATERIALS OBTAINED THROUGH CHAPTER 119.

The Appellant claims that the lower court failed to grant him adequate time in which to file amendments to the motion to vacate, with materials obtained through Chapter 119 requests, This is, in essence, a repetition of the claims raised in Argument II. The State, in response to that argument, pp. 23-32, supra, has clearly demonstrated that the Appellant was provided with extensive time in which to file any amendments, There have been no demonstrations of any public records violations. There were no demonstrations in the lower court, through the filing of copies of pleadings from other jurisdictions, that there were even any public records claims pending in any court, let alone that they were being pursued, in good faith, and in a timely, diligent manner. There have been no demonstrations that any materials obtained through public records requests have provided the basis for any claims or amendments to existing claims, beyond those matters which have already been pled. The State fully adopts and incorporates the arguments set forth at pp. 23-32, supra, as if fully set forth in this Argument.

CONCLUSION

Based on the foregoing, the lower court's summary denial of post-conviction relief should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by prepaid first class mail to **STEPHEN M. KISSINGER,** Chief Assistant CCR, Office of the CCR, Post Office Drawer 5498, Tallahassee, Florida 323 14, on this 15th day of June, 1997.

FARIBA N. KOMEILY
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