IN THE SUPREME COURT OF FLORIDA

ARTHUR DENNIS RUTHERFORD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 89,142

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

After a Santa Rosa County jury convicted Rutherford of first-degree murder and robbery early in 1986, the trial court granted a mistrial. Venue was changed to Walton County, and the state tried Rutherford again, with the trial running from September 29 through October 2, 1986. Assistant public defenders John Gontarek and William Treacy represented Rutherford at his second trial. Gontarek handled the guilt phase, while Treacy did the penalty phase. (PCR VI 32, 60). They assisted each other, however, in both phases. (PCR VI 61-62). The jury convicted Rutherford as charged and, after the penalty proceedings, recommended that he be sentenced to death. The trial court agreed with that recommendation, and the Florida Supreme Court affirmed Rutherford's convictions and death sentence. Rutherford v. State, 545 So. 2d 853 (Fla.), cert. denied, 493 U.S. 945 (1989).

In August 1991, Rutherford filed a motion for postconviction relief raising fifteen claims: I) ineffective assistance of counsel at the guilt phase; II) ineffective assistance at the penalty phase; III) ineffective assistance regarding certain testimony at the penalty phase; IV) penalty-phase instructions shifted the burden of proof; V) penalty-phase instructions failed to define the aggravators; VI) unconstitutional application of the cold, calculated, and premeditated (CCP) aggravator; VII) unconstitutional application of the heinous, atrocious, or cruel

(HAC) aggravator; VIII) untimely written sentencing order; IX) trial court erred regarding mitigators; X) trial counsel's conflict of interest; XI) admission of inflammatory photographs; XII) use of nonstatutory aggravators; XIII) counsel did not obtain a mental health expert to conduct a constitutionally adequate evaluation; XIV) lack of guidelines scoresheet for the robbery conviction; and XV) Rutherford should not have been retried after the mistrial. (PCR I 2 et seq.).[1] The State responded to the postconviction motion (PCR I 198 et seq.) and, later, moved for access to trial counsel's files. (PCR II 275). On September 21, 1992, the circuit court issued an order directing that Rutherford's amended motion be filed in thirty days. (PCR II 282). Thereafter, Rutherford filed an amended motion (PCR II 286), and the state filed a response. (PCR II 372).

On January 29, 1993, the circuit court issued an order granting an evidentiary hearing on issues I through III and XIII and summarily denying the other issues. (PCR II 386). In May 1993, the court ordered that an evidentiary hearing would be held starting August 23, 1993 (PCR III 433) and granted the state access to trial counsels' files. (PCR III 435). In response to the latter order the Office of the Capital Collateral Representative (CCR)

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[1] "PCR I 2" refers to page 2 of volume I of the postconviction record. References to the record on appeal in case no. 69,825, Rutherford's appeal of his conviction and sentence, will be "DAR" followed by volume and page number.

filed an emergency petition for writ of prohibition and/or mandamus. This Court stayed all proceedings and ultimately denied the petition without opinion on January 1994. Rutherford v. Bell, 634 So.2d 626 (Fla. 1994).[2]

CCR also appealed the circuit court's order granting access to counsels' files on June 7, 1993. After receiving briefs from the parties, this Court dismissed the appeal on August 15, 1994.[3]

In November 1994, CCR moved for the appointment of conflict-free counsel (PCR III 523), based on Rutherford's suing his CCR counsel in federal court. (PCR III 574 et seq.). By order dated December 22, 1994, the circuit court granted the motion to withdraw. (PCR III 573). The order also stated that, if CCR did not find replacement counsel, the court would appoint such counsel. (PCR III 573). CCR did not locate replacement counsel, and, on January 12, 1995, the circuit court appointed a local attorney to represent Rutherford. (PCR III 578).

On January 20, 1995, CCR filed another emergency petition for writ of prohibition and/or mandamus, seeking to have the December 22 and January 12 orders vacated. This Court denied the petition without opinion on June 29, 1995. Rutherford v. Bell, 658 So.2d

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[2] Rutherford v. Bell is case no. 81,990, and the state asks this Court to take judicial notice of the record in that case.

[3] Reference to Rutherford v. State, no. 82,007, is published in the table at 642 So.2d 1363. The state asks this Court to take judicial notice of the record in that case.

992 (Fla. 1995).[4] Prior to filing the emergency petition, CCR also appealed the December 22 order to this Court. After the parties filed their briefs, CCR asked that the appeal be dismissed, which this Court did on August 21, 1995. Rutherford v. State, 661 So.2d 825 (Fla. 1995).[5]

In October 1995, the circuit court set the evidentiary hearing for April 1996. (PCR III 585). After that hearing, the circuit court entered its order denying relief (PCR IV 675), and this appeal followed.

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[4] This petition is case no. 85,031, and the state asks this Court to take judicial notice of the record in that case.

[5] The appeal is case no. 85,173. The state asks that this Court take judicial notice of the record in that case.

SUMMARY OF ARGUMENT

ISSUE I

The circuit court correctly held that, even if counsels' performance were deficient, Rutherford suffered no prejudice because of the testimony of three of the victim's friends.

ISSUE II

The circuit court correctly found no merit to the claim that counsel were ineffective as to mental mitigation.

ISSUE III

The circuit court correctly found counsel effective regarding the penalty phase.

ISSUE IV

The circuit court properly found the double jeopardy issue to be procedurally barred.

ISSUE V

The circuit court did not err in refusing to find guilt-phase ineffectiveness.

ISSUE VI

The circuit court did not err in denying Rutherford's other claims without a hearing.

ARGUMENT

ISSUE I

WHETHER TRIAL COUNSEL RENDERED EFFECTIVE ASSISTANCE REGARDING THE PENALTY-PHASE TESTIMONY OF THREE STATE WITNESSES.

In Issue III of his postconviction motion (PCR I 71) Rutherford claimed that his counsel were ineffective for not preventing three of the victim's friends from testifying during the penalty phase that the victim was afraid of Rutherford. As the circuit court found (PCR IV 690-92), there is no merit to this issue.

Rutherford testified on his own behalf during the guilt phase of his trial. He stated that he was a good friend of the victim (DAR IV 607-08) and that she "was just like my mother to me." (DAR IV 624). He also claimed to have no problems with the victim (DAR IV 627) and that she asked him to paint her home, which he was supposed to start doing the following Monday except that the victim was killed. (DAR IV 612, 633-37). Rutherford also testified that, on the day before her death, friends of the victim came to visit while he was at her home. (DAR IV 630-32).

During the penalty phase the state presented testimony from three of the victim's friends: Lois LeVaugh (DAR V 804); Richard LeVaugh (DAR V 813); and Beverly Elkins. (DAR V 819). Mrs. LeVaugh testified that she and her husband and their houseguests went to the victim's home the day before her death because the victim called and said that Rutherford was there and that the

victim was nervous. (DAR V 806). Later, the victim told them that Rutherford scared her. (DAR V 807). When asked if the victim mentioned having Rutherford paint her house, Mrs. LeVaugh responded "No, because she had the house painted the spring before by her friend Charlie Craven." (DAR V 808-09). Defense counsel did not object during direct examination of Mrs. LeVaugh, but, on cross-examination, established that she never saw or heard Rutherford threaten the victim. (DAR V 813).

Mr. LeVaugh testified that he and his wife visited with the victim frequently and that he helped her with minor repairs. (DAR V 814-15). Although Rutherford stated that he fixed the sliding glass doors on her bathroom tub (DAR IV 607-08), LeVaugh testified that the victim never mentioned a problem with them to him. (DAR V 816). Treacy objected "to the general line of questioning as not being within the scope of any of the nine" aggravators, which the trial court sustained. (DAR V 817). On cross-examination defense counsel established that LeVaugh never saw or heard Rutherford threaten the victim. (DAR V 818-19).

Beverly Elkins testified that the victim was one of her best friends (DAR V 820) and that the victim asked Elkins' husband to check the exterior sliding glass doors Rutherford installed. (DAR V 821). Treacy again objected that the testimony went to none of the aggravators. (DAR V 821). Later, Gontarek repeatedly raised the same objection to Elkins' testimony. (DAR V 822-24). On

cross-examination counsel established that the Elkins never heard of Rutherford going to the victim's house by himself. (DAR V 826).

On direct appeal Rutherford challenged the friends' testimony as 1) irrelevant to any of the aggravators, especially the cold, calculated, and premeditated (CCP) and heinous, atrocious, or cruel (HAC) aggravators; and 2) inadmissable hearsay. (Appendix A). In spite of trial counsels' objections the state responded that no objections had been made. (Appendix B). In addressing the issue this Court stated:

> The last penalty-phase issue involves testimony from three witnesses to the effect that the victim was afraid of the defendant. The judge used this evidence to buttress his finding of cold, calculated, and premeditated. Without addressing the question of whether upon the facts of this case the victim's state of mind could have been relevant to this aggravating factor, there was no objection to these comments at trial. Indeed, one of them was elicited by defense counsel on cross-examination; thus the issue was waived.

Rutherford, 545 So.2d at 857 (footnote omitted).[6]

At the evidentiary hearing collateral counsel briefly questioned Treacy about testimony from the victim's friends.

> Q. During the penalty phase of Mr. Rutherford's case the state called a number of witnesses or at least some witnesses who testified -- or do you recall the state calling some witnesses that testified that the victim in this case was afraid of Mr. Rutherford?

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[6] Undersigned counsel does not know why the state did not point out the objections made at trial or why this Court did not discover them when it reviewed the record on direct appeal. See Ciccarelli v. State, 531 So.2d 129 (Fla. 1988).

A. I recall that.

Q. Okay. And do you recall the judge specifically relying upon that testimony and finding the existence of the cold, calculated, and premeditated aggravating factor?

A. No, I don't recall.

Q. Did you object to the admission of that testimony?

A. I don't know.

Q. At the present time, well, considering your knowledge of the law at the time of trial -- if you can recall as a general concept, do you consider the introduction of that testimony improper?

A. Her state of fear?

Q. Yes.

A. Yes. I think it would be objectionable because you can't testify to somebody's else [sic] mental state; you can testify -- Well, generally you can't.

Q. And would that be the, is that the type of testimony which at that time you would have considered it important to object to?

A. Well, yes. Every time you object you think it is important?

(PCR VI 90-91). The circuit court held that the friends' testimony could have been admissible to respond to Rutherford's guilt-phase testimony and that, even without the complained-about testimony, the evidence was sufficient to support both the CCP and the HAC aggravators. (PCR IV 691-92). The court also stated: "Any alleged deficiency in counsel's [sic] performance for failing to object was not serious enough to deprive Mr. Rutherford of a fair

trial. Any error was not so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment." (PCR IV 691).

Strickland v. Washington, 466 U.S. 668 (1984), sets out a two-part test for deciding ineffectiveness claims:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. A postconviction movant must make both showings, i.e., both incompetence and prejudice. Id.; Kimmelman v. Morrison, 477 U.S. 365 (1986); Cherry v. State 659 So.2d 1069, 1073 (Fla. 1995) ("The standard is not how present counsel would have proceeded, but rather whether there was both a deficient performance and a reasonable probability of a different result.") (emphasis in original). This standard "is highly demanding." Kimmelman, 477 U.S. at 382. Only those postconviction movants "who can prove under Strickland that they have been denied a fair trial by the gross incompetence of their attorneys will be granted" relief. Id.; Rogers v. Zant, 13 F.3d 384, 386 (11th Cir. 1994) (cases granting relief will be few and far between because "[e]ven if many

reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. This burden, which is petitioner's to bear, is and is supposed to be a heavy one.") (emphasis supplied). Counsel should be presumed competent, and second-guessing counsel's performance through hindsight should be avoided. Strickland v. Washington; Kimmelman; White v. Singletary, 972 F.2d 1218 (11th Cir. 1992); Atkins v. Singletary, 965 F.2d 952 (11th Cir. 1992); White v. State, 664 So.2d 242 (Fla. 1995); Phillips v. State, 608 So.2d 778 (Fla. 1992).

While the standard for a postconviction movant claiming counsel was ineffective is a demanding one, competent counsel must perform at a minimum level, not a maximum one. "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at the trial." White, 972 F.2d 1220; see also Hendricks v. Calderon, 70 F.3d 1032, 1039 (9th Cir. 1995) (Strickland v. Washington requires only minimal competence).

Furthermore, a court considering a claim of ineffectiveness may decide the prejudice component before the performance part of the Strickland v. Washington test. Strickland v. Washington, 466 U.S.

at 697. This is so because "[t]he object of an ineffectiveness claim is not to grade counsel's performance." Id. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." Id. This Court has followed this admonition and held that when a postconviction movant fails to demonstrate prejudice, the issue of substandard performance need not be reached. Breedlove v. State, 692 So.2d 874 (Fla. 1997); Hardwick v. Dugger, 648 So.2d 100 (Fla. 1994); Torres-Arboleda v. Dugger, 636 So.2d 1321 (Fla. 1994); Remeta v. Dugger, 622 So.2d 452 (Fla. 1993); Provenzano v. State, 616 So.2d 428 (Fla. 1993); Kennedy v. State, 547 So.2d 912 (Fla. 1989).

The circuit court first noted that the complained-about testimony could have been admissible to rebut Rutherford's guilt-phase testimony. ({PCR IV 691). Even if admitting that testimony were error, however, the court went on to hold that it "was not so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment." (PCR IV 691). In other words, Rutherford failed to establish the prejudice component of the Strickland v. Washington test.

Rutherford has demonstrated no error in the circuit court's ruling. As the circuit court stated, the friends' testimony could have been admissible. Treacy testified at the evidentiary hearing that the theory of mitigation was to humanize Rutherford "as a good

fellow, good father, good citizen, loyal Marine. . . . Loyal and trustworthy, friendly. . . . The goodness, if you will, of A.D. Rutherford." (PCR VIII 409). As noted earlier, Rutherford testified that he was a friend to elderly people and especially to the victim. Surely, the victim's fear of Rutherford was relevant to rebut the picture that Rutherford tried to paint.[7] See Wuornos v. State, 644 So.2d 1012 (Fla. 1994), cert. denied, 514 U.S. 1070 (1995); Lucas v. State, 568 So.2d 18 (Fla. 1990); Bertolotti v. State, 565 So.2d 1343 (Fla. 1990).

Also, as the circuit court held, even if counsel should have made a different objection to the friends' testimony, Rutherford was not prejudiced by the introduction of that testimony because the CCP and HAC aggravators are supported sufficiently "without resorting to this evidence." (PCR IV 692). In finding that the CCP aggravator had been established, the trial court stated:

> (i) The crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. This aggravating circumstance was proven by the witnesses whom the defendant told of his plan to kill the victim to get her money. The defendant discussed this crime with two or more people and stated to one of them that he would do the crime, but would not do the time. This was further

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[7] Contrary to Rutherford's argument (initial brief at 10-11), this case is not analogous to Dragovich v. State, 492 So.2d 350 (Fla. 1986). This Court held that testimony as to Dragovich's reputedly being an arsonist was reversible error. Here, on the other hand, the friends did not testify as to Rutherford's reputation. Instead, their testimony went only to the victim's reaction to Rutherford and to rebut Rutherford's testimony.

> established by the testimony at the penalty phase of the trial that indicated the victim was deathly afraid of the defendant and had expressed her fear of the defendant and her fear of being alone with him.

(Appendix C).[8] This Court approved those findings:

> Rutherford also argues that this case does not contain the heightened premeditation necessary to support a finding that the killing was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. We disagree. Rutherford apparently planned for weeks in advance to force Mrs. Salamon to write him a large check and then kill her in a manner that would look like an accidental drowning. Except for being able to force her to write the check, he followed his plan to the letter.

Rutherford, 545 So.2d at 856. Thus, it is apparent that this Court found the evidence sufficient to demonstrate CCP without reference to the friends' testimony.

The circuit court did not err in finding no merit to this claim, and this Court should affirm that finding.

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[8] The trial court did not rely on the friends' testimony in finding HAC, and this Court approved that finding. Rutherford, 545 So.2d at 855-56.

ISSUE II

WHETHER THE CIRCUIT COURT PROPERLY FOUND THAT RUTHERFORD FAILED TO PROVE THAT TRIAL COUNSEL WERE INEFFECTIVE REGARDING MENTAL HEALTH MITIGATION.

Rutherford argues that his trial counsel were ineffective for not presenting mental health mitigation and that the circuit court erred in holding that he did not prove that claim. There is no error in the circuit court's findings, and this claim should be denied.

The current issue is a combination of two claims raised in the motion for postconviction relief, claims II (PCR I 54) and XIII. (PCR I 172). The circuit considered the two claims together (PCR IV 692-702). After stating the claim (PCR IV 692), the court discussed the evidence presented at trial (PCR IV 693-94) and at the evidentiary hearing. (PCR IV 694-96). Following these recitations, the court discussed the applicable law regarding mental health experts:

> Under the facts of his case and the applicable law, Mr. Rutherford has failed to establish that the hiring of mental health experts with the sole task of developing available mitigation is a *sine qua non* to effective assistance of counsel. An exhaustive analysis of this issue (especially relative to PTSD evidence) has revealed no applicable, binding precedent supporting such a position. There is no indication in any case contemporaneous with Mr. Rutherford's trial that competent representation of capital defendants at penalty phases in 1986 required the hiring of a mental expert to evaluate a defendant solely for purposes of preparing mitigation, especially when counsel already had two, unchallenged competency/sanity evaluations which included an evaluation of "the mental and

> emotional condition and mental process of the Defendant at the time of the alleged offense, including the nature of any mental impairment and its relationship to the actions and state of mind of the Defendant at the time of the alleged offense". *See paragraph (B), page 3 of the trial order; also see Jackson v. Dugger,* 547 So.2d 1197 (Fla. 1989) and *State v. Sireci,* 502 So.2d 1221 (Fla. 1987). As Mr. Gontarek testified, though it is now a given that such additional evaluations are performed, the standard at the time of trial did not so dictate.
>
> This position is strengthened by the implicit rationale and language of the new Rule 3.202, Fla.R.Crim.P. recently adopted by the Florida Supreme Court and effective January 1, 1996. The rule does not assume a defense mental health expert will be hired for the penalty phase of every capital case, much less that expert testimony of mental mitigation will be presented in every such proceeding. It merely provides a means to "level the playing field" if the State seeks the death penalty and the defendant intends to present expert mental health testimony at the penalty phase.

(PCR IV 697-98) (footnote omitted).[9] The court then applied the standards of Strickland v. Washington and made extensive findings of fact:

> As with the other claims, the review of counsel's performance is guided by *Strickland.* As *Strickland* warns, counsel's conduct is to be evaluated from the surrounding circumstances and counsel's perspective at

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[9] Rutherford argues, contrary to the circuit court's order, that "this Court decided in 1988 that effective representation in 1983 of a capital defendant with known mental health problems required the retention of an independent mental health expert for mitigation purposes." (Initial brief at 34). His reliance on State v. Michael, 530 So.2d 929, 930 (Fla. 1988), to support this statement, however, is misplaced. In Michael this Court held that competent substantial evidence supported the circuit court's holding that, on the facts of that case, Michael's trial counsel was ineffective for not obtaining "the experts' opinions on the applicability of the statutory mental mitigating factors." Id. This Court did not hold that such must be done in every case.

the time, not in hindsight. Such an evaluation shows that the conduct of both counsel fell "within the wide range of reasonable, professional assistance."

Both counsel were comfortable relying on the two evaluations prepared during the first trial. Neither believed it was necessary to order additional mental health evaluations solely for mitigation purposes.

Mr. Gontarek reviewed the two competency/sanity reports, knew they had been admitted into evidence in the prior trial, and believed they were detailed enough. He rejects Mr. Rutherford's post-conviction assertion that a separate evaluation specifically enumerating statutory and non-statutory mitigators was necessary, much less required for competent representation. Mr. Gontarek's position is that mitigation evaluations, separate and apart from competence/sanity evaluations, were not typically done at the time. His position appears credible. Though there are no cases directly on point, as noted above, the contemporary case law did not mandate such an evaluation.

Mr. Treacy, counsel primarily responsible for the penalty phase, said he would hire psychological expert witnesses for mitigation if a psychological evaluation was not available. In Mr. Rutherford's case, Mr. Treacy was aware of the two mental health evaluations discussed above and an interview with a V.A. representative. Mr. Treacy did struggle in distinguishing between a competency evaluation and an evaluation for mitigation purposes, but he has been out of the practice of representing capital defendants for several years. Nonetheless, Mr. Treacy believed the information he had from the two competency/sanity evaluations, his personal observations of the defendant, the prior trial record, and his own investigation made any further evaluations unnecessary.

Mr. Treacy reviewed the two available competency/sanity evaluations for evidence of statutory and non-statutory mitigation factors. Given this expert information, the pre-trial investigation, and his professional experience, if Mr. Treacy saw the defense as a mental health issue and needed an additional expert, he would have hired one. In Mr. Rutherford's case, Mr. Treacy was comfortable with the

information he had and saw no need to hire an additional expert. Having reviewed the two available evaluations, the entire files, and the testimony of Dr. Larson and Dr. Baker, it is difficult to dispute Mr. Treacy's position in light of the *Strickland* standard and the unique facts of this case.

In summary, the post-conviction evidence shows that Mr. Treacy had no personal reservations concerning Mr. Rutherford's competency to proceed to trial or sanity at the time of the offense. The two evaluations were consistent with his perceptions. Although these evaluations were for competency/sanity, they necessarily discussed the pertinent aspects of Mr. Rutherford's mental health. After reviewing these reports and other factors, Mr. Treacy concluded that the presentation of mental health testimony before the jury would not be helpful to Mr. Rutherford. Nonetheless, he did assure that the sentencing judge would have the benefit thereof. This strategy was reasonable under the circumstances especially given Mr. Rutherford's continued insistence on the defense of innocence.

The reasonableness of counsel's decision not to obtain additional mental health evaluations is buttressed by these additional factors:

1. The evaluations by Dr. Larson and Dr. Baker were consistent with the two competency/sanity evaluations. As Dr. Larson said, "I am not saying anything right now that is inconsistent with the evaluations. . . Those evaluations touched upon some of the same factors I touched upon. So they are internally consistent and the focus is simply different."

Regarding the descriptive diagnosis of PTSD, Dr. Larson said of Dr. Medzarian's evaluation:

> "She used a slightly different phrase and used the phrase anxiety disorder associated with Vietnam. And I will use a different label, post-traumatic stress disorder."

2. There is no indication the two available competency/sanity evaluations ignored any "clear indications of mental health problems." *Rose v. State*,

617 So.2d 291, 295 (Fla. 1993), citing *State v. Sireci*, 502 So.2d 1221, 1224 (Fla. 1987). The *Sireci* court had held that a new sentencing hearing is warranted "in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage." *Sireci* at 1224. Mr. Rutherford has not challenged the competency of the evaluations available to trial counsel.

3. Mr. Rutherford has a personality disorder associated with anxiety. His PTSD is classified as severe, not chronic. There is no indication that he has a mental illness, is mentally retarded, or has any organic brain damage. There is no thought disorder or grossly disturbed thinking. In other words, his PTSD is not so severe that it involves serious secondary symptoms such as neurosis or psychosis. It is the more extreme or chronic conditions that lay behind most, if not all, of the cases finding counsel ineffective for not properly investigating the mental health of a defendant.

4. Significantly, Mr. Rutherford's PTSD and alcohol dependency did not disable or keep him from cooperating with trial counsel.

5. Other than possibly mollifying the adverse effects of Mr. Rutherford's trial testimony, expert testimony about his PTSD and alcohol dependency would not have given the jury or judge much helpful information they did not already have. As has been reiterated numerous times, this is especially true given Mr. Rutherford's insistence on the defense of innocence.

To finish discussion on his Claim XIII, the failure of counsel to obtain a mental health expert solely for the purposes of developing mitigation did not constitute ineffective assistance of counsel under *Strickland*. The absence of such an expert did not significantly inhibit counsel's ability to present reasonably available statutory and non-statutory mitigation and other evidence consistent with the defense strategy. As with the other claims, any failure to present available mitigation was due primarily to Mr. Rutherford's refusal to cooperate with

> trial counsel and the strategy dictated by his persistent claim of innocence.
>
> Even if Mr. Rutherford had allowed trial counsel the same freedom he has allowed C.C.R. to fully prove the mental health mitigation presented by Dr. Larson, Dr. Baker, and other witnesses at the post-conviction hearing, this Court finds no reasonable probability that the jury's recommendation or the judge's sentence would have differed. As stated earlier, the two possible statutory mental health mitigators were not established by Mr. Rutherford, and most of the non-statutory mitigation brought by these witnesses was before the trial jury and judge. *Rose v. State*, 617 So.2d 291, 295 (Fla., 1993).

(PCR IV 698-702) (footnotes omitted). The record supports the circuit court's findings and conclusions.

Prior to his first trial Philip Phillips, a psychiatrist, and Barbara Medzerian, a psychologist, examined Rutherford to determine his competency to stand trial. Rutherford introduced their reports into evidence at the evidentiary hearing as defendant's exhibits 1 and 2, respectively. (PCR VI 82). Both reports recite details from Rutherford's life, including his family history, his military service in Vietnam, his medical problems that he attributed to Agent Orange, and his drinking and treatment at a local hospital among other things. Both Phillips and Medzerian concluded that Rutherford was competent both at the time of the crime and to stand trial.

At the evidentiary hearing Treacy testified that the Public Defender's Office frequently hired Dr. Phillips to examine its clients. (PCR VI 79). Treacy also confirmed that it was office

practice to obtain the assistance of a mental health expert if a mental health issue arose. (PCR VI 106). He was comfortable with Dr. Phillips' report; his office used him frequently because "he was a person who if he was to favor one side or the other always favored insanity, the low I.Q. Whatever you got if you are a public defender get Dr. Phillips." (PCR VI 107). Treacy introduced the reports for the trial court's consideration in mitigation even though he and Rutherford had a difference of opinion about introducing psychological testimony. (PCR VI 111).

Treacy did not seek further mental health examinations because Rutherford

> always acted rationally. That is, I'll say normally, normally.
>
> Certainly he was not insane. And certainly he had a low intelligence level. But there wasn't any indication from all of my discussions with him, discussions with his family, discussions with his friends, co-workers, that there was any mental impairment that would go to convince a jury that he was so impaired that he needed to be, that this was a big factor.
>
> Again, I think I mentioned it the other day, we had Dr. Phillips' report. And Dr. Phillips if anything was quite defense minded. In my opinion. And [I] used those reports as the basis for mitigation.

(PCR VIII 415). In Treacy's opinion humanizing Rutherford was the best way to mitigate his sentence and mental health testimony would not have been as effective. (PCR VIII 432; VIII 434-35).

Gontarek testified that he and Treacy discussed Phillips' and Medzerian's reports and "concluded that they were not favorable."

(PCR VI 32). He would have considered retaining a mental health expert if he thought it would help (PCR VI 33), but Rutherford gave no indication that such would be helpful. (PCR VI 35). Gontarek also testified that at the time of Rutherford's trial little emphasis was put on introducing psychological testimony at a penalty phase. (PCR VI 36). A seminar that he attended emphasized trying to bring in family members and showing that the defendant did not have a violent past. (PCR VI 37). Collateral counsel asked whether the standard practice in the mid 1980's involved using a mental health expert in every capital case, and Gontarek responded: "Not unless it had to do with the competency to stand trial. And nowadays it is like a given that you have one. But back then it wasn't." (PCR VI 39).

As the circuit court pointed out, Rutherford has now been examined by two psychologists, James Larson and Robert Baker. Both concluded that Rutherford has PTSD (PCR VI 184; VII 338), and Larson opined that Rutherford "was likely under the extreme emotional disturbance" (PCR VII 194) and "was in extreme emotional stress." (PCR VII 195).[10]

That Rutherford has now obtained experts who conclude that he had serious mental problems at the time of the crime does not mean

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[10] Dr. Baker did not testify that any of the statutory mental mitigators applied. Moreover, this Court has held that "expert testimony alone does not require a finding of extreme mental or emotional disturbance." Foster v. State, 679 So.2d 747, 755 (Fla. 1996).

that his trial counsel were ineffective. Turner v. Dugger, 614 So.2d 1075 (Fla. 1992); Engle v. Dugger, 576 So.2d 696 (Fla. 1991); Provenzano v. State, 561 So.2d 541 (Fla. 1990); Correll v. Dugger, 558 So.2d 422 (Fla. 1990). Instead, the reasonableness of counsel's actions, i.e., not seeking and obtaining favorable mental health reports, must be assessed. See Strickland v. Washington, 466 U.S. at 690. In making this assessment counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. Moreover, if a defendant gives "counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Id. at 691; Thompson v. Wainwright, 787 F.2d 1147 (11th Cir. 1986). Applying these standards, it is obvious that Rutherford's counsel performed in an acceptable manner.

This is not a case where counsel failed to prepare. Counsel considered the previously prepared mental health reports and Rutherford's demeanor and behavior. See Bush v. Singletary, 988 F.2d 1082 (11th Cir. 1993); Melendez v. State, 612 So.2d 1366 (Fla. 1992); Mills v. State, 603 So.2d 482 (Fla. 1992); Johnston v. Dugger, 583 So.2d 657 (Fla. 1991). They concluded, however, that humanizing him would be more likely to influence the judge and jury to mitigate his sentence. Rutherford has failed to show that this

was an unreasonable choice. Middleton v. State, 465 So.2d 1218, 1224 (Fla. 1985) ("Given the inconsistency between the psychological evidence and the defense at trial, the strategy here was not only reasonable, but was the only logical approach."). This claim, in reality, is just a disagreement with trial counsel's choices as to strategy. Indeed, Gontarek's statement that mental health mitigation was not emphasized in 1986 while it is now demonstrates that the instant claim is the type of second-guessing through hindsight that Strickland v. Washington condemns. Rutherford did not demonstrate that every counsel, to be effective at the time of his trial, would have presented the testimony of mental health experts. Moreover, when questioned by the circuit court, Larson stated that Rutherford's refusal to cooperate with counsel was not caused by Rutherford's PTSD. (PCR VII 233).

Rutherford has failed to meet the two-part test of Strickland v. Washington. His counsel performed competently and made reasonable choices. The substandard performance required to show the first part of the test has not been proved. Moreover, Rutherford has not proved that counsels' performance prejudiced him, the second part of the test. See Bertolotti v. State, 534 So.2d 386 (Fla. 1988).

The circuit court's findings are supported by competent substantial evidence and should be affirmed. Because there is no merit to this issue, it should be denied.

ISSUE III

WHETHER THE CIRCUIT COURT CORRECTLY FOUND THAT TRIAL COUNSEL RENDERED EFFECTIVE ASSISTANCE AS TO MITIGATING EVIDENCE.

In this issue Rutherford argues that counsel were ineffective because they "failed to conduct a reasonable statutory and non-statutory mitigation investigation." (Initial brief at 50). As the circuit court found, however, there is no merit to this claim.

Rutherford raised this claim in issue II of his postconviction motion. (PCR I 15-54; II 291 et seq.). The circuit court made the following findings on this claim:

> Mr. Rutherford alleges in Count II that his counsel breached their duty to conduct a reasonable investigation by failing to investigate, develop, and present substantial mitigating evidence about Mr. Rutherford's harsh childhood and Vietnam war experience. As with Claim I, any failure to present additional mitigating testimony about Mr. Rutherford's childhood or Vietnam War record is more the responsibility of Mr. Rutherford than his counsel. He refused to help his counsel develop mitigation. Mr. Rutherford insisted on pursuing the defense of innocence and that he was not present at the scene of the murder. He maintained this position of innocence and refusal to cooperate throughout the trial, including the penalty phase, despite:
>
> 1. The overwhelming evidence of his guilt and the lack of any viable alibi or other evidence giving credibility to his claim of complete innocence and being framed for these charges;
>
> 2. Knowing that the prior jury had rejected his claim of innocence, had found him guilty, and recommended a sentence of death;
>
> 3. The second jury had just found him guilty as charged; and,

4. The stern and repeated recommendation of counsel to Mr. Rutherford of the need to obtain detailed records of his war time experience and other available mitigation. As Mr. Treacy testified: "I remember chewing him out unmercifully. . . telling him things like. . . 'This is your life at stake and we are the people that are going to do something or not be able to do something'. . . What triggered that. . . was just. . . right up to trial a failure of complete cooperation."

Under the circumstances of this case, no claim of ineffectiveness can be sustained. Mr. Rutherford preempted the strategy options of his attorneys. Once the jury reached its verdict of guilty, the penalty phase strategy could have been modified to put on much of the evidence of Mr. Rutherford now claims should have been presented. The evidence he now proffers (which does not establish innocence, but mitigation in hopes of avoiding the death penalty) could have been presented. Mr. Rutherford's decision to maintain his absolute innocence through the penalty phase preempted counsel from pursuing a strategy which would have including the elements he now insists upon. As Mr. Treacy testified in response to the Court's question on this point: ". . . you may put on remorse if the client would agree. But Mr. Rutherford adamantly denies and right up to the present day any guilt. So that would affect your strategy."

If one "eliminates the distorting effect of hindsight" as *Strickland* requires, fairly assesses these attorneys' performance under the circumstances at the time, and indulges a "strong presumption" that their conduct falls within the wide range of reasonable, professional assistance, one must deny Mr. Rutherford's attempt to shift the responsibility for the strategy chosen. As Justice Wells recently cautioned: "Great weight should be given to what the defendant wants to do. A Court should not exchange its judicial role for that of a guardianship role. This Court should respect the right of a competent defendant to decide his own strategy. This also requires a respect for the consequence of that strategy." Mr. Rutherford understood the consequences of failing to cooperate with counsel in developing mitigation and should not be allowed to shift the burden of his choice.

Mr. Rutherford's obstructionism during trial preparation and his consistent maintenance of complete innocence throughout the entire process severely limited counsel's ability to argue available mitigators. One of the weightiest portions of Mr. Rutherford's claim is the alleged failure to investigate and present evidence of Mr. Rutherford's Vietnam War record. Counsel knew this record was available and asked Mr. Rutherford to execute the appropriate releases to obtain these records. He refused. He did not want it discussed, regarded it as irrelevant, and felt counsel did not need it. He told them not to get involved in his Vietnam history. Mr. Treacy did not believe he would be able to get this very pertinent information to the jury until Mr. Rutherford surprisingly opened up on the stand. Counsel elicited enough of Mr. Rutherford's wartime experiences to give the jury a good idea of that event. As Dr. Gilmartin testified, the Defendants's penalty phase description of his exposure to combat in Vietnam was "accurate and honest. . . a very accurate reflection of the sort of things that would stick in a young rifleman's mind. It was clear that he viewed that as an unpleasant experience. . ." Mr. Treacy tried to elicit even more information at trial, but the Defendant stopped the inquiry.

Mr. Rutherford also claims his counsel should have elicited more testimony about his harsh, abusive, and impoverished childhood. The evidence presented at hearing was not conclusive of an abusive situation. In fact, except for the testimony of his brother William, the other family members portrayed an essentially healthy family life quite distinct from the seriously dysfunctional family portrayed in the motion. Times were hard, and his father once had a problem with alcohol, but, given the time and circumstances of Mr. Rutherford's childhood and conflicting stories from within his own family, it is difficult to say that this childhood was in fact abusive. As with his Vietnam experience, Mr. Rutherford had the opportunity to provide evidence of a harsh childhood to counsel for presentation as mitigation, but he preempted any such defense.

Additionally, evoking images of an abusive childhood and debilitating war experience would have been inconsistent with the reasonable penalty phase strategy

developed by counsel. Given the limitations created by Mr. Rutherford's refusal to assist in a viable defense, counsel made reasonable tactical decisions with respect to the presentation of mitigating evidence about Mr. Rutherford's entire background inclusive of his childhood and war record.

Counsel made the decision to focus on the solid, "Boy Scout" character traits of Mr. Rutherford. The theory was that Mr. Rutherford was a "good 'ol fellow" who must have just lost it. That he really was a good guy. The attempt was to make him look as human as possible, to focus on his positive traits (e.g. no prior criminal record, no history of violence, a loyal Marine with exemplary service in Vietnam, a good family man with [four] children several of whom [were] deformed possibly as a result of the Defendant's exposure to Agent Orange, a loyal church member, a hard worker who struggled admirably through difficult marital problems, etc.) The selection of mitigation witnesses was based on who could testify to these positive character traits. Some suggested witnesses were rejected by counsel because they would be harmful to this theory.

To elicit testimony Mr. Rutherford now argues should have been presented (as asserted here and in Claim XIII) would have compromised the entire defense strategy. It does not harmonize with the other mitigating evidence and possibly would have destroyed any credibility Mr. Rutherford may still have had with the jury. *Rose v. State*, 617 So.2d 291, 294. *Strickland* admonishes against collateral appeal courts second-guessing trial strategies. *Rose* holds that, just as in the guilt phase, "counsel is entitled to great latitude in making strategic decisions." *Rose v. State*, 21 Fla.L.Weekly S109, 110 (Fla., March 7, 1996). Under this standard and the circumstances of the case as it existed in 1986, counsel's strategic decisions should not be second-guessed. Counsel made a reasonable investigation into the possible mitigation related to Mr. Rutherford's childhood and Vietnam War record. Given Mr. Rutherford's lack of cooperation and insistence on his complete innocence, counsel made reasonable tactical decisions regarding the presentation of the mitigation evidence they were able to ferret out.

(PCR IV 685-90) (footnotes omitted). The record supports the circuit court's findings.

At the evidentiary hearing Treacy stated: "The theory on mitigation was to make him look as human as possible. Knowing the jury has convicted him and he is now a convicted person try to humanize him and try to humanize him as a good fellow, good father, a good citizen, loyal Marine, a loyal-not boy scout, loyal church member. Loyal and trustworthy, friendly. The same thing but the strategy was the humanization and the goodness, if you will, of A.D. Rutherford." (PCR VIII 409). Gontarek agreed with Treacy's assessment of the theory of mitigation: "That he had no prior criminal history and was just, you know, if he was found guilty that he was just sort of a good ol' fellow that must have lost it or something. And that was what we were trying to go on. And really he was just a good guy that served in Vietnam and had no prior felonies and had a family. And was a worker and had some kids and some had disabilities, and maybe had some marital problems and that kind of thing if I recall." (PCR VII 392). The record on appeal supports Treacy and Gontarek's testimony.

During the penalty phase, Rutherford's father testified that Rutherford was "[j]ust a typical country boy" who grew up in a large family on a farm (DAR V 833), that Rutherford helped on the farm and was always a hard worker and loyal to his family (DAR V 834-35), that he liked to hunt and fish (ROA 835-36), and that

Rutherford was a carpenter and got along well with his siblings. (DAR V 835). He also testified that Rutherford was a lot more nervous and jittery after serving in Vietnam and that his son would not talk about his service experiences. (DAR V 837-38).

Joyce Coleman, Rutherford's younger sister, also testified on Rutherford's behalf. She testified that Rutherford looked after her at school (DAR V 840-41), that he liked to hunt and fish, among other things (DAR V 841-42), and that he worked on the family's farm. (DAR V 842). Coleman also testified that Rutherford was nervous and jittery on his return from Vietnam and that he would not talk about his experiences there. (DAR V 844-45). She described Rutherford as a hard worker (DAR V 846) and stated that, when their father left the family "a time or two," their mother had to take in washing and ironing. (DAR V 847). Coleman was close to Rutherford and did not consider him a trouble maker. (DAR V 848).

Rutherford's ex-wife, with whom he was living at the time of the murder, also testified at the penalty phase. They married in 1970 when Rutherford was discharged from service. (DAR V 850). She described how, for the first three years of their marriage, Rutherford would awaken at night in a cold sweat that he attributed to his experiences in Vietnam. (DAR V 852-53). She also talked about how Rutherford helped with the children and around the house and characterized him as a hard worker and a good provider. (DAR V 853-56). She talked about their concern that Agent Orange might

be responsible for their childrens' health problems (DAR V 856-57) and identified a petition signed by 250 people that asked for Rutherford's release on bond. (DAR V 857-60).

Frank Kolb, the father-in-law of one of Rutherford's sisters, testified that he had known Rutherford for thirty years and that he had never known Rutherford "to be in any trouble of any kind." (DAR V 861). He saw Rutherford frequently before and after his military service and described Rutherford as being more nervous after Vietnam. (DAR V 862). He thought that Rutherford's reputation in the community was good and that Rutherford was honest and a hard worker. (DAR V 863-64).

Rutherford himself talked about working on the farm and, in reference to his sister's stating that their father had left, testified that he and an older brother took care of the family. (DAR V 867-68). He confirmed that his mother took in washing and ironing and stated that he did not hold the past against his father. (DAR V 869). Rutherford talked about his work before entering service and stated that he liked to hunt and fish. (DAR V 870). After describing his service in Vietnam (DAR V 872-79), Rutherford talked about Agent Orange, blaming it for his childrens' health problems, and how he had appointments set up to investigate further regarding that chemical. (DAR V 879-81, 883-84). He also attributed his nightmares and cold sweats to Vietnam (DAR V 884-85), but said that he did not resent his country. (DAR V 885).

At the evidentiary hearing Rutherford's mother testified that he was always a good worker who helped on the farm and around the house. (PCR VII 238-41). Mrs. Rutherford did not press him to speak of his experiences in Vietnam, and Rutherford seemed to be about the same as before when he returned. (PCR VII 242-43). She described how Rutherford took care of his children when their mother was gone and how his wife's leaving upset Rutherford. (PCR VII 243-47). Mrs. Rutherford also stated that her husband drank for about ten years and that he sometimes left the family for "a day or two; sometimes not even that" (PCR VII 248) and that Mr. Rutherford's leaving upset the children. (PCR VII 248-49). According to his mother, Rutherford also drank some, but he always worked and took care of his family. (PCR VII 249).

Rutherford's father also testified at the evidentiary hearing and repeated much of the testimony that he gave at the penalty hearing, i.e., that Rutherford was a good worker and provided for his family (PCR VII 259), that he helped on the farm, liked to hunt and fish, and worked as a carpenter (PCR VII 259-60), and that Rutherford was more nervous when he returned from Vietnam. (PCR VII 261-62). Mr. Rutherford described how he and his wife helped Rutherford with the children when Rutherford's wife left them (PCR VII 263) and stated that Rutherford drank a little more after Vietnam, but could "not say it was a problem." (PCR VII 264). Mr. Rutherford acknowledged that he drank when he was younger and that

he left his family but he "never went off and stayed too long" (PCR VII 266) and he quit drinking in 1962. (PCR VII 264).

Earl Rutherford, a younger brother, described growing up on the farm and, when asked about the family, stated that "we never had a whole lot but what we had we all shared it. But as far as upbringing and all we had some good bringing up." (PCR VII 270). When asked how his father's leaving made him feel, Earl responded that the children missed him, but that he never stayed away more than a couple of days. (PCR VII 271). He could only remember two or three such absences when he was "real young." (PCR VII 271). Earl also stated that the children would do chores on other farms and give the money they made to their mother, who sewed, ironed, and babysat for people, while their father worked at a dairy and in construction as well as farming. (PCR VII 273-74). According to Earl, Rutherford was different when he returned from military service; he was fidgety and had headaches and drank more. (PCR VII 275-78). Rutherford also had nightmares. (PCR VII 279). Earl also stated that Rutherford's wife's leaving upset his brother (PCR VII 280), but that the marital troubles did not cause Rutherford to drink more. (PCR VII 281).

William Rutherford, an older brother, described growing up on the farm and called his brother a good worker. (PCR VII 284-86). He stated that their father left them sometimes, which upset the children and that he fought and argued with their mother and was

rough on the children. (PCR VII 286-88). He described Rutherford as agitated and unable to remain still after his military service (PCR VII 289-90) and stated that Rutherford drank more after his return but then quit drinking. (PCR VII 291). William said that Rutherford's wife's leaving affected Rutherford badly, but that he treated the children well and took care of them. (PCR VII 293). On cross-examination William stated that he did not want to be involved in his brother's trial. (PCR VII 298-99).

Rutherford's oldest children, Paul and Regina, also testified. Paul stated that his parents fought and his mother left several times and that his father and grandmother took care of the children. (PCR VII 302-03). Paul also described his father as having headaches and nightmares. (PCR VII 305-06). Regina's testimony was similar to her brother's. (PCR VII 309-16).

Buddy Morrell testified that he had known Rutherford for seventeen years and considered him "the best friend I ever had." (PCR VII 318). Morrell and Rutherford spent a lot of time together, and Rutherford helped him and was kind to elderly people. (PCR VII 318). He knew that Rutherford's wife was running around and that Rutherford drank, but said that Rutherford always took care of his children and was a good father. (PCR VII 319-21).

At the hearing Rutherford argued that counsel failed to conduct an adequate investigation because, if the investigation had been adequate, the witnesses at the evidentiary hearing would have given

the same testimony at the penalty phase. See PCR VIII 408 where collateral counsel stated: "That there is evidence available and that's the evidence that we have presented to the court, which should have been presented and would have been presented had counsel performed competently." This complaint ignored the evidence that was presented, i.e., that Rutherford was a hard worker who loved his children and family, who was raised in a poor, rural environment, and who had been affected by his military service in Vietnam. Rutherford claims that evidence should also have been presented showing that his father was a drunken wife-beater and that he drank, too. Trial counsel's decision to present Rutherford in the best light possible was a reasonable strategic choice. This tactic obviously did not work because Rutherford was sentenced to death. Rutherford, however, cannot reverse course now and claim that a bad background should have been presented as mitigation through the use of hindsight. White v. Singletary, 972 F.2d 1218 (11th Cir. 1992); Puiatti v. Dugger, 589 So.2d 231 (Fla. 1991).

As this Court stated: "The fact that a more thorough 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." Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla.), cert. denied, 479 U.S. 972 (1986). Therefore, the mere fact that other family members could

have been called does not demonstrate ineffectiveness. Devier v. Zant, 3 F.3d 1445 (11th Cir. 1993); Atkins v. Singletary, 965 F.2d 952 (11th Cir. 1992); Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987); Bryan v. Dugger, 641 So.2d 61 (Fla. 1994); Ferguson v. State, 593 So.2d 508 (Fla. 1992); Engle v. Dugger, 576 So.2d 696 (Fla. 1991). Moreover, Treacy's testimony at the evidentiary hearing establishes that more than a minimal investigation was made.

Among other things, Treacy recounted why he rejected two men who knew Rutherford as character witnesses. The first, a co-worker, told Treacy that Rutherford "never stole anything big from his employers; he would limit his thefts to small things like lightbulbs." (PCR VIII 405). The second, Jay Courtney, told Treacy that he felt Rutherford had cheated him and that he did not have anything positive to say about Rutherford. (PCR VIII 410-11). Contrary to collateral counsel's objection that "[w]ho Mr. Treacy rejected is irrelevant unless Mr. Rutherford contends that he should have called him" (PCR VIII 405), the reasons for rejecting potential witnesses constitutes trial strategy. Treacy's discussion of these two potential witnesses and his reasons for rejecting them show that counsel conducted more than a perfunctory investigation. That more and more favorable witnesses were not found does not mean that counsel did not look for such witnesses. Collateral counsel's contention that Treacy's rejection of possible

witnesses was irrelevant - "Why he made a strategic decision to reject a witness that we have not contended needed to be called is not relevant to these proceedings" (PCR VIII 408) - is simply incorrect.

Defense counsel persisted and contacted Rutherford's family despite his telling family members not to cooperate. (PCR VI 77; 128). As Treacy testified, they also contacted people such as Rutherford's co-workers and Jay Courtney. That the witnesses at the evidentiary hearing said they would have testified if asked to do so carries little weight. Collateral counsel did not ask defense counsel why Mrs. Rutherford was not called. The brothers knew that Rutherford was being retried, but made no effort to help. It is mere speculation that the children, given their ages, would have been called or that their current testimony would have more helpful than their mother's.

The record also supports the circuit court's conclusion that Rutherford impeded the presentation of evidence regarding his military service. Treacy was a retired lieutenant colonel who served twenty-six years in the navy and air force. (PCR VI 96). As such, he knew the value of military service and that such could be used in mitigation. (PCR VI 97). Treacy tried to convince Rutherford that his military records could be used in mitigation, but "Mr. Rutherford did not want me to use any military background or record, and would not discuss Vietnam service or his marine

corps service in general. And he just turned it off." (PCR VI 98).

Bill Graham, the defense investigator, corroborated Treacy's testimony. The defense team asked Rutherford to help them gather his military records. Rutherford, however, "said that we had everything that we needed and refused to get any releases or anything for any other military information." (PCR VI 131-32). Graham reiterated that Rutherford "did not want us to get into the Vietnam situation at all." (PCR VI 136). Rutherford spoke some of his military service, and Graham sent another investigator to have Rutherford sign releases for his records. (PCR VI 136). Rutherford, however, refused to cooperate. (PCR VI 136). Graham described Rutherford as "very, almost hostile as far as wanting any help" (PCR VI 137) and stated that he "had no cooperation from him." (PCR VI 139).

Gontarek's experiences with Rutherford mirrored those of Treacy and Graham. Gontarek stated that the defense team "got very little cooperation from Mr. Rutherford" in preparing for both the guilt and penalty phases of trial. (PCR VII 388). He also stated that the defense made a strategic decision to present evidence of Rutherford's military service, but that Rutherford hindered that presentation. (PCR VIII 398). Gontarek and Treacy tried to get Rutherford's military records released, but "he refused to help us do that, sign any kind of release because he did not want it

discussed." (PCR VIII 399). In response to collateral counsel's questions, Gontarek agreed that evidence about Rutherford's service in Vietnam was presented. (PCR VIII 401). When counsel asked if the presentation of evidence "was limited only by how much information you had obtained prior to trial," Gontarek responded: "We had to dig it all up ourselves because Mr. Rutherford would not help us." (PCR VIII 402).

Treacy testified that it was standard practice to discuss possible mitigation with clients, but that Rutherford refused to do so. (PCR VI 98). As Treacy testified at the evidentiary hearing:

> As a matter of fact the first time that Mr. Rutherford ever opened up to questions about his Vietnam service was when he was on the stand in mitigation. And I about fell off my chair because these were the very questions that he refused to answer to me in the months of preparation. And here he was answering the very questions that I wanted him to ask [sic]. And, of course, the old rule of: Do not ask the question unless you know the answer, I threw it out and went with it full bore best I could. But then again I did not have a set of notes from interviews with Mr. Rutherford because he would not discuss it prior to the trial.

(PCR VI 99). As the record of the penalty phase shows, Rutherford answered questions about his service in Vietnam (DAR V 874-79), but abruptly stopped, stating: "That's enough of that. I don't care to talk about that." (DAR V 879). He continued to respond, however, to Treacy's questions about Agent Orange (DAR V 879-81, 883-84) and the service medals and ribbons he received (DAR V 882-83) and said that he thought his experiences in Vietnam caused his

nightmares and cold sweats. (DAR V 884-85). Treacy also testified that, in spite of Rutherford's refusal to cooperate or to sign a release, he asked Rutherford's family to give him any documents relating to Rutherford's military service that could be found. (PCR VI 99). The family gave Treacy a copy of Rutherford's honorable discharge, and he introduced that document into evidence at the penalty phase. (DAR V 882). Treacy reiterated that the defense "obtained the forms to release his military records and all he had to do was sign them. But he would not sign them." (PCR VI 104-05).

At the evidentiary hearing John Gilmartin, a professor of military history, testified based on his reading of materials provided to him by collateral counsel, including Rutherford's military records, the command chronologies set out in the original and amended motions, and Rutherford's penalty-phase testimony. (PCR VI 44). It is doubtful that the voluminous command chronology material would have been admissible at the penalty phase because of its lack of reference to Rutherford as an individual. Be that as it may, there can be no charge of ineffectiveness for not presenting the testimony of someone such as Gilmartin.

Gilmartin's testimony is of dubious value as mitigation. He described Rutherford as "a marginally qualified marine that in my judgment should never have been in uniform." This less than complimentary assessment would not have aided the defense's attempt

to portray Rutherford in the best light possible. (PCR VI 54). Furthermore, Gilmartin conceded that Rutherford's testimony was an accurate portrayal of service in Vietnam:

> His descriptions of his exposure to combat struck me as accurate and honest, it strikes me in particular as a very accurate reflection of the sorts of things that would stick in a young rifleman's mind.
>
> It was clear that he viewed that as an unpleasant experience, and it would be rather surprising if he didn't.

(PCR VI 56). Gilmartin also agreed that Rutherford's penalty-phase description of the DMZ as "It is hell" (DAR V 875) was "certainly an accurate depiction indeed." (PCR VI 58). These are matters of general knowledge, for which an "expert's" testimony is superfluous.

A defense attorney has the duty to investigate, but decisions regarding investigations "must be directly assessed for reasonableness, in all circumstances, applying a heavy measure of deference to counsel's judgments." Strickland v. Washington, 466 U.S. at 691. Here, counsel were willing to investigate Rutherford's military service, but Rutherford actively obstructed that investigation by refusing to sign a release for his records. Counsel cannot be considered ineffective for failing to obtain those records in such circumstances.

As stated in Strickland v. Washington: "When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer .

. . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695; Bolender v. Singletary, 16 F.3d 1547 (11th Cir. 1994). The trial court found that three aggravators had been established, i.e., HAC, CCP, and felony murder (robbery)/pecuniary gain, and this Court affirmed those aggravators. Rutherford, 545 So.2d at 855-56. The evidence Rutherford now claims should have been presented would not have changed the result in light of the three strong aggravators. Mendyk v. State, 592 So.2d 1076 (Fla. 1992).

James Larson, a psychologist, diagnosed Rutherford as having post-traumatic stress disorder (PTSD), alcohol dependence, and "a personality disorder not otherwise specified." (PCR VI 184). The court questioned Larson as to whether any or all of those disorders would have prevented Rutherford from cooperating with counsel. (PCR VII 229-33). Larson responded that he did not "think that the impairment would rise to that level . . . . it would predispose him not to cooperate, but it is not so flagrant that he can not." (PCR VII 233).

Thus, apparently, Rutherford could have cooperated with counsel and signed a release for his military records. He did not, however, and his subsequent cooperation with collateral counsel does not show that trial counsel were ineffective. Instead, counsel used their best efforts to find and present mitigating evidence in spite of Rutherford's lack of cooperation. "Counsel's

actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Strickland v. Washington, 466 U.S. at 691.

Rutherford showed neither substandard performance nor prejudice, let alone both, in regards to the mitigating evidence presented at his penalty phase. Compare, e.g., Mills v. Singletary, 63 F.3d 999, 1024-26 (11th Cir. 1995) (counsel made a thorough investigation and the decision not to introduce more evidence was reasonable); Bush v. Singletary, 988 F.2d 1082, 1091 (11th Cir. 1993) (through his investigation counsel was aware of Bush's background); Card v. Dugger, 911 F.2d 1494, 1508-12 (11th Cir. 1990) (counsel was aware of Card's background and that northwest Florida juries did not consider a deprived childhood to be worth much in mitigation); Knight v. Dugger, 863 F.2d 705, 749-52 (11th Cir. 1988) (counsel did not abandon Knight even though he told them not to use the evidence they wanted); Clark v. Dugger, 834 F.2d 1561, 1567-68 (11th Cir. 1987) (counsel conducted a reasonable investigation and made a tactical decision not to present some of the available evidence); Routly v. State, 590 So.2d 397, 401-02 (Fla. 1991) (counsel conducted little investigation, but evidence was not truly mitigating and would not have changed result), with Blanco v. Singletary, 943 F.3d 1477, 1503 (11th Cir. 1991) (the decision "not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels'

eagerness to latch onto Blanco's statements that he did not want any witnesses called"); Rose v. State, 675 So.2d 567, 572 (Fla. 1996) ("counsel never attempted to meaningfully investigate mitigation"); Cherry v. State, 659 So.2d 1069, 1074 ("Counsel made virtually no attempt to present evidence or argue mitigating circumstances;" allegations sufficient to require evidentiary hearing); Hildwin v. Dugger, 654 So.2d 107, 109-10 (Fla. 1995) (counsel's "investigation was woefully inadequate" and prejudiced Hildwin); Deaton v. Dugger, 635 So.2d 4, 8-9 (Fla. 1993) (counsel presented nothing in mitigation). The circuit court was correct in finding that Rutherford did not demonstrate that trial counsel were ineffective regarding the presentation of mitigating evidence. That court's findings should be affirmed, and this issue should be denied.

ISSUE IV

WHETHER THE CIRCUIT COURT PROPERLY HELD THE MISTRIAL/DOUBLE JEOPARDY CLAIM TO BE PROCEDURALLY BARRED.

Rutherford argues that the circuit court erred in summarily denying his claim that retrying him after a mistrial constituted double jeopardy. No error occurred because this claim is procedurally barred.

Rutherford raised this claim on direct appeal, and this Court found no error in retrying Rutherford. Rutherford, 545 So.2d at 855. Postconviction proceedings are not to be used as a second appeal, and, because Rutherford raised this issue on direct appeal, it is now procedurally barred. Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995); Medina v. State, 573 So.2d 293 (Fla. 1990). The circuit court, therefore, correctly found this claim to be procedurally barred, and this Court should deny this issue summarily.

Rutherford complains that the court refused to allow him to question Gontarek about the double-jeopardy issue (initial brief at 76), but the court properly refused to permit such questioning. (PCR VI 30-31). This claim is issue XV in the motion for postconviction relief. (PCR I 177-81). No allegation of ineffectiveness on counsel's part is included in issue XV.

A claim not raised in a postconviction motion and presented to the circuit court is procedurally barred and cannot be raised on

appeal. Doyle v. State, 526 So.2d 909, 911 (Fla. 1988). This issue was fully litigated on direct appeal, and barring it from consideration now is neither "intellectually dishonest" nor "error". (Initial brief at 76).

ISSUE V

WHETHER THE CIRCUIT COURT CORRECTLY FOUND NO INEFFECTIVENESS AS TO THE GUILT PHASE.

In this issue Rutherford complains that the circuit court erred by denying his claims that counsel were ineffective at the guilt phase. He also argues that the court erred in denying his eleventh-hour public records claim. There is no merit to this issue.

This claim is issue I in the postconviction motion and contended that counsel were ineffective at the guilt phase for failing to: 1) investigate and prepare for the expert's testimony matching Rutherford's palm print with a print found in the victim's bathroom; 2) investigate Rutherford's claim that he obtained the money he had legitimately; 3) review prior statements and testimony of witnesses to prepare for cross-examination; and 4) pursue an intoxication defense. (PCR I 6-11; II 288-91). Although granted an evidentiary hearing on this issue, Rutherford presented little or no evidence to support the subclaims at that hearing

The circuit court made the following findings as to subclaim 1: "No evidence was presented by the Defendant on this issue. In fact, there is no competent record evidence contradicting the State's latent print expert's testimony. The still unrefuted evidence is that the prints found in the bathroom where Ms. Solomon lay slain were Mr. Rutherford's." (PCR IV 678). The record supports this finding. Rutherford asked neither Treacy nor

Gontarek about the prints at the evidentiary hearing. He failed absolutely to support his allegation that consulting a forensic expert would have produced an "adequate" cross-examination of the print expert. (PCR I 10).

As to the third subclaim, reviewing prior statements and testimony, the court held: "No competent evidence was produced by the Defendant on this claim. The record reflects no basis for relief." (PCR 679). A postconviction movant "must allege specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the" movant. Roberts v. State, 568 So.2d 1255, 1259 (Fla. 1990); Kennedy v. State, 547 So.2d 912 (Fla. 1989). This subclaim is merely conclusory and fails to identify what witnesses counsel failed to cross-examine in a minimally competent manner. At the hearing Rutherford never asked either Gontarek or Treacy about this subclaim. Moreover, the claim ignores Gontarek's statement that he reviewed and "had transcripts of the previous trial in which a mistrial was granted in and the depositions taken and I thoroughly reviewed all of those papers and had discussed the case with Mr. Rutherford." (DAR V 928).

On the second subclaim the court made the following findings:

> The responsibility for not discovering available evidence, if any, lies more at Mr. Rutherford's feet than his trial counsel. The essentially unrebutted testimony of trial counsel and their investigator is that Mr. Rutherford was obstinent and obstructioninstic toward them. He not only failed to assist them, but

impeded trial counsel in their efforts to develop a defense. As Mr. Graham, the defense investigator (a Florida Investigator of the Year) stated: ". . . the defendant was very, almost hostile as far as wanting to help." Later, Mr. Graham testified, "I had no cooperation from him." In the preparation for both trials, Mr. Rutherford had the opportunity to provide all the non-expert information he now asserts his counsel should have discovered and presented at trial. Though competent and able to provide this information, he freely chose not to fully assist his trial counsel. In doing so, he willfully limited counsel's ability to assist him.

A contemporaneous case which would have instructed trial counsel of their investigative duties in such circumstances is *Mitchell v. Kemp*, 762 F.2d 886 (11th Cir. 1985), *cert. denied*, 483 U.S. 1026, 107 S.Ct.3248, 97 L.Ed.2d 774 (1987). The *Mitchell* court made the following pertinent points:

> A criminal attorney has the duty to investigate, but the duty to investigate is governed by a reasonableness standard. As stated by the Supreme Court, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes a reasonable investigation unnecessary." (citing to *Strickland*). The reasonableness of a decision on the scope of investigation will often depend upon what information the defendant communicates to the attorney. The Supreme Court has advised that "inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions (citing to *Strickland*). The attorney's decision not to investigate must not be evaluated with the benefit of hindsight but accorded a strong presumption of reasonableness. (citing to *Strickland*). . . When a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made. (citations omitted). Nonetheless, "informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel." (citations omitted). . . "Strategic choices made

> after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigations." (citing to *Strickland*).

Despite an uncooperative client, trial counsel reviewed the entire record of the prior trial, took depositions, interviewed a number of witnesses, obtained or used two psychiatric evaluations, and conducted an investigation of Rutherford's background. Counsel made reasonable investigations or made reasonable decisions that particular investigations were unnecessary. As Mr. Treacy said, "We did not miss a witness that we were aware of from the intake, the initial conference with Mr. Rutherford or subsequent follow-up conferences, or with those of his friends who may give you the name of somebody else that could help. No. We did them all."

The allegation that counsel failed to interview two witnesses available to corroborate the Defendant's testimony regarding the source of cash found upon him or in his possession was unproven. Mr. Rutherford failed to establish that he told counsel about Mr. Pete Nelson or Mr. Winnie Perritt or that they were known or reasonably discoverable by trial counsel.

The Defendant's motion mentions a Mr. Pete Nelson and a transaction in which Mr. Rutherford allegedly sold Mr. Nelson some dogs. Mr. Nelson did not testify at the hearing. No explanation was given by defense counsel for not calling Mr. Nelson or presenting competent evidence about his testimony. The only credible testimony regarding a dog transaction was Mr. Treacy's. He interviewed a Mr. Jay Courtney who acknowledged paying Mr. Rutherford for three dogs. Mr. Treacy elected not to call Mr. Courtney to testify at trial because Mr. Courtney thought the Defendant had cheated him and was "the biggest crook I ever saw."

The second witness cited in the motion was Winnie Perritt. A Mr. Winston Perritt testified at hearing about paying an uncertain sum to the Defendant by check some days prior to the murder. Even if one accepted the Defendant's argument that counsel was deficient for failing to interview and call his witnesses, Mr. Rutherford did not satisfy the second *Strickland* prong.

Failing to call Mr. Perritt did not render the trial result unreliable.

(PCR IV 679-89) (footnotes omitted). The record supports these findings.

At the evidentiary hearing Arron Weston Perritt testified that Rutherford had been building a porch on Perritt's house and that Perritt paid him a couple of days before the murder. (PCR VI 168). Perritt's testimony merely corroborates Rutherford's testimony during the guilt phase of trial that Perritt paid him $275 for building the porch and that he had spent part of that money. (DAR IV 635). During his testimony Rutherford stated several times that he had only $125 put by at the house and less than $10 (that he borrowed from Frank Kolb) on him the day of the murder. (DAR IV 618, 632, 633, 635). Rutherford has not demonstrated how Perritt's testimony would have prevented his conviction. As set out in issue III, supra, the record also supports the court's conclusion about the dog transaction.

The court made the following findings on the claim that an intoxication defense should have been presented:

> This claim must be denied for three basic reasons:
>
> a. As John Gontarek testified, counsel discussed the two available psychological evaluations and, under the circumstances, determined there was no need for mental health expert testimony at the guilt phase.
>
> b. Any such testimony would have been diametrically opposed to the entire defense of the case; a defense strategy dictated by Mr.

> Rutherford. Mr. Rutherford has always maintained he did not do the crime and was not at the scene. In fact, Mr. Rutherford tried to blame the crime on someone else named Aterbury. The guilt phase strategy was based upon this unaltered position of the Defendant. A diminished capacity defense based on alcohol consumption would have been wholly inconsistent with and contrary to the strategy dictated by Mr. Rutherford. Given his insistence that he was not present when the crime was committed and that counsel maintain this defense, there is no merit to this claim.
>
> c. There is no competent evidence Mr. Rutherford was intoxicated or otherwise sufficiently impaired at the time of the crime to the degree counsel should have pursued a diminished capacity defense.
>
> Mr. Rutherford has failed to demonstrate trial counsel's guilt phase performance was deficient as that term is defined in *Strickland*.

(PCR IV 682-83) (footnotes omitted). The record also supports these findings.

The amended motion quotes several statements about Rutherford's drinking on the day of the murder, but none of the people to whom those statements were attributed testified at the evidentiary hearing. Furthermore, Rutherford's counsel did not question Gontarek or Treacy about such a defense. The following exchange occurred during the state's questioning of Gontarek:

> Q: Now, in the area of the defense that you put together in this particular case on the guilt phase aspect of it what was your theory in that regard and what was presented to the jury?
>
> A: That Mr. Rutherford did not do it [and] that somebody else had done it. And he tried to put it off on someone named Aterbury (phonetic) or something like that.

Q: Did any type of diminished capacity, alcohol defense ever come into play with this particular situation?

A: Never. Mr. Rutherford always maintained that he did not do it and was not there.

(PCR VII 391).

As stated in Strickland v. Washington: "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." 466 U.S. at 691. This subclaim ignores Rutherford's insistence that he was innocent and his adamant refusal to consider anything less than a verdict of not guilty. See DAR V 930; cf. Stano v. Dugger, 921 F.2d 1125, 1146 (11th Cir. 1991) ("Even a defendant who hires trial counsel for the purpose of making strategic decisions does not relinquish to his attorney final authority to make fundamental decisions, such as the plea he will enter."); Koon v. Dugger, 619 So.2d 246, 249 (Fla. 1993) (counsel not ineffective for failing to persuade client, who insisted on his innocence, to pursue an intoxication defense); Rose v. State, 617 So.2d 291, 294 (Fla. 1993) ("When a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made")(quoting Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985), cert. denied, 483 U.S. 1026 (1987)). Furthermore, this subclaim ignores the fact that an intoxication

defense would have been inconsistent with Rutherford's claim of innocence. Cherry v. State, 659 So.2d 1069 (Fla. 1995); Remeta v. Dugger, 622 So.2d 452 (Fla. 1993); Engle v. Dugger, 576 So.2d 696 (Fla. 1991); Correll v. Dugger, 558 So.2d 422 (Fla. 1990); Harich v. Dugger, 484 So.2d 1237 (Fla. 1986).

Rutherford failed to demonstrate either substandard performance or prejudice as to this issue. The circuit court's denial of relief should be affirmed.

Rutherford also complains that the court erred in not canceling the evidentiary hearing so that he could pursue further public records requests. (Initial brief at 79-80). There is no merit to this claim.

As set out in the Statement of the Case and Facts, Rutherford filed his motion for postconviction relief in August 1991, and it took almost five years to get the case to an evidentiary hearing. Just prior to the evidentiary hearing, the circuit court quashed a subpoena on the Florida Department of Law Enforcement (FDLE). (PCR VI 4). At the beginning of the hearing Rutherford brought the matter up again and complained that he needed records from FDLE. (PCR VI 6-9). The court responded that an amendment would be allowed if the newly discovered evidence standard were met. (PCR VI 9). After further discussion (PCR VI 9-15), the court adhered to its prior rulings and ordered that the evidentiary hearing would proceed. (PCR VI 15-16). Further discussion ensued (PCR VI 16-

21), and the court agreed with the state's suggestion that the hearing proceed as scheduled because, if truly new evidence were discovered, a subsequent postconviction motion could be filed. (PCR VI 21-24). Later, Rutherford attempted to question an employee of the sheriff's office as to why evidence not introduced at Rutherford's trial had been destroyed. (PCR VI 161-63). The court upheld the state's objection to this testimony that any claim it went to was not included in either the original or amended postconviction motion. (PCR VI 163-66).

Rutherford presented nothing at the hearing and has presented nothing on appeal demonstrating why the evidentiary hearing should have been canceled. The claims that Rutherford tried to present at the eleventh hour were raised too late. If they are pursued, and if truly newly discovered evidence is produced, the claims can be raised in a subsequent postconviction motion. Roberts v. State, 678 So.2d 1232 (Fla. 1996); Swafford v. State 678 So.2d 736 (Fla. 1996); Scott v. State, 657 So.2d 1129 (Fla. 1995). This claim has no merit and should be denied.

As the last subclaim in this issue, Rutherford argues that counsel were ineffective in failing to discover that Jan "Johnson's qualifications as a blood spatter expert at the time of trial were suspect." (Initial brief at 80, footnote omitted). Johnson, an FDLE laboratory analyst, testified at the penalty phase of Rutherford's trial (DAR IV 788), and Rutherford raised this claim

as part of issue II (ineffectiveness at penalty phase) in his original postconviction motion. (PCR I 65-70). He has abandoned all complaints relating to Johnson's testimony except for her qualifications as a blood spatter expert because her "mentor," Judith Bunker, had "fabricated her credentials." (Initial brief at 81). There is no merit to this claim.

Johnson testified at the evidentiary hearing that she attended a one-week seminar on blood stain interpretation taught by Bunker and two other instructors. (PCR VI 150). Based on her training other than that seminar, Johnson would have held herself out as an expert without having taken Bunker's seminar. (PCR VI 154-55). Nothing presented at the evidentiary hearing demonstrated that Johnson's training was inadequate or that her conclusions were incorrect. Rutherford failed to demonstrate either substandard performance or prejudice, let alone both as required by Strickland v. Washington. This claim, therefore, should be denied.

ISSUE VI

WHETHER THE CIRCUIT COURT PROPERLY SUMMARILY DENIED SEVERAL PROCEDURALLY BARRED CLAIMS.

In its initial order on Rutherford's postconviction motion the circuit court directed that an evidentiary hearing would be held on the pure ineffective assistance claims, issues I through III and XIII (PCR II 387), and found the remaining claims to be procedurally barred. (PCR II 388-93). Now, Rutherford argues that the court erred in finding issues IV through XII, XIV, and XV procedurally barred because they all were concerned with ineffective assistance. (Initial brief at 84-85). Contrary to this contention, however, only issue X contains an allegation of counsel's ineffectiveness. As set out in issue IV, supra, claims not included in the postconviction motion and raised in the circuit court cannot be raised on appeal. Doyle v. State, 526 So.2d 909 (Fla. 1988); see also Valle v. State, no. 88,203, slip op. at 5, n. 6 (Fla. Dec. 11, 1997).

Issue X, the conflict of interest claim, contains an allegation of ineffectiveness (PCR I 157), but as pointed out by the circuit court: "The conflict of interest asserted in Claim X could have been raised on direct appeal. All requisite evidence was of record. No facts outside the record are alleged." (PCR II 392). The court correctly found this issue to be procedurally barred. Jennings v. State, 583 So.2d 316 (Fla. 1991); Kight v. Dugger, 574 So.2d 1066 (Fla. 1990); Correll v. Dugger, 558 So.2d 422 (Fla.

1990); Francis v. State, 529 So.2d 670 (Fla. 1988). Moreover, "[a] procedural bar cannot be avoided by simply couching otherwise-barred claims in terms of ineffective assistance of counsel." Kight, 574 So.2d at 1073; Cherry v. State, 659 So.2d 1069 (Fla 1995); Lopez v. Singletary, 634 So.2d 1054 (Fla. 1993); Medina v. State, 573 So.2d 293 (Fla. 1986); Quince v. State, 477 So.2d 535 (Fla. 1985).

Despite the procedural bars, and the absence of allegations of ineffectiveness in the postconviction motion, Rutherford includes argument on several of the procedurally barred claims in his initial brief.[11] The state will address them in turn.

A. INSTRUCTION ON AND APPLICATION OF AGGRAVATORS

Rutherford argues that his jury received vague instructions on the heinous, atrocious, or cruel (HAC) and cold, calculated, and premeditated (CCP) aggravators.[12] As the circuit court noted (PCR II 389-90), Rutherford raised the applicability of the HAC and CCP aggravators on direct appeal, and this Court held that the evidence supported finding both aggravators. Rutherford, 545 So.2d at 855-56. Also as noted by the circuit court (PCR II 389-91), any other complains about these aggravators, including the standard

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[11] These postconviction claims are V through VIII, XII, and XIV. Because the brief contains no argument as to the remaining claims, IX through XI, any complaint as to them should be summarily dismissed. Duest v. Dugger, 555 So.2d 849 (Fla. 1990).

[12] These are claims V through VII in the postconviction motions. (PCR I 99-136; II 333-59).

instructions, could and should have been raised on direct appeal. Because they were not, they are procedurally barred. Bush v. State, 682 So.2d 85 (Fla. 1996); Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995); Cherry; Harwick v. Dugger, 648 So.2d 100 (Fla. 1994). Besides not being raised in the postconviction motion, Rutherford's current claim that counsel was ineffective for not objecting to the instructions (initial brief at 86) has no merit because "trial counsel cannot be deemed ineffective. . . for failing to object to these instructions when this Court had previously upheld" their validity. Harvey, 656 So.2d at 1258.

B. NONSTATUTORY AGGRAVATORS

Rutherford argues that the trial court relied on nonstatutory aggravators, specifically, testimony of three friends that the victim was afraid of Rutherford, Rutherford's lack of remorse, and the first jury's sentencing recommendation.[13] (Initial brief at 86). All of these "nonstatutory aggravators" were raised on direct appeal. Rutherford, 545 So.2d 856-57. Because it was raised on direct appeal, this claim is procedurally barred. Harvey; Medina; see also Cherry (complaints about nonstatutory aggravators are procedurally barred in postconviction proceedings); Bryan v. Dugger, 641 So.2d 61 (Fla. 1994) (same); Remeta v. Dugger, 622

[13] This issue is claim XII in the postconviction motions. (PCR I 162; II 359).

So.2d 452 (Fla. 1993) (same). Therefore, this claim should be summarily denied.

C. WRITTEN SENTENCE

The trial court filed its written sentencing order several days after imposing the death sentence. Rutherford now argues that not filing a contemporaneous order violates the requirements of subsection 921.141(3), Florida Statutes.[14] (Initial brief at 87). This claim is procedurally barred, Bush v. Dugger, 579 So.2d 725 (Fla. 1991); Parker v. Dugger, 550 So.2d 459 (Fla. 1989), and should be summarily denied.

D. DEPARTURE SENTENCE

Rutherford argues that his thirty-year sentence for robbery should be reversed because the trial court's failure to prepare a written guidelines scoresheet violated Pope v. State, 561 So.2d 554 (Fla. 1990).[15] (Initial brief at 88). The trial court did not provide a written guidelines scoresheet with a reason for the departure sentence on the robbery conviction. On appeal, therefore, this Court relinquished jurisdiction and, later, approved the written reason for departure. Rutherford, 545 So.2d at 857. This Court issued its opinion affirming Rutherford's convictions and sentences on June 15, 1989, and denied rehearing

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[14] This claim is issue VIII in the postconviction motion. (PCR I 136).

[15] This claim is issue XIV in the postconviction motion. (PCR I 175).

five weeks later. Rutherford, 545 So.2d at 853. The opinion in Pope, on the other hand, did not issue until April 26, 1990. Pope, 561 So.2d at 554. As the circuit court held (PCR II 393), this claim is procedurally barred because Pope is not a fundamental change in the law, and "failure to file written reasons for a departure sentence contemporaneously with sentencing does not constitute fundamental error." Domberg v. State, 661 So.2d 285, 286 (Fla. 1995); Davis v. State, 661 So.2d 1193 (Fla. 1995). Because this claim is procedurally barred, it should be summarily denied.

CONCLUSION

For the foregoing reasons the State of Florida asks this Court to affirm the circuit court's denial of Rutherford's motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Gregory C. Smith, CCR, P.O. Drawer 5498, Tallahassee, Florida 32314-5498, this 12th day of December, 1997.

Barbara J. Yates
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IN THE SUPREME COURT OF FLORIDA

ARTHUR DENNIS RUTHERFORD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 89,142

APPENDIX TO
ANSWER BRIEF OF APPELLEE

APPENDIX	DOCUMENT
A	Issue V of Appellant's Initial Brief
B	Issue V of Appellee's Answer Brief
C	Order on Sentencing

APPENDIX "A"

IN THE SUPREME COURT OF FLORIDA

ARTHUR D. RUTHERFORD,

Appellant,

v. CASE NO. 69,825

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA

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V

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT HEARSAY EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL THEREBY TAINTING THE JURY'S RECOMMENDATION AND RENDERING RUTHERFORD'S DEATH SENTENCE UNCONSTITUTIONAL

During the penalty phase, the prosecutor introduced the testimony of three of the Stella Salaman's friends. (R 804, 814, 819) Much of their testimony consisted of hearsay statements the victim allegedly made concerning her anxious feelings when Rutherford was present. (R 806-808, 822-828) Lois LeVaugh related a time when Salaman telephoned and asked for her to come to her house because Rutherford had been there for some time.(R 806) Salaman said to her, "I am quite nervous right now. A.D. Rutherford is here." (R 806) LeVaugh, her husband and two of their friends drove to Salaman's house. (R 806-807) Rutherford was sitting on the front porch when they arrived.(R 807) After he and Salaman had a conversation about the patio doors, Rutherford left.(R 807) Salaman then told her friends, "I sure am nervous. He scared me. He really made me nervous." (R 807) Beverly Elkins testified that Salaman later told her about this event.(R 823) Salaman said, "I just wish they would quit coming to the house. I get very upset and they act like they are casing the joint."(R 823) Elkins stated that Salaman told her that she was frightened of him.(R 823) Elkins and Richard LeVaugh also related comments Salaman made concerning the problems she had with the repair of the patio doors.(R 815-817, 821-823)

None of this evidence was relevant to prove any of the aggravating circumstances enumerated in Section 921.141 Florida Statutes. The victim's state of mind at a time prior to the commission of the crime has no place in evaluating the circumstances of the crime for aggravating factors. In his sentencing order, the trial judge used this evidence as partial support for finding the homicide to be cold, calculated and premeditated.(SSR 3-6)(A 1-4) This reliance was misplaced, however, because this evidence did not shed light on Rutherford's state of mind which is the pertinent consideration when assessing the premeditation aggravating factor. Mason v. State, 438 So.2d 374, 379 (Fla. 1983). The reasons for Salaman's statements about her anxiety were speculative at best. She was suspicious, but no evidence of Rutherford's behavior provided a foundation for that suspicion. Consequently, the evidence had no bearing on Rutherford's state of mind.

Assuming for argument that Salaman's statements had foundation, they were still irrelevant to prove the premeditation aggravating circumstance. Her alleged suspicion was that Rutherford was "casing the joint."(R 823) Evidence that a perpetrator is planning a theft or robbery is not a proper consideration in determining if the homicide was cold, calculated and premeditated. Jackson v. State, 498 So.2d 906 (Fla. 1986); Hardwick v. State, 461 So.2d 79 (Fla. 1984) As this Court said in Hardwick, "The premeditation of a felony cannot be transferred to a murder which occurs in the course of that

felony for purposes of this aggravating factor." 461 So.2d at 81. The jury should not have heard this evidence.

The evidence was also irrelevant to the heinous, atrocious or cruel aggravating circumstance. Sec. 921.141(5)(h), Fla. Stat. Although the state of mind of the victim can be relevant for this factor, it must be mental state immediately prior to or contemporaneous with the homicide. See, Routly v. State, 440 So.2d 1257 (Fla. 1983); Knight v. State, 338 So.2d 201 (Fla. 1976). The victim's mental anguish as the result of knowledge of impending death is the key consideration. Ibid. The evidence in question tended to show the victim's state of mind at a time well before the commission of the homicide. Her anxiety was not due to knowledge of impending death. It was merely the product of her own speculation which was not based upon any evidence of imminent threat of death.

This testimony was also inadmissible hearsay, even if relevant. While hearsay is admissible in penalty phase, it must be of a character which affords the defendant a fair opportunity to rebut. Sec. 921.141(1) Fla. Stat.; Dragovich v. State, 492 So.2d 350, 355 (Fla. 1986). Perri v. State, 441 So.2d 606, 608 (Fla. 1983) The evidence here did not meet that requirement. In stating that Rutherford made her nervous, the victim was expressing her opinion that Rutherford was acting in a suspicious manner. She never stated specific behaviors which prompted her reaction. Consequently, the substance of the hearsay was nothing more than the victim's opinion without any foundation expressed. This is analogous to the reputation testimony this

court deemed inadmissible hearsay in Dragovich because it was impossible to fairly rebut. Just as Dragovich could only introduce reputation evidence that he was not known as an arsonist, Dragovich, at 355, Rutherford would be forced to introduce evidence that he did not act suspiciously. Furthermore, characterizing behavior as suspicious involves the perception of the one drawing the conclusion. To fairly confront such conclusions, cross-examination of the one making it is essential. The victim made the speculative conclusions here, and no amount of cross-examination of the witnesses who related her bare statement of these conclusion will be helpful in rebutting them.

Since the jury heard this irrelevant evidence of nonstatutory aggravating circumstances, its recommendation of death is tainted. Rutherford's sentence based upon this tainted recommendation violates the Eighth and Fourteenth Amendments to the United States Constitution. This Court must reverse his death sentence.

APPENDIX "B"

IN THE SUPREME COURT OF FLORIDA

ARTHUR D. RUTHERFORD,

Appellant,

v. CASE NO. 69,825

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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ISSUE V

THE TRIAL COURT DID NOT ERR IN ADMITTING HEARSAY EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL. (Restated by Appellee)

During the penalty phase of the trial, the State introduced the testimony of three of the victim's friends. (R. 804, 814, 819).

Appellant argues that, "Much of their testimony consisted of hearsay statements the victim allegedly made concerning her anxious feelings when Rutherford was present.", and that the admission of this testimony constituted error. (AB. 35).

With reference to the testimony of friend, Lois LaVaugh, the defense made no objection to her testimony. (R. 804-810). Since Appellant did not timely object to the testimony he has not preserved this point for appellate review. Clark v. State, 363 So.2d 331 (Fla. 1978). The purpose of an objection by counsel is to ferret out possible prejudice and correct it at the time of trial. Castor v. State, 365 So.2d 701 (Fla. 1978).

With reference to the testimony of friend, Richard LaVaugh, Appellee submits that he gave no testimony on direct examination relative to the victim's anxious feelings about Rutherford. (R. 813-817). In fact, defense counsel on cross-examination, solicited the only testimony about the victim's fear of Rutherford. The State cannot be blamed for defense counsel's

questions. (R. 819). Clearly, there is no reversible error relative to the testimony of Richard LaVaugh.

With reference to the testimony of friend, Beverly Elkins, the defense made no objection to her testimony concerning the victim's fears of Rutherford. (R. 823-825). Appellant did not timely object and thus has not preserved this point for review. (See argument above).

No error occurred by the trial court allowing the testimony of the three friends. Plainly, there is no merit to this argument.

APPENDIX "C"

IN THE CIRCUIT COURT IN AND
FOR SANTA ROSA COUNTY, FLORIDA
FIRST JUDICIAL CIRCUIT

Case No.

STATE OF FLORIDA,

Plaintiff,

-vs-

ARTHUR D. RUTHERFORD,

Defendant.

SENTENCING

Pursuant to Florida Statute 921.141(3), the Court hereby sets forth its findings upon which the sentence is imposed.

The defendant, Arthur D. Rutherford, a thirty-seven year old white male, was convicted on October 2, 1986, of the offenses of first degree murder and robbery.

During the guilt phase of the trial, the Court heard evidence that convinced the jury and the Court of the defendant's guilt beyond a reasonable doubt of the offenses of robbery and murder in the first degree.

At the penalty phase of the trial, the Court heard evidence of the aggravating and mitigating factors to be considered by the jury in determining what sentence the jury would recommend and what sentence the Court would impose.

Based upon the evidence presented, the Court finds the following aggravating circumstances present in this case:

(d) This crime was committed by the defendant while robbing that victim in this case as evidenced by his negotiation of the check that was written on the victim's checking account and cashed at a Santa Rosa County bank by a witness who testified at his trial.

(f) The capital felony was committed for pecuniary gain. While this aggravating circumstance is basically the same as "d" above, the Court finds that the purpose of the defendant killing the victim was to get the victim's money.

(h) The Court finds that this crime was especially heinous, atrocious and cruel. The evidence in this case showed that the victim had a dislocated arm, leading the Court to the conclusion that the defendant dislocated the victim's arm in the course of the robbery. Additionally, the victim had a number of gashes on her head where she had obviously had her head struck by an object or had her head bashed against an object causing the severe injuries to the victim. Additionally, the victim was placed in the bathtub where she was submerged under water. Her death was attributed to asphyxiation, but the pathologist could not rule out the effects of the blows as a cause of death.

While the Court cannot use the attitude of the defendant and his lack of remorse for this crime as an aggravating circumstance, the Court does find that the defendant's lack of remorse adds weight to the Court's determination that the crime was especially heinous, atrocious and cruel.

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(i) The crime was committed in a cold, calculated, and premeditated manner without any pretence of moral or legal justification. This aggravating circumstance was proven by the witnesses whom

the defendant told of his plan to kill the victim to get her money. The defendant discussed this crime with two or more people and stated to one of them that he would do the crime, but would not do the time. This was further established by the testimony at the penalty phase of the trial that indicated the victim was deathly afraid of the defendant and had expressed her fear of the defendant and her fear of being alone with him.

The Court has also considered the mitigating circumstances presented in this case, including those listed in 941.141(6) and the possibility of mitigating factors other than those listed in the Statute.

The Court finds mitigating factor "a" present in that the defendant had no prior significant history of criminal activity.

The Court has considered the testimony of the defendant regarding his past, including his extensive testimony about his record in Vietnam. When his testimony is weighed against the credibility of the defendant on other matters where the Court was able to test his credibility, considered further in light of the total lack of any corroboration, the Court concludes that there were no other factors presented that constitute mitigating factors.

Balancing the aggravating factors against the mitigating factors, the Court determines that four of the aggravating circumstances exist but because "d" and "f" overlap, it leaves a net of three aggravating factors present.

On the other hand the Court could find only one mitigating factor present leading the Court to the conclusion that the appropriate sentence in this case is the sentence that was recommended by the

trial jury by a majority of seven and by the previous mistrial jury by a majority of eight.

Accordingly, the Court, having considered these aggravating and mitigating circumstances and the Pre-Sentence prepared by the Florida Department of Corrections, now adjudges the defendant to be guilty of the crimes of first degree murder and robbery.

It is the judgment of the Court and the sentence of the law that for the crime of first degree murder the defendant is hereby sentenced to die in the electric chair at a time to be filed by the Chief Executive Officer of this State.

For the crime of robbery, the defendant is hereby sentenced to a term of thirty years in the Department of Corrections of the State of Florida, said sentence to run concurrent with the sentence just imposed.

CLYDE B. WELLS
Circuit Judge