

IN THE SUPREME COURT OF FLORIDA

GUILLERMO OCTAVIO ARBELAEZ,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

---

Case No. 89,375

L.T. Case No. 88-5546

Dade County

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE CIRCUIT COURT  
OF THE ELEVENTH JUDICIAL CIRCUIT,  
IN AND FOR DADE COUNTY, FLORIDA

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL  
TALLAHASSEE, FLORIDA

DAVID M. SCHULTZ  
ASSISTANT ATTORNEY GENERAL  
FLORIDA BAR NO. 0874523  
1655 PALM BEACH LAKES BLVD.  
SUITE 300  
WEST PALM BEACH, FL 33401  
(561) 688-7759

**Counsel for Appellee**

TABLE OF CONTENTS

	<u>PAGE</u>
PRELIMINARY STATEMENT	iv
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	
POINT I: SUMMARY DENIAL	
A. AFFIDAVITS	4
B. GUILT-PHASE PROCEEDINGS	
1/2. EVIDENCE OF EPILEPSY/EXPERT TESTIMONY	6
3. VOIR DIRE	14
4. WAIVER OF MIRANDA	16
C. PENALTY-PHASE PROCEEDINGS	
1. RETENTION OF A MENTAL HEALTH EXPERT	25
2. INVESTIGATION OF ABUSIVE BACKGROUND	29
POINT II:	37
WHETHER JUDGE ROTHENBERG SHOULD HAVE RECUSED HERSELF	
POINT III:	41
TRIAL COUNSEL'S FILES	
POINT IV: PUBLIC RECORDS	
A. CITY OF MIAMI POLICE DEPARTMENT	46
B. STATE ATTORNEY'S OFFICE/ATTORNEY GENERAL'S OFFICE	49

POINT V:	52
PSYCHOLOGICAL COERCION	
POINT VI:	56
IMPARTIALITY OF JURY	
POINT VII:	56
DIRECT APPEAL RECORD	
POINT VIII:	58
ADMISSION OF PHOTOGRAPHS	
POINT IX: FAILURE TO OBJECT BELOW	
A. AUTOMATIC AGGRAVATOR	61
B. HEINOUS, ATROCIOUS, OR CRUEL INSTRUCTION	62
C. COLD, CALCULATED AND PREMEDITATED INSTRUCTION	65
D. STATUTORY LANGUAGE	67
E. <i>EDDINGS/LOCKETT</i>	68
F. <i>CALDWELL</i>	69
G. BURDEN SHIFTING	70
POINT X:	71
ONE-YEAR TIME LIMIT FOR FILING A 3.851 MOTION	
POINT XI:	71
CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY STATUTE	
POINT XII:	72
INNOCENCE OF THE DEATH PENALTY	
POINT XIII:	73

JUROR INTERVIEWS

CONCLUSION 74

CERTIFICATE OF SERVICE 74

**PRELIMINARY STATEMENT**

Appellant, GUILLERMO OCTAVIO ARBELAEZ, was the defendant in the trial court below and will be referred to herein as "appellant" or "defendant." Appellee, the State of Florida, was the prosecution in the trial court below and will be referred to herein as "appellee" or "the State."

The following symbols will be used:

IB = Appellant's Initial Brief

R = Record on Direct Appeal

SR = Supplemental Record on Direct Appeal

SR2 = Second Supplemental Record on Direct Appeal

PCR = Record on Postconviction Appeal

PCS = Supplemental Record on Postconviction Appeal

Note that cites are by volume, followed by the appropriate page number and as necessary by the line number on the page, i.e. SR 20, 155/20 refers to volume 20 of the supplemental record on direct appeal, page 155, line 20.

**TABLE OF AUTHORITIES**

<b>Cases Cited</b>	<b>Page Number</b>
<b>FEDERAL CASES</b>	
<i>Bolender v. Singletary</i> , 16 F.3d 1547 (11th Cir. 1994) . . .	37
<i>Colorado v. Connelly</i> , 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) . . . . .	56
<i>Espinosa v. Florida</i> , 112 S. Ct. 2926 (1992) . . . . .	63
<i>Francis v. Dugger</i> , 908 F.2d 696 (11th Cir. 1990) . . . . .	37
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) . . . . .	7, 14
<b>STATE CASES</b>	
<i>Arbelaez v. State</i> , 626 So. 2d 169 (Fla. 1993) . . .	13, 26, 55, 63, 65, 68, 70
<i>Atkins v. Dugger</i> , 541 So. 2d 1165 (Fla. 1989) . . .	14, 70, 71
<i>Atkins v. State</i> , 663 So. 2d 624 (Fla. 1995) . . . . .	52
<i>Barwick v. State</i> , 660 So. 2d 685 (Fla. 1995) . . . . .	40
<i>Bertolotti v. State</i> , 534 So. 2d 386 (Fla. 1988) . . . . .	70
<i>Blanco v. State</i> , 706 So. 2d 7 (Fla. 1977) . . . . .	63, 73
<i>Blanco v. State</i> , 706 So. 2d 7 (Fla. 1997) . . . . .	73
<i>Blanco v. Wainwright</i> , 507 So. 2d 1377 (Fla. 1987) . . . . .	63
<i>Booker v. State</i> , 397 So. 2d 910 (Fla. 1981) . . . . .	73
<i>Brown v. State</i> , 565 So. 2d 304 (Fla.), <i>cert. denied</i> , 111 S. Ct. 537 (1990) . . . . .	69, 72
<i>Brown v. State</i> , 596 So. 2d 1026 (Fla. 1992) . . . . .	58

<i>Buenoano v. Dugger</i> , 559 So. 2d 1116 (Fla. 1990)	. . . . .	37, 58
<i>Bunney v. State</i> , 603 So. 2d 1270 (Fla. 1992)	. . . . .	12
<i>Burch v. State</i> , 343 So. 2d 831 (Fla. 1977)	. . . . .	56
<i>Cannady v. State</i> , 427 So. 2d 723 (Fla. 1983)	. . . . .	57
<i>Cave v. State</i> , 529 So. 2d 293 (Fla. 1988)	. . . . .	72
<i>Chandler v. Dugger</i> , 634 So. 2d 1066 (Fla. 1994)	. . . . .	71
<i>Chestnut v. State</i> , 538 So. 2d 820 (Fla. 1989)	. . . . .	11
<i>Correll v. Dugger</i> , 558 So. 2d 422 (Fla. 1990)	. . . . .	28, 37
<i>Correll v. State</i> , 698 So. 2d 522 (Fla. 1997)	. . . . .	38
<i>Delap v. State</i> , 350 So. 2d 462 (Fla. 1977)	. . . . .	58
<i>Dragovich v. State</i> , 492 So. 2d 350 (Fla. 1986)	. . . . .	38
<i>Ferguson v. Singletary</i> , 632 So. 2d 53 (Fla. 1993)	. . . . .	59
<i>Fischer v. Knuck</i> , 497 So. 2d 240 (Fla. 1986)	. . . . .	41
<i>Fotopoulos v. State</i> , 608 So. 2d 784 (Fla. 1992)	. . . . .	69, 73
<i>Gilliam v. State</i> , 582 So. 2d 610 (Fla. 1991)	. . . . .	74
<i>Hardwick v. Dugger</i> , 648 So. 2d 100 (Fla. 1994)	. . . . .	59
<i>Harvey v. Dugger</i> , 656 So. 2d 1253 (Fla. 1995)	. . . . .	26, 55, 58, 61 64, 66, 69
<i>Henderson v. State</i> , 463 So. 2d 196 (Fla.), <i>cert. denied</i> , 473 U.S. 916 (1985)	. . . . .	61
<i>Henyard v. State</i> , 689 So. 2d 239 (Fla. 1996)	. . . . .	69
<i>Hunter v. State</i> , 660 So. 2d 244 (Fla. 1995)	. . . . .	73
<i>Jackson v. Dugger</i> , 633 So. 2d 1051 (Fla. 1993)	. . . . .	6, 12, 17, 27, 30, 74

<i>Jackson v. State</i> , 648 So. 2d 85 (Fla. 1994)	65
<i>Jennings v. Dugger</i> , 583 So. 2d 316 (Fla. 1991)	29
<i>Johnson v. State</i> , 609 So. 2d 637 (Fla. 1995)	63
<i>Johnston v. Dugger</i> , 583 So. 2d 657 (Fla. 1991)	29
<i>Jones v. State</i> , 648 So. 2d 669 (Fla. 1994), <i>cert. denied</i> , 515 U.S. 1147 (1995)	61
<i>Kennedy v. State</i> , 547 So. 2d 912 (Fla. 1989)	6, 14, 15, 16, 61, 66, 70, 71
<i>King v. Dugger</i> , 555 So. 2d 355 (Fla. 1990)	70, 71
<i>Klokoc v. State</i> , 589 So. 2d 219 (Fla. 1991)	69
<i>Knight v. Dugger</i> , 574 So. 2d 1066 (Fla. 1990)	63
<i>Koon v. Dugger</i> , 619 So. 2d 246 (Fla. 1993)	72
<i>L.G. v. State</i> , 702 So. 2d 1337 (Fla. 5th DCA 1997)	41
<i>Lambrix v. State</i> , 534 So. 2d 1151 (Fla. 1988)	13
<i>Lightbourne v. State</i> , 438 So. 2d 380 (Fla. 1983)	73
<i>Livingston v. State</i> , 441 So. 2d 1083 (Fla. 1985)	38
<i>Lopez v. State</i> , 634 So. 2d 1054 (Fla. 1993)	50, 51
<i>Lopez v. State</i> , 696 So. 2d 725 (Fla. 1997)	52
<i>Medina v. State</i> , 573 So. 2d 293 (Fla. 1990)	55, 58, 59, 61, 64, 66, 69
<i>Melendez v. State</i> , 612 So. 2d 1366 (Fla. 1992)	63
<i>Mendyk v. State</i> , 592 So. 2d 1076 (Fla. 1992)	37
<i>Mills v. State</i> , 684 So. 2d 801 (Fla. 1996)	49
<i>Mordenti v. State</i> , 711 So. 2d 30 (Fla. 1998)	50

<i>Nassetta v. Kaplan</i> , 557 So. 2d 919 (Fla. 4th DCA 1990)	. . . . .	39
<i>Orange County v. Florida Land Co.</i> , 450 So. 2d 341 (Fla. 5th DCA 1984)	. . . . .	53
<i>Patrm v. Reynolds</i> , 571 So. 2d 493 (Fla. 1st DCA 1990)	. . . . .	42
<i>Pooler v. State</i> , 704 So. 2d 1375 (Fla. 1997)	. . . . .	73
<i>Preston v. State</i> , 607 So. 2d 404 (Fla. 1992)	. . . . .	61
<i>Puig v. State</i> , 636 So. 2d 121 (Fla. 3d DCA 1994)	. 6, 17, 27, 30	
<i>Ragsdale v. State</i> , 23 Fla. F. Weekly S544 (Fla. Oct. 15, 1998)	. . . . .	16, 54
<i>Reed v. State</i> , 640 So. 2d 1094 (Fla. 1994)	. . . . .	44, 45, 47
<i>Rivera v. State</i> , 23 Fla. L. Weekly S343 (Fla. Jun 11, 1998)		11
<i>Roberts v. Butterworth</i> , 668 So. 2d 580 (Fla. 1996)	. . . . .	52
<i>Roberts v. State</i> , 568 So. 2d 1255 (Fla. 1990)	16, 29, 54, 71, 72	
<i>Roland v. State</i> , 584 So. 2d 68 (Fla. 1st DCA 1991)	. . . . .	74
<i>Rose v. State</i> , 601 So. 2d 1181 (Fla. 1992)	. . . . .	40
<i>Rose v. State</i> , 675 So. 2d 567 (Fla. 1996)	. 26, 55, 58, 61, 68	
<i>San Martin v. State</i> , 705 So. 2d 1337 (Fla. 1997)	. . . . .	72
<i>Sconyers v. State</i> , 513 So. 2d 1113 (Fla. 2d DCA 1987)	. . . . .	74
<i>Shere v. State</i> , 579 So. 2d 86 (Fla. 1991)	. . . . .	74
<i>Shevin v. Bryon, Harless, Schaffer, Reid &amp; Associates, Inc.</i> , 379 So. 2d 633 (Fla. 1980)	. . . . .	52
<i>Smith v. State</i> , 525 So. 2d 477 (Fla. 5th DCA 1988)	. . . . .	41
<i>Sochor v. State</i> , 619 So. 2d 285 (Fla. 1993)	. . . . .	71
<i>Sorgman v. State</i> , 549 So. 2d 686 (Fla. 1989)	. . . . .	17

<i>State v. Cayward</i> , 552 So. 2d 971 (Fla. 2d DCA 1989)	56
<i>State v. DiGuilio</i> , 491 So. 2d 1129 (Fla. 1986)	68
<i>State v. Kokal</i> , 562 So. 2d 324 (Fla. 1990)	52
<i>State v. Moore</i> , 530 So. 2d 349 (Fla. 2d DCA 1988)	56
<i>State v. Salmon</i> , 636 So. 2d 16 (Fla. 1994)	64
<i>Suarez v. Dugger</i> , 527 So. 2d 190 (Fla. 1988)	38
<i>Swafford v. Dugger</i> , 569 So. 2d 1264 (1990)	71
<i>Tafero v. State</i> , 403 So. 2d 355 (Fla. 1981)	41
<i>Thompkins v. Dugger</i> , 549 So. 2d 1370 (Fla. 1989)	37
<i>Tillman v. State</i> , 471 So. 2d 32 (Fla. 1985)	58
<i>Turner v. Dugger</i> , 614 So. 2d 1075 (Fla. 1992)	59
<i>Turner v. State</i> , 530 So. 2d 45 (Fla. 1987)	45
<i>Valle v. State</i> , 705 So. 2d 1331 (Fla. 1997)	58, 61, 69, 70, 71, 73
<i>VanPoyck v. State</i> , 694 So. 2d 686 (Fla. 1997)	64, 70, 74
<i>White v. State</i> , 559 So. 2d 1097 (Fla. 1990)	14

**RULES OF PROCEDURE**

Fla. R. App. P. 9.140(j)(1)	62
Fla. R. Crim. P. 3.851	72
Fla. R. Jud. Admin. 2.160(e)	40
Fla. R. Jud. Admin. 2.160 (d)(2)	42

### **STATEMENT OF THE CASE AND FACTS**

The State accepts Appellant's Statement of the Case and Facts to the extent that it represents an accurate non-argumentative recitation of the procedural history and facts of this case, subject to any additions, corrections, clarifications, and/or modifications contained in the body of this brief.

### **SUMMARY OF ARGUMENT**

I. When the trial court mentioned affidavits regarding only two issues, she did so in the context of explaining that appellant's pleadings were otherwise legally insufficient for failing to identify alleged witnesses who could support his allegations. The trial court performed an exhaustive analysis of these issues and also summarily denied them on the basis that the record clearly rebutted the claims. In regard to appellant's epilepsy, the record shows that counsel did understand,

investigate and argue that this condition could be a defense to the intent element, and the trial court allowed counsel to inquire about this condition. However, additional inquiry would have been irrelevant and the defense was ultimately not available, since when appellant testified he never indicated that he suffered from an epileptic seizure immediately before or during the murder. Therefore, there would be no prejudice for counsel's failure to voir dire the jury panel about mental health issues. Appellant's *Miranda* claim is both legally insufficient and refuted by the record. Counsel did file a motion to suppress appellant's confessions. Moreover, the record clearly shows that appellant made a knowing and intelligent waiver of *Miranda*. Appellant's allegations concerning mental health experts and investigation of his abusive background are also legally insufficient and refuted by the record. Counsel did in fact retain the services of mental health experts, who concluded that appellant was functioning at a low average intellectual capacity. Even if there had been additional testimony regarding appellant's childhood, there is no reasonable probability that the outcome would have been different.

II. The trial court properly denied appellant's motion for disqualification, because during the hearing that defense counsel failed to attend only administrative matters were discussed. Appellant also failed to demonstrate any actual bias by the trial court so as to create a reasonable fear by appellant.

III. The trial court stayed his order allowing the State access to trial counsel's files and to date the State has not had access. However, the attorney-client privilege was waived when appellant filed his postconviction motion claiming ineffective assistance of counsel. Further, appellant has failed to demonstrate any prejudice had the files been provided to the State.

IV. Each of the records appellant claims he did not receive from the Miami Police Department he either received from the State Attorney, was admitted in evidence at trial or, in the case of a police report from appellant's 1986 arrest record does not exist. The notes from the State Attorney and the Attorney General are not public records.

V. The alleged conduct by law enforcement does not amount to psychological coercion.

VI. Venireman Kelly took no part in deliberations in either phase of this trial, so there was no prejudice to allowing him to sit as an alternate.

VII. Appellant is barred from now bringing a claim regarding the record on appeal or effectiveness of counsel in that regard. Moreover, appellant failed to demonstrate any prejudice.

VIII. Defense counsel did object to every photograph which showed the victim's body. These photographs were relevant to show the condition of the body when discovered and the nature of his injuries.

IX. Each of these claims is procedurally barred and appellant cannot circumvent that bar by now couching these claims in terms of ineffective assistance of counsel. Also, this Court has repeatedly rejected such claims regarding the felony murder instruction, the constitutionality of the language of Florida's penalty statute and *Caldwell* claims. In regard to the HAC and CCP instructions, these circumstances would have been found to exist under any definition. The record clearly rebuts appellant's claim that the trial court refused to consider his epileptic condition as mitigating.

X. This Court has repeatedly rejected the argument that the one-year limit for filing a 3.851 motion is unconstitutional.

XI. This Court had repeatedly rejected the arguments now presented by appellant concerning the constitutionality of Florida's death penalty statute.

XII. The points raised by appellant in this claim are merely redundant to other claims in his brief.

XIII. The procedure limiting juror interviews is not unconstitutional, because it provides a vehicle for doing so upon a prima facie showing of juror misconduct.

**ARGUMENT**

**POINT I**

**SUMMARY DENIAL**

**A. AFFIDAVITS**

Appellant argues that the trial court erred in denying his

motion without an evidentiary hearing, because in regard to his ineffective assistance claims the trial court's ruling was premised on the erroneous belief that the allegations pled in a Rule 3.850 motion must be supported by affidavits. In the order denying relief as to the ineffective assistance claims and relative to this issue, the trial court wrote:

The Defendant alleges that his attorney provided ineffective representation of counsel in litigating the Motion to Suppress his statements to police. The Defendant claims that his attorney failed to investigate and to present evidence of his low intelligence, his epilepsy, and his "cultural differences" and to argue the impact these items had upon his ability to knowingly, intelligently and freely waive his *Miranda* rights.

As these claims by the Defendant are mere allegations unsupported by either Affidavit or the record, they should be **Summarily Denied** by this Court as legally insufficient. The Defendant failed to present any evidence that these claims are supported by any competent evidence or that there were any witnesses who would have testified in support of these assertions had they been called upon by the Defendant to do so.

A review of the record reflects that the Defendant's trial attorney did present and litigate a Motion to Suppress the Defendant's Statements. A review of those proceedings and of the statement given by the Defendant reflect that the unsubstantiated claim by CCR that the Defendant was of "low intelligence" is unsupported by the record...

(PCR II, 358-59). Clearly, the reference to an affidavit only related to the ineffectiveness issue pertaining to the Motion to Suppress. Appellant seems to have conceded this in his initial brief (IB 27).

Appellant also alleges that the trial court made the same error in regard to issue C1 below, where appellant alleges that trial counsel was ineffective during the penalty phase for failure to retain a mental health expert (IB 27-8). In her order denying relief, the trial court stated:

This Court notes that there are no Affidavits by these "health professionals" attached to the Defendant's Motion, and that no names were provided in the Defendant's Motion.

(PCR II, 360).

Based on this record two things are very clear. First, when the trial court mentioned affidavits it was in the context of not being provided with the identity of the alleged witnesses who would support appellant's proffer, which was otherwise purely conclusory in nature and legally insufficient. These are valid reasons for summarily denying a motion for post-conviction relief. See e.g., *Jackson v. Dugger*, 633 So. 2d 1051, 1054 (Fla. 1993); *Puig v. State*, 636 So. 2d 121 (Fla. 3d DCA 1994); *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989).

Second, it is apparent from the record that trial court performed an exhaustive analysis of these claims (PCR II, 354-360, 360-363) and justified summary denial of these claims based upon her conclusion that the record rebutted these claims. To the extent that the record does rebut these claims, which is shown below, any error founded on the trial court's comments regarding

affidavits is harmless.

**B. GUILT-PHASE PROCEEDINGS**

**1 & 2. EVIDENCE OF EPILEPSY/EXPERT TESTIMONY**

After a thorough examination of the trial transcript and a proper application of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the trial court made her determination that appellant's allegations of ineffective assistance of counsel were insufficient to require an evidentiary hearing. The trial court concluded that appellant did not demonstrate either of the *Strickland* prongs, finding that defense counsel did effectively argue for the admissibility of evidence regarding appellant's epilepsy, and that the trial court did permit the introduction of such evidence as a defense to appellant's ability to form the requisite intent (PCR II, 355). The trial court also found that appellant was not precluded from calling any witnesses to establish or develop this issue at trial (PCR II, 355). The trial court noted that defense counsel did present both lay and expert testimony during penalty phase and concluded, from a review of this testimony, that even if defense counsel had attempted to introduce this evidence during the guilt phase it was not likely that it would have been admissible and that had it been admitted it likely would not have affected the outcome of the case (PCR II, 355-56). The trial court further stated:

The Defendant himself testified that he suffers from epilepsy and sometimes took medication for his condition. He did not testify that he had an epileptic attack or seizure on the day of the homicide, or that he could not remember the events leading to and including the murder of Julio Rivas. (trial transcript pages 780-797)

The Defendant's confession which was taken shortly after the homicide and which was introduced at trial, reveals that the Defendant did not suffer from an epileptic seizure on the day in question and in fact had a very detailed and vivid memory of the events in question, which is further evidence that the Defendant did not "black-out" or go into a convulsion.

In the taped statement the Defendant gave to Detective Martinez, he admitted that he had moved in with Graciela Alfara, Julio's mother, approximately 3 ½ months prior to the homicide and that they were planning to get married on February 15, 1988. Prior to the wedding, Ms. Alfara told the Defendant that she no longer wanted to marry him and on February 13, 1988, one day before the homicide, the Defendant saw Ms. Alfara getting into a man's vehicle. This upset the Defendant, who went looking for Ms. Alfara. When she returned at midnight, he saw her kissing this man and he confronted her with what he had seen. Ms. Alfara told the Defendant she no longer loved him. The Defendant testified that the next morning he awoke early and decided that he would drown her child Julio out of revenge and to make her "sorry for the rest of her life". The Defendant took the child and drove to Key Biscayne and called Ms. Alfara. When she refused to talk to him, he drove onto the bridge, parked the car and raised the hood so passing motorists would assume the car was disabled. He then took the child out of the car and threw him over the bridge into the water. After leaving the area of the bridge, he tried to burn his car, abandoned it and walked to a friend's house. He told his friend what he had done, showered, changed clothes and borrowed money from that friend. He then flew to Puerto Rico under a false name and after receiving a ticket from his family, flew to Columbia. (trial transcript pages 138-173).

It is clear that based upon the Defendant's confession which was introduced at trial, and the testimony of the lay witnesses and the Defendant's Doctor at the penalty phase, that the fact that the Defendant is an epileptic provided no defense for the First Degree Murder of Julio Rivas. The Defendant's trial attorney was clearly not deficient for failing to call witnesses during the guilt phase to establish that the Defendant suffers from epilepsy, and had he attempted to do so, the evidence would most likely have been excluded by the Court on relevancy grounds. Even if this evidence was offered and admitted by the Court, it is clear beyond all reasonable doubt that it would not have had any impact upon the verdict in this case. This Court notes that this evidence was presented in the penalty phase and the jury recommended 11-1 for death.

(PCR II, 356-58).

The record supports the trial court's conclusion. First, it is clear that defense counsel investigated appellant's epilepsy as a possible defense to first degree murder, as evidenced by his cross-examination of numerous state witnesses and his presentation of additional witnesses during the penalty phase. It is also clear that both he and the trial court understood that evidence of an epileptic seizure at the time of the homicide could be relevant to negate the intent element of first degree murder. At a hearing prior to trial the following colloquy took place between defense counsel and the trial court:

Mr. Diaz: ...Let me tell you what the problem is. If the defendant testifies, he may tell this court and this jury that on the day that this boy fell from this bridge, that he had a seizure and that he doesn't know what happened.

Now, we have examined his disease and it's not one that rises to the level of an insanity defense.

The Court: It may go to the intent, however.

Mr. Diaz: Exactly. That is where I think that if the defendant was to testify and say that he doesn't remember what happened because he had this seizure, this attack that prevented him from knowing or understanding --

(SR I, 9/2-17)(emphasis added). Thus, not only did defense counsel investigate epilepsy as a defense, he argued its relevance to the trial court.

Second, although the State initially objected to any argument or cross-examination by the defense relating to appellant's epilepsy in general, the trial court ultimately permitted defense counsel to cross-examine various state witnesses about it. In fact, the trial court subsequently permitted defense counsel to elicit on the cross-examination of appellant's friend, Juan Londrian, that appellant was an epileptic and took medicine for epileptic seizures (SR III, 397/7). Furthermore, during the testimony of Detective Martinez, the trial court allowed the jury to hear appellant's sworn statement, where appellant indicated that he suffered from epilepsy (SR IV, 623/13, 640/4). The trial court also permitted defense counsel to cross-examine appellant's friend, Pedro Salazar, about having witnessed appellant have seizures (SR III, 429/17-432/12). It was the trial court's position, however, that Mr. Salazar was not in a position to testify that the seizures

were due to epilepsy (SR III, 425/24-427/25). Nonetheless, Mr. Salazar testified that appellant would have seizures once a month (SR III, 432/9) and that he witnessed three of these seizures (SR III, 432/7), where appellant would tremble (SR III, 430/20), fall to the ground (SR III, 431/16), spit up saliva (SR III, 431/25) and not remember anything after the attack was over (SR III, 432/4). Mr. Salazar also testified on cross-examination that when appellant went to his home after the homicide, appellant's hands and body were shaking (SR III, 429/17-22). However, appellant testified that he was shaking due to his nerves (SR V, 797/6). Thus, contrary to appellant's contention, the trial court did not find evidence of epilepsy irrelevant and inadmissible in contravention of *Chestnut v. State*, 538 So. 2d 820 (Fla. 1989).

Of critical importance, however, is that although appellant testified in his own behalf that he was epileptic and took medication for his condition (SR V, 780/14), he never testified that he had an epileptic seizure or "attack" during the relevant period on February 14, 1988, when he took the child, Julio Rivas, from his home and subsequently threw him off the Powell Bridge. Rather, appellant testified that Rivas' death was an accident. In direct contravention to his sworn statements to the police, appellant testified that he was investigating the cause of his engine failure when he heard a splash and rushed over to the bridge railing to see Rivas floating in the water below. Thus,

appellant's defense of accident was directly contrary to any epileptic seizure defense, which requires an admission of the act, but a lack of intent. *Rivera v. State*, 23 Fla. L. Weekly S343 (Fla. Jun 11, 1998).

Without any direct evidence or testimony by appellant at trial that he, in fact, had an epileptic seizure at the time he threw Rivas from the bridge, any additional evidence or testimony relating to a diagnosis of epilepsy, the symptoms of a seizure or circumstantial evidence of appellant's demeanor following the murder would have been irrelevant and inadmissible. See *Bunney v. State*, 603 So. 2d 1270, 1273 (Fla. 1992); cf. *Jackson v. Dugger*, 633 So. 2d 1051 (Fla. 1993). This critical omission defeats any allegation that defense counsel was ineffective for failing to present additional evidence of appellant's epilepsy, since the relevancy and admissibility of any such evidence hinges on appellant's admission that he had a seizure at the time of the murder.

Even if defense counsel should have attempted to admit appellant's additional evidence, and the trial court had admitted it, there is no reasonable probability that the outcome of the trial would have been different. As the trial court noted in its order, appellant's confession to the police was very detailed and evidenced appellant's "vivid memory" of the events surrounding the murder (PCR II, 357). Moreover, appellant confessed many times to

throwing Rivas off the bridge. For example, Pedro Salazar testified that appellant told him that he (appellant) threw the child off the bridge (SR III, 407/23). Agent Reuben Munoz, a legal attache in the U.S. Embassy in Bogota, Columbia, testified that appellant had confessed to him that he (appellant) had thrown the boy off the bridge (SR III, 456/21). Detective Martinez testified that he overheard appellant tell Detective Cadavid that he (appellant) was involved in this homicide (SR IV, 554/19). Detective Martinez also testified that appellant told him in great detail how he threw the child off the bridge (SR IV, 577). Appellant also gave Detective Martinez two taped statements. During both statements, appellant explained in great detail how and why he threw the child off the bridge (SR IV, 607-617, 646-658).

It is clear that counsel's actions in not bringing forth additional evidence concerning appellant's history of epilepsy was not deficient, as it would not have supported a defense of lack of specific intent. However, even if counsel's actions were deficient, there is no reasonable probability that the outcome of the trial would have been different. Appellant's own testimony, as well as his confessions, did not establish that at the time of the homicide he was having any sort of seizure or epileptic attack such that he could not form the specific intent to kill or kidnap the five-year-old victim. As this Court stated:

Moreover, the record shows that Arbelaez's epilepsy did

not play a part in the murder. There is no evidence that Arbelaez suffered an epileptic attack immediately before or during the murder.

*Arbelaez v. State*, 626 So. 2d 169, 178 (Fla. 1993).

In other capital cases in where defendants allege that counsel was ineffective for failing to develop an intoxication defense, an analogous defense to epilepsy, this Court has rejected the claim where the evidence showed that the defense, if presented, would have been unsuccessful. See *Lambrix v. State*, 534 So. 2d 1151 (Fla. 1988)(finding that the prejudice prong of *Strickland* had not been proven, and noting that the proffered evidence would not have established the defense of voluntary intoxication); see also *White v. State*, 559 So. 2d 1097 (Fla. 1990)(counsel was not ineffective for failing to raise an intoxication defense, where the defense would have been incompatible with the deliberateness of defendant's actions); *Atkins v. Dugger*, 541 So. 2d 1165 (Fla. 1989).

Furthermore, contrary to appellant's assertion, defense counsel was aware of his Dade County Jail hospital records (R, I, 82-83). Those records indicated that appellant had stated that he had epilepsy, was taking medication for seizures, had been hospitalized for seizures, had been treated for a mental disorder ten (10) years ago, had fainted or had a head injury eight (8) days prior to his jail admission, and that he had a problem with his nerves (PCR I, 206-231).

A claim of ineffective assistance of counsel must be reviewed under the two pronged test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), whereby appellant must demonstrate counsel's deficient performance and resulting prejudice. Further, a motion for postconviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. *Id.* The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that fulfill the two *Strickland* prongs. *Id.*

The record clearly shows that defense counsel did effectively argue for the admissibility of evidence of epilepsy and that defense counsel was permitted to introduce such evidence at trial. Any additional evidence, however, would have been irrelevant and inadmissible given appellant's failure to assert that he in fact had an epileptic seizure at the time of the murder. Thus, the record supports the trial court's conclusions that defense counsel was not deficient and that there was no reasonable probability that this evidence, if admitted, would have altered or affected the outcome of the trial. Therefore, this Court should affirm the

summary denial of this claim.

### 3. VOIR DIRE

Appellant's motion also claimed that counsel was ineffective for failing to voir dire the panel about mental health issues, i.e., their understanding of the concept that epilepsy could negate the intent element of the charge (PCR I, 46). The trial court found that:

The only mental health issue in this case is the Defendant's epileptic condition which has not been shown to have any relevance either as to guilt or in mitigation of the Defendant's actions as the Defendant was not suffering from any epilepsy-related symptoms or trauma on the day in question.

(PCR II, 358).

Again, the record conclusively refutes any suggestion that appellant experienced an epileptic seizure either during or immediately before the homicide. Appellant's defense at trial, that the victim had fallen off the bridge accidentally, is inconsistent with his position now that he did the crime but lacked the specific intent to be held criminally responsible. Therefore, there can be no prejudice to appellant in regard to questioning the jury about epilepsy as a defense to intent. Furthermore, the trial court correctly concluded that it was also not relevant to mitigation, in that unless appellant experienced a seizure during or immediately prior to the homicide his epilepsy would not mitigate against the imposition of the death penalty. Moreover,

appellant has not alleged that any of the jurors had any particular bias in regard to these matters, nor has he demonstrated that had these questions been asked there is a reasonable probability that the outcome would have been different. As previously stated, an evidentiary hearing on an ineffective assistance of counsel claim is unnecessary where the facts alleged by appellant to demonstrate deficiency in counsel's performance that prejudiced the defendant are conclusively rebutted by the record. *Ragsdale v. State*, 23 Fla. F. Weekly S544 (Fla. Oct. 15, 1998). A summary denial is proper where, as here, a review of the record demonstrates that the claimed deficiencies were not so substantial as to probably have affected the outcome of the proceedings. *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990); *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989).

#### 4. WAIVER OF MIRANDA

Appellant's motion to vacate alleged that he was unable to make a knowing, voluntary, and intelligent waiver of his *Miranda* rights due to his low intelligence, which classifies him as mentally retarded,<sup>1</sup> his brain damage (including the epilepsy), as well as cultural differences, and that counsel was ineffective for not developing and presenting this evidence.

In denying relief for this claim, the trial court found (1)

---

<sup>1</sup> Please note that appellant alleges in his brief that his IQ is 57; however, in Claim V of his amended motion, appellant indicated that his IQ is 67 (PCR I, 49).

that defense counsel did present and litigate a motion to suppress appellant's statements; (2) that the unsubstantiated claim that the appellant was of "low intelligence" was unsupported by the record and that appellant's conversations and statements to the police and his testimony at trial demonstrated that appellant had no difficulty comprehending or assimilating information and that he clearly understood the rights he was waiving and the meaning of that waiver; and (3) appellant failed to articulate any relevance to his "cultural differences" (PCR II, 359).

As noted by the trial court (PCR II, 358-59), this claim is legally insufficient, in that it does not allege what witnesses were available and willing to testify that appellant was mentally regarded, brain damaged (other than epilepsy), and why he was incapable of voluntarily waiving *Miranda* because he was from Columbia. See *Jackson v. Dugger*, 633 So. 2d 1051, 1054 (Fla. 1993), *Puig v. State*, 636 So. 2d 121 (Fla. 3d DCA 1994); *Sorgman v. State*, 549 So. 2d 686, 687 (Fla. 1989).

Moreover, this claim is refuted by the record. Defense counsel did file a motion to suppress defendant's oral and written statements to government agents on the grounds that these were obtained in violation of his rights under the Fifth and Sixth Amendments to the United States Constitution (R I, 101-06). The trial court held a hearing on this motion on February 6, 1991 (R II, 294-395).

Detective Cadavid's deposition, admitted pursuant to a stipulation (R II, 364-66), reflects that this witness was born in Medellin, Colombia, the same area that appellant is from (SR2, 4). Cadavid speaks the dialect typical of Medellin, Colombia (SR2, 5). On March 16, 1988, Detective Martinez asked Cadavid to make a telephone call to appellant's family in Colombia, because of his accent (SR2, 3-4, 10). The detectives at this time had no idea that appellant was in Colombia (SR2, 9). Cadavid initially spoke with appellant's mother, identifying himself as a homicide detective with the Miami Police Department, and she put appellant on the phone (SR2, 6-7). Cadavid again identified himself as "Detective Cadavid of the City of Miami Police Department in the United States" and stated, "nicely that I needed to talk to him about a problem here, that happened here in Miami" (SR2, 7). Appellant immediately responded, "Yes, I know. I'm in trouble," and indicated that he wanted to come back to Miami (SR2, 7). Appellant then added that he could not do so, because he lacked the necessary documentation and money (SR2, 8). Cadavid responded that he could help with the documentation through the American Embassy and also provide him with plane fare (SR2, 8). Cadavid also told appellant that appellant would have to go before a judge and stand trial (SR2, 12). Appellant then gave Detective Cadavid another telephone number where he could be contacted after Cadavid made arrangements with the American Embassy (SR2, 12). This telephone

conversation was brief, lasting only "five minutes or less" (SR2, 8).

Detective Cadavid then called the American Embassy in Bogota, Colombia, and spoke to Rubin Munoz (SR2, 15, 19) advising him of appellant's willingness to return to Miami but needing a visa to do so (SR2, 10-11). On the same day, Cadavid called appellant back (SR2, 14). Although appellant was not home, his brother answered the phone; Cadavid again identified himself as a detective from Miami (SR2, 12). Appellant's brother stated that appellant was planning to return to the United States as soon as possible and asked if the police were going to pay for appellant's plane fare, in that the family had no money (SR2, 15). Cadavid again stated that the police department would pay for the ticket (SR2, 14). Cadavid then gave appellant's brother the phone number of Rubin Munoz at the American Embassy, indicating that Mr. Munoz would be appellant's contact who would help him make travel and visa arrangements (SR2, 14, 19). During this conversation, appellant's brother also mentioned that appellant suffered from chronic epileptic seizures and had been through psychiatric treatment in Colombia when he was 18 to 20 years old (SR2, 14, 19). Appellant's brother also indicated that he could provide the pertinent medical records, and although Detective Cadavid asked him to send them Cadavid never received any such documents (SR2, 15). Thereafter, Detective Cadavid had no further contact with appellant, and has

never met appellant (SR2, 15, 18).

Rubin Munoz testified during the suppression hearing that in March 1988, he was a legal attache assigned to the United States Embassy in Bogota, Colombia (R II, 299). Legal attaches do not have any jurisdiction to perform any law enforcement functions in the host countries, such as arresting, etc. (R II, 312). Mr. Munoz testified that in March 1988, he received a message from the Miami Police Department that they needed assistance in obtaining a visa for a defendant who had volunteered to return to the United States (R II, 300, 308). Mr. Munoz was not in any way part of the homicide investigation being conducted by the Miami Police Department and was not even aware of the charges at the time (R II, 303). On March 24, 1988, Mr. Munoz received a telephone call from appellant, which he took due to the previous message from the Miami Police Department (R II, 300). Appellant indicated that he was calling from his home in Medellin, Colombia (R II, 300-01). Appellant indicated that he had spoken to detectives from the Miami Police Department "and that he had some problems in the states, that he was wanted for a murder, and he wanted to return to, in effect, face the music. He had left Miami initially for fear of what would happen to him and once he returned to his home in Medellin, his family apparently talked him into going back and facing prosecution" (R II, 303). Mr. Munoz also testified that appellant told him that he caused the death of his girlfriend's son

(R II, 305). Appellant explained to him that he had been living with the mother of the victim (R II, 305); they had planned to get married, and he had been giving her his paychecks (R II, 305); there had been an argument and he had seen the mother in a vehicle kissing another man (R II, 300); he confronted her and she told him that she no longer wanted anything to do with him (R II, 305); so he threw her son off a bridge at the causeway and let the boy drown (R II, 305). Appellant explained to Mr. Munoz that "as a Latin you would understand the best way to get to a woman is through her children" (R II, 305). Mr. Munoz told appellant that he would need a Colombian passport prior to procuring a visa to return to the United States (R II, 301). Mr. Munoz also told appellant that he could not assist appellant in obtaining the passport, and that appellant would first have to obtain a national identification card or the equivalent of a military card from the Colombian government (R II, 302).

Mr. Munoz had a total of three (3) conversations with appellant (R II, 305). After the first conversation detailed above, which was initiated by appellant (R II, 301/13, 306/1), Mr. Munoz telephoned appellant twice at his home in Medellin (R II, 306, 314). The latter two conversations were with appellant and his mother regarding appellant's progress in obtaining his passport (R II, 306). Ultimately, Mr. Munoz did not assist or obtain a visa for appellant (R II, 306, 314). Appellant returned to the United

States without ever visiting the United States Embassy in Bogota; apparently he went to the embassy in Barranquilla, Colombia instead (R II, 307). All of Mr. Munoz's contacts with appellant were by means of telephone conversations, between the cities of Bogota and Medellin; Mr. Munoz never met appellant (R II, 314).

Detective Martinez testified at the suppression hearing that he was the lead investigator in this homicide (R II, 317). On February 18, 1988, four days after the homicide, he obtained a warrant for appellant's arrest; however, the police were unable to locate appellant at the time (R II, 350-51). He testified that he listened to the March 16, 1988, conversation between appellant and Detective Cadavid (R II, 318) and on March 24, 1988, prior to the conversation between appellant and Mr. Munoz, he called appellant at the alternate phone number appellant had given Detective Cadavid. Martinez identified himself as a police officer from the City of Miami Police Department investigating the death of Julio Rivas and told appellant that Mr. Munoz would assist appellant in obtaining a visa (R II, 322). At all times, Detective Martinez informed appellant that there was a warrant for his arrest for this homicide and that he would be arrested upon arrival in the United States (R II, 364). Martinez also gave appellant his phone number at the Miami Police Department (R II, 322).

Thereafter, several telephone conversations took place between appellant and Detective Martinez. Appellant initiated some by

calling Detective Martinez at the police department in Miami (R II, 322). During one of these telephone conversations, appellant told Martinez that he was being represented by an immigration attorney in Miami, who was in possession of appellant's identification card, which was needed to obtain his Colombian passport (R II, 357). Appellant asked Martinez to call this attorney to obtain the identification card for him (R II, 357). Martinez did so, but the attorney indicated that he was not in possession of the card; however, during the conversation the immigration attorney told Detective Martinez that appellant had indicated that he was being represented by an attorney named Martinez (R II, 35). Detective Martinez immediately called appellant to ensure that appellant knew that he was a police officer and to determine if appellant was confused; however, appellant admitted that he had always known Martinez's identity and status, and that he was not confused (R II, 354-55). The remainder of Detective Martinez's telephone contacts with appellant involved periodic checks on appellant's progress in obtaining the proper documentation for entry into the United States. During one of these telephone conversations, appellant requested "confidentiality" but only in terms of "media coverage" (R II, 355). Appellant also indicated that he liked working and inquired about the availability of jobs in prison (R II, 354). Detective Martinez responded that work was per se available in prison but never indicated or promised that appellant would have a

job in prison (R II, 354). Finally, appellant called Detective Martinez, told him that he had obtained the necessary documentation and asked Detective Martinez to send him an airline ticket.

Appellant received this ticket and boarded a plane to Miami alone, unaccompanied by any law enforcement personnel (R II, 324). Upon arrival at the airport in Miami at 1:00 p.m. on April 11, 1988, appellant was met by Detective Martinez (R II, 324, 327). Martinez identified himself and assisted appellant through Customs without asking any questions and without any discussion with appellant (R II, 325-26). Upon exiting the airport, Martinez informed appellant that he was under arrest for the homicide of Julio Rivas and read appellant his *Miranda* rights in Spanish. Martinez ascertained that appellant had a sixth grade education, understood his rights, was coherent, did not appear to be under the influence of narcotics or alcohol, and was not threatened or promised anything in return for making any statements (R II, 326, 333-35). Since Martinez had already been told by appellant's family that appellant was taking medication for epilepsy, Martinez also asked appellant if he had taken his medication (R II, 361). Appellant indicated that he had taken his medication (R II, 360). This medication, Depakote, did not cause any disorientation in appellant (R II, 360). Appellant waived his *Miranda* rights and indicated that he did not want an attorney present and did want to make a statement (R II, 329). Martinez then placed appellant into

his vehicle. Appellant was not handcuffed. During the ride out of the airport, appellant admitted having thrown the victim off a bridge on the Rickenbacker Causeway (R II, 330). Martinez asked appellant if he would show him the exact location, and appellant agreed (R II, 330). While en route and due to the timing of appellant's arrival, Detective Martinez asked appellant if he wanted lunch (R II, 329). In accordance with appellant's wishes, they then ate at a local Wendy's restaurant. Appellant then directed Detective Martinez to the Rickenbacker Causeway, told him to make a U-turn on the high bridge, Powell Bridge, counted four posts and told Martinez to stop. Appellant then stated that on the day of the crime he had stopped the car there, raised the hood in order to pretend he was stranded and then threw the child off the bridge at that location (R II, 330-31).

Detective Martinez then drove appellant to police headquarters (R II, 331), where Martinez placed a written *Miranda* waiver form in front of appellant and again read him his *Miranda* rights (R II, 331-39). Appellant again acknowledged his rights, placed his initials beside each of the rights on the waiver form and signed the waiver form in the presence of Detective Martinez and another witness, Officer Sam (R II, 331-39). Approximately two hours after his arrival in Miami, appellant gave a tape-recorded statement to Detective Martinez, during which he again acknowledged his *Miranda* rights and waived them (R II, 342-45). Immediately after giving

the tape-recorded statement, appellant consented to a video recording of his statement during which he again acknowledged his *Miranda* rights and waived them (R II, 345-46). Appellant was then jailed.

The tape-recorded and video statements were both reviewed by the trial court (R II, 349). After hearing arguments from both the State and defense counsel on February 8, 1991, the trial court denied appellant's motion to suppress (R II, 395).

It is clear from the record that despite any evidence of appellant's low intelligence, mental problems or cultural differences, appellant was able to voluntarily waive his *Miranda* rights. Therefore, even with defense counsel's alleged failure to present such evidence, there is no reasonable probability that the outcome would have been different in regard to the motion to suppress. Furthermore, even if appellant's post-custody statements had been suppressed, his pre-custody statements to Mr. Munoz would have been admissible, see *Arbelaez v. State*, 626 So. 2d 169, 175 (Fla. 1993), and thus, there is no reasonable probability that the outcome of this trial would have been different.

Finally, this issue is also procedurally barred, in that it should have been raised at trial and merely recasts this issue as ineffective assistance of counsel. Thus, this issue should or could have been raised on direct appeal and is clearly not a proper ground for a motion for post-conviction relief, and as such is

procedurally barred. *Rose v. State*, 675 So. 2d 567, 569 n.1 (Fla. 1996); *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995).

### C. PENALTY-PHASE PROCEEDINGS

#### 1. RETENTION OF A MENTAL HEALTH EXPERT

Appellant alleged that he has obtained the services of mental health experts, who have examined him and are now prepared to testify to various mitigating circumstances, in particular that appellant suffers from epilepsy, brain damage and mental retardation, that is, he has an I.Q. of 67. However, appellant again failed to state who those experts were and that they were available and willing to testify at the time of trial. As such, this allegation was insufficiently factually pled. See *Jackson v. Dugger*, 633 So. 2d 1051, 1054 (Fla. 1993); *Puig v. State*, 636 So. 2d 121 (Fla. 3d DCA 1994).

Regardless, the record is clear that defense counsel adequately investigated appellant's mental health history and, even if there were deficiencies, there is no reasonable probability that the outcome would have been different. The trial court noted in her order denying relief:

Clearly, if any mental health "expert" which the Defendant now claims he has located had been called to testify and testified consistent with what the Defendant now claims, this testimony would be in direct conflict with his own previous mental health experts' findings.

The Defendant's taped and video-taped statements and his testimony at trial also dispute any claim that the

Defendant is "retarded" or is of such low intelligence so as to be relevant to any of the issues before the jury.

(PCR II, 361).

There can be no question that counsel was aware that appellant suffered from epilepsy. During penalty phase, defense counsel presented the testimony of Dr. Lopez, appellant's treating neurologist, as well as appellant's friends, Juan Londrian and Adelfa Salazar, who testified that appellant had epilepsy and had suffered epileptic attacks (SR VII, 982-1016). Appellant was also psychiatrically evaluated pursuant to defense counsel's request (R I, 93-98, 99-100). Dr. A.M. Castiello evaluated appellant on December 19, 1990 (See report of Dr. Castiello at PCR I, 235-39). Appellant told Dr. Castiello that he had tried to kill himself twice in Colombia by taking rat poison, and that he had provoked a fight with a priest, which resulted in him taking poison. Appellant also stated that he had been in a mental institution for several months, had escaped and was taken back. He told Dr. Castiello that he had suffered from epilepsy since he was eighteen (18) years old. When he related the facts of the incident to Dr. Castiello, he did not claim to have suffered a seizure, but rather claimed that the child was "hyper" and had fallen from the bridge into the water.

As for his social history, appellant told Dr. Castiello that he was born in Colombia on August 29, 1956, that he was the

youngest of twelve living siblings, that his parents were still alive and together, and that his father was a police officer. Appellant stated that he was never able to learn and had great difficulties in school, although he did learn to read and write. Appellant also stated that he had been arrested a number of times due to his drinking problem.

Dr. Castiello opined that appellant was functioning at a low average intellectual capacity. Thus, appellant's newly alleged I.Q. of 67 and the mental functioning of a six year old is in conflict with Dr. Castiello's conclusion as to appellant's mental functioning. The fact that these new mental health experts disagree with the expert relied upon by defense counsel does not make counsel ineffective. See *Correll v. Dugger*, 558 So. 2d 422, 425 (Fla. 1990). Dr. Castiello also indicated that appellant's communication was over-elaborated and slow, although clear, coherent and relevant. He found that appellant displayed no gross memory deficits. Dr. Castiello found appellant to be competent to stand trial and sane at the time of the offense. He did, however, conclude that appellant's insight and judgment showed a definite tendency to be inadequate. Prior to trial, the State listed Dr. Castiello as a witness (PCR I, 241).

Appellant's allegation concerning counsel's failure to retain a mental health expert is refuted from the record. Not only did counsel present the testimony of Dr. Lopez, he was also aware of

Dr. Castiello's mental health examination. Clearly, both Dr. Castiello and Dr. Lopez possessed sufficient information to make their diagnoses, and thus counsel was not ineffective for not providing the experts with additional information. See e.g. *Jennings v. Dugger*, 583 So. 2d 316, (Fla. 1991); *Johnston v. Dugger*, 583 So. 2d 657, 660-61 (Fla. 1991); *Roberts v. State*, 568 So. 2d 1255, 1260 (Fla. 1990).

Appellant also alleges that his initial trial counsel retained Dr. Merry Haber, a mental health expert, who was not provided with adequate materials or information and, thus, could not be of assistance. However, appellant had not alleged that Dr. Haber would testify any differently than Dr. Castiello would have if called. Nor does appellant state with any specificity what mitigating circumstances Dr. Haber would have testified to. Thus, this claim is legally insufficient. See *Jackson v. Dugger*, 633 So. 2d 1051, 1054 (Fla. 1993).

Appellant again alleged that defense counsel did not discover his jail records, which document his epileptic condition; however, as stated above, the record clearly shows that defense counsel was aware of these jail records (R, I, 82-83).

## **2. INVESTIGATION OF ABUSIVE BACKGROUND**

Appellant alleges that counsel was ineffective for not presenting the testimony of unnamed acquaintances who would have testified about appellant's epilepsy, his strange behavior, his

being "mentally slow" and his non-violent character, as well as about his relationship with Graciela Alfara. Again, his failure to allege who these witnesses were and their willingness and availability to testify make this an insufficient allegation. See *Jackson v. Dugger*, 633 So. 2d 1051, 1054 (Fla. 1993); *Puig v. State*, 636 So. 2d 121 (Fla. 3d DCA 1994).

Appellant also alleges that counsel was ineffective for not presenting the testimony of various unnamed family members concerning appellant's background. Appellant asserts that these witnesses would have testified that appellant was born in Medellin, Colombia, on August 29, 1957. Appellant's mother did not want appellant or the last six other children. Appellant's father wanted the children, but only to put them to work for the money. Appellant's father got a job as a police inspector in San Vincente. Appellant's mother lived with the children in Medellin with her mother. When His father would come home, he would beat his mother and siblings. Appellant's father had a mental illness and sexually molested his daughters. Appellant's siblings suffer from extreme nervousness and other psychological problems. Appellant was a nervous child, slower in development, who completed only the sixth grade. Appellant was physically punished at school and beaten at home by his mother and older brother. Appellant ran away from home several times. In that the family was poor, appellant began working at a young age. He sniffed nail polish remover, smoked

marijuana, took LSD and would come home drunk or high on drugs. From an early age appellant spent many hours working at a church, where the priests exploited him and were cruel to him, so he tried to kill himself with poison or by cutting his veins. Appellant was sent to a mental hospital for massive drug and electric shock treatments. At the age of eighteen, appellant had his first epileptic attack. He was given pills but would often forget to take them. When he would have a seizure, he would bang his head on the floor. Appellant decided to come to the United States to work, where he met the victim's mother, Graciela Alfara.

This claim was also properly summarily denied in that even if counsel were deficient in not presenting such evidence, there is no reasonable probability that the result of the sentencing proceedings would have been different. The trial court found three aggravating circumstances (R II, 246-51). The first was that the homicide was committed in the course of the kidnaping of Julio Rivas. The second was that the murder was cold, calculated and premeditated without the pretense of moral or legal justification.

The court stated:

Defendant's statement to Juan Londrian, Pedro Salazar, Rubin Munoz and Detective Martinez are all consistent with a cold and calculated plan to avenge his perceived dishonor at the hands of Ms. Alfara. Indeed, Defendant told Munoz something to the effect, "What else was he to do?" Had the victim been Ms. Alfara, then perhaps there was a pretense of moral justification. But the victim was innocent of any wrongdoing, real or perceived. He

was executed by the Defendant in a carefully planned act of vengeance.

(R II, 250).

The third aggravating circumstance was that the homicide was especially heinous, atrocious or cruel. The court noted that despite appellant's police confession to the contrary, the medical examiner's testimony was that the victim's injuries were consistent with manual strangulation and a struggle (R II, 248). The court stated:

One can imagine the sheer terror of the boy in either being choked and beaten and dragged from the car and thrown, alive, off of the bridge, or if Defendant is to be believed, the boy's shock and horror, to have an adult he loved and trusted, to suddenly and without any reason, throw him into the bay. Even at five years of age, Julio must have helplessly anticipated his impending death.

(R II, 251).

Defense counsel presented six (6) witnesses at the penalty phase. Detective Martinez testified that during the course of his investigation he determined that appellant had no record of prior felony convictions (SR VII, 979). Martinez also testified that appellant returned to the United States voluntarily and without any threats to influence his decision (SR VII, 981).

Juan Londrian testified that he had known appellant for approximately eight years and saw him almost on a daily basis (SR VII, 983). He never saw appellant engaging in criminal activity or acting violently (SR VII, 983). Appellant was hard working and

never indulged in narcotics or alcohol in significant amounts (SR VII, 983-84). Appellant would take a pill every two days for epilepsy (SR VII, 989). He never saw appellant act in any abnormal behavior (SR VII, 984-85).

Pedro Salazar testified that appellant has been his family's friend for more than three years (SR VII, 990). Appellant had once lived with the Salazar family for approximately six months (SR VII, 990). This witness had never seen appellant take narcotics or drink alcohol in excess (SR VII, 991). Nor had this witness ever seen appellant engage in any criminal activity (SR VII, 991). This witness did indicate, however, that appellant was a very hard worker (SR VII, 9892).

Adelfa Salazar, Pedro's mother, testified that appellant was a close friend and that she trusted him enough to allow him to live in their home (SR VII, 994). She never saw appellant engage in any criminal, immoral or antisocial behavior, and also indicated that appellant was hard working and respectful (SR VII, 995). She indicated that appellant had several epileptic attacks while living in her home, and that during these attacks appellant would have strong convulsions and could not remember what had happened during these attacks (SR VII, 996).

Marta Salazar, who also lived with Pedro and Adelfa, testified in substantial conformity with the two other above witnesses (SR VII, 997-99).

Dr. Raul Lopez testified that he was a neurologist in Miami, Florida (SR VII, 1005). In 1984 he treated appellant after appellant had an epileptic attack (SR VII, 1006). Appellant had epilepsy and a history of seizures for several years (SR VII, 1007). He had previously been treated with anti-convulsion medication, which had ceased to be effective (SR VII, 1007, 1009). Dr. Lopez thus prescribed another anti-convulsion medication in March of 1984. Subsequently, this medication was also changed (SR VII, 1010-11). The side effects of the last medication prescribed by Dr. Lopez, Depakote, are stomach upsets, nausea, weight gain and a mild shaking of the hands (SR VII, 1011). Dr. Lopez had prescribed 500 milligrams of this medication, twice a day, in November 29, 1984 (SR VII, 1014-15). Dr. Lopez then lost contact with appellant until January 1986, when appellant went to Baptist Hospital following another convulsion (SR VII, 1019). Appellant had not been taking his medication as instructed (SR VII, 1015). Dr. Lopez specifically stated that "depression," "fatigue," etc. were not part of the side effects of appellant's medication (SR VII, 1012-13).

During the guilt phase, appellant testified he was born in Medellin, Colombia, but had left there and lived in the Bahamas, Panama and Venezuela prior to coming to the United States in 1980 (SR V, 766). Upon arrival in the United States, he began working with a restaurant chain (SR V, 767). He never married and had no

children (SR V, 768). He was epileptic and sometimes took medication for his condition (SR V, 780, 782).

In appellant's confession which was introduced during guilt phase, appellant stated that he was thirty-one (31) years old at the time of the crime (SR IV, 598). He had lived in the United States for eleven years (R I, 158). He met Graciela Alfara approximately two to three years prior to the crime at a cafeteria (R I, 138). He "liked her" and used to give her good tips (R I, 138). He moved into her house approximately three and one-half (3 ½) months prior to the homicide (R I, 162). She had asked him to help her move and he felt sorry for her (R I, 139). He then moved in and would give her money for the rent, groceries, etc. (R I, 139).

Appellant indicated that after the homicide while he was in Colombia, he told his family what he had done and they were frightened (R I, 178). Appellant indicated that he "didn't feel right in Medellin" and was thinking of coming to Chicago or New York until the police called him and talked to him (R I, 178). Speaking with the police gave him "more courage" and he "returned to pay for what I did" (R I, 178-79). Appellant stated, "I don't know if I did it in a moment of madness, desperation or my illness, I don't know how to qualify it, but what I did was not correct" (R I, 179). He added, "I hope they might give me work to work in the prison itself" (R I, 179).

Defense counsel argued that the only aggravating circumstance proven was the murder took place during the commission of a kidnaping (R II, 258). In mitigation, counsel argued: (1) lack of criminal history; (2) that appellant's actions were the result of extreme mental or emotional disturbance; (3) that appellant did not appreciate the criminality of his conduct; (4) the age of appellant; and (5) that appellant had expressed remorse by voluntarily returning to the United States and confessing (R II, 257-61; SR VII, 1038-49; SR2, 28-34).

The trial court found one statutory mitigating factor, that being that appellant had no significant history of prior criminal activity (R II, 251-52). With respect to nonstatutory mitigation, the trial court stated:

Having provided support for Ms. Alfara and her children, and having professed his love for her, he was enraged when he saw her with another man after she had told him previously to move out.

In his mind, he had to avenge the perceived affront to his honor and dignity and focused on Julio as the means to that end.

But this Court cannot conclude that either his distorted thinking or his epilepsy had any bearing on his killing the child to the extent that he was under the influence of any mental or emotional illness at the time of the killing or that he was unable to appreciate the criminality of his act.

The court does find in mitigation, however, that Defendant showed some remorse in voluntarily returning to this jurisdiction, knowing he would be prosecuted, but probably unaware that he might be sentenced to death if

convicted.

(R II, 252).

The jury recommended death by a vote of 11 to 1. The trial court followed the jury's recommendation and sentenced appellant to death.

Appellant was thirty-one years old when he participated in the kidnaping and murder of five-year-old Julio Rivas. Evidence of a deprived and abusive childhood would have therefore been given little mitigating weight. See *Bolender v. Singletary*, 16 F.3d 1547, 1561 (11th Cir. 1994); *Francis v. Dugger*, 908 F.2d 696, 703 (11th Cir. 1990).

Overall, it is clear that even if the evidence of appellant's background had been introduced, in light of the aggravating factors found and the mitigating evidence presented in this case, there is no reasonable probability that the results of the sentencing proceeding would have been different. As the trial court stated:

This Court further concludes that even if the Defendant were able to show that his family members would have testified as to the issues he claims, and that they were available and willing to testify at the sentencing hearing, there is not a reasonable possibility that the result would have been different.

(PCR II, 362).

This case is similar to *Thompkins v. Dugger*, 549 So. 2d 1370, 1373 (Fla. 1989), where Thompkins argued that there was additional mitigation that should have been presented at trial, but the trial

court found that the evidence would not have affected the outcome. This Court affirmed the trial court's finding that the second prong of the *Strickland* test had not been satisfied. See also *Mendyk v. State*, 592 So. 2d 1076 (Fla. 1992); *Buenoano v. Dugger*, 559 So. 2d 1116 (Fla. 1990); *Correll v. Dugger*, 558 So. 2d 422 (Fla. 1990). Thus, the State submits that it was proper for this claim to be summarily denied.

## POINT II

### **WHETHER JUDGE ROTHENBERG SHOULD HAVE RECUSED HERSELF**

Appellant argues that the Honorable Leslie Rothenberg should have recused herself, because she conducted an *ex parte* hearing and because appellant fears that she can not be fair and impartial due to her public pro-prosecution judicial campaign and her employment as a senior prosecutor in Dade County when appellant was prosecuted.

A judge's consideration of a motion for disqualification is limited to a determination of the motion's legal sufficiency. *Suarez v. Dugger*, 527 So. 2d 190 (Fla. 1988). A motion for disqualification is legally insufficient and must be denied unless the moving party shows that he has a well-grounded fear that he will not receive a fair trial or hearing. *Correll v. State*, 698 So. 2d 522, 524 (Fla. 1997); *Dragovich v. State*, 492 So. 2d 350, 352 (Fla. 1986). "The question of disqualification focuses on those matters from which a litigant may reasonably question a

judge's impartiality rather than the judge's perception of his ability to act fairly and impartially." *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1985). To be legally sufficient, the sworn allegations supporting a motion to disqualify must show some actual bias or prejudice so as to create a reasonable fear that a fair trial cannot be held. *Dragovich v. State*, 492 So. 2d 350, 353 (Fla. 1986).

Even if the allegations made by appellant were true, they do not warrant the disqualification of Judge Rothenberg. In regard to the *ex parte* hearing on March 15, 1996, appellant indicates that he did not find out about this hearing until the day before and was told that the hearing was for purposes of scheduling a *Huff* hearing (IB 46). Although appellant does not indicate why he could not attend the hearing, he alleges that he told the prosecutor to inform the trial court that he would agree only to rescheduling the matter for a status hearing on April 15, 1996 (IB 47). Appellant complains that instead of just resetting the hearing, the trial court (1) directed the State to file its response to his 3.850 motion on or before May 15, 1996, at which time a *Huff* hearing could be set; and (2) upon being advised of an outstanding motion to compel informed counsel that a hearing on the matter should be set for any convenient time (IB 48).

These allegations, even if true, are legally insufficient to show actual bias or prejudice by Judge Rothenberg so as to create

a reasonable fear that a fair trial or hearing could not be held. An *ex parte* communication by a judge is not per se a ground for disqualification as a matter of law. *Nassetta v. Kaplan*, 557 So. 2d 919, 921 (Fla. 4th DCA 1990). In this matter, the alleged *ex parte* communication only concerns the judge having determined that a time period should be set as to when the State should file its response to the motion to vacate and that the defendant should set a date for a hearing on his motion to compel. In *Rose v. State*, 601 So. 2d 1181, 1183 (Fla. 1992), this Court held that, "a judge should not engage in any conversation about a pending case with only one of the parties participating in that conversation. Obviously, ...this would not include strictly administrative matters not dealing in any way with the merits of the case" (emphasis original). See also *Barwick v. State*, 660 So. 2d 685, 692 (Fla. 1995). The court's determination that a compliance date should be set for the State to file its response, or that the defendant should schedule a hearing on his pending motion to compel, is nothing more than an administrative matter which did not in any way deal with the merits of this case.

In regard to Judge Rothenberg's public pro-prosecution judicial campaign and her prior employment as a senior prosecutor, this claim was not timely filed. Fla. R. Jud. Admin. 2.160(e) requires that a motion to disqualify a judge be filed no later than ten (10) days after the discovery of the facts constituting the

grounds for disqualification. The motion is insufficient as to these facts, because it is silent on when counsel first learned about this Court's background. The motion to disqualify was filed on March 27, 1996 (PCS I, 162). However, appellant admits that the prosecutor told him that a hearing was pending in this matter before Judge Rothenberg on March 14, 1996. This is more than ten days. Moreover, appellant was sentenced to death on March 14, 1991, when Judge Rothenberg was allegedly a prosecutor. In his motion to disqualify, appellant stated that he filed a motion to compel on April 28, 1995, and his motion to vacate on August 15, 1995 (PCS I, 162-63). Had counsel been the least bit diligent, he could and should have determined that these motions were pending before Judge Rothenberg. Counsel could and should have then filed the motion to disqualify. Therefore, the motion to disqualify was filed well over a year late and is untimely as to these allegations.

Moreover, these allegations, even if true, are also legally insufficient to show actual bias or prejudice by Judge Rothenberg so as to create a reasonable fear that a fair trial or hearing could not be held. This Court has held that the mere fact that a trial judge had been a highway patrolman did not in itself require the judge to recuse himself from a first degree murder trial where one of the victims was a highway patrol officer. *Tafero v. State*, 403 So. 2d 355 (Fla. 1981). There must be something in the

affidavit to show a personal bias or prejudice by the judge. *Id.*

In this matter, as in *Tafero*, there is nothing in the allegations that show that Judge Rothenberg has a personal bias or prejudice against appellant. The motion to disqualify was no more than a statement expressing a subjective fear, which is legally insufficient. *Fischer v. Knuck*, 497 So. 2d 240 (Fla. 1986); *L.G. v. State*, 702 So. 2d 1337 (Fla. 5th DCA 1997). Furthermore, mere allegations that a trial court is tough on crime are legally insufficient. *See Smith v. State*, 525 So. 2d 477 (Fla. 5th DCA 1988). Moreover, there is also nothing in the allegations which demonstrate that due to her prior employment Judge Rothenberg had any knowledge of the facts of this case which would require the court to be a witness. Even an assertion that the presiding judge could be called as a witness at a trial is not a ground for disqualification, unless it shows that the judge will testify as a material witness. Fla. R. Jud. Admin. 2.160 (d)(2). *See also Patrm v. Reynolds*, 571 So. 2d 493, 496 (Fla. 1st DCA 1990).

It is clear that even if appellant's allegations are true, they do not demonstrate an actual bias or prejudice sufficient to create a legitimate or reasonable fear that Judge Rothenberg could not fairly hear appellant's motion to vacate, and therefore the trial court did not abuse its discretion by denying appellant's motion to disqualify.

### **POINT III**

### TRIAL COUNSEL'S FILES

Simultaneously with its response to Appellant's postconviction motion, the State filed a motion to compel Arbelaez to produce trial counsel's files (PCS I, 184-87). In his written response to the motion to compel, Arbelaez objected to any disclosure of those files prior to the granting of any evidentiary hearing. (PCS II, 337-42). At a subsequent status conference, the State raised its motion to compel and argued that the trial court should grant disclosure prior to any ruling regarding an evidentiary hearing. It argued that disclosure was necessary to investigate the veracity of the claims in the postconviction motion. Again, Arbelaez objected, claiming that the State was limited to those files that related only to the issues for which the court granted a hearing. Ultimately, the trial court took the motion under advisement. (PCR III, 502-06).

At the *Huff* hearing three months later, Arbelaez again objected to the State's motion to compel. Although the trial court deferred ruling on which issues, if any, were worthy of an evidentiary hearing, it granted the State's motion. In order to allow Arbelaez an opportunity to appeal the ruling, the trial court suggested that Arbelaez provide a sealed copy of the files to the clerk, and gave him 30 days within which to file an appeal before the clerk would release the files to the State. The State suggested, however, that they wait until the trial court determined

whether the motion warranted an evidentiary hearing, because if it granted a hearing the issue would be moot since the State would automatically be entitled to the files. Arbelaez and the trial court agreed. (PCR II, 380-81; III, 523-24, 527-29, 530-31).

At the next scheduled hearing, the trial court summarily denied all of Arbelaez' postconviction claims and reaffirmed its prior ruling granting the State access to trial counsel's files. Because the court summarily denied the claims, the State agreed not to seek access to trial counsel's files until the conclusion of this appeal, and thus the trial court stayed its order granting access to the files until this appeal is final. (PCR III, 536-37).

Appellant complains that the trial court abused its discretion in granting the State's motion to compel prior to granting an evidentiary hearing and narrowing the issues for litigation. Specifically, he claims that the State cannot use trial counsel's files to rebut claims in the postconviction motion because such information would be outside the record, and such use would create a factual dispute, thereby mandating an evidentiary hearing. Appellant also complains that the State cannot simultaneously litigate the postconviction proceeding and investigate possible perjury charges against him or his counsel, as such would create a conflict of interest (IB 50-56).

At the heart of Arbelaez's complaint is the timing of any disclosure of trial counsel's files. He concedes that the State is

entitled to the files once the trial court grants an evidentiary hearing and narrows the issues for litigation. (PCS II, 337-42; IB at 54). But he opposes disclosure of the files at any point prior to such a ruling. What he has failed to prove, however, is what harm he would suffer from a pre-ruling disclosure. The State submits that no harm would occur. In fact, it believes that an early disclosure would beneficially affect the postconviction process. By having defense counsel's files prior to filing its response to the postconviction motion, the State would be in a far better position to assess the claims raised in the motion. Whereas the State might otherwise argue for summary denial because it believes that the record refutes the claim, it might agree to an evidentiary hearing based on information in the file.

In *Reed v. State*, 640 So. 2d 1094, 1097 (Fla. 1994) (emphasis added), this Court held that "Reed waived his attorney-client privilege when he filed a motion for postconviction relief claiming ineffective assistance of counsel." Thus, waiver of the privilege occurs when the motion is filed, not when the trial court decides that an evidentiary hearing is warranted. Appellant presents no legitimate reason why the State should not have access to defense counsel's files upon filing of the 3.850 motion. After all, once a defendant files his 3.850 motion, the State is entitled to discuss the issues with trial counsel. See *Turner v. State*, 530 So. 2d 45 (Fla. 1987) ("[A] lawyer who represents a client in any

criminal proceeding may reveal communications between him and his client when accused of wrongful conduct by his client concerning his representation where such revelation is necessary to establish whether his conduct was wrongful as accused.'" (quoting *Wilson v. Wainwright*, 248 So. 2d 249, 259 (Fla. 1st DCA 1971)). As this Court stated in *Reed*, "it is only fair that the State should have a right to refresh counsel's recollection concerning these matters by reference to the attorney's files." 640 So. 2d at 1097. That it seeks to do so prior to filing its response to the defendant's 3.850 motion, rather than after the trial court grants an evidentiary hearing, is of no moment. No harm would occur to the defendant,<sup>2</sup> and it would likely streamline the postconviction process.

Appellant's complaint that the State's use of information in the files would create a factual dispute mandating an evidentiary hearing does not present a compelling reason to restrict disclosure until the granting of an evidentiary hearing. First, Appellant's argument assumes that the State would use information from the files in its response. And second, if it did so, the defendant would only benefit thereby.

As for Appellant's conflict claim, the State did not obtain

---

<sup>2</sup> Of course, the defendant would still have the right to move to exclude from disclosure any materials in the files that are unrelated to the crimes for which the defendant was convicted, subject to an in-camera inspection. See *Reed*, 640 So. 2d at 1097.

access to Arbelaez' files in this case; thus, no conflict occurred. As for any other case that would be affected by this Court's decision, the State would agree that a conflict could exist if a prosecutor sought to simultaneously litigate the postconviction motion and investigate the defendant and/or counsel for perjury. However, it is extremely unlikely that prosecutors across the state would be motivated to simultaneously litigate a 3.850 motion and investigate the defendant's veracity of the allegations so as to create a conflict of interest. Therefore, this Court should affirm the trial court's ruling in this case, granting the State's motion to compel the disclosure of trial counsel's files prior to any ruling regarding an evidentiary hearing.

#### **POINT IV**

#### **PUBLIC RECORDS**

##### **A. CITY OF MIAMI POLICE DEPARTMENT**

On or about May 2, 1995, appellant filed a motion to compel the disclosure of certain Miami Police Department records (PCS I, 8). When appellant subsequently filed his initial motion to vacate, he alleged that the Dade County Office of the State Attorney and the Office of the Attorney General had also failed to comply with public records requests (PCS I, 37). Appellant indicated that the State Attorney had turned over a box of documents to him but was withholding other documents. *Id.* These documents are discussed in the following sub-issue. At a hearing

on June 19, 1996, appellant indicated that he had received about 900 pages of documents from the City of Miami Police Department (PCR III, 495/23-496/2). However, appellant's amended motion to vacate, which was filed on or about July 30, 1996, alleged that the City of Miami Police Department had still failed to provide him with the following public records:

1. Graciela Alfara's sworn statement
2. Harlam Alfara's sworn statement
3. Angel Perez' sworn statement
4. Pedro Salazar's sworn statement
5. Jorge Arbelaez' taped statement
6. Videotape recording of Mr. Arbelaez' confession
7. Audio tape and audio tape transcript of Mr. Arbelaez' confession
8. Audio tape recording of Enildo Aguilar's sworn statement
9. Sealed records from Mr. Arbelaez' 1986 arrest by the City of Miami Police Department were received by Mr. Arbelaez' counsel on July 29, 1996. The records, however appear incomplete (footnote omitted).

(PCR I, 28-29).

In its response, the Office of the State Attorney indicated that above items 6 and 7 were admitted into evidence at trial (PCR I, 199); thus the police department would no longer have possession of them. This response also indicated that the State Attorney had provided appellant with items 1-5 and 8 as part of its public records response (PCR I, 200); therefore, disclosure by the police department would be cumulative. In regard to item 9, appellant's 1986 arrest records, the response indicated that there was never a police report generated because the matter was no-actioned (PCR I,

200); thus, the agency could not give what it did not have.

In her order denying relief, the trial court stated in part:

As noted earlier, that while the Defendant filed a Motion to Compel the production of these documents on August 15, 1995, he failed to calendar the Motion or to Notice any of the agencies, nor take any action until ordered to do so by this Court.

The Defendant claims that certain documents are missing from the City of Miami's files, specifically: a videotape, an audiotape, and a transcript of the Defendant's confession. These items are not in the police department's file as they were introduced into evidence. (See State Exhibits 27, 28, 29 and 30 and see trial transcripts pages 586-595) Copies of each of these items were also provided to trial counsel prior to trial through discovery. The six witness statements which the Defendant claims were not provided to him, were provided to trial counsel and have been in the Defendant's possession since the beginning of the discovery process, well before trial.

\* \* \* \*

The final argument under Claim II is that The Miami Police Department has failed to produce any police reports from a separate 1986 arrest. Pursuant to the Defendant's request to unseal his 1986 arrest file, this Court granted that Order, the file was unsealed, and the Defendant's CCR attorney reviewed that file. As no police report was contained in the file, he alleges this report was withheld from him. The file reflects that the case was no-actioned. There is no evidence that any police reports were generated for that case. Based upon the no-action status of the case, it is not unreasonable to conclude that no police reports were generated. Mere speculation by the Defendant is insufficient. The Defendant has not in any way indicated what the possible relevance of the 1986 no-actioned case is and therefore, there is no apparent prejudice.

In conclusion, this Court specifically finds that

the various agencies over which this Court has jurisdiction, have complied with their obligations to provide all public records to the Defendant and that any delay in doing so are directly attributable to the Defendant's failure to diligently pursue his requests for those documents. As no new grounds alleged can be attributed to the documents provided after the filing of the Defendant's initial Motion on August 15, 1995, there is also clearly no prejudice to the Defendant. Therefore, Claim II is hereby Denied.

(PCR II, 350-53).

Appellant argues that he alleged in his motion that the Miami Police Department failed to provide him with certain documents, and that this claim is not clearly rebutted by the record just because the trial court finds that his trial counsel was previously provided these records (IB 57). However, the record does show with as much certainty as is possible that appellant did receive these records. In the State's response to appellant's amended motion, the Assistant State Attorney certified that her office had complied with appellant's public records request and that the subject public records either were provided to appellant by her office, were admitted as exhibits at trial or, as to appellant's 1986 arrest records, do not exist<sup>3</sup> (PCR I, 198-200). This response was filed on or about August 12, 1996, and the *Huff* hearing did not take place until September 12, 1996 (PCR III, 519-533). As this Court

---

<sup>3</sup> A trial court does not abuse its discretion by failing to order the production of records when there has been no demonstration that they exist. *Mills v. State*, 684 So. 2d 801, 806 (Fla. 1996).

has noted, one function of the *Huff* hearing is to allow a defendant to be heard on the status of his public records requests. *Mordenti v. State*, 711 So. 2d 30 (Fla. 1998). However, even in the face of the State's response to these claims, appellant made no further effort at the *Huff* hearing to obtain these documents (PCR III, 519-33). This Court holds that when a postconviction movant is dissatisfied with a response to any requested access to records, he or she must pursue the issue before the trial judge or that issue is waived. *Lopez v. State*, 634 So. 2d 1054, 1058 (Fla. 1993). Since appellant failed to raise this issue during the *Huff* hearing, he waived further review by this Court.

**B. STATE ATTORNEY'S OFFICE/ATTORNEY GENERAL'S OFFICE**

When appellant filed his initial motion to vacate on August 15, 1995 (PCS I, 142), he claimed public records violations by the Dade County Office of the State Attorney, the Office of the Attorney General, and the City of Miami Police Department, among others (PCS I, 37). The documents at issue as to the Office of the State Attorney were:

1. Four telephone messages.<sup>4</sup>
2. Eighteen pages of penalty phase closing notes.
3. Eleven pages of trial testimony outlines.
4. Thirty-six pages of jury selection and trial notes.
5. Seventy-three pages of trial notes.
6. Five pages of notes from motion to suppress.

---

<sup>4</sup> The State Attorney did turn over these documents to appellant (PCS II, 309).

7. Seventy-three pages of deposition notes.
8. Seven pages of deposition notes.
9. Twenty-three pages of miscellaneous notes re: strategy, witnesses, preparation.

(PCS II, 377). The State Attorney's position was that these documents were not public records. *Id.* The documents at issue from the Office of the Attorney General were also notes (PCR III, 443/11).

These issues were heard on May 17, 1996 (PCR II, 390), where the trial court decided to make an in camera inspection of the subject documents and requested briefs from all parties (PCR III, 439-40). These memoranda are found at (PCS II, 299-317). Subsequently, at a hearing on June 19, 1996, the trial court indicated that he had reviewed the documents from the State Attorney and Attorney General and ruled that none were public records except one telephone message (PCR III, 499). In denying appellant's amended claim, the trial court wrote:

The Defendant claims that he has been denied access to files and records and that certain records, some of which he has itemized, have not been provided to him.

This Court finds this claim to be meritless and somewhat of a surprise as this Court held a hearing regarding the production of the files requested by the Defendant. The State Attorney's Office, the Attorney General's Office and the City of Miami Police Department turned over their complete files to the Defendant on or before June 6, 1996, except those documents specified and listed for the Defendant and which this Court reviewed in-camera and determined did not constitute Public Records (with the exception of notes on the back of one telephone message which this Court found did not probably

qualify as a Public Record, but did turn over to the Defendant).

(PCR II, 350).

Appellant now claims that the trial court conducted a legally insufficient in camera inspection of these records, because he failed to compare the subject "notes" with some final product emanating from these notes (IB 58). However, these documents are not items that fall under the definition of a public record. Handwritten notes of depositions or trial notes or strategy notes are clearly "notes from the attorneys to themselves designed for their own personal use in remembering certain things," and are not public records. *Lopez v. State*, 696 So. 2d 725 (Fla. 1997); *State v. Kokal*, 562 So. 2d 324, 327 (Fla. 1990). Nor are notes of the State Attorney's investigations. *Atkins v. State*, 663 So. 2d 624, 626 (Fla. 1995). These documents are simply not "records" that were prepared with the intent of perpetuating or formalizing knowledge. *Shevin v. Bryon, Harless, Schaffer, Reid & Associates, Inc.*, 379 So. 2d 633 (Fla. 1980). See also *Roberts v. Butterworth*, 668 So. 2d 580, 581 (Fla. 1996).

As to the notes withheld from the Office of the Attorney General, these also are not public records for the above reasons. Furthermore, these records are exempt as work product until execution of sentence or imposition of a life sentence. § 119.07(3)(1), Fla. Stat. (1995); *Roberts v. Butterworth*, 668 So. 2d

580, 581 (Fla. 1996).

Appellant argues that the only way to determine whether a note is or is not a public record is to compare it with some final version of this information. However, not one case cited by appellant supports this proposition. Clearly, the trial court can make this evaluation without having to compare a note with some final report. A good example of this is in the *Kokal* opinion, where this Court quoted from *Orange County v. Florida Land Co.*, 450 So. 2d 341, 344 (Fla. 5th DCA 1984), where the trial court evaluated whether certain notes were public records. Nowhere in that opinion did the trial court indicate that it compared the notes to some final product, and nowhere did this Court indicate that such a procedure is required.

Since the documents at issue have either already been provided to appellant, do not exist or are not public records, the trial court did not abuse its discretion by not requiring their production.

#### **POINT V**

#### **PSYCHOLOGICAL COERCION**

In his amended motion to vacate, appellant alleged that the State failed to disclose, or defense counsel failed to investigate and present, evidence that the Government deceived him into returning to Florida by taking advantage of his mental disease through repeated telephone calls and by (1) indicating that they

wanted to help him; (2) assuring him that they would keep the matter confidential; and (3) befriending him (PCR I, 76-78). Appellant argues that the Government's conduct is so egregious that it denied appellant due process.

In his motion, however, appellant failed to allege that defense counsel did not have the information and could not have obtained it by due diligence -- one of the *Brady* prongs. Nor did he allege that counsel had the information, but failed to use it to the prejudice of appellant's defense -- a requirement under *Strickland*. By making a single-sentence conclusory statement encompassing mutually exclusive claims, appellant failed to state a prima facie claim for relief. See *Roberts v. State*, 568 So. 2d 1255, 1259 (Fla. 1990)(conclusory allegations that counsel ineffective do not warrant evidentiary hearing); *Ragsdale v. State*, 23 Fla. L. Weekly S544 (Fla. Oct. 15, 1998)(evidentiary hearing properly denied where defendant failed to assert in motion that he could not have obtained records himself through due diligence or how the outcome would have been different had the evidence been introduced).

Regardless, each of the facts appellant now alleges, about conversations prior to his return to the United State, was testified about at trial (See Issue IB 4 above). Detective Cadavid testified that appellant's brother told them that appellant had psychiatric problems and that he offered to arrange for appellant's

return to the United States (SR2, 14-16). In regard to the promised "confidentiality," Detective Martinez testified that this was only in terms of media coverage (R II, 353). Detective Cadavid also testified that he told appellant that he would help him with the required documentation and plane fare (SR2, 8). Appellant has not alleged any new material that was unknown at the time of trial. Moreover, on direct appeal appellant did raise *Miranda* issues relative to government communications prior to his returning to the United States. *Arbelaez v. State*, 626 So. 2d 169 (Fla. 1993). Thus, this issue should or could have been raised on direct appeal and is clearly not a proper ground for a motion for post-conviction relief, and as such is procedurally barred. *Rose v. State*, 675 So. 2d 567, 569 n.1 (Fla. 1996); *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995)(finding most of claim 1(a) procedurally barred because defendant had attacked confession on direct appeal and could have made additional arguments then). To the extent appellant phrases the issue as one of ineffective assistance of counsel or a *Brady* violation, it is inappropriate to recast a barred claim as one of ineffective assistance of counsel in order to escape the bar. *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990).

In denying appellant relief, the trial court wrote:

The Defendant claims that the government "took advantage of Mr. Arbelaez' mental infirmities when psychologically coercing him to return to the United States from Colombia."

The government's actions in negotiating the Defendant's return to the United States were presented for the jury's consideration and reviewed by the Florida Supreme Court. Statements made by the Defendant while in Colombia to Sergeant Martinez who was in Miami and the context in which they were made were also presented for review by the jury, the trial court and the Florida Supreme Court. The actions of the government and the statements made by the Defendant are issues that were raised or should have been raised on direct-appeal and are therefore not properly raised in a Motion for Post-Conviction Relief. This Court also notes that there is nothing contained in the record, nor any evidence submitted by the Defendant in his Motion to support his claim of improper police conduct and/or psychological coercion. The Defendant's claim is therefore also legally insufficient and without merit.

Claim VII is hereby Denied as procedurally barred and alternatively is legally insufficient and without merit.

(PCR II, 363-4). This ruling was proper.

Even if the claim were not procedurally barred and/or legally insufficient, it is nonetheless without merit. Appellant's alleged personal characteristics, standing alone, are never dispositive of the voluntariness of his waiver or confession; there must also be an element of police overreaching such as threats or promises. *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Appellant claims that this overreaching is psychological coercion by means of deception. Again, appellant alleges that this deception was by befriending appellant and offering to help him with the situation. However, in terms of the voluntariness of a confession, police deception does not render a confession

involuntary per se. *State v. Cayward*, 552 So. 2d 971 (Fla. 2d DCA 1989). Florida courts routinely uphold confessions resulting from misleading statements made by the police to suspects. *Id.* For example, misrepresentations of fact do not require suppression. *State v. Moore*, 530 So. 2d 349 (Fla. 2d DCA 1988). Even fabrication of the true nature of the evidence does not amount to coercion. *Burch v. State*, 343 So. 2d 831 (Fla. 1977). More importantly, offers of help, so long as not specifically made in exchange for a confession, and befriending the defendant do not amount to coercion. *Cannady v. State*, 427 So. 2d 723, 727-28 (Fla. 1983). Clearly, if this conduct does not invalidate a confession, the conduct alleged would not be so egregious as to violate due process. Thus, this claim was properly summarily denied.

#### **POINT VI**

#### **IMPARTIALITY OF JURY**

Appellant states that trial counsel was ineffective for allowing Mr. Kelly to sit as an alternate, after having struck Mr. Kelly using one of his peremptory challenges (IB 63). Mr. Kelly was discharged when the jury retired to deliberate and took no part in the deliberations (SR VI 954-956). He also took no part in the penalty-phase deliberations (SR VII, 1057-58). Moreover, the record reveals that counsel allowed Mr. Kelly to sit as an alternate, because the trial court would have otherwise proceeded with only one alternate to avoid interviewing a new panel (SR II 268/3). Under these circumstances, appellant failed to prove both

prongs of *Strickland* and this claim was properly summarily denied.

**POINT VII**

**DIRECT APPEAL RECORD**

In the amended motion to vacate, although appellant alleges that a complete trial transcript is necessary for appellate counsel to be effective, appellant never alleges that counsel was ineffective for failing to ensure that a complete trial transcript was part of the record (PCR I, 79-82). On appeal, however, appellant's sole argument is that trial counsel was ineffective for failing to raise this issue on direct appeal (IB 65). Appellant may not make different arguments on appeal than he makes below. *Tillman v. State*, 471 So. 2d 32,35 (Fla. 1985).

In response to appellant's amended motion, the State argued that this issue could have been raised on direct appeal, but was not, and is therefore procedurally barred, citing to *Delap v. State*, 350 So. 2d 462 (Fla. 1977) and *Buenoano v. Dugger*, 559 So. 2d 1116 (Fla. 1990). The trial court denied the claim on this basis but also denied it on the basis of being legally insufficient, writing:

This Court also notes that counsel has failed to articulate what attempts, if any, he has made to obtain these transcripts. He has also failed to allege what prejudice, if any, his client has suffered.

(PCR 364).

The trial court properly denied this claim summarily, since

appellant could have raised it on direct appeal. When grounds are raised on a 3.850 which could or should have been raised on direct appeal, they are procedurally barred and cannot be raised in a postconviction relief motion. *Rose v. State*, 675 So. 2d 567, 569 n.1 (Fla. 1996); *Harvey v Dugger*, 656 So. 2d 1253 (Fla. 1995). Further, raising a different argument in a rule 3.850 motion to relitigate an issue raised and rejected on direct appeal is inappropriate. *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Brown v. State*, 596 So. 2d 1026 (Fla. 1992). An attempt to relitigate a procedurally barred claim by couching it in terms of ineffective assistance of counsel is also barred. *Valle v. State*, 705 So. 2d 1331, 1336 n.6 (Fla. 1997). Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal. *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990).

To the extent this Court considers appellant's ineffectiveness allegations, they are without merit. Appellant failed to establish any error that occurred in those missing pages. *Cf. Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994); *Ferguson v. Singletary*, 632 So. 2d 53, 58 (Fla. 1993); *Turner v. Dugger*, 614 So. 2d 1075, 1079-80 (Fla. 1992). Therefore, appellant failed to establish deficient conduct or prejudice under *Strickland*.

#### **POINT VIII**

#### **ADMISSION OF PHOTOGRAPHS**

In his amended motion, appellant alleges that the State was permitted to introduce gruesome photographs of the victim's body, which were not relevant and were highly prejudicial. The trial court ruled that this claim was insufficiently pled, because appellant failed to specify which of the photographs introduced were not objected to by his attorney, so that his claim of ineffective assistance of counsel could be reviewed (PCR II, 365). The trial court also indicated that she had reviewed the photographs and that they were clearly relevant and that their probative value outweighed any prejudicial effect upon the jury (PCR II, 365-66). Appellant indicates that the subject photographs were admitted in pages 310-316 of the record (PCR I, 84; IB 65). This was during the testimony of the crime scene technician, Hector Infante. During this testimony, exhibits 1-A, 1-B, 1-C, 1-D, 1-E and 1-F were admitted into evidence as Exhibits 1, 2, 3, 4, 5 and 6 respectively (SR II, 310/9, 312/20). Prior to the admission of 1-F, defense counsel objected on the basis that it depicted the victim's body and was prejudicial; this objection was overruled (SR II, 311/15-312/15). Subsequently, when additional photographs of the body of the victim were offered into evidence (1-G, 1-H and 1-I), defense counsel also objected to their admission (SR II, 314/7-317/15). The trial court ruled that 1-G was admissible, although the witness could not explain the cause of the injury it revealed (SR II, 315/6), and that 1-H and 1-I were

relevant and not excessively gruesome (SR II, 315/20). They were admitted as Exhibits 7, 8 and 9 (SR II, 3167/12).

The only photographs not objected to were 1-A (#1), 1-B (#2), 1-C (#3), 1-D (#4), and 1-E (#5). Although the record is not terribly clear as to #1, it appears to be a photograph of the dock area where the victim was taken after having been recovered from the water (SR II, 309/14-310/16). This is certainly consistent with photographs admitted as #2-#5, which are found at pages 110-113 of volume I of the record on direct appeal. These photographs are merely generic photos of the surrounding area and contain no part of the victim's body. Photographs #6-9, however, do show the victim's body (R, I, 114-117); however, defense counsel objected to their admission. With the exception of #9, none of these pictures offer cumulative information, and #9 was offered because it was the only full-length picture of the victim (SR II, 316/7).

The trial court was correct to impose a procedural bar to this claim (PCR II, 365). Again, when grounds, such as the admissibility of photographs, could or should have been raised on direct appeal, they are procedurally barred and cannot be raised in a postconviction relief motion. *Rose v. State*, 675 So. 2d 567, 569 n.1 (Fla. 1996); *Harvey v Dugger*, 656 So. 2d 1253 (Fla. 1995). Moreover, appellant's attempt to relitigate this procedurally barred claim by couching it in terms of ineffective assistance of counsel is also barred. *Valle v. State*, 705 So. 2d 1331, 1336 n.6

(Fla. 1997). Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal. *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990).

Furthermore, both claims are clearly rebutted by the record and summary denial was proper on this basis. *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). Foremost, persons who murder others should expect to be confronted with evidence of their accomplishments. *Henderson v. State*, 463 So. 2d 196, 200 (Fla.), *cert. denied*, 473 U.S. 916 (1985). See also *Jones v. State*, 648 So. 2d 669 (Fla. 1994), *cert. denied*, 515 U.S. 1147 (1995)(finding no abuse of discretion in admitting photographs that "were relevant either to show the condition and location of the body when discovered, or to assist the medical examiner in explaining the condition of the victim's clothing or the nature of his injuries and the cause of death."); *Preston v. State*, 607 So. 2d 404, 410 (Fla. 1992)("The fact that photographs are gruesome does not render their admission an abuse of discretion."). Clearly, the photographs of the victim's body were relevant to show the condition of the body and to explain the cause of death.

Further, the record clearly rebuts any allegation that trial counsel failed to preserve the issue for appellate review. He objected to every photograph that depicted the victim's body. Also, to the extent that appellant alleges ineffective assistance

of appellate counsel when appellant stated in his brief that it "was trial counsel's duty to raise this issue on appeal," a rule 3.850 motion is the incorrect vehicle. Fla. R. App. P. 9.140(j)(1). Summary denial of this claim was proper.

#### **POINT IX**

##### **FAILURE TO OBJECT BELOW**

Appellant argues that trial counsel's failure to object to the following matters constitute ineffective assistance of counsel.

##### **A. AUTOMATIC AGGRAVATOR**

Appellant argues that the felony murder instruction acts as an unconstitutional automatic aggravating circumstance, and that trial counsel was ineffective for failing to object on this basis to the instruction. The trial court found that this claim was procedurally barred, in that it was not raised at trial or on direct appeal (PCR II, 366). The trial court also found that this claim failed on the merits. *Id.*

Again, based on the cases cited above, this claim was properly barred because it could or should have been raised at trial or on direct appeal and was not. Appellant's attempt to couch this claim in terms of ineffective assistance of counsel does not circumvent this bar.

Moreover, this Court has repeatedly rejected appellant's claim that the felony murder instruction acts as an automatic aggravator.

*Blanco v. State*, 706 So. 2d 7, 11 (Fla. 1977); *Johnson v. State*, 6609 So. 2d 637, 647 (Fla. 1995). Therefore, appellant has not demonstrated either deficiency or prejudice, and his allegation of ineffective assistance of counsel is legally insufficient. The claim was properly denied. *Melendez v. State*, 612 So. 2d 1366, 1369 (Fla. 1992).

**B. HEINOUS, ATROCIOUS, OR CRUEL INSTRUCTION**

Appellant also argues that the State failed to prove the existence of this circumstance, that the instruction for this circumstance is unconstitutionally vague, and that defense counsel was ineffective for failing to object to the instruction.

In denying this claim, the trial court stated:

As there was no challenge at trial or on direct appeal to the instruction which was subsequently held improper in *Espinosa v. Florida*, 112 S.Ct. 2926, 2928 (1992), this claim is procedurally barred. On appeal, the Defendant only argued that the facts did not establish this factor, an argument that was rejected by the Florida Supreme Court. See *Arbelaez v. State*, 626 So. 2d at 176-177.

The Defendant cannot avoid the procedural bar by couching his argument in terms of ineffective assistance of counsel. See *Knight v. Dugger*, 574 So. 2d 1066 (Fla. 1990); *Blanco v. Wainwright*, 507 So. 2d 1377 (Fla. 1987).

The Defendant alleges that the Defendant's trial attorney who is charged with the responsibility of knowing the law, was deficient. *Espinosa* was, however, decided in 1992, while the Defendant was tried and sentenced in 1991. Therefore, the Defendant's attorney cannot be held to have been deficient in his knowledge of a finding not reached until one year after his

representation of the Defendant.

(PCR II, 372).

This claim was properly denied. In regard to whether the record supports a finding of this circumstance, this issue was raised and rejected on direct appeal; therefore, it is procedurally barred. *VanPoyck v. State*, 694 So. 2d 686, 698 (Fla. 1997). In regard to the vagueness of the instruction, again, this claim was properly barred because it could or should have been raised at trial or on direct appeal and was not. *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990). Couching this claim in terms of ineffective assistance of counsel does not circumvent this bar. *Id.*; *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995)(counsel cannot be deemed ineffective for failing to object to instructions the validity of which have been previously upheld).

Even if this Court were to find that counsel were deficient for failing to object to this instruction, there would be no prejudice under *Strickland*. The evidence presented at trial clearly established that this circumstance would have been found to exist under any definition of its terms. *See State v. Salmon*, 636 So. 2d 16, 17 (Fla. 1994). As this Court wrote in its opinion on direct appeal:

The record in the instant case supports the trial judge's finding of the heinous, atrocious, or cruel aggravating circumstance beyond a reasonable doubt. Both the medical examiner's testimony and Arbelaez's own statements show

such additional acts as to set this murder apart from the norm of capital felonies.

The record shows that Arbelaez beat and strangled the child before throwing him off the Powell Bridge. At trial, Pedro Salazar testified that Arbelaez confessed to him shortly after killing the child. According to Pedro Salazar, Arbelaez stated that he shook the child, and that "he squeezed the boy's neck." Pedro Salazar's testimony was corroborated by the medical examiner's testimony. The medical examiner testified that the child's injuries were consistent with strangulation. Further, the numerous bruises along the right and left sides of the child's body and the linear abrasions and rectangular bruises on the child's head and face show that the child was knocked or pressed into something. These injuries are consistent with the damage found inside Arbelaez's car. Moreover, the medical examiner found that the bruises to the child's body and choking on the neck were recent injuries that occurred while the child was alive, but shortly before death. The record shows that Arbelaez severely beat and choked the child before throwing him off the bridge. In addition to the bruises on the child's body, the record shows that the child was conscious at the time Arbelaez threw him off the bridge. Arbelaez's statements show that he called to the child and that the child lifted his arms up to be picked up. Arbelaez reached down picked up the child and threw him off the bridge into the water seventy feet below. The medical examiner found the child's lungs were hyper inflated and filled with blood and frothy material which resulted from asphyxiation associated with both strangulation and drowning. We find that these facts show beyond a reasonable doubt the existence of the aggravating circumstance.

*Arbelaez v. State*, 626 So. 2d 169, 176-77 (Fla. 1993).

**C. COLD, CALCULATED AND PREMEDITATED INSTRUCTION**

Appellant argues that the instruction given by the trial court is unconstitutionally vague in violation of *Jackson v. State*, 648

So. 2d 85 (Fla. 1994), and that to the extent trial counsel did not object to this instruction he was ineffective. The trial court found this claim procedurally barred, in that it was not raised at trial or on direct appeal (PCR II, 368).

Again, based on the cases cited in the previous issue, this claim was properly barred because it could or should have been raised at trial or on direct appeal and was not, and now couching this claim in terms of ineffective assistance of counsel does not circumvent this bar. *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995)(counsel cannot be deemed ineffective for failing to object to instructions the validity of which have been previously upheld).

The trial court also found this claim legally insufficient, in that (1) it failed to proffer what evidence or what arguments could have been offered in addition to those that were offered had the limiting instructions now required been given; (2) appellant failed to allege what prejudice he suffered; and (3) appellant failed to demonstrate that there is a reasonable probability the result would have been different had the instruction now required been given (PCR II, 369). This was a correct ruling, in that a defendant may not simply file a motion for postconviction relief containing conclusory allegations that his trial counsel was ineffective and then expect to receive an evidentiary hearing. *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989).

Finally, the trial court also found that even if she had been required to review this claim on the merits, it would also fail stating:

A review of the record reveals that when the Defendant committed the murder of five (5) year old Julio Rivas, he did so with calm and cool reflection. The evidence established a careful plan or prearranged design to commit the murder, and that the murder was executed with "heightened premeditation" with no justification which could have rebutted the cold and calculating nature of the Defendant's acts. The Defendant carefully thought out and planned the murder of Julio Rivas to avenge his mother. He sought to hurt Julio's mother for daring to leave him and for seeing another man. The Defendant believed that the way to destroy Julio's mother was to drown her son Julio. The Defendant's actions were not the product of a sudden and uncontrollable outburst of emotion. He planned and plotted his revenge, waiting until the following morning to lure Julio away from his mother, and then to drive him to the beach and onto the bridge. Despite his deadly intentions, the Defendant had the presence of mind to carefully conceal his actions. Before exiting his car, he popped open the hood so that any passing vehicle would believe he was a disabled motorist and not become concerned about his stopping upon the bridge. Before hurtling this trusting five (5) year old child into the waters below, the Defendant beat him and strangled Julio to ensure that he would not survive his plunge into the sea and to emphasize the message to his mother. The Defendant then casually drove away, abandoned the car after trying to burn it and went to a friend's house where he showered, changed his clothes, borrowed money and left Miami for Puerto Rico where he hid until he could obtain money from his family so he could fly to Colombia.

The Jury, who recommended a sentence of death by a vote of 11-1, clearly felt that the dissolution of a 3 ½ month relationship was hardly a legal or moral justification for the calculated premeditated murder of a five(5) year old child. The pain and terror this child endured to avenge the termination of this short

relationship clearly weighed heavily against the pain and anger the Defendant may have suffered over his loss.

The Defendant has failed to allege or demonstrate that had his attorney objected to the wording of the instructions given to the Jury and that if the court had read the limiting instructions now approved by the Supreme Court, that the Jury would not have recommended and the Court would not have imposed a sentence of death upon the Defendant. Having failed to meet this burden under the *Strickland* test, the Defendant's Motion is Denied.

The final argument made by the Defendant is that his attorney failed to argue this issue to the Jury. This allegation is disputed by the record as the Defendant argued at trial that the facts did not establish this aggravating factor, an argument which was rejected by the jury and on appeal by the Florida Supreme Court. See *Arbelaez v. State*, 626 So. 2d at 177.

(PCR II, 370-71). The opinion of this Court generally reiterated the above comments by the trial court, but additionally referenced a comment made by appellant, "the best way to get back at Latin women is through the children." *Id.*

Similar to the above sub-issue, no prejudice has been demonstrated. On this record, there is no reasonable possibility the giving of the challenged instruction contributed to the jury's recommendation of death, and clearly made no difference to the trial court. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The evidence presented at trial clearly established that this circumstance would have been found to exist under any definition.

**D. STATUTORY LANGUAGE**

Appellant argues that at the time of his sentencing, the language of § 921.141(5), Fla. Stat. (1991), which defined the CCP and HAC circumstances, was unconstitutionally vague and overbroad, and to the extent that counsel failed to object to such he was ineffective. The trial court correctly imposed a procedural bar, in that this claim was not raised at trial, sentencing or on direct appeal (PCR II, 376). *Rose v. State*, 675 So. 2d 567, 569 n1 (Fla. 1996); *Harvey v Dugger*, 656 So. 2d 1253 (Fla. 1995). Moreover, appellant's attempt to relitigate this procedurally barred claim by couching it in terms of ineffective assistance of counsel is also barred. *Valle v. State*, 705 So. 2d 1331, 1336 n.6 (Fla. 1997). Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal. *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990).

Furthermore, this Court has rejected this claim repeatedly. *Fotopoulos v. State*, 608 So. 2d 784 (Fla. 1992); *Klokoc v. State*, 589 So. 2d 219, 222 (Fla. 1991); *Brown v. State*, 565 So. 2d 304 (Fla.), cert. denied, 111 S.Ct. 537 (1990); *Henyard v. State*, 689 So. 2d 239 (Fla. 1996).

E. ***EDDINGS/LOCKETT***

In his amended motion, appellant argued that the trial court refused to consider his epilepsy as a nonstatutory mitigating circumstance (PCR I, 90-93).

In her order denying relief, the trial court stated:

The particular aggravating circumstance that the Defendant argues was not considered and found by the trial Court is the Defendant's epilepsy. The issue of the Defendant's epilepsy was argued by the Defendant's trial counsel, considered by the trial Court and raised on direct appeal. Therefore, the Defendant's claim is both procedurally barred and without merit, and as such is hereby Denied.

(PCR II, 366-67).

In its opinion, this Court wrote:

Moreover, the record shows that Arbelaez's epilepsy did not play a part in the murder. There is no evidence that Arbelaez suffered an epileptic attack immediately before or during the murder. Thus, we find that the trial court properly rejected the assertion that Arbelaez's epilepsy was a mitigating circumstance.

*Arbelaez v. State*, 626 So. 2d 169, 178 (Fla. 1993).

Since this claim was considered and rejected on direct appeal it is procedurally barred. *VanPoyck v. State*, 694 So. 2d 686, 698 (Fla. 1997). It is also conclusively rebutted by the record; therefore, summary denial was proper. *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). Appellant's attempt to relitigate this procedurally barred claim by couching it in terms of ineffective assistance of counsel is also barred. *Valle v. State*, 705 So. 2d 1331, 1336 n.6 (Fla. 1997).

**F. CALDWELL**

Appellant argues that the jury was misled by comments that minimized the importance of their roles in regard to its sentencing function. In denying relief, the trial court imposed a procedural

bar, because this issue was not raised at trial, the sentencing proceeding or on direct appeal. This was a correct ruling. This Court has repeatedly held that when this claim is not raised below, it is procedurally barred from consideration in postconviction proceedings. *King v. Dugger*, 555 So. 2d 355 (Fla. 1990); *Atkins v. Dugger*, 541 So. 2d 1165 (Fla. 1989); *Bertolotti v. State*, 534 So. 2d 386 (Fla. 1988). As for appellant's claim that counsel was ineffective for failing to object below, appellant's assertion is merely conclusory and has failed to demonstrate either deficiency or prejudice. Therefore, it is legally insufficient and summary denial was correct. *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). Again, appellant's attempt to relitigate this procedurally barred claim by couching it in terms of ineffective assistance of counsel is also barred. *Valle v. State*, 705 So. 2d 1331, 1336 n.6 (Fla. 1997).

Moreover, this Court has repeatedly rejected *Caldwell* claims. *E.g.*, *Sochor v. State*, 619 So. 2d 285, 291-92 (Fla. 1993) (Florida's standard jury instructions fully advise the jury of the importance of its role). Therefore, counsel cannot be ineffective for failing to raise a nonmeritorious claim. *See Chandler v. Dugger*, 634 So. 2d 1066, 1067 (Fla. 1994).

#### G. **BURDEN SHIFTING**

Finally, appellant argues that both the prosecutor and the trial court improperly shifted to appellant the burden of proving

that life was the appropriate penalty. Again, the trial court imposed a procedural bar, because this issue was not raised on direct appeal (PCR II, 374-75). Summary denial was correct on this basis. This Court has repeatedly held that when this claim is not raised below, it is procedurally barred from consideration in postconviction proceedings. *King v. Dugger*, 555 So. 2d 355 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264 (1990); *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990); *Atkins v. State*, 541 So. 2d 1165 (Fla. 1989). Again, appellant's attempt to relitigate this procedurally barred claim by couching it in terms of ineffective assistance of counsel is also barred. *Valle v. State*, 705 So. 2d 1331, 1336 n.6 (Fla. 1997). Regardless, this Court has repeatedly rejected this claim. *E.g.*, *Brown v. State*, 565 So. 2d 304, 308 (Fla. 1990).

#### **POINT X**

##### **ONE-YEAR TIME LIMIT FOR FILING A 3.851 MOTION**

Appellant argues that the requirement under Fla. R. Crim. P. 3.851, requiring him to file his motion for post-conviction relief prior to the two-year time limit allowed other non-death row inmates, violates his rights to due process, equal protection and reasonable access to the courts. This argument has been repeatedly rejected by this Court. *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993); *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990); *Cave v. State*, 529 So. 2d 293 (Fla. 1988). In her order denying relief,

the trial court also noted that appellant's conviction and sentence became final in 1993 and that Defendant actually had three years to pursue his claims (PCR II, 354).

#### **POINT XI**

##### **CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY STATUTE**

Appellant argues that Florida's death penalty statute is unconstitutional on several bases. The trial court denied relief on the basis that none of these issues had been raised below and were therefore procedurally barred (PCR II, 376). That was a correct ruling. See *San Martin v. State*, 705 So. 2d 1337 (Fla. 1997).

Moreover, this Court has previously rejected each of these bases as meritless. *Blanco v. State*, 706 So. 2d 7 (Fla. 1997); *Pooler v. State*, 704 So. 2d 1375 (Fla. 1997); *Hunter v. State*, 660 So. 2d 244 (Fla. 1995); *Fotopoulos v. State*, 608 So. 2d 784 (Fla. 1992); *Lightbourne v. State*, 438 So. 2d 380 (Fla. 1983); and *Booker v. State*, 397 So. 2d 910 (Fla. 1981).

Again, appellant's attempt to relitigate this procedurally barred claim by couching it in terms of ineffective assistance of counsel is also barred. *Valle v. State*, 705 So. 2d 1331, 1336 n.6 (Fla. 1997).

#### **POINT XII**

##### **INNOCENCE OF THE DEATH PENALTY**

Appellant argues that he is "innocent of the death penalty", because of the three aggravating circumstances relied upon by the judge, two (HAC and CCP) are unconstitutionally vague and the third (felony murder) is an unconstitutional automatic aggravator. Each of these issues has already been argued above and is incorporated herein by reference.

In denying this claim, the trial court also noted that proportionality of appellant's death sentence was raised and rejected on direct appeal and is therefore barred (PCR II, 377).

### **POINT XIII**

#### **JUROR INTERVIEWS**

Appellant argues that Rules of Professional Conduct Rule 4-3.5(d)(4)(Communication With Jurors) is unconstitutional, because it restricts counsel's ability to litigate constitutional claims (IB 72). This claim was never presented at trial or on direct appeal and is therefore procedurally barred. *VanPoyck v. State*, 694 So. 2d 686, 698 (Fla. 1997). It is also purely conclusory and therefore facially insufficient. *Jackson v. Dugger*, 633 So. 2d 1051 Fla. (1993).

Nonetheless, the rule allows juror interviews under certain circumstances. See *Roland v. State*, 584 So. 2d 68 (Fla. 1st DCA 1991)(finding no criminal rule allowing for postverdict juror interviews, but noting application for such by motion "as a matter of practice"); *Sconyers v. State*, 513 So. 2d 1113 (Fla. 2d DCA

1987)(construing criminal rules to allow postverdict juror interviews upon motion which makes a prima facie showing of juror misconduct); *cf. Gilliam v. State*, 582 So. 2d 610 (Fla. 1991)(affirming denial of defendant's motion to conduct postverdict interview of jurors where defendant failed to make prima facie showing of misconduct); *Shere v. State*, 579 So. 2d 86 (Fla. 1991)(affirming denial of defendant's motion to conduct postverdict interview of jurors; Fla. R. Civ. P. 1.431(h) ("A party who believes that grounds for legal challenge to a verdict exist may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to challenge.")). If appellant had made a prima facie showing of misconduct, he could have obtained juror interviews. His inability to meet these requirements, however, did not affect the constitutionality of his conviction and sentence. Therefore, this claim was properly denied and should be affirmed.

#### **CONCLUSION**

**WHEREFORE**, based on the foregoing arguments and authorities, the State requests that this Honorable Court **AFFIRM** the trial court's Order denying relief.

#### **CERTIFICATE OF FONT AND SERVICE**

**I HEREBY CERTIFY** that this brief has been prepared in Courier New font, 12 point, and that a true and accurate copy of the

foregoing was furnished by United States mail to Todd G. Scher, Esq., Chief Assistant CCRC, Capital Collateral Regional Counsel, 1444 Biscayne Boulevard, Ste. 202, Miami, Florida 33132, this \_\_\_\_ day of December, 1998.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL  
Tallahassee, Florida

---

**DAVID M. SCHULTZ**  
Assistant Attorney General  
Florida Bar No. 0874523  
1655 Palm Beach Lakes Blvd.  
Suite 300  
West Palm Beach, FL 33401  
(561) 688-7759