IN THE SUPREME COURT OF FLORIDA

EDWARD EUGENE RAGSDALE,

Appellant,

v. Case No. 89,657

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Defendant Edward Ragsdale was convicted of first degree murder and sentenced to death in 1988. His conviction and sentence were affirmed on appeal. Ragsdale v. State, 609 So. 2d 10 (Fla. 1992). This Court summarized the facts of the case as follows:

> The relevant facts reflect that on the evening of January 1, 1986, Samuel Morris heard noises emanating from his neighbor Ernest Mace's mobile home. After hearing what he described as "slamming furniture," Morris went over to Mace's home and observed someone in the kitchen. Morris knocked on Mace's door several times and, eventually, two men came out of the back of the mobile home. Morris gave chase to one of the men, but could not catch him. He returned to Mace's mobile home and found Ernest Mace badly beaten with his throat cut "from ear-to-ear." Morris asked Mace who his attackers had been, and, although unable to talk, Mace indicated by moving his head that he knew who his attackers had been. Morris testified that he asked Mace if it had been an individual named Mark, to which Mace responded with a negative motion. Emergency rescue workers arrived shortly thereafter, but Mace died enroute to the hospital.
>
> Investigating law enforcement officers concluded from their preliminary investigation that Ragsdale, together with Leon Illig, was involved in the murder. They obtained a statement from Carl Florer, the husband of Ragsdale's cousin, that on the day following the murder Ragsdale told him that he had "cut the old man's throat." Bulletins were then sent out notifying law enforcement agencies that Ragsdale and Illig were sought in connection with a murder investigation.
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> On January 12, 1986, Ragsdale was arrested in Alabama on a fugitive warrant issued in 1985 when his parole officer reported that Ragsdale had left the state without permission. While processing Ragsdale's arrest, Alabama authorities

discovered that he was wanted as a suspect in the Mace murder.

On January 16, 1986, a grand jury indicted Illig and Ragsdale for first-degree murder and armed robbery. Prior to Ragsdale's trial, Illig pleaded nolo contendere and received a sentence of life imprisonment. Shortly before Ragsdale's trial, the trial judge granted the state's motion in limine for an order directing the defense to make no attempt to inform the jury of Illig's conviction and sentence during voir dire and the guilt phase of the trial.

During the course of the trial, the victim's neighbor, Samuel Morris, testified as previously indicated. Carl Florer and Ragsdale's brother, Terry Ragsdale, testified that the appellant stated that he had hit the victim several times and then cut his throat. Terry Ragsdale testified that the appellant had said that the person killed was named Ernest Kendricks. Terry Ragsdale also identified a knife which the appellant had stated was the murder weapon.

Cindy LaFlamboy, Illig's girlfriend and roommate, stated that Ragsdale and Illig borrowed her car on the night of the murder in order to allegedly 'collect some money" and stop by a liquor store. She testified that, approximately forty-five minutes later, Ragsdale returned to her home by himself. She stated that Ragsdale was in a very upset and nervous state. LaFlamboy testified that, when Ragsdale arrived, he stated that "I hope that Leon didn't get caught." LaFlamboy testified that, when Illig returned, clad only in shorts, he and Ragsdale quarreled over "the need to kill that man." She also testified that she saw Ragsdale cleaning blood from a pocket knife in her kitchen sink. The following day, when news of the murder appeared in the newspaper, LaFlamboy took Illig to the bus station and then drove with Ragsdale to Alabama. LaFlamboy testified that, during their drive to Alabama, Ragsdale repeated that he had cut the victim's throat. On cross examination, however, LaFlamboy

testified that there were no bloodstains on Ragsdale's clothing.

The state presented two confessions obtained by investigators. The first confession **was** obtained by a sheriff's deputy sent to question Ragsdale while in custody in Alabama. Evidence **was** presented that Ragsdale, after being advised of his rights, admitted going to the victim's house with the intent to rob him. Ragsdale stated to the sheriff's deputy that he left Illig with the victim and, upon returning, found blood covering the floor. In this confession, Ragsdale stated that, after reentering the room, Illig declared that he had murdered the victim because the victim could have identified them. Finally, Ragsdale described fleeing the scene in LaFlamboy's car without Illig and eventually returning to her house, where Illig later arrived, scantily clad. Ragsdale also repeatedly declared that he had not been an active participant in the killing and described attempts by Illig's family to get their son out of the country.

In his second confession, Ragsdale admitted striking the victim and cutting him with a knife when he believed the victim was reaching for a gun. However, Ragsdale stated that, after he cut the victim, Illig took the knife from him, said, 'Let me show you how it's done," and inflicted the fatal cut. In this confession, Ragsdale also admitted owning the murder weapon, robbing Mace, and giving Illig's girlfriend the stolen money.

After the state rested, defense counsel attempted to call Illig as a witness. Illig asserted his Fifth Amendment rights and refused to testify. The trial judge then denied a request by Ragsdale's counsel to allow Illig to plead the Fifth Amendment in the presence of the jury. The defense rested and the jury returned guilty verdicts against Ragsdale to all of the offenses charged.

During the penalty phase of the trial, the State again presented LaFlamboy, who testified that Illig was not acquainted with the victim and that Ragsdale had admitted killing the victim because he could identify

Ragsdale. On cross-examination, LaFlamboy stated that she **was** Illig's fiancee and that she had helped Illig and Ragsdale leave the state. She also stated that Ragsdale had no blood on his clothing when he returned to her apartment on the night of the murder.

In mitigation, Ragsdale presented the testimony of his brother, who stated that he had known Ragsdale for almost thirty years, and that Ragsdale was a follower, not a violent person. Ragsdale's brother also stated on cross-examination that Ragsdale **was** a bully, became mean when on dope, and 'could do anything if he was mad enough." He also noted that the victim **was** a family friend and thought that his brother's statement that he had cut the man's throat was false. He also testified that Ragsdale boasted a lot and that much of what he said was unreliable.

After commencing its deliberations, the jury asked the trial judge two questions. First, the jurors asked the judge whether it is 'unjust--just to sentence the defendant to a greater sentence (death) than the accomplice, if based on the testimony heard by the jurors, the jurors believe that the defendant may have had **a** lesser part in the murder?" The trial judge, without objection, reread to the jury the following portion of the jury instructions:

> Deciding **a** verdict is exclusively your job. That's true in this phase of the trial, as well as the earlier phase. I cannot participate in that decision in any way. In fact, you should please disregard, again, anything I may have said or done, at any time during either phase of this trial, that made you believe I preferred one verdict over another.

In its second question, the jury requested the legal definition of "nolo contendere." In response to the second question, the judge read the definition of nolo contendere from Black's Law Dictionary.

One of the jurors asked if the State had the right to rebut defense counsel's remarks in the penalty phase and was told "no." The same juror then asked whether the question regarding the fact that Iilig received a life sentence could be reworded. The trial judge interrupted the juror and stated that the court could not assist any further in the matter. The jury returned to its deliberations and returned with a verdict recommending the death penalty by a vote of eight to four.

The court, in accordance with the jury recommendation, sentenced Ragsdale to death. The court found the following three aggravating factors: (1) the crime was committed while Ragsdale was on parole, under a sentence of imprisonment; (2) the murder occurred during a robbery and was committed for pecuniary gain; and (3) the crime was extremely wicked, evil, atrocious, and cruel. The court specifically supported the last finding by referring to the defendants' ages, the severity of the cut, and the evidence of defensive wounds on the victim. The trial court found no mitigating evidence and addressed the question of the differences in culpability between Illig and Ragsdale in its findings. In its findings, the trial court stated:

> There was differences in the culpability of the two defendants for this murder. The credible evidence indicated that while Mr. Illig struck Mr. Mace, it was Mr. Ragsdale that pitilessly cut his throat. In fact, the testimony of Ms. LaFlamboy indicated that Illig was upset that Ragsdale had killed Mr. Mace and considered the killing to be unnecessary.
>
> Furthermore, there was a difference in the criminal histories of these two defendants. Mr. Illig was only 17 years old at the time of the killing, while Mr. Ragsdale was

> 25 years old. Mr. Illig had no prior significant criminal record, while Mr. Ragsdale had been confined to the Alabama prison for commission of a felony and had absconded from parole from that state.
>
> Finding that no mitigating circumstances existed to offset the aggravating circumstances, the trial court imposed the death penalty.

609 So. 2d at 10-13.

The appellant filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 on March 24, 1994, and amended motions were filed on November 16, 1994 and July 12, 1996 (R. 10-75, 85-187, 283-394).[1] The court held hearings to explore the appellant's allegation that he was being denied access to public records and to determine whether the appellant was entitled to an evidentiary hearing (R. 570-595). Thereafter, the motion was summarily denied (R. 399-407). This appeal follows.

'References to the record on appeal will be designated as R. followed by the appropriate page number; references to the record on appeal from the appellant's direct appeal, Florida Supreme Court Case No, 72,664, will be designated as DA-R. followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

I. The appellant was not denied the right to inspect any applicable public record in the preparation of his motion for postconviction relief. The court below conducted a proper in camera inspection and no evidentiary hearing is warranted.

11. The court below properly denied the appellant's motion to disqualify Judge Cobb. The motion was legally insufficient to establish that the appellant had a well-founded fear of prejudice or bias.

III. The court below did not err in summarily denying the appellant's motion for postconviction relief. The allegations that the state withheld exculpatory evidence, that newly discovered evidence exists because a witness has recanted, and that the appellant was denied the effective assistance of counsel, were not sufficient to warrant an evidentiary hearing.

IV. The appellant similarly was not entitled to a hearing on his claim of ineffective assistance of counsel in the penalty phase of his capital trial. The postconviction motion failed to specify any substantial mitigation which had not been presented to the appellant's jury. No deficiency or prejudice has been alleged by the appellant with regard to trial counsel's penalty phase performance which requires evidentiary development, so the trial court properly rejected this claim.

V. The court below did not err in summarily denying the appellant's claim of ineffective mental health assistance. This claim was procedurally barred and insufficiently pled.

VI. The court below did not err in summarily denying the appellant's competency claim. This claim was procedurally barred and insufficiently pled.

VII. The court below did not err in summarily denying the appellant's claim of ineffective assistance of counsel due to counsel's alleged failure to object to the prosecutor's closing penalty phase argument. This claim is refuted by the record.

VIII. The court below did not err in summarily denying the appellant's claim of ineffective assistance of counsel due to counsel's alleged failure to argue effectively. This claim is refuted by the transcript of counsel's closing argument.

IX. The court below did not err in summarily denying the appellant's claim that the jury instructions improperly shifted the burden of proof. This claim was procedurally barred and without merit.

X. The court below did not err in summarily denying the appellant's claim regarding the constitutionality of the jury instructions on the aggravating factors of under sentence of imprisonment; during the commission of armed robbery; pecuniary gain; especially wicked, evil, atrocious or cruel; and cold,

calculated and premeditated. This claim was procedurally barred and without merit.

XI. The court below did not err in summarily denying the appellant's claim that the harmless error analysis conducted in his appeal was inadequate. This claim was procedurally barred and without merit.

XII. The court below did not err in summarily denying the appellant's claim that the jury was misled as to its role in the appellant's sentencing. This claim was procedurally barred and without merit.

XIII. The court below did not err in summarily denying the appellant's claim that the death penalty statute is overbroad. This claim was procedurally barred and without merit.

XIV. The court below did not err in summarily denying the appellant's claim of ineffective assistance of counsel due to counsel's alleged failure to assure his presence at trial. This claim was procedurally barred and refuted by the record.

[No Issue XVI

XVI. The court below did not err in summarily denying the appellant's claim that the trial court failed to independently weigh the aggravating and mitigating factors. This claim was procedurally barred and without merit.

XVII. The court below did not err in summarily denying the appellant's claim of judicial bias. This claim was procedurally barred and insufficiently pled.

XVIII. The court below did not err in summarily denying the appellant's claim that his prior violent felony conviction was unconstitutional. This claim was procedurally barred and insufficiently pled.

XIX, The court below did not err in summarily denying the appellant's claim that the death penalty statute is unconstitutional. This claim was procedurally barred and without merit.

XX. The court below did not err in summarily denying the appellant's claim that his shackling was unconstitutional. This claim was procedurally barred and without merit.

XXI. The court below did not err in summarily denying the appellant's claim that he was denied due process by the rules limiting his right to interview jurors. This claim does not present a basis for postconviction relief, especially where no motion to interview jurors has been denied, and is also without merit.

XXII. The court below did not err in summarily denying the appellant's claim that cumulative error warrants postconviction relief. This claim was without merit.

ARGUMENT

ISSUE I

WHETHER THE APPELLANT HAS BEEN DENIED **ANY** RIGHTS UNDER FLORIDA'S PUBLIC RECORDS LAW.

The appellant initially challenges the state's compliance with Florida's public record law, Chapter 119. This challenge disputes the propriety of the public record exemptions claimed by the state and the trial court's actions in denying the appellant an evidentiary hearing and in conducting an in camera review. However, a review of the record fails to establish any reason to prolong this matter by remanding for further public records litigation.

The appellant first complained to the court below about a lack of public records compliance by filing a Motion to Compel on October 17, 1994; an Amended Motion to Compel **was** filed January 31, 1996 (R. 79-84, 188-191). Following the dictates of Walton v. Dugser, 634 So. 2d 1059 (1989), the court below held a hearing to determine the status of public records requests and thereafter conducted an in camera review of the documents that the State Attorney's Office had withheld as exemptions to Chapter 119 in responding to the requests (R. 570-582). The court concluded that all of the documents were properly exempt from disclosure, and returned the documents to the State Attorney's Office (R. 279). The sealed documents are before this Court, and this Court can

certainly determine the legitimacy of the statutory exemptions claimed by the state and upheld by the judge below.

Although the appellant breaks his discussion into the different statutes cited by the state in claiming the exemptions, his argument is basically the same for each of the different exemptions: he believes that the State Attorney's Office has no 'standing" to claim exemptions, because the documents were generated by other agencies and it is generally those agencies that are governed under the various statutes cited. As will be seen, this is not a reason to fail to apply any of the statutory authorities referenced by the state in withholding the relevant documents.

None of the authorities cited by the appellant support his conclusion that otherwise exempt information must be disclosed under Chapter 119 when it is transferred to another state agency during the course of a criminal investigation. To the contrary, case law and public policy demand that information which is statutorily exempt from disclosure must remain exempt even after it has been disclosed to another state agency under these circumstances. The applicability of a particular exemption is determined by the document being withheld, and not by the identity of the state agency possessing the record. See, City of Riviera Beach v. Barfield, 642 So. 2d 1135, 1137 (Fla. 4th DCA 1994) (noting "the primary focus must be on the statutory classification

of the information sought rather than upon in whose hands the information rests"), rev. denied, 651 So. 2d 1192 (Fla. 1995).

By focusing on the identity of the state custodian claiming the exemption rather than the content or substance of the information withheld as exempt, the appellant ignores the statutory directive to protect the confidentiality of information which is not to be disclosed to the public under Chapter 119. Many of the statutes involved may implicate privacy rights of the subjects of the public records. See, Post-Newsweek Stations, Florida Inc. v. Doe, 612 So. 2d 549 (Fla. 1992) (balancing public's right to access against subjects' constitutional right to privacy) . In Shaktman v. State, 553 So. 2d 148 (Fla. 1989), Justice Ehrlich stated:

> In this case, the information sought was the telephone numbers dialed by an individual. Access to this information is very limited. Although the telephone company has the information, its records are not open to the public. As with the bank records at issue in Winfield [v. Division of Pari-Mutuel Wagering 477 so. 2d 544, 548 (Fla. 1985)], the individual certainly expected that the information would not be released without authorization. Such personal and private information comes within the zone of privacy protected by Article I, Section 23, of the Florida Constitution.

553 So. 2d at 153 (Ehrlich, J., concurring) . In fact, the confidentiality of protected information heralds such respect that courts have recognized that even when records had been released to the public, they did not lose their confidential status where the release was negligent. Cantanese v. Ceros-Livingston, 599 So. 2d

1021, 1026 (Fla. 4th DCA), rev. denied, 613 So. 2d 2 (Fla. 1992). In denying that "any vestiges of confidentiality has been irrevocably waived," the court noted in that case that "confidentiality ... is not a bursting bubble to be lost at the first pin-prick." Although the appellant is quick to criticize the state for withholding medical records or financial records, implying bad faith and the need for further investigation and litigation, the state obviously has a legitimate interest in protecting confidentiality to the extent it is permitted by law. This protection includes submitting any questionable documents to a court for an in camera review rather than opening a file and disclosing everything.

The appellant's reliance on cases such as Wolfinger v. Sentinel Communications Co., 538 So. 2d 1276 (Fla. 5th DCA 1989), for the proposition that materials, regardless of their source, became public record once they were received in the course of discovery is misplaced for several reasons. In the first place, these documents were not obtained in "discovery," they were submitted to the state in the course of a criminal investigation. In addition, Wolfinger and similar cases involve situations where records that previously belonged to a private, non-state party were disclosed in discovery and then became public; they are not applicable to the instant case, where public records which have

always been statutorily exempt are provided to another state agency.

A few specific comments are in order as to the particular statutory exemptions claimed by the state. The first statute discussed in the appellant's brief is § 39.045, pertaining to documents described as "juvenile complaint reports" and "HRS referral histories." The appellant asserts that, because this is not a juvenile delinquency case and the State Attorney's Office was not the original custodian, this exemption cannot be claimed. Section 39.045 clearly demands that this information is not subject to disclosure under Chapter 119 under any conditions. Section 39.045(5) provides that, except as otherwise provided, 'all information obtained under this part in the discharge of official duty by any . . . law enforcement agent . . . is confidential and may be disclosed only to [enumerated personnel], or upon order of the court." Section 39.045 provides for courts to punish by contempt any violation of the confidentiality provisions of that section. In addition, to the extent that these documents are judicial records maintained by the clerk's office, the records are not subject to disclosure under Chapter 119. Times Publishing Co. v. Ake, 660 So. 2d 255 (Fla. 1995).

The next cited exemption is § 119.07(3)(y). The appellant's claim that this exemption does not apply because the victim's identity 'is no secret" demonstrates the absurdity to which public

records claims can be litigated.[2] The appellant is challenging the state's attempt to protect the name of the victim from release in accordance with § 119.07. There is no dispute that the victim in this case was Ernest Mace; this fact is mentioned in this Court's prior opinion. The appellant does not, and has never, challenged the victim's identity. Since this information is already known to the defense, any error in the failure to disclose the victim's name could not be prejudicial.

The next statutory bases cited are § 119.072 and § 943.053, relating to NCIC/FCIC criminal justice information including arrest histories, or 'rap sheets." The appellant claims that § 943.053 only applies to Florida Department of Law Enforcement, and that the state did not specify the relevant confidentiality agreement or identify the originating agency. Section 943.053(1) and (2) provide that criminal justice information from other 'systems" can only be released in accordance with federal law and with the rules of the originating agency. Subsections (5) and (6) emphasize the importance of the confidentiality by dictating that the confidentiality extends to private parties that may be operating detention and correctional facilities by contract with the state. Although the appellant asserts that subsection (3) compels disclosure, that subsection clearly only authorizes disclosure not

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[2]Such absurdity is further demonstrated by the fact that Walton, 634 So. 2d at 1062, remains pending in the circuit court four years after its remand for public records litigation.

otherwise prohibited by subsections (1) and (2). See generally, Morris v. Whitehead, 588 So. 2d 1023, 1024 (Fla. 2d DCA 1991) (upholding exemption of record received by state under confidentiality agreement with federal government).

Section 395.3025, protecting the confidentiality of patient medical records, is the next statutory basis cited to support an exemption. Subsection 395.3025(7) specifically provides that, if the content of a record of patient treatment is provided to anyone other than the patient, the recipient may only use the information for the stated purpose 'and may not further disclose any information to any other person or entity, unless expressly permitted by the written consent of the patient." The same subsection provides "[t]he content of such patient treatment record is confidential and exempt from the provisions of s. 119.07(1) and s.24(a), Art. I of the State Constitution." See, Mercy Hospital v. Department of Professional Regulation, 467 So. 2d 1058 (Fla. 3d DCA 1985) (discussing scope of exemption). In fact, the confidentiality of this section is so protected that even a non-record holder whose interest may be implicated can invoke the exemption. Alice P. v. Miami Daily News, Inc., 440 So. 2d 1300 (Fla. 3d DCA 1983).

The next cited statutory exemption is § 401.30, concerning emergency calls containing patient or treatment information. The appellant is so outraged by the state's assertion of what he claims

is a "frivolous" exemption that he suggests it shows not only the state's bad faith but the invalidity of the trial court's in camera review. The purpose of § 401.30 is to assure that emergency call records are exempt and not subject to disclosure under Section 119.07 and to limit the disclosure that could be made without the consent of the patient, There is no reason to believe that records which were obtained in this investigation and which contain patient treatment information exempt under this section could not be withheld from disclosure in response to the appellant's public records request. This Court has encouraged state attorneys to "raise any defenses to the disclosure which they may deem applicable." Lopez v. Sinsletary, 634 So. 2d 1054, 1059 (Fla. 1993), quoting Hoffman, 613 So. 2d 405, 406 (Fla. 1992). The appellant's base attack on the state's actions in invoking this exemption is unwarranted.

The next statutory citation is § 655.057, pertaining to financial records. Section 655.057(3)(e) provides for the provision of financial records to appropriate law enforcement agencies for reporting suspected criminal activity, and (3) also provides that confidential information obtained pursuant to that subsection 'shall be maintained as confidential and exempt from the provisions of s. 119.07(1)." The appellant admitted that he and Illig were trying to rob the victim in this case, and the state may have obtained the victim's confidential financial records as part

of the investigation. There is no reason not to apply this exemption if the documents in question are financial records under this statute.

The last statutory exemption discussed is § 945.10, relating to a defendant's presentence investigation. The appellant again accuses the state of bad faith as he asserts that § 945.10(2)(c) prohibits withholding these records from an attorney of an inmate under a sentence of death. The appellant ignores the part of that section requiring the written request for this information to include a statement "demonstrating a need for the records or information." Since the appellant has always maintained that he has complete access under Chapter 119 without having to show a need for the requested materials, he has never offered one with regard to any request for his presentence investigation. In addition, victim information remains confidential under that subsection.

Finally, the appellant challenges the failure to disclose any documents which may have been withheld as not being public records under the purview of Chapter 119. He suggests that personal notes, trial preparation encompassed in memoranda, and drafts in connection with agency business are all subject to disclosure. This Court has consistently recognized that notes of state attorney investigation, litigation preparation, and annotated photocopies of decisional law are exempt from disclosure because they are not "public records." Bryan v. Butterworth, 22 Fla. L. Weekly S170

(Fla. March 27, 1997); Atkins v. State, 663 So. 2d 624, 626 (Fla. 1995); St-ate v. Kokal, 562 So. 2d 324, 327 (Fla. 1990).

The appellant's repeated concerns that the state failed to describe with particularity the specific documents withheld and the basis for the withholding are unwarranted. The state provided the statutory bases as required by § 119.07(2). There is no reason to judicially impose additional procedures for the submission of documents for an in camera inspection; this is a matter best "left to the conscientious judgment of our trial courts." Lorei v. Smith, 464 So. 2d 1330, 1332 (Fla. 2d DCA), rev. denied, 475 So. 2d 695 (Fla. 1985).

In addition to challenging the withholding of documents in this issue, the appellant also criticizes the trial court's actions in denying an evidentiary hearing and allegedly failing to conduct a proper in camera inspection. The appellant has not identified any evidence which he would present at any evidentiary hearing. He does not even identify what particular issues need factual development on this claim. Therefore, no evidentiary hearing is warranted.

The appellant's suggestion that the trial court's "perusing" the withheld records implies a less than adequate in camera review is not persuasive. The court below was fully aware of the relevant case law and the purpose and scope of the in camera hearing. This Court has acknowledged that it "will not second-guess the trial

" in reviewing findings after an in camera hearing. Bryan, 22 Fla. L. Weekly at S171.

On the facts of this case, no violation of Chapter 119 or this Court's case law concerning capital defendants' rights to public records has been demonstrated. relief is warranted on this issue.

ISSUE II

WHETHER THE COURT BELOW ERRED IN DENYING THE APPELLANT'S MOTION TO DISQUALIFY JUDGE COBB.

The appellant next contends that the court below should have granted his Motion to Disqualify, which was denied by Judge Cobb as legally insufficient; however, no relief is warranted. The appellant's claim is premised on the fact that Judge Cobb's nine page Order denying postconviction relief characterizes some of the asserted claims as "bogus," "a sham," or 'abject whining." The fact that a trial judge is not persuaded by the appellant's claims for relief does not provide a reasonable basis for a belief that the judge was biased.

Rather than examining this issue by exploring the sufficiency of the allegations offered for the disqualification, the appellant focuses on the merits of his allegations, and asserts that his claims were *not* bogus, or a sham, or abject whining, because they are claims which have been recognized by this Court and the United States Supreme Court for many years. Of course, whether or not the appellant's claims are bogus when raised in the factual context of this case may be subject to debate in this appeal, but it is irrelevant for purposes of this particular issue. See, Cave v. State, 660 so. 2d 705 (Fla. 1995) (consideration of legal sufficiency of motion does not permit passing on truth of allegations); Livingston v. State, 441 So. 2d 1083 (Fla. 1983).

Once review of this issue focuses on the legal sufficiency of the motion filed, it is clear that no relief is warranted.

The appellant's argument for disqualification merely boils down to the fact that the judge found his claims to be without merit. Allegations which lack specificity and "go almost entirely to judicial rulings of the judge," do not require disqualification, since adverse judicial rulings are not a basis for disqualification. Barwick v. State, 660 So. 2d 685, 692 (Fla. 1995) cert. denied, ___ U.S. ___, 116 S. Ct. 823 (1996); Jackson v. State, 599 So. 2d 103 (Fla.), cert. denied, 506 U.S. 1004 (1992); Heier v. Fleet, 642 So. 2d 669, 670 (Fla. 4th DCA 1994). This Court has acknowledged that disqualification is not intended as vehicle to oust a judge who has made adverse rulings. Hardwick v. Dugger, 648 So. 2d 100, 103 (Fla. 1994), quoting Tafero v. State, 403 So. 2d 355, 361 (Fla. 1981), cert. denied, 455 U.S. 983 (1982).

Characterizing the claims as "bogus" or "a sham" does not require disqualification. A trial judge is required to make determinations as to the validity of a defendant's claims as part of his or her job. The fact that the judge determines a claim to be "bogus" does not indicate any degree of prejudice or bias; this is clearly not a facially prejudicial term. Under the appellant's reasoning, disqualification would be required every time a trial judge granted a motion to strike filed pursuant to Florida Rule of Civil Procedure 1.150, because the judge would have determined the

opposing party's pleading to have been a 'sham" under that rule. In fact, this Court has even characterized actions by a party as being a "sham," in Jackson v. Stat-e, 498 So. 2d 906, 909 (Fla. 1986), but use of that term did not imply prejudice or bias against the state, just disapproval of what the prosecutor had attempted to do. The same implication is present in the instant case, and it is not a basis for judicial disqualification.

A trial judge's criticism of CCR and expression of frustration in dealing with capital postconviction cases are not legally sufficient reasons requiring disqualification. See, Correll v. State, 22 Fla. L. Weekly S188 (Fla. April 10, 1997) (judge's statements accusing CCR of using Chapter 119 as a delay tactic in capital cases did not legally require disqualification); Ellis v. Henning, 678 So. 2d 825, 827 (Fla. 4th DCA 1996) (trial judge's expression of dissatisfaction with counsel or a client's behavior alone does not give rise to a reasonable belief that the trial judge is biased); Wargo v. Wargo, 669 So. 2d 1123, 1124 (Fla. 4th DCA 1996) ("Generally, mere characterizations and gratuitous comments, while offensive to the litigants, do not in themselves satisfy the threshold requirement of a well-founded fear of bias or prejudice.") A judge's hostility toward an attorney only requires disqualification where the prejudice is of such a degree that it adversely affects the client. Barwick, 660 So. 2d at 693. No such hostility has been alleged in this case.

The cases cited by the appellant are not factually comparable and do not demand disqualification in the instant case. Compare, Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988) (judge alleged to have made extrajudicial statements to newspaper after defendant's death warrant had been signed expressing special interest in defendant's speedy execution); Town Center of Islamorada v. Overby, 592 So. 2d 774 (Fla. 3d DCA 1992) (judge involved in extrajudicial dispute over comment made by attorney at luncheon); Lamendola v. Grossman, 439 so. 2d 960 (Fla. 3d DCA 1983) (judge and attorney involved in extrajudicial incidents of antagonism); Hayslip v. Douglas, 400 So. 2d 553 (Fla. 4th DCA 1981) (judge announced at hearing early in case that particular attorney should not be on case).

Even if the Motion to Disqualify was legally sufficient, the appellant would not be entitled to a new judge unless this Court were to remand this cause for further postconviction proceedings. Since the judge below did not make any factual determinations, but merely ruled on the legal sufficiency of the postconviction motion, this Court's independent review of the legal rulings would otherwise cure any possible error in the denial of the motion.

On these facts, the appellant has failed to demonstrate any error in the denial of his Motion to Disqualify. Therefore, he is not entitled to relief on this issue.

ISSUE III

WHETHER THE APPELLANT WAS DEPRIVED OF AN ADVERSARIAL TESTING IN THE GUILT PHASE OF HIS CAPITAL TRIAL.

The appellant's next issue is a multifaceted attack on the adversarial testing which occurred in the guilt phase of his capital trial. This attack includes allegations that the state withheld material, exculpatory evidence; that newly discovered evidence reveals a state witness lied at trial; and that his trial attorney's performance was constitutionally inadequate. Each of these assertions will be addressed in turn; as will be seen, each claim **was** properly rejected by the trial judge.

Although trial courts are encouraged to have evidentiary hearings on postconviction motions, if the motion lacks substantial factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied. Steinhorst v. State, 498 So. 2d 414, 414-415 (Fla. 1986); Porter v. State, 478 So. 2d 33 (Fla. 1985). A hearing is only warranted on an ineffective assistance of counsel claim where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrate a deficiency in performance that prejudiced the defendant. Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995); Jackson v. Dugger, 633 So. 2d 1051, 1055 (Fla. 1993); Mendvk v. State, 592 So. 2d 1076, 1079 (Fla. 1992); Roberts v. State, 568 So. 2d 1255, 1256-1260 (Fla. 1990); Kennedy v. State,

547 So. 2d 912, 913 (Fla. 1989). Since the postconviction motion filed below did not render the appellant's conviction vulnerable to collateral attack, the trial court properly denied the motion without an evidentiary hearing.

A. BRADY V. MARYLAND CLAIM

The appellant first claims that an evidentiary hearing is necessary to resolve an alleged violation of Bradv v. Marvland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). According to the appellant, the state withheld material evidence which would have been key for the defense in attempting to demonstrate that the appellant's codefendant, Leon Illig, was the one that actually slit the victim's throat. Specifically, the appellant claims that the luminal testing performed on Illig's clothes suggested the presence of blood on Illig's pants, shoes and jacket, as well as the gym bag recovered with Illig's clothes; and that therefore the photographs of the luminal testing should have been disclosed pursuant to Brady.

As to this issue, the appellant has failed to show or even allege that he did not possess these records or could not have obtained them himself with due diligence. This is one of the elements required for relief on a Brady claim. Roberts, 568 So. 2d at 1260; Mendyk, 592 So. 2d at 1079. Clearly, counsel knew that the luminal testing had been done; he successfully obtained a court

order authorizing funds and appointing a defense scientific expert to examine Illig's clothes and the luminal photographs to assist the defense on March 15, 1988 (DA-R. 885-886, 888, 900-901). Given the trial court's willingness to insure that the appellant had access to this evidence, and the lack of any further indication in the record suggesting that the evidence was not disclosed as ordered, the appellant has failed to offer facts that warrant an evidentiary hearing.

Since the appellant was aware of this evidence, obtained a court order for disclosure of the evidence, and went to trial without complaining that the evidence had not been disclosed as ordered, the only reasonable conclusion is that the evidence was in fact disclosed.[3] If it was not, the issue was waived at that point, and since counsel certainly could have obtained the photographs with due diligence, no relief is warranted on this claim.

In addition, the requirements that withheld materials must have been exculpatory and material in order to establish a due process violation under Brady have not been met. The most glaring impediment to Ragsdale's plea for relief on this basis is the fact that there was no information regarding the testing of Illig's

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[3]The appellant acknowledges this possibility by making the inconsistent allegation that defense counsel was ineffective for failing to present forensic expert to support the defense (Appellant's Initial Brief, pp. 32-33).

clothes, as described in the 3.850 motion, which was not already known to defense counsel or, for that matter, to the jury. At trial, Cindy LaFlamboy testified that when the appellant returned to her house after Mace's murder, the appellant had no blood on his clothes, and that when Illig arrived ten or fifteen minutes later, Illig was wearing jogging shorts and underwear, and some kind of sweater draped over his shoulders (DA-R. 400, 416, 417, 419). It was a chilly evening; when Illig had left about an hour earlier, he had been wearing underwear, jogging shorts, a pair of jeans, a pull-over shirt and possibly a jacket (DA-R. 400, 419, 420). Illig told her that the appellant cut Mace's throat 'from ear to ear" and that the blood squirted on Illig, and that he had buried his clothes near Zephyr Lake (DA-R. 421, 424, 425). Furthermore, the medical examiner testified at trial that Mace's wounds indicated that the person that cut Mace's throat was behind Mace at the time (DA-R. 371).

The information alleged to have been suppressed can not meet the test of materiality. Evidence is only 'material" for Brady purposes if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); Porter v. State, 653 So. 2d 374, 379 (Fla. 1995). This 'reasonable probability" must be sufficient to undermine confidence in the

outcome. Id. The mere possibility that information "might have" helped the defense or affected the outcome of the case does not establish materiality, and the proper test is whether the suppressed information creates a reasonable doubt of guilt that does not otherwise exist. United States v. Asurs, 427 U.S. 97, 109, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). Therefore, even if Ragsdale were able to establish that these photographs should have been disclosed and were not, any such failure to disclose could not possibly meet the standard for materiality required for relief.

All of the purported evidence discussed in this claim could only have provided a cumulative inference that Illig's clothes were bloody and the appellant's were not. From this, the appellant would have the jurors speculate that Illig was the one to cut the victim's throat. Since any inference from Illig's bloody clothes would have been drawn based on the testimony presented by Cindy LaFlamboy, a different guilt or penalty phase result would not have been reasonably probable had this evidence presented.

Although the appellant faults trial counsel for failing "to present any forensic testimony to support the defense theory that the person who actually killed the victim would have blood on his clothing," he has not identified any such testimony in the course of his Brady argument. In fact, he has never alleged the ability to offer evidence to establish that any blood on Illig's clothes is probative of Illig having cut Mace's throat and exonerates the

appellant from this action. Without such evidence, any factual development about the condition of Illig's clothes would not be material.

The appellant does not explain how this evidence would affect the guilt phase verdict. Since the state was proceeding under a principal theory and this evidence casts no doubt on the fact that the appellant was present and participating in the robbery when Mace was killed, there is no reasonable possibility that this evidence could have any result on the appellant's conviction. In addition, this evidence is consistent with evidence at trial suggesting that Illig had blood on his clothes and the appellant did not; cumulative evidence would also not have affected the penalty phase result.

Finally, it should be noted that the record in this case refutes the allegation that the luminal testing of Illig's clothes would be exculpatory to the appellant. At the sentencing hearing held May 13, 1988, Detective Fay Wilbur testified that although the luminal testing indicated the presence of blood on the clothes, Wilbur had been advised by experts at the FDLE lab that luminal testing would not be accurate under the circumstances presented here, since the clothes had been buried in a lake for several weeks (DA-R. 651-655). Wilbur was told that the luminal could have been reacting to vegetation or minerals in the water (DA-R. 654). According to the FDLE lab, there was no test which could determine

if there was blood on these clothes that was not visible to the eye (DA-R. 652).

On these facts, the appellant has failed to demonstrate any error in the trial court's summary denial of his Brady claim.

B. **NEWLY DISCOVERED EVIDENCE CLAIM**

The appellant next asserts that confidence in his conviction is also undermined by the alleged newly discovered evidence that one of the state's witnesses gave inaccurate testimony due to threats and intimidation. Unfortunately, the appellant has never bothered to identify this witness or the substance of the alleged false testimony, making the seriousness of this issue difficult to assess. Although the appellant maintains that the witness testified that the appellant 'confessed" to him, this does not identify the witness or the evidence, because a number of witnesses testified that the appellant had confessed to them (DA-R. 299-301, 310-311, 408-412, 430, 436-437, 439-441, 446-449, 455-488).

Clearly, this allegation is not legally sufficient to require an evidentiary hearing. The conclusory nature of this claim and the lack of any specific supporting facts mandated summary denial. Rule 3.850(c)(6) expressly requires the recitation of the facts relied upon in support of a postconviction motion. The failure to allege any such facts in this claim mandates summary denial of the claim. See, Jackson, 633 So. 2d at 1054 ("Conclusory allegations

are not sufficient to require an evidentiary hearing"); Kennedy, 547 so. 2d at 913.

In addition, the allegation that some testimony of a "confession" was inaccurate and procured by threats would not meet the standard required for a hearing on newly discovered evidence, since there were several witnesses that testified that the appellant had confessed to them (see, Carl Florer, DA-R. 299-301; Terry Ragsdale, DA-R. 310-311; Cindy LaFlamboy, DA-R. 408-412, 430, 436-437, 439-441; Det. William McNulty, DA-R. 446-449, 455-488). Jones v. State, 591 So. 2d 911, 915 (Fla. 1991) (in order to be entitled to a hearing on newly discovered evidence, a defendant must allege facts 'of such nature that it would probably produce an acquittal on retrial"), cert. denied, U.S. ___, 117 s. ct. 1088 (1996). Any alleged impropriety about testimony that the appellant made incriminating statements to another person would necessarily not meet this standard, since such testimony would be cumulative to testimony from other persons to whom the appellant confessed. See, Williamson v Dugger, 651 So. 2d 84, 88-89 (Fla. 1994) (cumulative evidence insufficient basis for hearing on newly discovered evidence), cert. denied, U.S. , 116 S. Ct. 146 (1995). Therefore, no evidentiary hearing is warranted on this claim.

C. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

The last aspect of the appellant's "adversarial testing" claim concerns the appellant's allegation that his attorney failed to provide constitutionally effective assistance. In Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. In this case, the appellant identifies three alleged deficiencies in his attorneys' performance: failing to provide the trial court with relevant Fifth Amendment law; failing to investigate and present evidence about the appellant's mental state and voluntary intoxication at the time of the crime; and failing to investigate and present evidence that the appellant's postarrest statements were taken in violation of his constitutional rights. These alleged deficiencies will be examined in turn; as will be seen, none of the asserted deficiencies can justify the granting of an evidentiary hearing in this case.

1. Knowledge of Fifth Amendment Law

The appellant initially suggests that his trial counsel was ineffective for failing to know the law, resulting in counsel's

inability to have Leon Illig testify as a defense witness. According to the appellant, had counsel understood that a witness has no right to refuse to testify under the Fifth Amendment once he had pled to this murder, he could have been permitted to question Illig at trial. This claim must fail for several reasons. First, any legal error arising from the unsuccessful attempt to call Illig as a defense witness could have been raised on direct appeal, and therefore is barred from postconviction consideration. All of the facts relied upon in support of this claim are reflected in the record on appeal. The appellant's complaint in this subissue is that Illig's invocation of the Fifth Amendment was legally improper because Illig had already been convicted and sentenced for this offense. Because this complaint could have been raised on direct appeal it is procedurally barred at this time. The appellant cannot turn this into a cognizable claim simply by converting the issue to effective assistance of counsel. Cherry, 659 So. 2d at 1072; Medina v. State, 573 So. 2d 293, 295 (Fla. 1990).

Secondly, this claim was clearly insufficiently pled because the appellant has never indicated what Illig would have said had he been prohibited from invoking the Fifth Amendment. See, Jackson, 633 So. 2d at 1054 (pleadings insufficient for hearing where they failed to show what testimony should have been presented). The appellant has never alleged that Illig would have exculpated him if Illig had been forced to testify. Absent such an allegation, any

failure on the part of counsel in getting Illig to testify could not be deficient or prejudicial under Strickland.

The record reflects that counsel was attempting to put Illig before the jury in order for Illig to invoke the Fifth, so that the jury could draw improper conclusions from his invocation. This is apparent because Illig's invocation of his right to remain silent would be more probative to the appellant than anything Illig could have truthfully said about the offense. However, the law is clear that the appellant had no right to have his jury hear Illig invoke his Fifth Amendment rights. Carter v. State, 481 So. 2d 1252, 1253 (Fla. 3d DCA), rev. denied, 492 So. 2d 1330 (1986). Therefore, no relief is warranted on this issue.

2. Failure to present voluntary intoxication defense

The appellant's next basis of ineffective assistance of counsel asserts that his attorney failed to investigate and present available evidence regarding his intoxicated state at the time of the crime. According to the appellant, "plentiful" evidence of voluntary intoxication was available, although no such evidence is specified or identified anywhere in the postconviction motion. Once again, this claim is insufficiently pled and no evidentiary hearing was warranted. Jackson, 633 So. 2d at 1054-1055; Engle v. Dusaer, 576 So. 2d 696, 699 (Fla. 1991); Lambrix v. State, 534 so. 2d 1151, 1154 (Fla. 1988).

The appellant criticizes the trial judge for rejecting this issue by reference to the lack of evidence of intoxication in the record, and claims that the court should not have assessed the facts in the postconviction motion but should have accepted them as true. If the motion had contained any such facts, the court may have done just that. Although the appellant believes his allegations were sufficient in the absence of a rule requiring the motion to contain the names of available witnesses, they are not. In addition to not identifying witnesses for this defense, the appellant has not identified what, when, or how much alcohol he believes he consumed the night of the murder. As in Jackson, "Nothing in the record or in these pleadings establishes that [Ragsdale] was intoxicated during or immediately before the commission of the murder." 633 So. 2d at 1054.

The record reflects that the theory of defense at trial was that Leon Illig killed Mace, not the appellant. As in Engle, "The existence of other theories of defense does not mean that counsel was ineffective." 576 So. 2d at 699. In addition, any voluntary intoxication defense would have been inconsistent with the evidence admitted at trial. For example, Cindy LaFlamboy testified that she was concerned about the appellant borrowing her car, since she had never let anyone else use it (DA-R. 415-416). Her statements suggest she would not have let the appellant drive it if she believed that he was intoxicated at the time. More significantly,

the appellant was able to drive from LaFlamboy's house to Mace's trailer, and back; the appellant had the presence of mind to have to saw his pocket knife across Mace's throat because he knew the blade was dull; the appellant's attempt to spook Samuel Morris, the victim's neighbor that came over during the attack, demonstrates the appellant's consciousness of guilt; and the appellant recalled details of the offense, admitting to Det. McNulty that he possessed the intent to rob Mace when he entered Mace's home. Accordingly, no deficiency or prejudice can be gleaned from counsel's failure to present a voluntary intoxication defense.

Since this was not and could not have been a viable defense, there was no deficiency by counsel in failing to voir dire the prospective jurors as to their ability to accept this defense. On these facts, the appellant has not demonstrated any error in the summary denial of this issue.

3. Failure to challenge postarrest statements

The appellant's last guilt phase attack on counsel's performance claims that his attorney failed to adequately challenge the admissibility of the appellant's postarrest statements to law enforcement. This appears to be another claim in which the appellant is attempting to circumvent the rule against using postconviction proceedings as a second appeal. Cherry, 659 So. 2d at 1072; Medina., 573 So. 2d at 295. The record reflects that the

appellant's initial trial counsel filed a motion to suppress the appellant postarrest statements, and that this motion was denied by the Honorable Ray Ulmer following an evidentiary hearing (R. 504-506; DA-R. 845-846, 848). After trial counsel Robert Culpepper was appointed, he also filed a motion to suppress, on which the court reserved ruling until the transcript from the previously held suppression hearing could be reviewed (DA-R. 875-876, 881). Counsel objected to the statements at the time they were admitted during trial, thus preserving the issue for appellate review (DA-R. 452, 454). Since this issue could have been raised on appeal, it is barred.

Furthermore, no ineffectiveness can be demonstrated. Clearly, this claim does not offer sufficient facts to warrant the granting of an evidentiary hearing. Although the appellant states that his Miranda waiver was invalid because his alleged mental deficiencies precluded him from being able to properly waive his rights, he does not specify what witnesses should have been called or what evidence exists to support his claim. Nor does he identify any alleged state misconduct in securing his postarrest statements. His alleged mental difficulties, without more, do not offer a constitutional basis for the suppression of his statements. Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). Without specific facts to support his claim of a

deficient performance by counsel, this issue was properly subject to being summarily denied.

As to all of the alleged bases of ineffective assistance of counsel, the appellant has failed to show or even seriously allege any prejudice. The overwhelming nature of the evidence of the appellant's guilt, including his admission to law enforcement that Mace was killed while the appellant and Illig were perpetrating a burglary and robbery, clearly demonstrates the lack of any prejudice. Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla.), cert. denied, ___ U.S. ___, 116 S. Ct. 420 (1995). Therefore, no hearing on the claim of ineffective assistance of guilt phase counsel was necessary.

In conclusion, the trial court's summary denial of the appellant's claim that he **was** denied his right to an adversarial testing of his guilt **was** proper. The appellant has failed to allege specific facts which would warrant an evidentiary hearing on this issue. Therefore, he is not entitled to any relief.

ISSUE IV

WHETHER THE APPELLANT WAS DEPRIVED OF AN ADVERSARIAL TESTING IN THE PENALTY PHASE OF HIS CAPITAL TRIAL.

The appellant's next issue challenges the adequacy of his legal representation in the penalty phase of his trial. The appellant contends that his attorney failed to **adequately** investigate and prepare for his penalty phase, instead simply presenting the appellant's brother, Terry, to testify about his background and life history. However, **neither the fact that other** family members were available to be witnesses nor the conclusory allegations about the appellant's mental deficiencies and history of substance abuse establish that the appellant should have had a hearing on his claim of ineffective assistance of penalty phase counsel.

It is important to keep in mind the evidence that was presented during the penalty phase. Terry Ragsdale testified that he is three years older than the appellant and that he knew the appellant very well, having spent nearly thirty years with him (DA-R. 687). He stated that Ragsdale was not dangerous; that the appellant may talk about doing something bad when he's upset, but that he wouldn't follow through with his threats (DA-R. 688). According to Terry, Eugene Ragsdale was a follower, not a leader (DA-R. 688). Ragsdale quit school in the seventh grade and can read fairly well (DA-R. 689-690). Terry also explained that the

scar on the appellant's right cheek was from an automobile accident, which happened when the appellant was coming home with another guy and they hit a tree; the appellant went through the window (DA-R. 690). In addition, the appellant's right eye "seems to wander" because when they were small, the appellant and Terry were playing cowboys and Indians and Terry accidently shot an arrow which caught the appellant in the eye, blinding the eye (DA-R. 690-691). Finally, Terry opined that the appellant was not capable of killing Ernest Mace (DA-R. 691).

The appellant suggests that trial counsel was ineffective for using Terry as a witness, since their mother and other brothers were available and Terry had been a witness for the state. Defense counsel was obviously aware of the other family members, since they were mentioned over the course of the trial, and counsel's decision to use Terry rather than another family member is a classic strategic decision that cannot be second-guessed under Strickland. Defense counsel may have believed that Terry would receive more credibility with the jury because of the fact that he had testified for the state, or wanted the first hand account of the appellant's eye injury. At any rate, since the appellant has not identified any additional testimony or evidence that should have been elicited from any family member but has only chosen to question the manner in which defense counsel put this evidence before the jury, this allegation of ineffective assistance does not warrant an

evidentiary hearing. See, Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987) (the mere fact that other witnesses might have been available or other testimony might have been elicited is not a sufficient ground to prove ineffectiveness), cert. denied, 487 U.S. 1241 (1988). As in Spaziano v. Singletary, 36 F. 3d 1028 (11th Cir. 1994), cert. denied, U.S. ___, 115 s. ct. 911 (1995), "[t]here is nothing in the record to indicate that [Ragsdale's] present counsel are either more experienced or wiser than his trial counsel, but even if they were, the fact that they would have pursued a different strategy is not enough." If the best lawyers or even most good lawyers "could have conducted a more thorough investigation that might have borne fruit," (which the appellant does not even allege) it does not mean that this attorney's performance fell outside the wide range of reasonably effective assistance. Id. at 1040, 1041.

The appellant also claims that ineffective assistance was demonstrated by counsel's failure to present evidence relating to his mental health and substance abuse problems. However, the appellant's allegations as to this claim are conclusory and do not include specific facts so as to require a hearing. The appellant's suggestion that counsel was on notice of potential mental health issues because the appellant had a scar on his cheek and a wandering eye and because one of his previous attorneys had requested a competency evaluation is not persuasive. It was not

unreasonable for counsel to fail to further investigate a mental health issues based on the appellant's physical appearance; there is no logical correlation between a person's physical characteristics and his mental abilities. And the fact that a prior attorney had secured a competency evaluation resulting in no apparent benefit to the defense, standing alone, does not impose a constitutional duty on any successor attorney to further explore mental health issues,

Although the appellant asserts that he suffers from brain damage and would present evidence of his mental condition at an evidentiary hearing, these conclusory allegations are insufficient. See, Jackson, 633 So. 2d at 1054 (claim that defense counsel ineffective for failing to present mental health defenses insufficient for hearing where record reflected counsel had obtained services of mental health expert and postconviction pleadings failed to show what expert would have testified to if called at trial); compare, Cherry, 659 So. 2d at 1074 (hearing required where motion and supporting material alleged substantial background mitigation and specifically identified three mental health experts indicating Cherry was mentally retarded, brain damaged, and incompetent at time of trial); and Harvey v. Dugger, 656 So. 2d 1253, 1257 (Fla. 1995) (hearing required where motion presented substantial mitigating evidence of childhood difficulties, substance abuse, affidavits by a psychiatrist stating

Harvey suffered brain damage and depression at time of offense, and allegation that defense expert witness from trial had recommended psychiatric evaluation).

The cases cited by the appellant do not compel the relief he seeks. In Hildwin, 654 So. 2d at 109, this Court approved a trial court's finding defense counsel's sentencing investigation to be "woefully inadequate." As a result, counsel was unaware that Hildwin had **a** history of psychiatric hospitalizations and suicide attempts. The appellant herein has not identified similar compelling mitigation that could have been discovered in this case, but has offered only the fact that a current mental health expert has determined that the appellant suffers mental deficiencies to support this issue. Similarly, in Futch v. Dugger, 874 F.2d 1483 (11th Cir. 1989), the defendant had alleged that a prison psychologist had evaluated him and found him to be incompetent, and that counsel **was** aware of this evaluation but failed to obtain it or to interview the psychologist. See also, Rose v. State, 675 So. 2d 567 (Fla. 1996) (defense counsel was inexperienced in capital cases, unfamiliar with the concept of aggravating and mitigating circumstances, and consequently "made practically no investigation" into mitigation; the jury never heard substantial statutory and nonstatutory mitigation, including that Rose had been severely injured in a 30-foot fall and suffered head trauma, chronic blackouts, dizziness, and blurred vision, or that a physician had

previously characterized Rose as schizoid); Agan v. Singletary, 12 F.3d 1012 (11th Cir. 1994) (brief review of defendant's prison medical file would have revealed lengthy history of mental health problems, including psychiatric hospitalizations and diagnoses of psychosis and schizophrenia). In sum, all of the cases cited by the appellant identify evidence of mental disorders available at *the time of trial* which were not discovered due to a lack of investigation by counsel. In contrast, the appellant has not identified *any* evidence available at the time of trial that could have been discovered **but was not**; his claim focuses entirely on the fact that a new expert, years later, has concluded that he suffers from mental illness.

As this Court has recognized, mental health is not an issue in every case. Mills v. State, 603 So. 2d 482, 485 (Fla. 1992); Blanco v. Wainwright, 507 So. 2d 1377, 1383 (Fla. 1987). Since no facts have been offered which should have reasonably alerted counsel to the need to further explore mental health issues, no basis of ineffectiveness has been demonstrated. Melendez v. State, *612 So.* 2d 1366, *1368* (Fla. 1992) ("We find nothing in the record calling Melendez's sanity or mental health into question or alerting counsel or the court of the need for a mental health evaluation; accordingly, we do not find that counsel was ineffective in failing to investigate further and present additional evidence"), cert. denied, 510 U.S. 934 (1993).

On these facts, the appellant has failed to offer sufficient allegations of any attorney deficiency to warrant an evidentiary hearing on this claim. However, Strickland also counsels that, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, it is not necessary to address whether counsel's performance fell below the standard of reasonably competent counsel. 466 U.S. at 697. In this case, even if deficient performance is presumed, the lack of prejudice is clear.

In Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990), trial counsel had allegedly failed to present mitigating evidence that Buenoano had an impoverished childhood and was psychologically dysfunctional. Buenoano's mother had died when Buenoano was young, she had frequently been moved between foster homes and orphanages where there were reports of sexual abuse, and there was available evidence of psychological problems. Without determining whether Buenoano's counsel had been deficient, the court held that there could be no prejudice in the failure to present such evidence in light of the aggravated nature of the crime. See also, Mendyk, 592 so. 2d at 1080 (asserted failure to investigate and present evidence of mental deficiencies, intoxication at time of offense, history of substance abuse, deprived childhood, and lack of significant prior criminal activity "simply does not constitute the quantum capable of persuading us that it would have made a difference in this case," given three strong aggravators, and did

not even warrant a postconviction evidentiary hearing); Routlv v. State, 590 So. 2d 397, 401-402 (Fla. 1991) (additional evidence as to defendant's difficult childhood and significant educational/behavioral problems did not provide reasonable probability of life sentence if evidence had been presented); Provenzano v. Dugger, 561 So. 2d 541, 546 (Fla. 1990) (cumulative background witnesses would not have changed result of penalty proceeding). This is clearly not a case where the postconviction motion revealed substantial mitigation that had not been presented at trial.

In order to establish prejudice to demonstrate a Sixth Amendment violation in a penalty phase proceeding, a defendant must show that, but for the alleged errors, the sentencer would have weighed the balance of the aggravating and mitigating factors and find that the circumstances did not warrant the death penalty. , ric and, 466 U.S. at 694. The aggravating factors found in this case were: committed during the course of a felony and for pecuniary gain; committed while under sentence of imprisonment; and committed in a heinous, atrocious or cruel manner. The appellant has not and cannot meet the standard required to prove that his attorney was ineffective when the facts to support these aggravating factors are compared to the purported mitigation now argued by collateral counsel.

The investigation and presentation of mitigating evidence in this case was well within the realm of constitutionally adequate assistance of counsel. Trial counsel conducted a reasonable investigation, presented appropriate penalty phase evidence, and forcefully argued for the jury to recommend sparing Ragsdale's life. There has been no deficient performance established in the way Ragsdale was represented in the penalty phase of his trial.

On these facts, the appellant has failed to demonstrate any error in the denial of his claim that his attorney was ineffective in the investigation and presentation of mitigating evidence. The trial court properly summarily denied this issue.

ISSUE V

WHETHER THE APPELLANT WAS DENIED EFFECTIVE MENTAL HEALTH ASSISTANCE.

The appellant's next claim asserts that he was denied competent mental health assistance. Citing Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), he asserts that he was denied an alleged constitutional right to effective mental health assistance because an unidentified expert now concludes that the appellant suffers serious mental problems. A review of the postconviction motion to vacate demonstrates that no evidentiary hearing was warranted on this claim.

This Court has rejected similar claims in postconviction proceedings as procedurally barred. See, Johnson v. State, 593 So. 2d 206, 208 (Fla.), cert. denied, 506 U.S. 839 (1992); Medina, 573 So. 2d at 295. To the extent that the appellant relies on Ake to allege that the state deprived him of resources to prepare and present his defense, this is a direct appeal issue which could have been raised on appeal, See, Moraan v. State, 639 So. 2d 6, 12 (Fla. 1994) (applying Ake in direct appeal case); Burch v. State, 522 So. 2d 810 (Fla. 1988). To the extent that the appellant is asserting counsel was ineffective for failing to ensure adequate mental health assistance, this claim has been addressed in Issue IV, infra.

To the extent that any substantive mental health claim remains, the 3.850 motion was legally insufficient in light of the trial record. The record reflects that initial trial counsel William Webb sought and obtained a funded mental health evaluation pursuant to Florida Rule of Criminal Procedure 3.216, and the order directing that the appellant be transported for the evaluation by Dr. Donald DelBeato on October 3, 1986, was attached to the trial court's order summarily denying this claim below (R. 503). Contrary to the appellant's assertions, there is no indication from the motion, the order, or the applicable rule that this evaluation was limited to a competency determination.

The appellant has not identified any specific deficiency with regard to DelBeato's evaluation. He has not cited any relevant mental health evidence which was available at the time but not considered by Dr. DelBeato. The appellant's claim that his new, unnamed expert could have offered favorable testimony is not a sufficient basis for relief. Engle, 576 So. 2d at 700; Provenzano, 561 So. 2d at 546; Correll v. State, 558 So. 2d 422, 426 (Fla. 1990); Hill v. Duaaer, 556 So. 2d 1385, 1388 (Fla. 1990), cert. denied, ___ U.S. ___, 116 S. Ct. 196 (1995); Stano v. State, 520 so. 2d 278, 281 (Fla. 1988) ("That Stano has now found experts whose opinions may be more favorable to him is of little consequence"). As in Correll, 'There is no assertion that [Ragsdale] had ever received prior mental health treatment." 558

So. 2d at 426. See also, Engle, 576 So. 2d at 701 ("This is not a case like Mason v. State, 489 So. 2d 734 (Fla. 1986), in which a history of mental retardation and psychiatric hospitalizations had been overlooked").

Psychiatric evaluations may be considered constitutionally inadequate so as to warrant a new sentencing hearing where the mental health expert ignored 'clear indications" of either mental retardation or organic brain damage. Rose v. State, 617 So. 2d 291, 295 (Fla.), cert. de- 510 U.S. 903 (1993); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). No such indications have been identified in this case.

In order to obtain an evidentiary hearing on this claim, Ragsdale must have alleged more than the conclusory argument presented in his motion. Engle, 576 So. 2d at 702. Since the appellant has failed to specifically identify any inadequacies in his mental health examination, or to otherwise show that his mental health assistance was constitutionally ineffective, this claim was properly summarily denied.

ISSUE VI

WHETHER THE COURT BELOW ERRED IN SUMMARILY DENYING THE APPELLANT'S COMPETENCY CLAIM.

The appellant's next issue challenges the trial court's summary denial of his competency claim. For many of the same reasons already expressed in Issues IV and V, the trial court's ruling on this claim was proper.

As with Issue V, to the extent that the appellant is claiming the trial court should have conducted a competency hearing, this is a direct appeal issue. Johnston, 583 So. 2d 657, 660 (Fla. 1991), cert. denied, ___ U.S. , *115* S. Ct. 1262 (1995); see also, Kilgore v. State, 22 Fla. L. Weekly S105 (Fla. March 6, 1997) (reviewing claim that trial court should have conducted competency hearing on direct appeal). The appellant maintains that the trial court should have conducted a competency hearing because it was on notice that competency could be an issue since initial counsel William Webb requested and obtained the assistance of a mental health expert. Clearly, a defendant's request for such assistance pursuant to Florida Rule of Criminal Procedure 3.216(a) does not place an obligation on trial courts to hold a competency hearing. The rule does not require such action and, in fact, finding that such an obligation exists would have a chilling effect on defendants that may not want unfavorable conclusions drawn by experts appointed under Rule 3.216 to be available to the court and to the state. The rule is intended to secure *confidential* mental

health assistance to criminal defendants; it should not be mutated into a device to attack a court's failure to hold a competency hearing, the necessity of which is otherwise not apparent.

The appellant relies on the fact that this motion was filed, along with his observable physical injuries and Webb and another attorney's subsequent withdrawal from representation due to "irreconcilable differences," as sufficient to put the trial court on notice as to the need for an evidentiary hearing on his competency at the time of trial. Since these facts were available at the time of the direct appeal, this issue is barred.

To the extent that the appellant is challenging counsel's performance in failing to further explore his competency, he has failed to offer sufficient facts to alert counsel as to any need for such investigation. A defense attorney is only bound to seek further expert assistance if evidence exists which calls a defendant's sanity into question. Bush v. Wainwriaht, 505 So. 2d 409, 410 (Fla.), cert. denied, 484 U.S. 873 (1987). In Bush, as in the instant case, defense counsel secured an expert pursuant to Rule 3.216, and no further mental health investigation occurred. This Court held that Bush's claim of incompetency was properly summarily denied, specifically rejecting that the numerous psychological problems identified by the mental health expert assisting postconviction counsel sufficiently raised a valid question as to Bush's competency to be tried. 505 so. 2d at 411.

Accord, Copeland v. Wainwright, 505 So. 2d 425, 429 (Fla.), vacated on other grounds, 484 U.S. 807 (1987).

To the extent that the appellant is not claiming error due to his trial court's inaction or his attorney's alleged ineffectiveness but is merely asserting that his due process rights were violated because he was tried while incompetent, for whatever the reason, his motion is insufficient to warrant relief. Significantly, the appellant does not allege that his new mental health expert would testify that he was incompetent at trial, but only that his expert has determined that he suffered from organic brain damage and mental retardation. This is insufficient. Bush, 505 So. 2d at 412 (Barkett, J., concurring) (allegation that expert would now testify to possibility of incompetence falls short of adequately raising factual question of competency).

The appellant's reliance on Mason, 489 So. 2d at 734, and State v. Sireci, 536 So. 2d 231 (Fla. 1988), is clearly misplaced. This case does not present allegations of evidence which was unknown at the time of the appellant's evaluation and which may have made a difference in Dr. DelBeato's conclusions.

There is no indication either in the record or in the postconviction pleadings that the appellant did not rationally understand the proceedings against him. In light of the absence of specific facts to support the appellant's conclusory assertion that

he was incompetent at the time of trial, the court below properly denied this issue. No relief is warranted.

ISSUE VII

WHETHER THE APPELLANT WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO OBJECT TO ALLEGEDLY IMPROPER ARGUMENT.

The appellant next asserts that his attorney rendered constitutionally deficient assistance by failing to object to the prosecutor's penalty phase closing argument. This issue was presented in the postconviction motion primarily as a due process claim of prosecutorial misconduct based on the state's closing argument, which was properly denied as procedurally barred (R. 340-342, 404). The appellant's attempt to revive the issue by casting it as an ineffective assistance of counsel claim must be rejected. Cherry, 659 So. 2d at 1072; Medina, 573 So. 2d at 295.

The appellant has failed to establish that the Sixth Amendment was violated by the lack of an objection to the prosecutor's argument. When the entire argument is read in context, it is clear that no objectionable statements were made. The prosecutor's description of the victim and his suffering was relevant since the state was seeking the aggravating factor of heinous, atrocious or cruel. Similarly, the prosecutor's comment that the appellant violated the trust of the state of Alabama by violating parole was relevant to the aggravating factor of under sentence of imprisonment. The comments about the appellant's past legal troubles, including his drug dealing, were appropriate since the appellant was seeking the mitigating factor of no significant

criminal history. See, Muehleman v. State, 503 So. 2d 310, 317 (Fla.) (comments may have excited passions but were highly relevant in establishing aggravating factors), cert. denied, 484 U.S. 882 (1987).

Even if the prosecutor's comments in this case were deemed to be improper, the failure to object did not demonstrate ineffectiveness, since the challenged remarks did not become a feature of the trial. See, Sims v. State, 602 So. 2d 1253, 1257 (Fla. 1992) (rejecting claim of ineffective assistance of counsel for failure to object to Golden Rule violation), cert. denied, 506 U.S. 1065 (1993); Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (prosecutor's penalty phase closing argument, including Golden Rule violation, not egregious enough to warrant new sentencing), cert. denied, 497 U.S. 1044 (1990). In this case, the prosecutor's closing argument comprises 16 pages of transcript (DA-R* 716-732). The appellant has noted isolated comments from the argument; however, reading the comments in context demonstrates the propriety of the argument as outlined above.

This was an deplorable offense involving three aggravating circumstances (one of which was merged from two factors) and no mitigating factors. The appellant has not shown that the prosecutor's argument was improper; but even if some of the statements were improper, they did not rise to the level of reversible error since they were not a feature of the trial. On

these facts, any objection would not have made any difference in the outcome of the penalty phase. Thus, the appellant cannot establish either a deficient performance or prejudice based on his attorney's **failure** to object to the prosecutor's closing penalty phase argument.

ISSUE VIII

WHETHER THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S ALLEGED FAILURE TO ADEQUATELY ARGUE HIS CASE.

The appellant's next issue was properly denied as refuted by the record. A review of defense counsel's closing argument clearly refutes the appellant's claim of ineffectiveness based on the alleged inadequacy of the argument. While the defense may not have focused on emphasizing particular mitigating factors to current counsel's satisfaction, the overall theme of the closing argument was to repeatedly stress the penalty phase strategy: that the appellant was an accomplice in this murder, and his participation was relatively minor. This strategy was obviously effective in getting the jury to consider the comparative roles of these defendants, as evidenced by the jury question on relative culpability (DA-R. 762). Counsel also challenged the existence and weight of the aggravating factors and emphasized as nonstatutory mitigation the character evidence that had been elicited from Terry Ragsdale (DA-R. 732-748).

The appellant asserts that trial counsel should have argued that the appellant's good behavior during trial and prior head injuries mitigated his behavior in killing Ernest Mace. This is exactly the type of second-guessing counsel's actions that is prohibited by Strickland. The question is not whether collateral counsel has a different argument he would offer; the question is

whether the argument that was given fell below the standard expected of a reasonably competent attorney. Ferauson v. State, 593 so. 2d 508, 511 (Fla. 1992) (speculation in hindsight that a different argument may have been more effective does not establish deficient performance of argument given).

The appellant's reliance on Clark v. State, 22 Fla. L. Weekly S172 (Fla. March 27, 1997), is misplaced. Counsel herein did not express any doubts about asking the jurors to recommend a life sentence or offer any negative opinions about the appellant's character. The appellant has not identified any comment from counsel's closing argument which could suggest that counsel had abdicated his responsibility to the appellant.

A review of defense counsel's closing argument refutes the suggestion that counsel **was** ineffective for failing to adequately argue for a life recommendation. Therefore, he is not entitled to relief on this issue.

ISSUE IX

WHETHER THE COURT BELOW ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM THAT THE JURY INSTRUCTIONS IMPROPERLY SHIFTED THE BURDEN OF PROOF.

The appellant's next claim is procedurally barred. Challenges to the propriety of jury instructions must be presented at trial and on direct appeal, This Court has repeatedly rejected this exact claim as barred. Harvey, 656 So. 2d at 1255-1256; Roberts, 568 So. 2d at 1257-1258; Engle, 576 So. 2d at 701. The appellant does not even attempt to explain why this claim should be subject to consideration at this time. The claim is also meritless. Preston v. State, 531 So. 2d 154, 160 (Fla. 1988); Aranso v. State, 411 So. 2d 172, 174 (Fla.), cert. denied, 457 U.S. 1140 (1982). No relief is warranted.

ISSUE X

WHETHER THE COURT BELOW ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM THAT THE JURY INSTRUCTIONS GIVEN ON HIS AGGRAVATING FACTORS WERE IMPROPER.

The appellant next raises a claim which is clearly procedurally barred. He asserts that his sentence is invalid because his jury was inadequately or improperly instructed on five aggravating factors. Although such a claim may be cognizable in postconviction proceedings where trial counsel objected to the adequacy of the instruction given and the sufficiency of the instruction was presented as an issue on direct appeal, the instructions in this case were not challenged at trial or on appeal, and therefore this issue is barred.

The appellant's allegation of unconstitutionality of the "during the course of a felony" aggravating factor on the theory that it is an automatic aggravator is not subject to review simply because the appellant had moved to dismiss the indictment based on the alleged unconstitutionality of the statute prior to trial; this did not preserve any claim regarding the instruction for appellate review. Harvey, 656 So. 2d at 1258; Ferguson v. Sinaletary, 632 So. 2d 53, 56 (Fla. 1993); Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993), cert. denied, 114 S. Ct. 2122 (1994). Similarly, the appellate challenge to the constitutionality of Florida's death penalty statute does not compel postconviction review of this issue. In addition, the claim has been rejected by this Court many

times, and none of the cases cited by the appellant demand that the issue be revisited. Stewart v. State, 588 So. 2d 972, 973 (Fla. 1991), cert. denied, U.S. [112 S. Ct. 15991 (1992); Engle, 576 So. 2d at 702.

Similarly, the lack of an instruction that the factors of "committed during a robbery" and "committed for pecuniary gain" must be treated as one factor does not establish constitutional error in the appellant's sentencing proceeding. This Court has upheld the lack of such an instruction where, as here, there was no request for the instruction made at trial and the trial court properly merged the applicable factors. Jones v. State, 652 So. 2d 346, 350 (Fla.), cert. denied, ___ U.S. , 116 S. Ct. 202 (1995); Derrick v. State, 641 So. 2d 378, 380 (Fla. 1994), cert. denied, U.S. ___, 115 s. ct. 943 (1995).

As to the instruction on the factor of pecuniary gain, the appellant does not identify the basis of his consitutional challenge or cite any relevant authority to support his assertion that the instruction violated the Eighth Amendment. The appellant has never offered an expanded definition for this factor which he believes should have been given.

As with the other instructions discussed in this issue, there was no objection to the heinous, atrocious or cruel instruction during the trial, and no alternative instruction on this factor was ever suggested by counsel. Even though the issue was not raised on

direct appeal, this Court addressed the adequacy of the instruction since Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992) was released while rehearing was pending in this case. Any Espinosa error was specifically found to be both barred and harmless. See, 609 So. 2d at 14. In addition, this Court has rejected the suggestion that counsel should be found ineffective for failing to litigate the adequacy of the instruction. Lambrix v. Singletary, 641 So. 2d 847 (Fla. 1994).

The appellant's complaint on the 'under sentence of imprisonment" factor is that the jury was not told "the weight of this aggravator was less if the defendant had not committed the homicide after escaping from confinement," citing Sonser v. State, 544 so. 2d 1010 (Fla. 1989). Even if that were true, although the State does not read Songer as establishing this as a matter of law, there is no constitutional requirement that a jury be told what weight to give an aggravating factor. The appellant's second complaint, that the trial judge was incorrect in noting that the factor had not been provided to the jury or found by the judge, is of no moment since the court's primary rejection of this issue as procedurally barred was correct.

Finally, the appellant challenges the instruction on cold, calculated and premeditated as improper since the trial judge did not find this factor to exist. As this Court has recognized, a jury is not going to be misled about a factor which lacks the

necessary factual support. Foster v. State, 679 So. 2d 747, 753 (Fla. 1996), cert. denied, ___ U.S. , 117 s. ct. 1259 (1997); Johnson v. Singletary, 612 So. 2d 575, 577 (Fla.), cert. denied, 508 U.S. 901 (1993). The appellant's reliance on Archer v. State, 613 So. 2d 446 (Fla. 1993), is misplaced as that case involved a factor which was found improperly as a matter of law, and not due to a lack of factual support, since the heinous, atrocious or cruel factor is not to be applied vicariously.

In conclusion, the appellant's claim of jury instruction error based on the instructions given on the five aggravating factors is not properly before this Court and must be rejected entirely as procedurally barred. Gorham v. State, 521 So. 2d 1067, 1070 (Fla. 1988) ('Because a claim of error regarding the instructions given by the trial court should have been raised on direct appeal, the issue is not cognizable through collateral attack").

ISSUE XI

WHETHER THE COURT BELOW ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM THAT THIS COURT DID NOT PROPERLY ASSESS ANY JURY INSTRUCTION ERROR.

The appellant's next claim is also procedurally barred. The appellant claims that a new sentencing is required because this Court "failed to address" an issue never presented in the direct appeal, to wit, the impact of having instructed the jury on the cold, calculated and premeditated aggravating factor when that factor was not found by the trial judge. Such allegations of jury instruction error are properly rejected as barred in postconviction proceedings. Gorham, 521 So. 2d at 1070.

The appellant asserts that, as a matter of law, Archer, 613 so. 2d at 448, and Richmond v. Lewis, 506 U.S. 40, 113 S. Ct. 528, 121 L. Ed. 2d 411 (1992) require that relief be granted. However, those cases are inapposite as they involved aggravating factors which were improperly weighed by the sentencers. In the instant case, the trial judge concluded that this circumstance had not been factually established; the jury is presumed to have reached the same conclusion. Foster, 679 So. 2d at 753. No relief is warranted.

ISSUE XII

WHETHER THE COURT BELOW ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM THAT THE APPELLANT'S JURY INSTRUCTIONS DILUTED THEIR SENSE OF RESPONSIBILITY.

The appellant's next claim is again procedurally barred. The appellant faults the trial court for repeatedly characterizing the jury's role as "advisory," allegedly in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). This is clearly an issue which must be raised on direct appeal, and this Court has repeatedly rejected claims that defense counsel's failure to properly litigate this issue during the trial and direct appeal amount to ineffective assistance of counsel. See, Johnston, 583 So. 2d at 662-663, n. 2; Gorham, 521 So. 2d at 1070; pose, 617 So. 2d at 297; Mendyk, 592 So. 2d at 1080-1081; Provenzano, 561 So. 2d at 545. No relief is warranted.

ISSUE XIII

WHETHER THE COURT BELOW ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM THAT THE DEATH PENALTY STATUTE IS UNCONSTITUTIONALLY OVERBROAD.

The appellant's next claim is procedurally barred. A challenge to the constitutionality of the death penalty statute was raised and rejected in the appellant's direct appeal. 609 So. 2d at 14. Although the appellant asserts that Richmond v. Lewis, 113 S. Ct. at 528, requires reconsideration of this issue, Richmond is not a case about the constitutionality of a statute. Florida's death penalty statute has been repeatedly upheld by this Court as well as the United States Supreme Court against this same claim. No relief is warranted.

ISSUE XIV

WHETHER THE COURT BELOW ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S ALLEGED FAILURE TO ASSURE HIS PRESENCE.

The appellant's next claim is also procedurally barred. The appellant's absence from legal discussion between his counsel, the state, and the judge was known at the time of the appellant's direct appeal, and should have been raised as an issue at that time. Although the court below found this claim to be barred, the appellant does not even attempt to challenge that ruling; he merely asserts that his absence violated his constitutional rights.

In Hardwick v. State, 648 So. 2d 100, 105 (Fla. 1994), this Court rejected a similar claim:

> In the instant case, Hardwick failed to raise this issue on direct appeal and it is procedurally barred. However, to the extent that Hardwick argues fundamental error and counsel ineffectiveness, we find no merit to his claim. Hardwick was present throughout the trial and does not allege that he raised any objection to the bench conferences or expressed any desire to participate in those conferences. Hardwick has not shown nor attempted to show that any matter was determined at these conferences that required his consultation, nor has he demonstrated that any prejudice resulted from his absence during the depositions. Under these circumstances, Hardwick is not entitled to postconviction relief.

648 So. 2d at 105.

In this case, the appellant's absence from two legal discussions did not interfere with his Sixth, Eighth, or Fourteenth Amendment rights. For the same reasons expressed in Hardwick, the appellant is not entitled to postconviction relief on this issue.

ISSUE XVI

WHETHER THE COURT BELOW ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM THAT THE TRIAL COURT FAILED TO INDEPENDENTLY WEIGH THE AGGRAVATING AND MITIGATING FACTORS IN SENTENCING THE APPELLANT TO DEATH.

The appellant's next claim is also procedurally barred. The sufficiency of a court's findings with regard to aggravating and mitigating factors is clearly an issue which must be presented in a direct appeal. Turner v. Dugger, 614 So. 2d 1075, 1077 (Fla. 1992); Engle, 576 So. 2d at 702; Agan v. State, 560 So. 2d 222, 223 (Fla. 1990). No relief is warranted.

ISSUE XVII

WHETHER THE COURT BELOW ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM THAT THE TRIAL COURT WAS BIASED IN FAVOR OF THE STATE.

The appellant's next claim is **again** procedurally barred. All of the instances of alleged judicial bias are reflected in the direct appeal record, so this issue should **have** been raised on direct appeal. Kelley v. State, 569 So. 2d 754, 756 (Fla. 1990). In addition, the issue is insufficiently pled. Although the appellant asserts that bias is evident based on the fact that the trial judge overruled seventeen trial objections by defense counsel, he does not identify a single objection that should have been sustained or explain the legal theory that required the sustaining of any objection. No judicial bias is demonstrated by the overruling of meritless objections. This claim was properly summarily denied.

ISSUE XVIII

WHETHER THE COURT BELOW ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM THAT THE APPELLANT'S PRIOR FELONY, LEADING TO HIS BEING "UNDER SENTENCE OF IMPRISONMENT," WAS UNCONSTITUTIONAL.

The appellant's next claim was properly summarily rejected. The constitutionality of the appellant's prior Alabama conviction is not subject to attack in this postconviction motion. Bush v. State, 682 So. 2d 85, 88 (Fla. 1996) (this Court has no jurisdiction over prior case affirmed by the Fourth District Court of Appeal); Buenoano, 559 So. 2d at 1120. In addition, although the appellant claims that he did not have the mental ability to knowingly waive any rights and he was not represented by competent counsel, he does not offer any specific facts 'to support these conclusory allegations. Thus, this issue was insufficiently pled, Finally, it must be noted that the actual conviction that was allegedly unconstitutionally obtained was not directly used to enhance the appellant's sentence; the aggravating factor of "under sentence of imprisonment" would apply regardless of the legitimacy of the underlying imprisonment at issue. Even if the conviction were subsequently set aside, the appellant was still acting under a sentence of imprisonment at the time he killed Mace. Therefore, the appellant is not entitled to relief on this issue.

ISSUE XIX

WHETHER THE COURT BELOW ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM THAT THE DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

The appellant's next claim is again procedurally barred. A challenge to the constitutionality of the death penalty statute was raised and rejected in the appellant's direct appeal. 609 So. 2d at 14. Thus, it is clearly barred. Engle, 576 So. 2d at 699. The appellant has not cited any relevant authority that indicates the need to reconsider the constitutionality of the statute. No relief is warranted.

ISSUE XX

WHETHER THE COURT BELOW ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM THAT HIS SHACKLING WAS UNCONSTITUTIONAL.

The appellant's next claim is procedurally barred. A challenge to the security measures taken during the appellant's trial should have been brought at the time of trial and raised on appeal. Williamson, 651 So. 2d at 86; Koon v. Duaaer, 619 So. 2d 246 (Fla. 1993). The appellant never addresses the trial court's finding this issue to be procedurally barred. Furthermore, the claim of ineffective assistance of counsel for failing to object to the security measures is without merit.

ISSUE XXI

WHETHER THE COURT BELOW ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM THAT HE HAS BEEN DENIED DUE PROCESS DUE TO HIS INABILITY TO INTERVIEW JURORS.

The appellant's next claim cannot compel postconviction relief. It must be noted initially that this claim is not appropriate for a motion to vacate under Rule 3.850, since it does not attack the validity of the appellant's convictions or sentences. Foster v. State, 400 So. 2d 1 (Fla. 1981). Even if the claim is considered, however, Ragsdale has not demonstrated that relief is warranted. Florida Rule of Professional Conduct 4-3.5(d) (4) does not impose a blanket prohibition on the appellant's right to contact the jurors that deliberated his fate, as implied in his brief; it only restricts any such contact to circumstances where an attorney can demonstrate to the trial judge that he has reason to believe that grounds for a legal challenge to the verdict may exist. Even if these restrictions are construed to potentially impinge upon a constitutional right, the rule is valid because it serves vital governmental interests in protecting the finality of a verdict, preserving juror privacy, and promoting full and free debate during the deliberation process.

The United States Supreme Court has held that "long-recognized and very substantial concerns" justify protecting jury deliberations from the intrusive inquiry which the appellant's attorney is apparently seeking to conduct in this issue. Tanner v.

United States, 483 U.S. 107, 127, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1986). Federal courts have consistently upheld the federal restrictions on post-trial juror interviews against constitutional challenges much like Ragsdale offers in his brief. See, United States v. Hooshmand, 931 F.2d 725, 736-737 (11th Cir. 1991); United States v. Griek, 920 F.2d 840, 842-844 (11th Cir. 1991). The reasoning of those cases applies equally well to Florida's rule restricting juror contact when considered in light of Florida's constitutional right of access to the courts, and demonstrates that the appellant is not entitled to relief in this issue.

ISSUE XXII

WHETHER THE COURT BELOW ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM THAT CUMULATIVE ERROR REQUIRED RELIEF.

The appellant's next claim asserts that the combined effect of all alleged errors in this case warrants a new trial and/or penalty phase. This cumulative error claim, which the appellant insists is not abject whining, is not an independent claim, but is contingent upon the appellant demonstrating error in at least two of the other claims presented in his brief. For the reasons previously discussed, he has not done so. Thus, the claim must be rejected because none of the allegations demonstrate any error, individually or collectively. Although this may be a legitimate claim on the facts of a particular case, such facts are not present herein. No relief is warranted.

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the trial court's order denying the appellant's motion to vacate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to TODD G. SCHER, Office of Capital Collateral Representative, 1444 Biscayne Boulevard, Suite 202, Miami, Florida 33132, this 7th day of July, 1997.

Carol M. Dittmar

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