IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,669

ROBERT PATTON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the denial of postconviction relief pursuant to Fla. R. Crim. P. 3.850 without an evidentiary hearing. the following symbols will be used to designate references to the record in this appeal.

"R. ___" ...record on direct appeal to this Court;

"T. ___" ...transcripts of trial in the above record;

"R2. ___" ...record on direct appeal (re-sentencing) to this Court;

"T2. ___" ...transcripts of resentencing

"PCR. ___" ... record on instant appeal to this Court;

"SPCR. ___" ...supplemental record on appeal to this Court;

"PCT. ___" ...transcripts of hearings conducted below.

CERTIFICATE OF FONT

This brief is typed in 12 point Courier New font.

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STATEMENT OF THE CASE AND FACTS

A) First Trial and Direct Appeal

The defendant was charged with the first degree murder of Nathaniel Broom, armed robbery of Maxime Rhodes, and grand theft of a motor vehicle belonging to Michael Snowden. All crimes were alleged to have been committed on September 2, 1981. On February 22, 1982, the defendant was found guilty as charged. During the penalty phase, the jury sent a note to the judge indicating that it was deadlocked at 6-6, as to what the sentencing recommendation should be. (T. 1773). The trial court instructed the jury to continue deliberating (T. 1779-82), and then by a vote of 7-5, recommended that the defendant be sentenced to death. (T. 1785). The court sentenced the defendant to death for the first degree murder of Nathaniel Broom, one hundred and ten (110) years for the armed robbery of Maxime Rhodes, and five (5) years for grand theft.

The defendant appealed his convictions and sentences to this Court. The following five (5) guilt phase issues were raised:

> **I.** Defendant's prior adjudication of insanity required the State to establish his sanity as an essential element of its case.
>
> **II.** The trial court was required to hold an evidentiary hearing to determine if exclusion of electronic media was necessary.
>
> **III.** The search warrant for defendant's residence failed to establish that the items to be searched for would be found at the location to be searched.

IV. The court abused its discretion by limiting individual voir dire, refusing to sequester the jury during voir dire and trial, failing to allow defendant additional preemptory challenges and refusing to remove for cause death prone jurors.

V. The court erred in denying an evidentiary hearing on the issue of whether a death qualified jury was also a guilt prone jury.

The Defendant also raised eight (8) sentencing issues. On January 10, 1985, this Court affirmed the defendant's convictions, but reversed the defendant's sentence due to the trial court's giving of the "Allen" charge to the jury, and remanded the case to the trial court for a new sentencing proceeding before a jury. Rehearing was denied on April 18, 1985. Patton v. State, 467 So. 2d 975 (Fla. 1985). This Court found the following historical facts of the crimes:

> The facts reflect that on September 2, 1981, the victim, a Miami police officer, attempted to stop appellant for traveling the wrong way on a one-way street. Appellant abandoned his car, which was later determined to have been stolen, and fled the scene on foot. He ran down an alley with the officer in pursuit. Witnesses heard gunshots and one witness testified that appellant had hidden in the alley and waited for the officer to approach before shooting him. The officer was found dead with two bullet wounds. One bullet had penetrated his heart, killing him instantly, and another had entered the officer's foot in a manner indicating that the officer had been shot after he was dead and lying prostrate.
>
> Immediately after the shooting, appellant stole a car at gunpoint and fled the area. He was arrested later that day and charged with first-degree murder, armed robbery, grand theft, and violation of probation. Two days later, after obtaining a search warrant, the police recovered the murder weapon from beneath a heating grate

in appellant's grandmother's home.

467 So. 2d at 975-76.

On October 7, 1985, the United States Supreme Court denied the defendant's petition for writ of certiorari. Patton v. Florida, 474 U.S. 876 (1985).

B) Proceedings Prior to Resentencing

On December 14, 1985, the defendant filed a Motion to Accept Life Recommendation in the trial court. After denial thereof, the defendant filed a Petition for Writ of Prohibition in this Court to prohibit the commencement of the new penalty phase, based on a violation of the double jeopardy clause. (R2. 3360-3363). On June 14, 1986, this Court denied the petition.

On April 28, 1987, the defendant filed a federal Petition for Writ of Habeas Corpus. Patton v. Dugger, 87-811-Civ-Spellman. The petition alleged that a new sentencing hearing would violate the defendant's double jeopardy rights. On November 23, 1987, the Magistrate issued his Report and Recommendation, that the petition be denied. On February 4, 1988, the district court adopted and affirmed the Magistrate's recommendation, and dismissed the petition with prejudice. The defendant appealed to the Eleventh Circuit Court of Appeals. The Eleventh Circuit, on January 13, 1989, in an unpublished opinion, dismissed the action without prejudice. Rehearing was denied.

C) Resentencing and Appeal Thereof

On April 29, 1989, the resentencing proceedings commenced before a new jury and judge. On May 4, 1989, the jury recommended death by a vote of 11 to 1. (R2. 3805). The trial court conducted a further hearing on May 15, 1989. On May 15, 1989, the trial court imposed the death penalty for the first degree murder of Nathaniel Broom. (T2. 3838-39; R2. 3837-3840).

The defendant appealed his sentence of death to this Court. The following issues were raised: 1) error in failing to provide special verdict forms for specification of aggravating and mitigating factors and their weight; 2) ex post facto application of the police officer performance-of-official-duties aggravator; 3) alleged prosecutorial misconduct; 4) alleged error in applying two separate statutory aggravators because each referred to the same aspect of the crime; 5) whether the trial court erred in its mitigation findings, and whether the aggravating circumstances outweighed the mitigation; 6) whether the interests of justice required a life sentence; and 7) unconstitutionality of the death penalty.

On March 12, 1992, this Court affirmed the defendant's sentence. Rehearing was denied on June 10, 1992. Patton v. State, 598 So. 2d 60 (Fla. 1992). The United States Supreme Court denied the defendant's Petition for Writ of Certiorari on April 5, 1993. Patton v. Florida, 507 U.S. 1019 (1993).

D) Post-Conviction Proceedings

On June 7, 1994, the defendant filed his first Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend, raising 26 claims. The State's response, attaching various exhibits from the court file, was filed on August 26, 1994. (SPCR.184-358). The State also filed a separate motion to compel inspection of the trial counsel files, in reliance upon Reed v. State, 640 So. 2d 1094 (Fla. 1994) and Turner v. State, 530 So. 2d 45 (Fla. 1988), as the defendant had waived attorney client privilege by virtue of ineffectiveness claims. (PCR. 393-4). The defendant filed an objection on September 19, 1994. (PCR. 380-92).

The Defendant filed an amended motion to vacate on April 5, 1995, without an oath. (PCR. 32-201). A supplement to the amendment was then filed on May 8, 1995, again without an oath. (SPCR. 409-16). The State filed its response to these on June 21, 1995. (SPCR. 422-95). A second amended motion to vacate, again without verification, was then filed on July 22, 1995. (PCR. 202-380). The State's response was filed on July 28, 1995. (SPCR. 496-588). In addition to the various court file exhibits, the State had also provided the judge with "6 boxes" of the records on appeal, pleadings and transcripts of trial and resentencing. (PCT. 294-5).

In the interim between the motion to vacate and the amendments, the lower court held numerous hearings, where the prosecutor and various police department and jail personnel

testified with respect to the defendant's public record claims. (PCT. 31-115; 158-243).

The lower court then scheduled and held a Huff[1] hearing on August 4, 1995. (PCT. 373-316). The parties presented arguments in accordance with their written pleadings set forth above. (PCT. 290-315).

Thereafter, on September 21, 1995, the judge conducted a telephone hearing, with both parties present. (SPCR. 637; 646). The judge stated that she was summarily denying the motion for the reasons set forth in the State's response, and requested the State to prepare an order to that effect. Id. The State then prepared two (2) proposed orders, and submitted them to the defense first. (SPCR. 637). The orders were identical with respect to addressing the claims contained in the motion to vacate. However, the prosecutor had neglected to obtain a ruling on the aforestated motion to compel trial counsel files, during the telephonic hearing. (SPCR. 637). One of the proposed orders thus contained a paragraph stating that the motion was granted; the other proposed order had a paragraph denying the motion. (SPCR. 638-45). The Defendant then wrote the prosecutor a letter stating that he objected to the proposed order granting the motion to compel. (SPCR. 646). The Defendant also stated that the order should only

[1] Huff v. State, 622 So. 2d 982.

state that it was denied for the reasons in the State's response, instead of delineating which claims were procedurally barred and which claims were insufficient as had been done in the response. Id. The State thus transmitted both the proposed orders and the Defendant's objection to the judge. (SPCR. 6478). The judge, who had been transferred from the criminal division, thereafter signed the proposed order which denied the State's motion to compel. (SPCR. 459-61). The lower court found claims IV.F, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII and XIX, raised in Appellant's brief to be procedurally barred. (PCR. 459). It should be noted that the Appellant's brief has renumbered the claims raised in the court below. Some of the claims have also now been combined; some have been separated into different issues. The claims of ineffective assistance of counsel were found to be legally insufficient, as they were refuted by the record and did not meet the standards of Strickland v. Washington, 446 U.S. 668 (1984). The remainder of the claims herein were found legally insufficient and refuted by the court files and transcripts. (PCA. 460). The Defendant then filed a motion for rehearing, which was denied after a response and a hearing. (PCR. 463-65, 470-72, PCT. 395-400).

The State filed a notice of cross-appeal from the above denial of its motion to compel trial counsel's files. In the interests of judicial economy, the State is not pursuing its cross appeal in the case, because the identical issue has been raised and is currently

pending in this Court in Arbelaez v. State, FSC Case no. 89,375.

SUMMARY OF THE ARGUMENT

I. The summary denial below was proper where all claims were procedurally barred, or refuted by the record and insufficient. The manner in which the lower court prepared its order herein was in accordance with the procedures permitted by this Court.

II. The motion to vacate was properly denied, on the alternative basis of a lack of verification, as the defendant never submitted a timely oath, notwithstanding repeated notice and opportunity to do so.

III. The public records claims are either procedurally barred, as not having been raised below, or without merit. Prosecutors' notes were not public record, and a City of Miami booking video had been legally destroyed and cannot be produced.

IV. Counsel was not ineffective for failing to seek a change of venue where the individual voir dire reflects impartial jurors. Counsel was not ineffective for failing to present evidence which either did not exist or was rebutted by the record, in support of an insanity/intoxication defense. The remainder of the guilt-phase ineffectiveness claims are relitigation of matters which were raised on direct appeal and/or do not establish any prejudice to the defendant.

V. Resentencing counsel was not ineffective in failing to seek a new jury panel where there was no basis to do so, the existing panel was not shown to be biased, and defendant was consulted and

agreed with counsel's decision. Counsel was not ineffective in failing to seek another competency determination, where there was no basis for one. Counsel was not ineffective in failing to present witnesses where testimony would have been cumulative or inadmissible. Similarly, the record reflects that defense witness Krop was adequately prepared.

VI. The Brady claim is time barred. The record also reflects that the alleged Brady material was in fact provided to defense counsel.

VII. The defendant was properly determined to be competent in 1981, as reflected by the unequivocal testimony of four court-appointed experts.

VIII. The Ake claim is without merit, as the experts were provided with defendant's prior history and were well prepared.

IX. The claim that the sentencing judge was biased is without merit, as it is based on the defendant's dislike of adverse rulings.

X-XVIII. Claims X-XVIII are all procedurally barred, and have been repeatedly rejected by this Court in the past.

XIX. The acceleration claim has repeatedly been rejected by this Court, and is without merit where defendant filed an amended motion after the two-year limit.

ARGUMENT

I.

THE LOWER COURT'S SUMMARY DENIAL WAS PROPER.

The defendant asserts that the lower court erred in summarily denying his motion for post-conviction relief without an evidentiary hearing. The judge in the instant case was initially provided with "six boxes" of court files, records on appeal and transcripts, by the State, which she reviewed thoroughly. (PCT. 294-95). The State also filed three (3) responses to the motion to vacate and the two amendments thereto, meticulously citing the specific portions of said records which refuted these claims procedurally and/or substantively. (SPCR. 184-358; 422-495; 496-588). The trial court, having reviewed the motion to vacate and amendments thereto, the State's responses, and the records, then held numerous hearings, including a Huff hearing, where the parties argued their positions. Thereafter, the judge conducted a telephonic hearing, attended by both parties, where she verbally denied the defendant's second amended motion to vacate, "for the reasons set forth in the State's response." (SPCR. 637; 646). The judge then, again during the same hearing, asked the State to submit a written order to this effect. Id. The State first submitted the proposed order to the defendant. (SPCR. 636). The defendant objected on the grounds that the order should be a single line, solely stating that the denial was based on the reasons

contained in the State's response; as opposed to the draft which summarized, numerically, which of the defendant's 26 claims were procedurally barred, and, which were insufficient and refuted by the record, in accordance with the State's response. (SPCR. 646). The State then submitted its proposed order and the defense's objection to the judge. (SPCR. 647-48). The judge signed the proposed order in accordance with the prior ruling. (PCR. 459-61).

Each and every claim in the motion to vacate, to which the Appellant alludes in Argument I, is fully addressed in the ensuing Arguments contained in this Brief of Appellee. A review of each and every one of those Arguments clearly demonstrates the summary denial of the claims in the motion to vacate was proper, as the claims were either procedurally barred - e.g., could have or should have been raised on direct appeal and relitigated claims already addressed on direct appeal - or were legally insufficient and conclusively refuted by the record. Under such circumstances, there was no need to conduct an evidentiary hearing. See Kennedy v. State, 547 So. 2d 912, 913-14 (Fla. 1989); Engle v. Dugger, 576 So. 2d 696, 699-700 (Fla. 1991).

The Appellant next relies on Valle v. State, 705 So. 2d 1331, 1334 (Fla. 1997), where this Court held that Fla.R.Crim.P. 3.850 does not require the movant to "attach an **affidavit** [nor] authorizes a trial court to deny the motion on the basis of the movant's failure to do so." The Appellant states that "the same

assistant state attorney in the same county," improperly presented argument in violation of Valle. Brief of Appellant at p. 18. The State notes that in the course of three (3) detailed and voluminous written responses, and during innumerable hearings, including the Huff hearing in the court below, the much maligned prosecutor never once mentioned the word "affidavit." Rather, in these proceedings which took place prior to Valle, the State, in the introductory paragraph of its response to ineffective assistance of counsel claims, wrote that a "proffer" of "available" evidence was necessary. (SPCR. 517). This argument was entirely appropriate in the circumstances of the instant case. The defendant is claiming, for example, that counsel was ineffective for failing to present a defense of insanity and incompetency, where four (4) court appointed psychiatrists and a confidential defense expert had examined the defendant prior to trial and found him to be competent and sane, and the Appellant has not proffered any mental health expert who would have testified otherwise at the time of trial. See, Arguments IV.C. and VII herein. Moreover, the State's argument was in accordance with the law in existence. See, e.g., Smith v. Dugger, 565 So. 2d 1293, 1295 (Fla. 1990) (summary denial of claims where the allegations were "insufficiently supported" was proper); Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984) (summary denial of post-conviction claims proper where, "there was no indication of the availability" of supporting evidence).

The Defendant next faults the trial court for accepting the State's argument that "the court could use documents not contained in the record on appeal, but rather anything in the court file" to refute his claims. Brief of Appellant at 19. The State is dumbfounded by this argument. Florida Rule of Criminal Procedure 3.850 provides:

> On filing of a rule 3.850 motion, the clerk shall forward the motion and **file** to the court. If the motion, **files**, and **records** in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. In those instances when the denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the **files** and **records** that conclusively shows that the prisoner is entitled to no relief shall be attached to the order.

(Emphasis added). If the trial court was restricted to matters contained in the record on appeal, there would be no reason to forward the "file" to the court; only the record on appeal would be needed. Further, there would be no reason for this Court to have referred to the "files" and "records" in discussing the source of documents to conclusively refute the claim. Rules are not construed in such a way as to render their plain language surplusage. See Florida Police Benev. Ass'n, Inc. v. Department of Agric. & Consumer Servs., 574 So. 2d 120, 122 (Fla. 1991)("This is a result required by the common sense rule that all words in a statute should be construed so as to give them some effect, not so as to render them meaningless surplusage"). Thus, the defendant's

claim flies in the face of the language of the rule and should be rejected.

The defendant next asserts that the trial court's attachment of the State's response and the records relied upon was insufficient. This argument has been previously rejected by this Court in Mills v. State, 684 So. 2d 801, 804 (Fla. 1996). There, the trial court summarily denied a motion for post-conviction relief, "for the reasons contained in the State's response." This Court found no reversible error as the State's response delineated the specific portions of the record which refuted the defendant's claims. In this case, as conceded by the Appellant's own pleadings below, the court's verbal denial of his motion was for "the reasons set forth in the state's response." (SPCR. 646). As noted previously, the State had provided "six boxes" of the records herein and meticulously specified the portions refuting the defense claims.

The defendant's reliance on Hoffman v. State, 571 So. 2d 449, 450 (1990), is misplaced. There, the court had denied the motion without providing any rationale for its order and without specifying any portion of the record that refuted the claims. Here, the court did specify its reasons for denying the defendant's motion and the State's response did specify the portion of the record in support thereof. Thus, Hoffman is not applicable here.

The cases relied upon by the defendant to claim that

attachment of the State's response was insufficient are equally inapplicable. They involve situations where the State's response was not accompanied by record documents. See Flores v. State, 662 So. 2d 1350 (Fla. 2d DCA 1995)(State's response only); Rowe v. State, 588 So. 2d 344 (Fla. 4th DCA 1991)(same); Jackson v. State, 566 So. 2d 373 (Fla. 4th DCA 1990)(same); see also Loomis v. State, 691 So. 2d 34 (Fla. 2d DCA 1997)(unexplained denial with State's response and transcript attached). Here, the trial court explained its reasons for denying the motion and attached the State's response and transcripts. Thus, this argument is unavailing.

The Appellant, in reliance upon Smothers v. State, 555 So. 2d 452 (Fla. 5th DCA 1990), also asserts that, "it is inappropriate for the State to designate which records refute defendant's allegations." In Smothers, the trial court did not attach any portions of the record to its order denying the motion for post-conviction relief. On appeal, the State, for the first time, submitted documents from the record that refuted the defendant's claims. Here, the State submitted its response to the trial court, provided records and specifically designated which portions of the files it believed refuted the claims. After having reviewed the motions, the responses, the files and records, and, after having held a Huff hearing, the trial court denied the claim for the "reasons set forth in the response." As such, this matter is vastly different than Smothers.

The defendant appears to be asserting that the State cannot be involved in the litigation of a motion for post conviction relief until an evidentiary hearing is ordered. However, the adversarial process is not suspended in post-conviction proceedings. Florida Rule of Criminal Procedure 3.850 provides:

> [T]he court shall order the state attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. The answer shall respond to the allegations of the motion. . . . [T]he judge, after the answer is filed, shall determine whether an evidentiary hearing is required.

If the State is not allowed to point out why the claims do not merit an evidentiary hearing, there would be no purpose for requiring a response from the State. Again, the defendant's contention would improperly render this portion of the rule surplusage and should be rejected. Florida Police Benev. Ass'n, Inc., 574 So. 2d at 122.

Finally, the defendant also contends that the lower court improperly delegated the responsibility to prepare the order denying his motion to the State. This argument is without merit, as the court below, after reviewing voluminous records of these proceedings and holding numerous hearings, found the claims were not meritorious "for the reasons set forth in the State's response." This finding was made after notice to, and in the presence of, both parties. The court then asked the State to prepare an order in accordance with this finding. There was no

error. As noted by the United States Supreme Court in Anderson v. Bessemer City, 470 U.S. 564, 572 (1985), "even when the trial court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." See also, Diaz v. State, 1998 WL 303860 (Fla. 1998). The Appellant's reliance upon Patterson v. State, 513 So. 2d 1257 (Fla. 1987), and progeny, is unwarranted. First, an order denying post-conviction relief is not the same as a death sentence order. A sentencing order is a statutorily required evaluation of aggravating and mitigating factors, which must be detailed so as to allow this Court to perform its proportionality review. A motion for post-conviction relief, in contrast, is brought after the convictions and sentence have been affirmed and presumed to be correct. Moreover, even in the case of a sentencing order, when the sentencer makes verbal findings, after notice to both parties, and then requests the State to prepare an order based on those findings, there is no error. Nibert v. State, 508 So. 2d 1 (Fla. 1987). The Appellant's claim is thus without merit.

II.

THE DENIAL OF THE MOTION ON THE ALTERNATIVE GROUND OF LACK OF A VERIFICATION WAS PROPER.

The defendant next asserts that the trial court erred in holding that the amended motion was not properly verified. The defendant also contends that a verification of the motion was in

the court file at the time of the "written" order of denial. The State would first note that the lower court's ruling as to the oath was an alternative holding. (PCR. 459). Moreover, the defendant did not file the verification until October 23, 1995, one month after the lower court had orally denied the second amended motion to vacate, and six months after the time (April 5, 1995) that the defendant had been given by the lower court to amend his motion to vacate. The oath was clearly untimely. A defendant must file a legally sufficient and sworn motion within the time periods provided by rule[2] or as extended by the court. For reasons unknown to anyone but the defendant and his counsel, no such timely verification was forth coming by the defendant, even though the State had argued in both its responses to the defendant's first and second amended motions that these should be denied because they were not verified.[3] (SPCR. 427; 501). As such, the defendant was on notice that a verification needed to be filed and simply chose not to do so in a timely manner.

The defendant's reliance on Anderson v. State, 627 So. 2d 1170 (Fla. 1993), is misplaced. There, the trial court summarily denied

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[2] The defendant's conviction became final with the denial of his petition for writ of certiorari on April 5, 1993. Thus, the defendant had until April 5, 1995 to timely file his motion.

[3] As conceded by Appellant, Groover v. State, 703 So. 2d 1035, 1038 (Fla. 1997), "requires that *all* motions be verified, even where the motion amends a previously filed verified motion." (Emphasis in original).

the motion to vacate without providing the defendant with the opportunity to amend the motion to include the needed verification. Unlike the instant case, there was no Huff hearing. Here, the defendant was given two opportunities to amend the motion to include the needed verification. He was informed that the State was arguing for dismissal of the motion for lack of a verification in its responses and in open court. Yet, the defendant made no effort to timely file the verification. Instead, he waited until after the second amended motion was orally denied to file the verification. As such, the defendant here was given his second bite at the apple that Anderson was denied and that case is inapplicable here.

The defendant's reliance on Jewson v. State, 688 So. 2d 968 (Fla. 1st DCA 1997), is also misplaced. There, the trial court had summarily denied the defendant's first motion for post conviction relief because it failed to state if he had filed any prior motions for post-conviction relief and the disposition of any such motions. At the time of the denial, the defendant had filed a corrected motion, containing the missing allegation. Here, the defendant was made aware of the defect in his motions before the trial court orally denied the motions and did nothing to correct the error until after the claim was denied. Further, the lower court here did address the merits of the defendant's claims, which was not done in Jewson. As such, Jewson is inapplicable here.

III.

THE PUBLIC RECORDS CLAIM IS PROCEDURALLY BARRED AND WITHOUT MERIT.

III.A. State Attorney's Office

The Appellant claims that the lower court's in camera review of the state attorney's notes was insufficient. He also argues that he was entitled to an evidentiary hearing to dispute whether or not the notes were public record. These arguments were not presented below and are thus now barred. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). The claims are also without merit.

On June 16, 1994, the State Attorney's Office made its files available to the defendant, and stated it was withholding, pursuant to Shevin v. Byron, Harless, 379 So. 2d 633 (Fla. 1980), that which was "not public record." (SPCR. 598). The State specifically listed, "preliminary drafts, notes, and other work product, which were not intended to perpetuate, communicate or formalize knowledge of the same." Id. The State also asked, pursuant to Lopez v. Singletary, 634 So. 2d 1054 (Fla. 1993), that if the defendant was dissatisfied with the public records issue, he should pursue it before the judge within 30 days or waive same. Id. The record does not reflect any response or hearing scheduled within the 30-day period. Thereafter, the State brought the matter to the court's attention and offered to provide the notes for in camera inspection, again stating that they were not public records. (PCT.

8; 11). The defense accepted the State's representation, and requested that the court conduct a Brady review as well. (PCT. 11). None of the current arguments on appeal were asserted below. The lower court reviewed the notes, and found they were not public records, during the course of a subsequent hearing. (PCT. 108-9). The defendant again did not raise any of the arguments now relied upon, but again asked that the notes be reviewed for Brady material. (PCT. 109-10). The judge agreed. (PCT. 111-12). At the next hearing on the matter, the judge stated that she had once again reviewed the notes and they did not contain any exculpatory information, nor were they public records. (T. 119-20). The defense's response was, "okay." (T. 120).

As seen above, the defendant's current arguments are barred, because they were never raised in the court below. Steinhorst, supra. The claim is also without merit. See, Valle, 705 So. 2d at 1335 (defendant's claim that he was deprived of the opportunity to argue against notes not being public record was without merit, where defendant was on notice of the State's claim and that an in camera inspection would be conducted). Moreover, the notes, on their face, reflect that they were for personal use. Valle, 705 So. 2d at 1335 (prosecutor's notes for personal use, including outlines of opening and closing arguments and notes of witness depositions are not public record). The State would note that the documents at issue were sealed, and are available for this Court's review,

although the Appellant is apparently not desirous of such review. (SPCR. 593A).[4]

III.B. City of Miami

The Appellant claims a remand is necessary for the City of Miami to produce a booking video. The claim is without merit, as the lower court, after reviewing official documentation from the Florida Department of State, found the tape had been destroyed. (PCT. 334-35).

On August 16, 1995, pursuant to the defendant's request, the lower court ordered the City of Miami to provide a booking video of the defendant, or to show cause why it could not do so. (SPCR. 675). On August 25, 1995, the City of Miami sent a response to the order, stating that the "tape did not exist." (PCT. 322; 326). The defendant requested a hearing. Counsel for the city testified that she had asked her custodian to locate the tape, but was informed that it was destroyed. (PCT. 330). Counsel stated that the "video tape" was from the old era of reel-to-reel processing tapes. When the city acquired new video machines, it requested authorization from the Florida Department of State to destroy such booking or processing tapes made between 1975 and 1989. (PCT. 326; 330-332).

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[4] The notes were originally lost and then found by the clerk's office, as indicated by the letter to defense counsel, dated September 16, 1996. The letter is contained in the Appellee's second volume of supplemental record on appeal, paginated as 593A, but it follows p. 380A in said volume of record.

These could no longer be played on the new machines. Counsel for the city then produced the authorization form, and stated that the defendant's "tape fell within the time period of the tapes that were destroyed pursuant to this disposition request form." (PCT. 332). The defendant had been processed in 1981. Counsel could not state who had "personally" destroyed the tape, and had no "personal knowledge" of the tape being destroyed. (PCT. 332-34). The trial judge ruled that the tape "no longer existed," and that it had been "destroyed in the course of business with other tapes that were being held by the city of Miami and I am not going to conduct further inquiry into that matter." (PCT. 334). The defendant objected, and requested another search be conducted. The judge ruled, "There is a public records document indicating those tapes had been destroyed," and that another search would be "futile." (PCT. 335). The State fails to see why a remand for an untimely and futile demand is necessary. The Appellant's reliance upon the City of Miami's "negligence" is unwarranted, where the defendant's first public request to the city was in January of 1995 (PCT. 251), and the court file reflects that trial counsel originally viewed this booking tape on January 25, 1982. (SPCR. 272).

IV.

THE CLAIMS OF INEFFECTIVE ASSISTANCE OF THE 1981 TRIAL COUNSEL ARE INSUFFICIENT AND WITHOUT MERIT.

IV.A. Failure to Request a Change of Venue

The defendant alleges that counsel was ineffective for failing to request a change of venue. The State, in both its response and at the Huff hearing below, argued that as there were no grounds for a change of venue, ineffective assistance of counsel could not be established. (SPCR. 528-29; PCT. 307). Although counsel did not request a change of venue, counsel did file motions for individual voir dire and sequestration of the jury. (R. 203-227). The trial court allowed individual voir dire as to the jurors' knowledge of the case. (T. 546). The record of voir dire, however, demonstrates that there were no grounds for a change of venue.

As noted by the Appellant, during the first month after the murder, the Herald had published three (3) articles which recounted the factual circumstances of the murder and arrest, related the evidence seized during search warrants, and reported the circumstances of the competency hearing. Brief of Appellant at pp. 34-5. Trial commenced approximately five months thereafter. The record reflects that of the 39 initial prospective jurors, 19 indicated some recollection of the case, either through recognizing the name of a witness or through media reports. (T. 558). These

19 did not recount the details of their recollection during the panel questioning; instead, there was individual voir dire. Only two (2) of these prospective jurors had formed a prior opinion in the case (T. 579-81; 603).[5] The remainder had not formed any opinions; they had only a vague recollection that a police officer had been shot, and, had no knowledge of the media reports of the evidence seized or the subsequent court proceedings. (T. 581-615; 624-46; 797-809). Most importantly, however, all of the jurors who had not formed any opinions stated that they were able to set aside what they had heard and decide the case only on what they heard in the courtroom. (T. 479, 488, 491, 495-96, 500, 507, 508-09, 510-11, 511-12, 514, 516, 518, 521-22, 523, 528, 531-533, 535, 536-37, 539-40, 543-44, 553, 573-615, 624-645, 774, 776, 777, 778, 798-808). Thus, counsel's actions to insure a fair trial for the defendant were not deficient, and there is no reasonable probability that had counsel requested a change of venue, that one would have been granted, and the outcome would have been different. See, e.g., Rolling v. State, 695 So. 2d 278, 284-88 (Fla. 1997)(no requirement that venue be changed in a high profile case, when the ability to seat an impartial jury was demonstrated by individual voir dire, which reflected either a lack of extrinsic knowledge among members of the venue, or, assuming such knowledge, a lack of partiality);

[5] None of the subsequent panel of eight (8) prospective jurors had formed any opinions. (T. 772-78).

Irvin v. Dowd, 366 U.S. 717, 722-23 (1961) (jurors need not be totally ignorant of the facts and issues involved); Provenzano v. Dugger, 561 So. 2d 541, 544 (Fla. 1990); Buford v. State, 492 So. 2d 355, 359 (Fla. 1986); Muhammed v. State, 426 So. 2d 533, 537 (Fla. 1982); see also Tafero v. Wainwright, 796 F.2d 1314, 1321 (11th Cir. 1986).

IV.B. Failure to Investigate and Utilize Evidence of Voluntary Intoxication.

The Appellant contends that counsel was ineffective for her failure to investigate and utilize available evidence of his voluntary intoxication at the time of the offense. The lower court properly found that the instant claim was refuted by the record and did not meet the standards of Strickland v. Washington. (PCR. 460). The record reflects that defense counsel did, in fact, present much of the evidence now relied upon. Although to date, the defendant has never been able to proffer how much or what drugs he had ingested, or that he was intoxicated at the time of the offense, defense counsel was successful in obtaining an intoxication jury instruction. The record reflects that the theory of intoxication was rejected, however, based upon the unequivocal testimony of two eyewitnesses, who were continuously with the defendant for the period of 2-2½ hours immediately prior to the crime. These witnesses testified that they did not see the defendant take any drugs, and, that the defendant was not under the influence of any

of the drugs relied upon by the Appellant. These witnesses had extensive familiarity with these types of drugs. The record reflects that the State's trial argument further relied upon the deliberateness of the defendant's actions during the shooting, as related by another eyewitness. The State had also presented numerous other witnesses who saw the deliberate actions of the defendant immediately after the shooting, when he escaped, robbed another victim of his car, drove without mishap, went to his grandmother's house, changed his clothes, cleaned the murder weapon, and hid it, all prior to being arrested seven hours after the crime. The record also reflects that the defense mental health experts, who were familiar with defendant's prior drug abuse and the same evidence of drug use now relied upon by the Appellant, were of the opinion that the defendant was not a drug addict, did not suffer from a substance abuse disorder, and was not substantially impaired. Furthermore, defense counsel knew that the court-appointed experts at the time of trial, who were also familiar with the defendant's prior drug history and his statements with respect to the use of drugs on the day of the murder, had opined that the defendant's statements and actions reflected that he was not intoxicated and was not experiencing any drug-induced psychosis at the time of the shooting. The record, as detailed below, thus supports the lack of any deficiency or prejudice to the defendant.

The Appellee will first set forth the record eyewitness testimony and physical evidence available to trial counsel in Section A herein. The mental health experts and opinions available to defense counsel will be set forth in Section B. The legal arguments presented by the Appellant will be addressed in Section C.

A. Eyewitness Testimony and Physical Evidence Available to Trial Counsel

The evidence presented at trial reflects that at the time of the murder of Officer Broom, the defendant was on probation, and had been warned by his probation officer of the consequences of his being found to have possession of a gun or having committed a new crime. (T. 854).

Two witnesses, Williams (now dead) and Butler, testified that on the morning of the murder, at approximately 8:00 a.m., they were approached by the defendant, who was in a Volkswagen, and asked if they knew where he could sell a gun. (T. 1081, 1121). Williams told defendant that he could find a buyer, and both Williams and Butler entered the Volkswagen. The defendant was concerned about two people accompanying him, so he ordered Williams to drive while he occupied the front passenger seat, with Butler in the rear. The defendant did not want to be driving with someone behind him. The defendant stated he wanted to sell the gun for $60, and would give Williams a $20 commission. (T. 1081-85). The defendant then gave directions to a grocery store and Williams drove them there. At the store, the defendant got out, but then turned around, asking: “Do you guys play long range or short range?”, meaning whether he had to take the car keys or if he could trust Williams and Butler. (T. 1085; 1122). Williams then got out and accompanied the defendant to the grocery store.

At the grocery store, the defendant took the bullets out of the gun, and gave it to the owner of the grocery store, Nelson, for inspection, in an attempt to sell the gun to the latter. (T. 1087). Nelson did not buy the gun. (T. 1087, 1117). The defendant then tried to sell Nelson some jewelry, but was unsuccessful. (T. 1089). The defendant then reloaded the gun, put the gun back in his waistband, and left the store. (T. 1091, 1117, 1124).

The trio then drove to Overtown. This time, the defendant was driving, with Williams in the front seat and Butler in the back. (T. 1091-1092, 1121, 1125).

At approximately 10:00 a.m., the defendant drove down the wrong way of a one-way street. Id. Williams yelled, "Hey there's a police car." (T. 1093, 1125). The defendant responded: "Oh, hell - I'm hot. The car's hot. We got to go." (T. 1094, 1125).

The defendant drove into the courtyard of an apartment building. Butler and the defendant jumped out of the car. (T. 1097, 1125). Williams testified that the defendant had the gun drawn while exiting the car, so Williams stayed in the car. (T. 1095-97).

Williams saw the victim, Officer Broom, run after the defendant, so he laid down in the car, then jumped out and went upstairs to the apartment building. (T. 1097). Butler testified that when he saw the police officer run after the defendant, he ran the other way. (T. 1125). Williams and Butler then heard gunshots.

(T. 1099, 1126).

Butler and Williams had been in the continuous presence of the defendant for more than two (2) hours at this point. (T. 1088; 1129-30). Williams stated that the defendant had not taken or used any drugs during this time. (T. 1108). Williams testified that he had previously used drugs himself. He saw people who are high on drugs and alcohol “every day.” He could differentiate between the effects of depressants, such as quaaludes and heroin, which cause a drowsy appearance, and cocaine, which creates a very up-tempo appearance and attitude, coupled with glassy eyes. The defendant had none of these symptoms, and appeared normal. Williams had also observed numerous people intoxicated by alcohol, and the defendant did not appear to be under the influence of alcohol either. (T. 1101-03). Likewise, Butler also testified that he had used drugs in the past. He had seen people under the influence of heroin, cocaine or pills, numerous times. The defendant did not appear high, nor had he ingested any drugs in Butler’s presence. The defendant had not mentioned having taken drugs before meeting with Butler and Williams, either. (T. 1129-30).

Various other civilian witnesses observed Officer Broom chase the defendant, heard shots, and then saw the defendant running away. (T. 926-928, 936-941, 943-946, 952-956). There was, however, an actual eyewitness to the shooting, Preston Stewart. He saw the defendant run around the corner of the alley, turn around and run

back again, and stand by the corner with the gun in his hand. (T. 972). Stewart then saw the defendant peek around the corner, stand back a step or two, aim the gun with both hands, and shoot twice. (T. 977-978). The defendant then jumped a fence and ran. (T. 973.)

The defendant was seen running up to I-95, by the victim/officer's partner, Russel. He had seen the victim chasing the defendant, heard the shots, and thus drove around the alley to locate the defendant. He testified that he made eye contact with the defendant, who then hid behind some columns when he saw the officer. (T. 1035, 1147). Within minutes, the defendant came down from I-95, and ran to a washhouse where Maxime Rhodes was repairing a washing machine. (T. 1168). The defendant pulled a gun from his waist, and demanded the keys to a car that was there. Charles Roubichek told him the keys were in the trunk. The defendant went and got the keys, got in the car, backed out slowly and in a straight line, avoiding the surrounding fence and building, and drove away. (T. 1162-1164, 1174-1175, 1181-1182).

Rhodes' car was found later that day, three blocks away from the defendant's grandmother's house. (T. 1184, T2. 2240). The defendant was present inside the house sometime between 12:00-1:00 p.m. (T. 1294). The defendant was arrested around 5:00 p.m., walking his dog near the Bali Hai Hotel, about 35 blocks away. (T. 1229, T2. 2242-43).

Pursuant to a search warrant, the murder weapon was found hidden under a metal grate in the floor in the hallway in the defendant's grandmother's house. (T. 1272). It had been wiped clean. The evidence also established that the defendant had changed his clothes after the murder and prior to his arrest. The defendant's fingerprints were found on the Volkswagen. Rhodes' belongings were also recovered from the defendant's bedroom.

Dr. Joseph Davis, the medical examiner, testified that Officer Broom died from a gunshot wound to his chest, which indicated that the assailant was to the front of the victim. The fact that the wound was horizontal to the surface, indicated that Officer Broom was bent over at this time. (T. 1305). Officer Broom was also shot in the left foot, from the bottom to the top, consistent with Officer Broom lying face down, dead, with his feet toward the shooter. (T. 1307). Another bullet also struck Officer Broom in his belt area, but did not penetrate. (T. 1317).

Despite the above overwhelming evidence, defense counsel established that syringes and drug paraphernalia were found in the stolen Volkswagen. (T. 1010). The owner of the car denied that these items were his. (T. 863). Through Butler, defense counsel established that the defendant wanted to sell the gun to get drugs. (T. 1134). In addition, through cross-examination of one of the officers, a tape-recorded BOLO was played to the jury. The tape recording reflected that the offender appeared to be extremely high

on something, eyes bulging, according to the victim of the armed robbery. (T. 1414-15). Based on this evidence, defense counsel requested and obtained a jury instruction on intoxication. (T. 1400, 1514).

In light of the above evidence, defense counsel's defense at trial was that although the defendant shot Officer Broom, he did not act through "premeditated design," and did not kill the victim with any feelings of hatred, ill will, or evil intent. (T. 848; 1497). Counsel argued that the defendant panicked, that the situation involved split-second decisions on the part of the defendant, that he was someone who needed drugs, was strung out on drugs, and was trying to buy drugs. (T. 848; 1498). Counsel argued that those things negated the facts that the defendant premeditated the killing, or killed with any ill will or malice. (T. 848; 1488).

With respect to intoxication, the State argued that the drug paraphernalia in the Volkswagen "probably" belonged to the defendant. (T. 1459). The prosecutor, however, detailed the testimony of Butler, Williams, Stewart, Rhodes and Russel, in addition to the physical evidence set forth previously. He argued that the deliberateness of the defendant's actions in the two hours before the crime, his statements, his actions at the time of the shooting, and his actions during the subsequent escape, robbery, driving of Rhodes' car and hiding of the evidence, all established that the defendant was not intoxicated to a degree where he could

not form intent. (T. 1461-72).

B. <u>Mental Health Experts and Opinions</u>

Dr. Jethro Toomer was appointed by the Court to assist the defense. In fact, he testified at the sentencing hearing that he had first seen the defendant on October 5, 1981, well before the February 1982 trial. (T. 1632). Toomer also testified at the resentencing hearing. Dr. Toomer was aware of the defendant's history of drug abuse at the time of trial. (T. 1639, 1642, 1643). However, he testified that he had not found the defendant to be addicted to drugs (T2. 2801), and he did not find that the defendant had a substance abuse disorder under DSM III. (T2. 2806).

Prior to trial, defense counsel also knew about the testimony and reports of four (4) court appointed mental health experts, Dr. Jacobson, Dr. Jaslow, Dr. Herrera, and Dr. Mutter, all of whom were aware of the defendant's reported history of drug abuse. (T. 56, R. 69, T. 77, T2. 3091-3092, 3118).[6] Dr. Herrera believed that the evidence suggested that the defendant was acting rationally after the murder, which would not be the case if he was experiencing a drug induced psychotic break at the time of the murder. (Exhibits to record on direct appeal at 551; T2. 2990-2992). Indeed, in light of the history, Dr. Herrera had checked the jail records, which reflected that both the jail nurse and psychiatrist had seen

[6] The details of these experts' reports and testimony have been addressed in Argument VII and are relied upon herein.

the defendant the day after his arrest, on September 3, 1981. They had not seen any drug withdrawal symptoms or psychosis. Exhibits to record on direct appeal at p. 551. Dr. Mutter, despite crediting the defendant's own statements about alleged use of drugs at the time of the offense, found nothing in the defendant's prior or subsequent behavior to indicate serious intoxication or impairment. (SPCR. 587-88; T2. 3091). It should be noted that when Mutter had asked the defendant, prior to trial, as to the amounts and types of drugs ingested, the defendant became “guarded and evasive.” (SPCR. 587). He found the defendant's lack of memory loss concerning the events of the day of the murder to be inconsistent with heavy drug or alcohol abuse. (SPCR. 587-88; T2. 3126).

The Appellant, in this appeal, has also relied upon Dr. Krop, although the latter was not mentioned in conjunction with the claim of ineffectiveness in the court below. (PCR. 210-237). The Appellant now states that Krop, at resentencing, testified that defendant “was severely intoxicated at the time of the offense.” Brief of Appellant at p. 40, n. 24. This is erroneous. The citation attributed to this statement reflects that Krop was not talking about the instant crime; he was relating intoxication in connection with a prior crime. (T2. 2559-61). This is the same crime for which the defendant had told his girlfriend about having “played sick” so he could go to a mental hospital instead of prison. Moreover, Krop stated that his information and opinion as

to “speed ball” injections and drug consumption in the year prior to this crime were based solely upon the defendant’s own statements. (T2. 2501, 2562).[7] Even based on the self report, Krop testified that, “I am not saying that he [defendant] was not knowing what he was doing” at the time of the crime. (T2. 2526). Krop also added that the defendant was not “substantially impaired,” during the time of the crime. (T2. 2527).

C. Argument

In light of the above record, Appellant’s claim that counsel was ineffective for not having done more to advance his intoxication defense is without merit. The defendant, in the court below, faulted counsel for several matters. (PCR. 210-37). He first stated that counsel should have established, through fingerprint analysis or cross-examination of Butler and Williams, that the drug paraphernalia in the Volkswagen belonged to the defendant. First, as seen above, at trial the State conceded that the drug paraphernalia “probably” belonged to the defendant. (T. 1459). Second, the ownership of paraphernalia does not establish its use or the amount of ingestion. Butler and Williams unequivocally testified that the defendant had not ingested any

[7] The State notes that defendant’s self-serving statements as to drug consumption are not admissible through a mental health expert. Expert testimony based upon such statements is not admissible either. Cirack v. State, 201 So. 2d 706 (Fla. 1969); Holsworth v. State, 522 So. 2d 348, 352 (Fla. 1988); Street v. State, 636 So. 2d 1297 (Fla. 1994).

drugs in the two hours immediately preceding the murder. His actions and appearance also did not indicate any intoxication. Moreover, despite years of post-conviction investigation, the Appellant has not proffered or alleged that fingerprints, or cross-examination of Butler and Williams, would in fact establish defendant's ownership of the paraphernalia.

The defendant had next complained that counsel did not present evidence from the victim of the car robbery mentioned in the taped BOLO, in order to establish that the defendant was "high." Again, the defendant failed to proffer or allege that the victim would have so testified. The record reflects that this victim, Rhodes, who was presented at the resentencing, would have, and did, in fact, testify that the defendant was not high or on drugs, but that he was excited. (T2. 932).

The defendant's assertion in the court below, that the defendant's girlfriend's statement could have been presented is equally without merit. In this statement, Ms. Castle stated that the defendant was "high" and left her at 3:30 a.m. on the day of the murder, approximately 6 1/2 hours prior to the shooting. (T2. 2250). The two witnesses who were with the defendant in the 2½ hours immediately prior to the shooting, however, testified that he was not high and had not ingested any intoxicants. Moreover, it should be noted that prior to trial, Ms. Castle had also testified that the defendant had told her that he had previously escaped from

a “road gang” and when he was found, “he played like he was sick,” so that he could be placed in a “mental hospital” instead of “prison.” (T. 82). The defendant had also told her that he had “pulled it off” with the doctors who had examined him in the instant case. (T. 84).

Finally, the Appellant suggests that counsel should have presented his extensive history of drug and alcohol abuse, and should have had a mental health expert appointed to aid in establishing the intoxication defense. As seen above, however, counsel did have such an expert appointed, and although counsel was aware of the defendant's history of substance abuse, there is nothing to indicate that such evidence would have strengthened an intoxication defense or, indeed, that it would have been admissible.

The trial court thus properly rejected this claim in accordance with this Court’s prior precedent. In Lambrix v. State, 534 So. 2d 1151 (Fla. 1988), the defendant alleged that counsel was ineffective in failing to develop additional evidence that would have entitled him to obtain an instruction on voluntary intoxication. Lambrix, in his motion to vacate, proffered the testimony of 1) a doctor who had examined the defendant prior to trial and concluded that Lambrix suffered from substance abuse disorder, and 2) an expert in addictionology who would testify that Lambrix's alcohol dependency rendered him intoxicated to the extent

that he was incapable of forming the specific intent necessary for first degree murder. 534 So. 2d at 1153. The trial court summarily denied the motion. This Court affirmed, finding that Lambrix failed to meet the prejudice prong of Strickland. This Court noted that the proffered evidence would not have established the defense of voluntary intoxication, and that based on the facts of the crime and those who saw Lambrix on the night of the crime, there was no reasonable probability that the jury would not have found him guilty of first degree murder even if it had received an instruction on voluntary intoxication. Id. at 1154.

In White v. State, 559 So. 2d 1097 (Fla. 1990), this Court held that trial counsel was not ineffective for failing to raise an intoxication defense where the defense would have been incompatible with the deliberateness of the defendant's actions. The evidence showed that the defendant took a loaded gun to the store, both victims were shot in the back of the head, the defendant took money from the store, ran steadily back to his car and drove away capably, changed his clothes and disposed of his clothes and murder weapon. 559 So. 2d at 1099; Atkins v. Dugger, 541 So. 2d 1165 (Fla. 1989); Blaylock v. State, 600 So. 2d 1250 (Fla. 3d DCA 1992).

Thus, the State submits that like Lambrix and White, the defendant has failed to demonstrate that there is a reasonable probability that the outcome would have been different if the additional evidence concerning the defendant's drug problems had

been presented.

IV.C. Failure to Present Defense of Insanity

The Appellant contends that trial counsel was ineffective at trial for failure to present a defense of insanity. The lower court properly denied this claim as it was refuted by the record and did not meet the standards of Strickland. (PCR. 460). The record reflects four court-appointed experts found the defendant to be sane. Patton, 467 So. 2d at 978-79. Moreover, the defendant's own expert at the time also found him to be sane under McNaghten test.

As noted on direct appeal of the guilt phase herein, trial counsel initially filed a notice of intent to rely upon the defense of insanity. Patten 467 So. 2d at 978; T. 35-36. The trial judge had appointed four (4) psychiatrists to examine the defendant for both competency and sanity. Patten, 467 So. 2d at 978; T. 30-1. The psychiatrists filed their reports with defense counsel, the State and the court. All four (4) of the court appointed experts found that the defendant was sane and competent under Florida's "McNaghten test". Patten, 467 So. 2d at 978; see also testimony of Drs. Jacobson, Jaslow and Herrera, that defendant's purported symptoms were inconsistent with any mental illness. (T. 56-7; 64-5; 72); Report of Dr. Herrera, dated September 10, 1981, Exhibits to Record on Appeal, at p. 553 ("I therefore conclude that he was

sane, according to the McNaghten rule... I don't find any evidence of a mental illness in the defendant at the present time. He seems to be engaging in an effort to appear mentally ill at present"); report of Dr. Mutter dated September 28, 1981,[8] SPCR. 587-88, ("I feel he knew right from wrong and understood the nature and consequences of his acts at the time of the alleged offense.")[9]

Despite the above four (4) court-appointed experts' opinions, and contrary to the Appellant's contention herein, trial counsel still retained her own confidential expert, Dr. Toomer. The latter had evaluated the defendant on October 5, 1981, (T. 1632; SPCR. 303), prior to the October 9, 1981 hearing, where the court appointed experts had testified. (T. 45-93). Dr. Toomer had had several interviews with the defendant, had taken "extensive personal history as well as the administration of psychological instruments," in addition to having reviewed "clinical records and institutional records which go back to Mr. Patton's experiences beginning at age three from a variety of institutions and doctors and also interviews with various family members." (T. 1633). At the time of trial herein, Dr. Toomer had testified that he could not give a diagnosis of defendant's mental condition. (T. 1652).

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[8] The parties had stipulated to the admission and consideration of said report by the trial judge. (T. 77).

[9] All of these court appointed doctors were familiar with the defendant's criminal history and background.

He also testified that in his opinion the defendant knew right from wrong, and also knew the consequences of his actions. (T. 1658). Dr. Toomer knew the defendant's history of "ingestion of drugs". (T. 1659). He stated that defendant's use of drugs did not make him "unable to stop doing what he knew to be wrong." Id. Dr. Toomer's position was that although the defendant knew it was wrong to kill, he could not "help himself." (T. 1658).

As seen above, Dr. Toomer's 1981 opinion was that the defendant was not insane. See Florida Standard Jury Instructions in Criminal Cases, 3.04(b)(defense of insanity requires that defendant not know what he was doing or the consequences, or, although he knew what he was doing and its consequences, he did not know it was wrong). Toomer's opinion would have at best supported "irresistible impulse", a defense not recognized in Florida for first degree murder. See Chestnut v. State, 538 So. 2d 820 (Fla. 1989); Morgan v. State, 639 So. 2d 6 (Fla. 1994).

As expressly noted on direct appeal, even in the face of the above opinions, trial counsel did not give up and sought to modify the McNaghten test. After the trial judge denied the request, counsel withdrew the insanity defense. Patten, 467 So. 2d 978-9:

> After all four court-appointed experts found appellant competent to stand trial and competent at the time of the offense under the state's modified McNaghten test, counsel did not attempt to affirmatively assert the defense of insanity under that test. In our view, this was not an inadvertent omission by counsel. Facing the obvious improbability of a successful insanity defense

> under these circumstances, counsel instead sought to have the trial judge reject the modified McNaghten test and adopt the broader criteria contained in the American Law Institute's Model Penal Code, including the "irresistible impulse" test. This Court has expressly rejected that portion of the A.L.I. insanity test that the appellant requested the trial court to accept.
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> . . .
>
> In this case the defense of insanity was not asserted, nor was the evidence of appellant's prior adjudication or commitment offered at trial. The reason for this is clear in the record. The appellant had no experts to testify as to his insanity. The state had four witnesses who concluded he was sane and two went further and stated that he was faking mental illness. The reason and logic for not asserting the defense of insanity is clear.

While this Court, as seen above, has noted that, "the reason and logic for not asserting the defense of insanity is clear" on the trial record, Appellant asserts counsel was ineffective, because eight (8) years after trial, at resentencing, Dr. Toomer stated that Defendant was now "insane." Dr. Toomer's resentencing opinion, however, was based on the same facts and history that he had utilized at the time of trial. As such, it could not be said that the arbitrary change of opinion was available in 1981. The resentencing opinion is also noteworthy, as Toomer stated that the defendant knew that being in possession of a stolen car immediately before the murder was wrong, and that drawing his gun before running into the alley where he killed the officer was wrong. At these points, the defendant also appreciated the consequences of his actions according to Toomer. The defendant, however, became insane as a result of the "stress" of his anti-social personality,

at the moment that he pulled the trigger, three times, and killed the officer. The defendant, according to Toomer, regained his sanity and appreciated the wrongfulness and consequences of his actions within a few minutes after the murder, when he escaped and robbed a second victim of his car, drove without mishap, changed his clothing, cleaned and hid the murder weapon, etc. (T2. 2766-7; 2783-92). The State would note that even the defense's other expert at the resentencing, Dr. Krop, expressly disagreed with Toomer's notion and stated that defendant was not insane at the time of the crime. (T2. 2537). The State respectfully submits that the record reflects that trial counsel was not deficient and there was no prejudice in failing to present a defense of insanity at trial. McCray v. State, 510 So. 2d 874, 876-77 (Fla. 1987).

IV.D. Failure to Voir Dire Jury on Mental Health Issues.

In conjunction with his claims that counsel was ineffective for failing to present evidence of various mental health defenses, the defendant alleges that counsel was ineffective for failing to voir dire the jury about their perceptions of mental health issues as viable defenses in a criminal case. The lower court again rejected this claim because it did not meet the standards of Strickland, in light of the record herein. Counsel certainly cannot be faulted in failing to question the jurors about evidence of mental illness in the guilt phase, as that was not counsel's

choice of defense. The reasons have been clearly set forth in argument IV.C. herein. With respect to the issue of drug abuse and addiction, the Appellant has ignored the record on appeal. Prior to voir dire, defense counsel filed a motion to submit written questionnaires to the jury. (R. 280-93). Counsel submitted sample questionnaires from federal cases and one of her own, patterned after the federal ones. Id. [10] The trial judge agreed to these. The prospective jurors completed the questionnaires and returned them to defense counsel prior to an overnight recess, and before counsel commenced her questioning of the panel. (T. 440; 444-5; 549-50; 557-8; 616). The questionnaires do in fact contain questions with respect to attitudes towards drugs and any perceived drug problems in the community. (R. 291-2). It should also be noted that defense counsel was utilizing a jury consultant/psychologist, who was providing juror profiles and strategy for presentation of evidence based upon the questionnaires. (SPCR. 299-300). The Appellant has not pointed to any bias in the juror's answers which would reflect any need for further questioning by defense counsel. There is no showing by the defendant that any of the jurors had any particular biases in those areas. Thus, there is no way the defendant can establish that even

[10] Counsel's own questionnaire was omitted from the record on appeal. The trial judge, however, submitted both the general federal questionnaire and counsel's specific one to the jury. (T. 440, 444-5; 549-550; 557-8; 616).

if more questions were asked of the jurors, that under Strickland, there is a reasonable probability that the outcome would have been different.

IV.E. Failure to Act as Advocate

The defendant alleges that counsel was ineffective when she conceded in her opening statement that the defendant killed Officer Broom. The lower court properly found this claim did not meet the standards of Strickland, in light of the record.

It is clear that although counsel conceded that the defendant shot Officer Broom, she did not concede that he was guilty of first degree murder. Counsel's defense at opening and through the trial was that the defendant did not premeditate the murder of Officer Broom and that he was guilty of a lesser degree crime. Such strategy, in light of the overwhelming evidence against the defendant [11] and the fact that there was no evidence shown or proffered that the defendant did not kill Officer Broom, was clearly reasonable. See, e.g., McNeal v. State, 409 So. 2d 528 (Fla. 5th DCA 1982); McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984).

IV.F. Trial Court Rendered Counsel Ineffective

Appellant contends that the trial judge summarily denied the

[11] A detailed statement of the factual circumstances has been provided in argument IV.B.(A), which is relied upon herein.

defense motion to exclude cameras, that he refused to appoint co-counsel, and that he conducted an "ex parte" hearing, thereby rendering counsel ineffective. This claim was properly found to be procedurally barred. (PCR. 459-60). The denial of the motion to exclude cameras was reviewed on direct appeal and this Court expressly agreed with the trial judge's ruling. Patten, 467 So. 2d at 979. The Appellant cannot couch the same claim in terms of ineffectiveness. Valle v. State, 705 So. 2d at 1337, n. 6. Likewise, a claim of requirement of co-counsel is an issue which could and should have been raised on direct appeal, and, has also been repeatedly rejected by this Court. Lowe v. State, 650 So.2d 969, 974-75 (Fla. 1994). The State notes that, as detailed in argument IX herein, the trial judge in fact granted the request for co-counsel, and defendant was represented by two attorneys at his trial. Finally, the "ex parte" hearing was transcribed, and the transcript was included in the record on direct appeal. (T. 43). As such, any issue with respect to it could and should have been raised on direct appeal. Kelley v. State, 569 So. 2d 754 (Fla. 1990); Robinson v. State, 707 So. 2d 688, 697 (Fla. 1988). Again, as detailed in Argument IX, the record also reflects that the trial judge merely carried out a previously issued ruling during the hearing at issue, which prior ruling had been agreed to by defense counsel.

IV.G. Counsel Failed to Cross Examine Witnesses.

The defendant alleges that counsel was ineffective for only cross-examining 23 of the 43 witnesses called by the State. In particular, the defendant cites four witnesses, Mortimer, Eaton, Gallo, and Curry, who testified that they saw the defendant either being chased by Officer Broom or running from the scene after hearing the shots.[12] None of these witnesses saw the actual murder. (T. 924-931, T. 943-949, T. 993-997, T. 1147-1154). The witnesses who did not identify the defendant in court, did so in a prior out-of-court identification. (T. 931, 997, 1153). There is no allegation by the defendant that any cross-examination of these witnesses would have shed any light on the defendant's mental state at the time of the homicide, or detracted from the overwhelming evidence set forth in Argument IV.B(a) herein. The defendant's defense was not that he did not shoot Officer Broom, only that he did not have the premeditated intent to do so. In light of the other witnesses who were cross-examined and testified concerning the defendant's actions prior to and at the time of the homicide, counsel's failure to cross-examine these witnesses or any others, was clearly not deficient or prejudicial under the standards of Strickland v. Washington, supra. See, e.g., Engle v. Dugger, 576

[12] The remainder of the witnesses complained of were chain of custody witnesses as to the items seized during various search warrants and from the victim's body. The search warrants had been extensively litigated prior to trial.

So. 2d 696, 700 (Fla. 1991); Magill v. State, 457 So. 2d 1367, 1369 (Fla. 1984). The lower court's ruling to this effect (PCR. 460), was thus proper.

V.

CLAIMS OF INEFFECTIVE ASSISTANCE OF RESENTENCING COUNSEL ARE WITHOUT MERIT.

V.A. Failure to Ensure Fair and Impartial Jury

The Appellant contends that his resentencing counsel was ineffective for having failed to pursue his motion to strike the panel of prospective jurors. The lower court held this claim to be insufficient under Strickland v. Washington, in light of the record (PCR. 460), which reflects that the motion was withdrawn after extensive discussions with the defendant, and where there was no prejudice to the defendant.

During voir dire the prospective jurors had been told that a prior jury had unanimously found the defendant guilty eight years before. A prospective juror then expressed concern why the prior jury did not also make a sentencing recommendation, and why the current jurors had to do so. (T2. 305). The trial judge instructed the jury that the typical criminal case was not a first degree murder case; that the prosecution does not ask for the death penalty in all first degree cases but there are others in which it does; that the history of the case was not important and the jurors should not concern themselves with it; and, that the jurors were

there “with a clean slate” to decide whether they could apply the law to the facts. (T2. 305-06). Defense counsel then asked that the panel be stricken because the judge had told them that the State seeks the death penalty in some cases but not others. (T2. 307-309). The judge agreed to strike the panel, but asked defense counsel to make sure the defendant agreed with this decision. (T2. 310).

The court and the parties noted that any future panels would naturally ask why they were deciding the case 8 years after the original jury. (T2. 313). However, the court stated that if the defense wanted a new panel, there would be “no problem.” Id. The jurors were then sent home and the court recessed so that defense counsel and defendant could discuss the matter. (T2. 313-319).

In the interim, counsel and defendant had “extensive” discussions. (T2. 319). Defense counsel then represented that, “we have gone carefully over each of the alternatives” with the defendant. (T2. 320). Defense counsel announced that in light of these discussions he wished to withdraw his motion to strike the panel. (T2. 320).

Instead, defense counsel requested that the jury be told the “truth” about the prior recommendation. Defense counsel noted that the State had told the jury that the prior jury had “unanimously,” by a vote of 12-0, found the defendant guilty. (T2. 332-4). Counsel expressed concern that the jury would think that the prior

jury had also "unanimously" recommended a death sentence. Id. Defense counsel thus requested that the jury be told that the prior jury was first split 6-6, was then erroneously instructed by the trial judge to go back, and "they came back seven to five. (T2. 334). Defense counsel stated:

> **MR. RICHEY [Defense counsel]**: I think we ought to tell them the exact truth. Tell them exactly what happened, which is what I tried to draft.
>
> If more of it ought to be added because it is incomplete, let's add it. But let's tell these people the exact truth of what happened so there can't be any misconception here. (T2. 335).

Defense counsel continued that jury studies with respect to jury psychology reflected that such matters would concern the jury during deliberations, and the questions would arise with all jurors. (T2. 338). Defense counsel thus again requested:

> What is wrong with telling these people the truth? The lady [prospective juror who had originally expressed concern with prior jury recommendation] is smart enough to ask. They are all smart enough to wonder. Let's tell them, line for line, exactly what happened. Six-Six became seven-five.

(T2. 338) (emphasis added).

The State objected to the jury being informed of the prior numerical vote of seven-five. (T2. 339-92). The judge agreed and proposed an instruction whereby the prospective jurors would be informed that, "the original jury failed to make a majority vote in regard to sentence. Incorrectly, the court ordered the jury that they must reach a majority. Because of this error we have a new

sentencing hearing." (T2. 345-6). Defense counsel agreed with the instruction, but still maintained that the prospective jury should be told of the subsequent "seven-five" prior vote, so as to dispel any notion of the prior vote having been unanimous. (T2. 346).

Thereafter, during trial, the Miami Herald published a "capsule" summary in the local section, which in its entirety, reported precisely what defense counsel had wanted to communicate to the jury. The article stated:

> The first jury convicted Patten of first degree murder in 1982 for killing patrolman Nathanial Brown. Jurors were split 6-6 on Patten's fate. Dade circuit judge Thomas Scott sent them back for more deliberations, after which they voted 7-5 to recommend death. The judge agreed the case came back on appeal after the Florida Supreme Court ruled the judge erred when he did not accept the 6-6 vote. The high court said that should have been a recommendation for life. (T2. 1102).

Defense counsel noted that the article read like the defense brief to the Eleventh Circuit. (T2. 1104).

The judge then conducted an individual voir dire of the jurors. Two of the jurors had seen this article. (T2. 1108-10; 1112-14). The remainder of the jurors did not know the contents of the article. (T2. 1105-6; 1117-1118; 1124; 1129). In any event, during the individual voir dire, every juror stated that the article would not affect their decision herein. Defense counsel did not request a mistrial, as the article merely stated exactly what he, after consultation with his client, had wanted the jurors to know. No issue was subsequently raised on direct appeal,

either. The State respectfully submits that no deficiency nor any prejudice has been demonstrated, where the defense counsel had legitimate concerns in light of the jury's questions, discussed these concerns with the defendant, and received exactly what he had previously requested to allay their concerns. Hindsight is not a basis for an ineffectiveness claim. Strickland v. Washington, 104 S.Ct. at 2065.

The Appellant also claims that defense counsel was ineffective in failing to remove the resentencing judge on the grounds that the latter was biased. The Appellant has raised these allegations with respect to the resentencing judge as an independent claim in issue IX herein. See Appellant's brief at pp. 76-7. The State has exhaustively addressed said allegations and demonstrated that they are insufficient and refuted by the record, in argument IX herein. The State relies upon said argument and submits that allegations of ineffectiveness for failing to remove the resentencing judge are without merit when there were no grounds to do so as seen in issue IX herein.

V.B. Failure to Request a Competency Hearing.

The defendant claims that resentencing counsel was ineffective for failing to request a redetermination of competency, despite "clear signs" that this was necessary. Appellant's brief at p. 55. This claim was also properly found to be insufficient and refuted

by the record. (PCR. 460). The Appellant has never stated what the signs were, nor elaborated on anything that occurred between the first trial and the resentencing trial which should have alerted counsel that the defendant may be incompetent. The Appellant has also never proffered the opinion of any mental health expert that the defendant was incompetent during the resentencing. The record clearly refutes defendant's claim that he was incompetent. The testimony, evidence and findings of competency from the 1981 competency proceedings have been exhaustively detailed in Argument VII and are relied upon herein. Four court-appointed psychiatrists, at that time, unequivocally found the defendant to be competent, after consideration of his alleged past psychological and drug abuse history. The trial judge, in addition to having found the defendant competent prior to trial, found as follows at the end of the guilt phase: “At no point in this trial in my viewpoint has Mr. Patton been anything but a composed and responsible individual in view of the charges.” (T. 1575). The defendant’s subsequent prison records from between the time of trial and the resentencing, reflected no psychological problems, either. (T2. 2649-51). Finally, at the resentencing itself, the record reflects that the defendant filed a pro se motion to act as co-counsel (R2. 3545-46), as well as a pro se motion for access to the Dade County Jail law library. (R2. 3547-48). Resentencing counsel also filed a motion for the defendant’s access to the law library, noting that the

defendant wanted to assist counsel in the resentencing. (R2. 3367-68). When the court granted the defendant's motion to act as co-counsel, the defendant stated that he wanted to participate at side bars, but not to do cross-examination, or opening statement. (T2. 572-573). Defense counsel also noted that his relationship with the defendant was excellent. (T2. 573). Thus, it is clear that there was no basis for defense counsel to request a competency hearing, and this claim fails under the standards of Strickland v. Washington, supra.

V.C. Failure to Investigate and Present Mitigation Witnesses.

The Appellant states that counsel was ineffective in the resentencing for failing to present additional mitigating evidence. In particular, the defendant claims that counsel should have presented the victim's mother as a witness because she did not believe in the death penalty. Unfortunately for the defendant, such testimony was not and is not admissible in a sentencing hearing. See, e.g., Campbell v. State, 679 So. 2d 720,725 (Fla. 1996); Cardona v. State, 641 So. 2d 361 (Fla. 1994); Jackson v. State, 498 So. 2d 406 (Fla. 1986); Floyd v. State, 497 So. 2d 1211 (Fla. 1986). The lower court thus properly denied this claim as insufficient and without merit. (PCR. 460).

The defendant also claims that counsel should have presented more background witnesses, without stating who. This argument is

also without merit. The State has detailed the extensive testimony of the mental health experts at resentencing in Argument VIII.C., where Appellant complains of ineffectiveness and lack of presentation of experts. The exhaustive psychological testing and background information relied upon by said experts is fully set forth in Argument VIII.C., and relied upon herein. The testimony of the defense experts was not only corroborated by school, social worker, doctor and hospital reports which were admitted into evidence, but also by the two family members who were willing to testify to childhood physical and emotional abuse. Defense counsel presented the testimony of the defendant's two sisters, Dyane Swartz and Colleen Parker, who recounted extensive family background information from the time of defendant’s birth, through his childhood, to shortly (several weeks) prior to the murder. (T2. 2277-2417; 2424-2449).

These two witnesses corroborated the mental health experts’, Krop and Toomer’s, testimony. The defendant has not proffered any other witnesses who were available and willing to testify in the defendant's behalf, or who could have offered further corroboration. It is clear that more than sufficient evidence of the defendant's background, including his mental health history, physical and emotional abuse, drug and alcohol abuse, etc., was presented to the jury. Any additional witnesses would only have been cumulative.

The State would note that at the resentencing, the judge also specifically questioned the defendant as to whether he wished additional family members to testify; the defendant and his counsel stated that he did not. (T2. 2329-30). Upon defense counsel's representation that some of family members were not "competent," the resentencing judge stated: "You can bring mentally incompetent people, too, and show that to the jury if you think that is appropriate... I don't want to get a letter, a motion, a Rule 3 that says: 'I asked my lawyer to get my grandmother, my mother, sister...'" (T.2. 2330). The Defendant again stated that he did not wish any other members of his family to be present. Id.

It is clear that counsel provided effective assistance, and counsel was thus not deficient in any way. Even if counsel should have presented more evidence, there is no reasonable probability that the outcome would have been different under the standards of Strickland v. Washington, supra. See, e.g., Valle, 705 So. 2d at 1334 (claim of ineffectiveness for failing to call additional witnesses to corroborate and buttress the expert testimony, was legally insufficient, as counsel cannot be deemed ineffective for failing to present cumulative testimony); Remata v. Dugger, 622 So. 2d 452 (Fla. 1993); Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992); King v. State, 597 So. 2d 780 (Fla. 1992); Puiatti v. Dugger, 589 So. 2d 231 (Fla. 1991); Johnston v. Dugger, 583 So. 2d 657 (Fla. 1991); Roberts v. State, 568 So. 2d 1255 (Fla. 1990); Card v.

State, 497 So. 2d 1169, 1176-77 (Fla. 1986). Thus, this claim was properly summarily denied.

The defendant alleges that trial counsel was ineffective in failing to properly prepare Dr. Krop as a witness, in not informing him of the proper standard for finding the statutory mental mitigating factors. This allegation is without merit. Dr. Krop had testified that he evaluated defendants for mitigating circumstances over 400 times, and testified for those individuals 45 times. (T2. 2485). In fact, he had been employed by and testified for the Capital Collateral Representative, the same counsel who now represents the defendant. (T2. 2533-34). Dr. Krop testified that mitigating circumstances were factors or conditions that have existed in the defendant's history or mental state at the time of the crime, which basically had an influence, either directly or indirectly on the person's behavior at the time of the offense. (T2. 2484). As to the statutory mental mitigating circumstances, Krop explained that the terms “extreme” and “substantial” were legal terms rather than psychological ones. (T2. 2526). In terms of psychology, Dr. Krop stated that he had chosen to use the word "extreme" to mean when the person is actively psychotic or retarded. (T2. 2541). As to the statutory mitigating circumstance of the substantial impairment of the defendant's capacity to appreciate the criminality of his conduct, Dr. Krop stated that his definition of "substantially" was

essentially a diminished capacity. (T2. 2543). Although Dr. Krop did not find either of the two statutory mitigating circumstances applicable, he did find the defendant had mental problems that resulted in poor impulse control and impaired judgment at the time of the offense. (T2. 2511-12). Dr. Krop's interpretation of the statutory mitigating circumstances does not conflict with this Court's standard in Duncan v. State, 619 So. 2d 279 (Fla. 1993). The determination of the existence of these factors is always subjective. Dr. Krop agreed there was an emotional disturbance; but it was not "extreme." He also found the defendant's ability to conform his conduct to be impaired, just not "substantially." Counsel was clearly not ineffective in the manner he prepared Dr. Krop to testify.

The defendant has failed to demonstrate that any alleged acts or omissions by counsel at the resentencing phase were deficient under the standards of Strickland v. Washington, supra; nor has he shown that under Strickland there is a reasonable probability that the outcome would have been different. As such, the lower court properly summarily denied this claim.

VI.

THE CLAIM OF BRADY VIOLATION IS REFUTED BY THE RECORD, PROCEDURALLY BARRED, AND WITHOUT MERIT.

On appeal and in his second amended motion in the court

below,[13] the Appellant contends that the State, "withheld information that upon Mr. Patton's arrest a white paper with powder and yellow pills were confiscated from him in a pack of Winston cigarettes and suspected as narcotics. No indications were noted that these substances were tested to find out what they really were." Brief of Appellant at P. 59; PCR. 246-7. This claim is without merit, as the State's response attached the State's 1981 discovery response to the defense counsel, which discovery response was contained in the court file. (SPCR. 574). The discovery response listed "9 pages and attachments" among which were "evidence and property receipts" listing "evidence and property entry of items taken from Robert Patten." (SPCR. 576, 578). The attached "evidence and property entry" form to said discovery response[14] specifically lists the "pack of Winston cigarettes" with "white paper with yellow pills and powder" having been taken from defendant at the time of his arrest, with a property receipt number of "B-39747." (Exhibit A).

Moreover, the State notes that apart from the court file, the

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[13] These allegations were not contained in the original motion to vacate nor in the first amendment and subsequent supplement thereto.

[14] Said property receipt has been omitted from the record on appeal, but a copy has been attached to the State's brief herein as Exhibit A. The State would note that in the court below, during arguments, said discovery response was relied upon, and there was no dispute with respect to the listing of the alleged Brady material in said response and attachments. (PCT.281-2; 295-96).

record on appeal reflects that at the time of trial, trial counsel filed an inventory of the various items of discovery actually received from the State. (R. 199-201). Said inventory also specifically states: that “Defendant had been provided with ... t) Evidence and property entry report for receipts, B 39628, B 39629, B 39744, B 39747, and B 39687." (R. 199-200). (emphasis added). This is the same property receipt number in Exhibit A herein, which specifically lists the items at issue. The Appellant’s contention herein that the record does not conclusively refute his allegation is thus entirely without merit.

More importantly, however, the State in the court below also argued that the instant claim is untimely and thus procedurally barred. (SPCR. 534). As seen above, the discovery response was contained in the court file since the time of the 1981 trial. Even if Appellant had not inspected the court file, which he should have, and even if Appellant did not inspect the record on appeal, which he should have, the Appellant also received the State Attorney’s file which contained the pertinent information. Under these circumstances, the Appellant could and should have filed the instant claim within the two (2) year time limitation of Fla. R. Crim. P. 3.850, that is April 5, 1995. The defendant’s motion to vacate, the first amended motion and the supplement thereto, however, did not contain any such claim. It should be noted that these were the only pleadings filed within the two (2) year limit.

As such, the State submits that in addition to being refuted by the record, the instant claim is untimely and procedurally barred.

Finally, the State respectfully submits that apart from being refuted by the record and procedurally barred, the instant allegations fall well short of demonstrating any probability of a different outcome. The evidence with respect to intoxication has been detailed in Argument IV.B. and is relied upon herein. As noted previously, the defendant was in the constant company of eyewitnesses in the two and a half hours immediately preceding the crime; these witnesses, who were familiar with the effects of drugs, unequivocally testified that defendant was not under the influence of any drugs or intoxicants nor had he ingested drugs prior to the murder. The deliberateness of the defendant's actions during and immediately after the crime were the emphasis of the State's case at trial. Finally the evidence reflected that defendant was arrested more than seven hours after the murder, and after he had changed his clothes and hid the murder weapon in the interim. Alleged evidence of powder and pills in the possession of the defendant at the time of his arrest, which items to date have not been identified as any form of narcotics, thus can not be said to have probably affected the outcome of the defendant's trial. Kyles v Whitley, 115 S.Ct. 1555 (1995). The instant claim is thus without merit.

VII.

CLAIM OF INADEQUATE COMPETENCY HEARING IS PROCEDURALLY BARRED AND WITHOUT MERIT.

The Appellant claims that the 1981 competency hearing was inadequate and the trial judge erroneously found the defendant to be competent. He also claims that defense counsel did not provide the mental health experts with defendant's psychological background, and did not have a confidential expert of her own. The substantive claim of inadequate hearing and finding of competency is procedurally barred. The competency hearing and the judge's findings were litigated at trial, included in the record, but never raised on direct appeal.[15] See, Johnston v. Dugger, 583 So. 2d 657, 659 (Fla. 1991). Couching the claim as ineffectiveness does not lift the bar. Robinson, 707 So. 2d at 698.

Moreover, the claim is without merit. The record reflects that counsel did hire her own expert, who examined defendant prior to the competency hearing; counsel also provided the very records complained of herein to the court-appointed experts. It should also be noted that two (2) of the 1981 court-appointed experts again testified during the resentencing proceedings. These experts, after having been provided with every conceivable piece of information about the defendant (prior psychological reports,

[15] The defendant has not filed any petition for writ of habeas corpus.

family and childhood background, drug abuse, etc.), testified that their 1981 opinions that defendant was competent had not changed. The defendant has never proffered any expert who would testify to the contrary. This claim is thus also insufficient and without merit. Johnston v. Dugger, supra; Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989); Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987); Bush v. Wainwright, 505 So. 2d 409 (Fla. 1987).

The circumstances of the request for competency hearing have been detailed at pp. 81-3, and are relied upon herein. Contrary to that Appellant's contentions, the record reflects that the trial judge ordered the evaluation for competency, after the indictment had been filed and more than three weeks after the formal appointment of defense counsel. The judge, during the course of a bond hearing, ordered the evaluation based upon: "my own personal observations and the state's requesting it." (T. 30). The trial court was entitled to sua sponte order the evaluation under then Fla.R.Crim.P. 3.210(b), and did so without objection by the defense. Defense counsel then asked for a competency hearing. (T. 35-36; R. 42-43). The court had ordered the evaluation to be done by four (4) psychiatrists. Defense counsel's motion for competency hearing, dated October 1, 1981, states that her "investigation" revealed that defendant had an extensive psychiatric history dating back to the time he was 8 years old, and that he had an extensive history of drug abuse. (R. 42).

The competency hearing was scheduled for, and took place on, October 9, 1981. Prior to the hearing, defense counsel hired her own expert, Dr. Toomer. The latter, in fact, examined the defendant on October 5, 1981, prior to the competency hearing. (T. 1632; SPCR. 303). Dr. Toomer subsequently testified, at the 1981 sentencing hearing, that he had taken "an extensive personal history as well as the administration of psychological instruments and exhausted review of clinical records and institutional records which go back to Mr. Patton's experience beginning at age three from a variety of institutions and doctors and also interviews with various family members." (T. 1633).[16] The Appellant has never indicated or proffered that Toomer, who not only testified in 1981, but also in the 1989 resentencing, has at any time found the defendant to be incompetent.

Apart from her own expert, defense counsel also sought to obtain favorable opinions from the court-appointed experts. The record reflects that prior to the competency hearing, counsel received Dr. Jaslow's report which "gave some indication that further examination might be helpful." (SPCR. 292). Counsel thus met with Dr. Jaslow and provided him with additional records. Id.

[16] Among the clinical records reviewed were records from Jackson Memorial Hospital, South Dade Mental Health Foundation; South Florida State Hospital; North Florida Evaluation and Treatment Center, in addition to court records in case no. 76-7607. (T. 1634). Dr. Toomer also reviewed the court appointed experts' reports herein. (T. 1644).

At the competency hearing, Dr. Jaslow confirmed that he had received and considered the very records that Appellant now complains were never provided:

> Q. [Defense counsel]: Doctor Jaslow, your examination of the Defendant also took place for about a period of an hour and a half; is that correct?
>
> A. An hour and a half with him, yes.
>
> Q. You did have the benefit of certain psychiatric reports dealing with the Defendant for approximately a two [year] period?
>
> A. Yes.
>
> Q. You were not aware of the fact that at the time you made this report that the Defendant had had psychiatric problems from the time he was approximately eight years old, were you?
>
> A. Well, these materials, of course, had history in them and the material covered periods of 1977 and I believe ‘78 and even in ‘79, so I did know there had been a history of psychiatric difficulty.
>
> Q. But you didn’t know how far back it went?
>
> A. I saw references in there to heavy use of drugs going back to the age of 13 at least and I think perhaps even earlier.

(T. 68-69). Dr. Jaslow testified that the defendant “is competent,” and had the capacity to fulfill the requirements of the 11 point competency test. (T. 65-66). Dr. Jaslow also stated that defendant was exaggerating some symptoms. (T. 66).

A second court-appointed expert, Dr. Jacobson, who was also aware of the defendant’s history, testified that the latter “was

competent for these legal proceedings." (T. 55).

The third court-appointed expert, Dr. Herrera, also testified that the defendant is "competent to stand trial." (T. 70). The defendant understood the function of his attorney, the judge, and the jury, and could assist his counsel if he so desired. (T.72). Dr. Herrera stated that his "definite impression" was that defendant was falsifying symptoms. Id. It should be noted that Herrera's report, dated September 30, 1981, states that: "Mr. Patton's voluminous records, which were made available to me by his attorney's law firm were received. They basically showed almost total consensus among the different psychiatrists that he has seen, that he presents an anti-social personality. Mr. Patton seems to have also suffered from drug induced psychotic episodes in the past. His records show that he has a fairly extensive drug abuse history. He has been in the state hospital system as a result of commitments on "a not guilty by reason of insanity basis." See, Exhibits to Record on Direct Appeal, FSC No. 61, 945, at p. 551. Dr. Herrera's examination had also been made in the "presence of one of his attorneys' assistant," at the "request of his attorney." Id. at 552.

After the testimony of the three court-appointed experts, the parties stipulated to the admissibility of the report of the fourth court-appointed expert, Dr. Mutter. (T. 77). Dr. Mutter's September 28, 1981 report reflects that he had previously examined

the defendant in 1978, in connection with prior charges. (SPCR. 587). In 1978, Dr. Mutter detected "soft signs of organic disturbance" associated with drug abuse. Id. Dr. Mutter stated, "Past history was reviewed and found to be consistent with information previously elicited." Id. With respect to the instant crimes, the defendant had stated he was taking cocaine, heroin, amphetamines, and quaaludes. Id. However, "[h]e was guarded and evasive when asked the quantities. There was no memory loss of his description of the circumstances involving this crime." Id. Dr. Mutter concluded:

> The patient was aware of the attorney representing him. He knew the name of the judge. He understood the range and nature of the penalties, the adversary nature of the proceeding, the role of his attorney, the prosecutor, the judge and jury. Additional questioning clearly indicated an awareness of the requirements of the law.
>
> . . .
>
> It is my opinion this individual meets the legal criteria that would enable him to properly aid counsel in the preparation of his defense to stand trial.

(SPCR. 558).

At the competency hearing, the State had also presented the testimony from the defendant's probation officer. She testified that defendant had told her that if he pled that he was incompetent he could perhaps get a shorter time of incarceration; that he had been able to do this before. The defendant had also asked her to say that he had been "strange and weird" during his probation

period. (T. 51).

Defense counsel then presented testimony from the defendant's girlfriend, Ms. Castle. She stated that defendant was forgetful after his arrest, and had hallucinated. (T. 80-82). However, Castle also stated that defendant had told her that he had once escaped from a road gang and when found, he "played like he was sick," so that he would be put in a "mental hospital" instead of prison. (T. 82). The defendant had told her that he stayed in the mental hospital for a year. (T. 83-84). The defendant had also written her "a letter saying that he might have pulled it off with the doctors." (T. 84). According to the defendant, "doctors stereotype." Id.

In light of the above record, the trial judge entered a written order finding the defendant to be competent, on October 28, 1998. (SPCR. 304). The judge found the defendant "meets the statutory criteria and is competent to stand trial. It is the finding of this Court that the Defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." Id.

Finally, it should be noted that at the resentencing hearing in 1989, Dr. Herrera again testified that he had previously found the defendant competent to stand trial. (T2. 2943). He stated that he found no evidence of a mental illness or disease, but only a

personality disorder, antisocial personality. (T2. 2943, 2948). Dr. Herrera testified that he had considered defendant's history of mental illness, and the reports of the doctors in 1976 and 1977. (T2. 2955-56), as well as his family history. (T2. 2956-2957).

Dr. Mutter also testified at the resentencing. He again stated that he had evaluated the defendant in 1978; and that although the defendant had problems with drug abuse, and there may have been soft signs of organicity, he believed the defendant was competent and sane. (T2. 3077-78). Dr. Mutter testified that he had also seen the defendant in 1981 for the present case. (T2. 3079). He found no change in his diagnosis from 1978. (T2. 3089). At the time, he did not have some of the mental health records of the defendant at age 12, but he stated that after reviewing them, as well as reports from family members, they would not have changed his opinion. (T2. 3080-81, 3124).

In light of the above record, the defendant’s reliance upon Manso v. State, 704 So. 2d 516 (Fla. 1988), is entirely unwarranted. Manso involved two mental health experts - one on behalf of the State, the other for the defense. This Court found that both of these experts had stipulated that Manso needed to be observed in a hospital setting, before they could render an opinion as to competency. As seen above, there was no such stipulation in the instant case. The court-appointed experts, having been provided with extensive past history, unequivocally found that

defendant was competent; they found defendant was faking symptoms of mental illness which he had probably learned during prior hospitalizations and in jail. The State would also note that even the defendant's own experts, Drs. Krop and Toomer, agreed that the defendant, due to his anti-social personality, had been malingering in 1981. (T2. 2523-24; 2743). The instant claim is thus also insufficient and refuted by the record. Johnston v. Dugger, supra; Jackson v. Dugger, supra; Engle v. Dugger, supra.

VIII.

THE CLAIM OF AN AKE VIOLATION IS WITHOUT MERIT.

A. Competency Hearing at Trial

The Appellant contends that trial counsel was ineffective for having failed to provide the court-appointed psychiatrists with defendant's prior psychiatric history in conjunction with the 1981 competency hearing. The lower court properly found this claim insufficient in light of the record. (R. 460). The circumstances of the competency hearing have been detailed in claim VII and they are relied upon herein. The record reflects that the court-appointed psychiatrists were in fact provided with, and were familiar with, the defendant's prior psychiatric history, including the 1977 reports mentioned by the Appellant. Thus, no deficiency has been established. Moreover, as noted previously, at the resentencing, two of these experts, after having reviewed every

conceivable piece of information about the defendant, from the time of his birth through the time of the crime (psychiatric and otherwise), testified that their opinions with respect to competency would not have changed. The defendant has not challenged the psychiatric credentials of these experts, nor has he proffered any expert who would have testified to the contrary. As such, the Appellant has not demonstrated any prejudice either. The claim of ineffectiveness in this regard was thus properly denied by the lower court.

VIII.B. <u>Resentencing Mental Health Experts</u>

The Appellant has first faulted resentencing counsel for their alleged failure to "retain an expert neuropsychologist." Brief of Appellant at p. 73. The record, however, refutes this contention. Resentencing counsel presented testimony from Dr. Krop, who testified that he had a speciality in neuropsychology. (T2. 2481-82).

Dr. Krop testified that he evaluated the defendant twice. The first was a two hour evaluation on December 28, 1988, the second a 4 ½ hour evaluation on January 17, 1989. Most of these interviews were devoted to psychological testing. (T2. 2492). He conducted neurological testing to determine the presence of brain damage. He conducted a full intellectual evaluation, including Wechsler's Adult Intelligence Scale (WAIS), the Aphasia screening test, Bender-Gestalt test and background procedure for that test, the

finger tapping test, a test to assess tactile sensation, a right/left orientation measure, and finally the Wechsler's Memory Scale, Form I. (T2. 2493).

The neurological and intellectual testing revealed average intellectual ability, although defendant scored much higher on the performance I.Q. (118, above average) than on the verbal I.Q. (89, low average), which can indicate possible organicity in certain areas, but which can also be explained by his lack of formal education, or other factors. (T2. 2507). The rest of the neurological testing was within normal limits. The defendant in fact had superior skills in certain motor and perception areas. The tests did not rule out organicity, nor did they provide evidence that it existed, other than the verbal/performance I.Q. discrepancy. (T2. 2508). The claim of failure to retain a neuro-psychologist was thus properly found to be refuted by the record. (PCR. 460).

The Appellant also asserts that the extent of defendant's mental illness, alcohol and substance abuse, physical abuse, and diminished capacity at the time of the offense "went undiscovered at the time of Mr. Patten's resentencing." Appellant's Brief at p. 73. In the court below, as in his brief, Appellant has never detailed what it was that was not presented at the resentencing. The defendant has never proffered any new expert who would testify any differently (in the defendant's favor) than the experts

retained by resentencing counsel. In any event, the record reflects that this claim is entirely without merit as the mental health experts at resentencing were provided with every bit of information about the defendant from the time of birth through the time of the crime and the resentencing, including his psychiatric history, childhood and family background information, in addition to the circumstances of the crime.

Dr. Krop testified that he reviewed an extensive amount of background material, including the depositions of some twenty witnesses in this case, including the defendant's sister, Dyane Swartz, and stepsister, Colleen Parker. He reviewed the trial transcript and the defendant's psychiatric reports from various institutions. He interviewed Swartz, Parker, the defendant's brother, his mother, and his stepfather. (T2. 2495). Krop also reviewed the defendant’s girlfriend’s statement at the time of the crimes (T2. 2661), which as previously noted, referred to his drug abuse. The defendant, too, had provided information as to his use of drugs. (T2. 2638)

Dr. Krop first related the circumstances of the defendant’s birth, through his sisters’ accounts. He testified that according to the sister, defendant was an unwanted child who was physically abused by his mother. (T2. 2496-2501). Dr. Krop admitted, however, that the defendant’s mother denied any physical abuse of the defendant. However, the mother had expressed severe hostility and

rejection toward the defendant. Krop also stated that the defendant, his stepfather, Bill Halloran, and the defendant's brother, also tended to minimize the physical abuse aspect, but that all the family members agreed he was not given normal attention and support, and that he suffered emotional abuse. (T2. 2497, 2653-55).

Dr. Krop then related the defendant's psychological history from childhood through the time of the crimes. He stated that the defendant, in his childhood, had spent eight sessions with a social worker, who reported some good results, but the mother terminated the sessions. (T2. 2498). The defendant was a kleptomaniac from an early age, and began using drugs at an early age. He stole pills from his mother, and once swallowed a single pill in front of his mother, to get attention. (T2. 2503). This occurred in 1971, when the defendant was 14, and was described as a "suicide gesture" by the doctor at the hospital, where the defendant was taken by his mother. This rebellious, antisocial behavior aggravated the hostility of his mother. (T2. 2498-2500). A report by Doctor Golden in 1969, when the defendant was twelve, diagnosed the defendant as "a budding sociopath with chronic behavioral difficulty with mother and schools." Golden saw no evidence of neurotic or psychotic episodes, and his impression was an "adjustment reaction of childhood, character disorder development." (T2. 2515-16). Dr. Krop then recounted psychological reports from

1976 (Dr. Guerreio), 1977 (South Florida Hospital), 1978 (Dr. Mutter), and 1978 EEG results indicating some brain damage consistent with drug use. (T2. 2509-10). All reports were presented into evidence. Dr. Krop had also reviewed the 1981 psychiatric reports for the trial. The defendant was “probably” malingering at that time. (T2. 2523-24). Dr. Krop stated that he asked the defendant about that period, and the defendant said that prior to trial in 1981 he tried to take advantage of his prior mental health problems. Dr. Krop testified that this was common in people with antisocial personality disorder, in that they try to manipulate the system. (T2. 2524). Finally, Krop had also reviewed the prison records from the time of trial through resentencing. There were no psychological problems since defendant’s incarceration in 1982. (T2. 2650-51).

Dr. Krop's first diagnosis was substance abuse. His second was an antisocial personality disorder. His third was a possibility of organic personality syndrome, which is a cluster of personality traits including poor impulse control, shifts in mood, and unpredictable acting out. (T2. 2510-11, 2640-41). In terms of mitigating factors, Dr. Krop testified that the first was the defendant's neglected and abusive upbringing. The second was his history of drug abuse. The third was long-standing emotional problems, possibly associated with organicity. (T2. 2511-12).

The other mental health expert called by the defense at the

resentencing hearing was Dr. Jethro Toomer. Dr. Toomer testified that he was retained in 1981. He met the defendant for five hours in 1981, reviewed records, and spoke with the defendant's sisters, Dyane Swartz and Colleen Parker, and Ms. Halloran. In the six months prior to the instant resentencing, he spent another four to five hours with the defendant. (T2. 2711).

In October, 1981, Dr. Toomer stated that he conducted a psycho-social evaluation to assess the defendant's background, upbringing, experience, emotional and personality development, etc. He administered the Bender Gestalt test in 1981, but the defendant refused further testing. (T2. 2713). In the six months prior to resentencing, he re-administered the Bender and also gave the Revised Beta (phonetic) test. The defendant scored slightly above average on the intelligence test. (T2. 2825). The Bender test showed "soft signs" of organicity. (T2. 2715). In the last six months prior to testifying, Dr. Toomer again reviewed numerous reports and other documents relating to the defendant's history. Dr. Toomer found no evidence of active psychosis or delusions in 1981. (T2. 2743).

Dr. Toomer testified that it was "likely" that one of the factors that motivated the defendant to shoot Officer Broom was his fear of going back to jail. (T2. 2765). The defendant knew he was on probation, driving a stolen car, in possession of a gun, and that he would go to jail if apprehended. (T2. 2766). Dr. Toomer

stated that the defendant knew what he was doing was wrong (T2. 2767), in regard to the gun and car, but at the time he killed Officer Broom, he did not know right from wrong, and hence was legally insane. (T2. 2769). Dr. Toomer acknowledged that in 1981, he testified the defendant did know right from wrong, but that he could not conform his conduct to the requirements of law, (T2. 2771), but he then explained that his 1981 testimony did not refer to the exact moment the defendant shot Officer Broom. (T2. 2772-75).

Dr. Toomer testified that the defendant met most of the criteria for antisocial personality disorder under the DSM-III. (T2. 2777-78). He acknowledged that this disorder was very prevalent in today's society, and that many with this disorder are capable of conforming to the requirements of law. The defendant met eleven of the twelve criteria under the DSM-III. (T2. 2780).

Dr. Toomer stated that he did not find the defendant to be addicted to drugs (T2. 2801), although he believed the defendant used drugs two to four hours before the instant offense. (T2. 2801). The alleged drug use took place at a convenience store, but Toomer did not know the drug, amount or method of ingestion. (T2. 2802). The sole basis for this belief was the defendant's statement that he used "drugs" at a convenience store two to four hours before the murder. (T2. 2803). Dr. Toomer was not aware of the testimony of the people who were with him before

the murder, Leroy Williams and Henry Nelson, the owner of the convenience store, who stated the defendant did not appear to be on drugs, and that the defendant did not take drugs or leave their presence at the store. (T2. 2804). He stated, however, that people with tolerance to drugs can be under the influence but still appear normal. (T2. 2859-60).

Dr. Toomer testified that in October 1981, a month after the murder, he did not observe any track marks on the defendant's arm. (T2. 2806). Dr. Toomer did not find that the defendant had a substance abuse disorder under the DSM-III. (T2. 2806).

In light of the above, the State fails to see what additional information was not "discovered" or provided to the defense experts. Of course, the State also notes that the voluminous records were also reviewed by other mental health experts who rebutted the defense experts above.

Dr. Edward Herrera testified that the defendant was not under the influence of an extreme mental or emotional disturbance at the time of the offense, and his ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was not substantially impaired. (T2. 2944). Dr. Herrera stated that at the time of the interview the defendant was malingering, in that he was trying to trick him by providing false information. Herrera had reviewed the prior records, which indicated that the defendant had done the same thing in the past. (T2. 2945).

Dr. Herrera found absolutely no evidence of any mental illness. (T2. 2948).

Dr. Herrera testified that an individual with an antisocial personality disorder does not have a well developed sense of values, and does not feel bound by the laws and norms of society. Dr. Herrera did not believe an antisocial personality disorder is a mitigating factor, as virtually all prison inmates have this disorder. (T2. 2954).

Dr. Herrera stated that, during his 1981 interview, the defendant did not provide him with any information on his drug use, either in terms of history or at the time of the offense. The jail records also indicated that he did not suffer withdrawal symptoms after his arrest. (T2. 2958). The defendant did not have any signs of brain damage, and his answers appeared to constitute a calculated effort to mislead and confuse him. (T2. 2958). Dr. Herrera did review a report from an EEG which indicated some type of abnormality. (T2. 2958). However, the discharge report from that treatment center did not mention the EEG, indicating the defendant's doctors did not attach much importance to the EEG. He testified that abnormal EEGs are common, and can be a temporary result of medication or drug abuse. (T2. 2959).

Dr. Herrera did not agree that the defendant suffered genuine psychotic episodes in the past because each time he was treated, following one of these alleged psychotic episodes, the diagnosis

was the same: antisocial personality disorder, not mental illness. The defendant may have temporarily exhibited some psychotic symptoms due to drug intoxication, but they always disappeared after a few days.(T2. 2966-2970, 2985). Such temporary drug induced psychotic periods did not represent a true mental illness. Dr. Herrera stated that long term drug abuse was not, in itself, a mitigating factor. (T2. 2988).

Dr. Herrera testified that as to the time of the murder, the evidence suggested that the defendant was acting rationally after the murder, which would not be the case if he was experiencing a drug induced psychotic break at the time of the murder. Except in the case of alcohol, such breaks last for several days. (T2. 2990-2992.).

The last resentencing expert, Dr. Mutter, testified that he had done a complete psychiatric evaluation in 1978 and 1981. Prior to the 1989 resentencing, Dr. Mutter also reviewed a large volume of reports and records, spanning the defendant's lifetime, including numerous mental health records, family members depositions, trial testimony, etc. (T2. 3080-81).

Dr. Mutter opined that at the time of the offense, the defendant was not under the influence of an extreme mental or emotional disturbance. He was under stress, because he knew his probation would be violated if caught. The defendant may even, according to his statement, have been under the influence of drugs,

but the entire record nevertheless did not support the finding of this mitigating factor. (T2. 3089-90). As for the defendant's drug use at the time of the offense, there was nothing in the defendant's prior or subsequent behavior to indicate serious intoxication or impairment. (T2. 3091). The defendant has an anti-social personality disorder.

A person with this disorder sets his own rules, and fails to learn from prior experience. He (or she) is usually at reasonable intelligence, and is able to rationalize his antisocial behavior. He manipulates other people for his own benefit and refuses to accept responsibility for his behavior. (T 2. 3082). He knows the rules of society, but simply does not care. (T2. 3082).

Dr. Mutter opined that the defendant's ability to appreciate the criminality of his conduct, and to conform his conduct to the requirements of law, was not substantially impaired. (T2. 3092). Dr. Mutter took the defendant's history of drug abuse into consideration in arriving at his conclusions.

Dr. Mutter testified that, in 1981 the defendant had good short term memory, which was not consistent with brain damage. (T2. 3096). Dr. Mutter took the defendant's abused childhood into consideration, but stated that it did not influence the defendant's conscious choice to kill Officer Broom rather than be caught. He stated that the abusive childhood had predictable influences on later functioning and reasoning, such as a basic mistrust of other

people and that many abused children develop mental illness but that was not the case with the defendant. Dr. Mutter opined that although the defendant was abused by his mother, there was no connection between that abuse and the defendant's action in killing Officer Broom. (T2. 3098).

Dr. Mutter also stated that during the 1981 interview, the defendant said he was using cocaine, heroin, dilloudid (a narcotic), amphetamines and quaaludes at the time of the offense. When Dr. Mutter asked how much and to what degree, the defendant became guarded and evasive. (T2. 3118). The defendant also said he took heroin and cocaine intravenously, but would not say how much or when. (T2. 3122). Dr. Mutter took the possibility of drug use, prior to the murder, into consideration in arriving at his opinions. (T2. 3124). The defendant had no memory loss concerning the events of the day of the murder, which Dr. Mutter stated was inconsistent with heavy drug or alcohol use. (T2. 3126).

It is abundantly clear that the mental health experts who testified for the defendant, as well as those on behalf of the State, at resentencing, were aware of and testified to the extent of the defendant's alleged mental illness, organic brain disorder, severe alcohol and substance abuse, physical abuse, diminished capacity at the time of the offense, and evidence of intoxication and narcotic abuse at the time of the offense. The defendant has not proffered any evidence that these expert opinions were

inadequate. This claim is obviously without merit and was properly summarily denied.

IX.

CLAIM OF BIASED JUDGES AT TRIAL AND RESENTENCING IS WITHOUT MERIT.

A. Trial Judge

The defendant claims that the original trial judge was biased because he: a) conducted trial 5 months after arrest, b) refused to appoint co-counsel, c) called for a competency hearing prior to arraignment and assignment of counsel, d) held ex parte proceedings, e) failed to hold an evidentiary hearing on presence of cameras in the courtroom, f) disallowed extra peremptory challenges, g) failed to restrict presence of officers, h) failed to grant defense motions for additional funds, and, I) made inflammatory references to Satan and Hitler. This claim is without merit as it is entirely based upon adverse rulings during trial. "The fact that a trial judge makes an adverse ruling is not a sufficient basis" for establishing bias so as to allow disqualification of a trial judge. Barwick v. State, 660 So. 2d 685, 692 (Fla. 1995); see also Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992); Gilliam v. State, 582 So. 2d 610, 611 (Fla. 1991); Tafero v. State, 403 So. 2d 355, 361 (Fla. 1981). The court below thus properly denied the instant claim.

The State would also note that the trial judge's rulings with respect to the cameras in the court room and denial of peremptory

challenges were raised[17] and rejected on appeal. Patten, 467 So. 2d at 979. This Court has previously held, "it is inappropriate to use a different argument to relitigate the same issue." Valle, 705 So. 2d at 1337, n.6 citing Medina v. State, 573 So. 2d 293, 298 (Fla. 1990). The remainder of the complaints with respect to the rulings are also without merit.

The judge originally scheduled trial for "late November", after having conferred with defense counsel, who stated that she had no problem with the date. (T. 30). Defense counsel then requested a two month continuance until February 1st, which was granted. (T. 147). At defense counsel's subsequent request, another two week continuance, until February 16, 1981, was granted. (T. 166). Defense counsel did not request any more time and affirmatively stated on the record that the defendant concurred. Id. The case thus proceeded to trial without any further request or mention of necessity for additional time. The State fails to see any bias in granting these defense continuances.

The defendant's contention that the trial judge denied the request for co-counsel is also without merit. The State would first note that this Court has repeatedly held that there is no right to co-counsel. Lowe v. State, 650 So. 2d 969, 974-75 (Fla. 1994); Armstrong v. State, 642 So. 2d 730 (Fla. 1994); Reaves v.

[17] See Brief of Appellant on direct appeal, Case No. 61,945, issues II and III.

State, 639 So. 2d 1 (Fla. 1994). Moreover, the record reflects that the trial judge did in fact allow co-counsel assistance in this case. Trial counsel's law firm in this case, apart from defense counsel, consisted of another partner who was an "experienced criminal lawyer" in addition to two associates. (T. 129-130). The trial judge allowed assistance by any member of the defense counsel's law firm and waived the statutory fee limits:

> **COURT:** The bottom line is this. I will not appoint another law firm. You have got plenty of good lawyers in your firm. You use who you need from your firm to represent this man effectively and fairly, and don't worry about any monetary limitations.

(T. 130). The additional appointment was as to "all aspects of this case." (T. 132). The record reflects that throughout trial, two attorneys represented the defendant. Likewise, the claim of withholding funds from the defense is also refuted. The record reflects that whenever requested, the trial judge authorized the costs requested by counsel, and provided the opportunity to request more if the need arose. (R. 41; 88-90; 128; 132). The sixteen (16) page affidavit for costs (SPCR. 286-301) and the thirty-one (31) page affidavit detailing trial counsel's actual preparation of the case (SPCR. 256-285), reflect the retention of and consultation with innumerable attorneys, mental health experts, investigators, ballistics experts, jury consultants, sociologists, etc. This documentation from the court file further belies the Appellant's claim with respect to funds being withheld.

Likewise, the claim of "ex parte" hearing is without merit. The alleged ex parte hearing[18] of October 5, 1981, took place in open court. A transcript of it was included in the record on appeal. (T. 43). Any issue regarding its propriety thus could and should have been included on direct appeal. Kelley v. State, 569 So. 2d 754, 756 (Fla. 1990). Moreover, the Appellant's contention of prejudice is refuted by the record. What occurred at the hearing at issue was that the judge ordered the clerk's office to turn over the court appointed experts' competency reports to the prosecutor for the upcoming competency hearing. (T. 43). The competency hearing had been requested by defense counsel four (4) days earlier, during the course of another hearing (on October 1, 1981). (T. 35-36). At that time, the trial judge, in the presence of, and without objection from, defense counsel, had ruled, "Then I'm going to obviously make the reports [court appointed doctors' competency reports] available to the state for the competency hearing on Friday." (T. 38). The State fails to see how the actual performance of a prior ruling, to which there was no objection, has prejudiced the Appellant. Nasetta v. Kaplan, 557 So. 2d 919, 921 (Fla. 4th DCA 1990) (allegations regarding ex parte communications must evince prejudice on the part of the judge); Rose v. Staste,

[18] Although the transcript does not show defense counsel to be present, the record reflects that she was in fact in court at this October 5th hearing. (SPCR. 259).

601 So. 2d 1181, 1183 (Fla. 1992) (ex parte communications with respect to administrative matters are not prohibited); Hardwick v. Dugger, 648 So. 2d 100, 103-04 (Fla. 1994) (same); Barwick v. State, 660 So. 2d 685 (Fla. 1993) (same).

In conjunction with the competency issue, the Appellant also states that the trial judge ordered the competency hearing prior to assignment of counsel and arraignment of the defendant. Again, these assertions are refuted by the record. As noted above, the competency hearing was requested by defense counsel. (T. 35-36). Counsel for the defendant had been formally appointed for the defendant on September 4, 1981. (T. 1-4). Counsel had consulted with the defendant even prior to this appointment. Id. In addition to the first degree murder charge, defendant had been charged with armed robbery, which he committed immediately after shooting the murder victim. He was formally arraigned on said charge[19] on September 23, 1981, at which time defense counsel also asked for a bond hearing on her previously filed motion for pretrial release. (T. 15-17; 11). The indictment for murder was also filed on September 23, 1981. (T. 16). The bond hearing was scheduled for September 25, 1981. On this date, at the commencement of the hearing, the prosecution provided the court with 23 sworn

[19] Defense counsel had requested that the defendant not be formally arraigned on the indictment for murder until after the competency hearing.

statements. (T. 25). The defense witnesses, however, were not available and the parties agreed that the bond hearing be postponed. (T. 27-28). At the end of this hearing, the judge, in the presence of defendant and his counsel, ordered a competency evaluation, by four (4) court-appointed experts, "based upon my own personal observation, and the state is requesting it." (T. 30). There were no objections, and as noted previously, defense counsel subsequently requested a hearing on competency. The State would note that under then Fla.R.Crim.P. 3.210(b), the trial court had the authority, on its own motion, to order a competency evaluation. It is thus abundantly clear that the Appellant's contentions are entirely without merit and he has not established any prejudice or bias, especially under the circumstances herein where the Appellant concedes that competency should have been evaluated. Nasetta v. Kaplan, supra; Rose, supra; Barwick, supra.

The defendant's claims with respect to the conduct of voir dire are, as previously noted, procedurally barred. The State submits that the current assertions as to the judge's "inflammatory references to Hitler and Satan" are also without merit. During voir dire, one of the prospective jurors stated that she had religious, moral or ethical reservations against the death penalty. (T. 489-90). The judge, in an effort to preclude a challenge for cause by the State, asked if the juror could think of any "extreme" situations, such as "Hitler" or "Satan," where she could impose

death. (T. 490). The juror responded in the affirmative and a challenge for cause by the State was prevented. The State again fails to see how the defendant has been prejudiced by the judge's effort to help him.

Finally, the claim with respect to presence of police officers has been exhaustively addressed in claim XI and that argument is relied upon herein. The record reflects that the judge, prior to trial, in fact admonished the officers, and throughout the trial, there were no more than three (3) uniformed officers in attendance. In sum, the claim of bias herein is frivolous.

B. Resentencing Judge

The Appellant's claim of bias by the resentencing judge was also properly found to be procedurally barred and without merit. Initially, the contentions with respect to the jury have been exhaustively addressed in claim V.A, which argument is relied upon herein. The record reflects that the judge acted in accordance with the defense requests and thus any claim of bias is without merit. Likewise, the Appellant's reliance upon adverse rulings during the course of proceedings is again unwarranted, as such are legally insufficient to establish bias or require disqualification. Barwick, 660 So. 2d at 692; Jackson v. State, 599 So. 2d at 107; Gilliam, 582 So. 2d at 611; Tafero, 403 So. 2d at 361.

The Appellant next contends, in reliance upon Porter v. Singletary, 49 F.3d 1483 (11th Cir. 1995), that the judge's

statement, at side bar and reported in the transcripts of the direct appeal, was evidence of bias such that the judge should have been disqualified. Brief of Appellant, pp. 54, 76. Again, in so far as the basis for these claims, unlike that in Porter, appears on the record on appeal, it should have been raised on direct appeal and is thus barred. Kelley v. State, 569 So. 2d 754, 756 (Fla.1990); Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1986) (allegations of bias by the judge involving facts and circumstances known at the close of trial "could have been addressed on direct appeal and are not cognizable under Rule. 3.850."). The claim is also without merit. In Porter, the trial judge, prior to trial, had stated that if the defendant was convicted, he would sentence him to death, thus expressing personal bias and prejudgment of the case.

The record herein, however, reflects that during voir dire, the judge stated that the penalty for the offense herein was life imprisonment or death by electrocution. At side bar, the prosecutor requested that the judge not refer to "electrocution," as the actual method of death could change in the future. (T2. 152-53). The judge noted that the law referred to death by electrocution and stated: "It's the truth. It's death by electrocution. Most people believe in it. I certainly do. It's a fact of life." Id. It is thus abundantly clear that the judge was not indicating any prejudgement of the case or the defendant, as

had been the case in Porter. General philosophies or agreement with punishments which are specified by the law, as opposed to prejudgement of the specific case or "ill will" towards a particular defendant, are not grounds for disqualification. See, e.g., Quince v. State, 592 So. 2d 669, 670 (Fla. 1996) (judge's out-of-court statement that "out of state lawyers," "look down their noses at us and tend to think we're a bunch of rednecks," which were "not made in specific reference to the Quince proceeding," was deemed legally insufficient to disqualify that judge); Jernigan v. State, 608 So. 2d 569 (Fla. 1st DCA 1992) (motion for disqualification on grounds that the judge was prejudiced against people whom he regards as child abusers properly rejected, as a claim of bias in a certain class of cases in general is legally insufficient); Keenan v. Wilson, 525 So. 2d 476 (Fla. 5th DCA 1988) (same); United States v. Bauer, 84 F. 3d 1549, 1560 (9th Cir. 1996) (judge's statements that marijuana distribution was a serious and pervasive social problem, were not grounds to disqualify him from trial for charges of possession and conspiracy to distribute marijuana); United States v. Conforte, 624 F.2d 869, 882 (9th Cir. 1980) ("a judge's views on legal issues may not serve as the basis for motion to disqualify.").

The Appellant, in reliance upon Valle v. State, also argues that the judge's "off the record communications with the victim's mother during recess in the proceedings" were grounds for

disqualification. Brief of Appellant at p. 54. The Appellant states that the Miami Herald reported the alleged event. However, the Appellant has never attached a copy of the alleged article, never divulged the date thereof, nor, indeed, stated what the article says. Nor has the Appellant ever, in any way, otherwise stated what the "communication" with the victim's mother was. Reliance upon Valle is unwarranted, as, in that case, the court found that the allegations of ineffectiveness for failing to move for disqualification warranted an evidentiary hearing where:

> Valle's motion alleged that Judge Gerstein had kissed the victim's widow and fraternized with friends of the victim in full view of the jury and that counsel was aware of this behavior but failed to move for Judge Gerstein's disqualification.

Valle, 705 So. 2d at 1333. In the instant case, there has never been any allegation of what the "communication" was; nor is there any allegation that the jury was in fact present, or that counsel was aware of the unknown "communication." The State notes that this Court, in another portion of Valle, expressly rejected any notion that allegations such as those herein would be sufficient for disqualification. In Valle, the defendant had also alleged ineffectiveness for failure to disqualify based on off-the-record or "ex parte" communication between the judge and one of the parties; the factual allegations for the claim were: "witnesses observed the state and judge emerging from his chambers during trial discussing, what appeared to be, matters of some importance."

Valle, 705 So. 2d at 1334. This Court held that, "this allegation was insufficient as a matter of law." Id. Allegations regarding off-the-record or ex parte communications must be set forth with specificity and must evince prejudice on the part of the judge. Nassetta v. Kaplan, 557 So. 2d at 921; see also, Rose, 601 So. 2d at 1183 (off-the-record communications which do deal with the "merits" of the case are not prohibited); Barwick, 660 So. 2d at 692 (motion for disqualification insufficient where any off-the-record or "ex parte" communication "that might have occurred" was not shown to be prejudicial); Haddock v. State, 192 So. 802, 807 (Fla. 1939) (allegations that the judge exhibited courtesy to the victim's family were insufficient to demonstrate prejudice). No such prejudice has been shown in the instant case, and the lower court thus properly rejected the claim.

X.

THE CLAIM REGARDING STATEMENTS IS PROCEDURALLY BARRED

In the court below, the defendant claimed that the trial and resentencing courts erroneously admitted into evidence his statements to the police. (PCR 259-74). The post-conviction court denied this claim as procedurally barred, as it could and should have been raised in the prior direct appeals of guilt and resentencing. (PCR. 459). The lower court's ruling was correct as the issue of the propriety and admissibility of the defendant's statements was raised in a motion to suppress and a subsequent

pretrial evidentiary hearing thereon. (R. 65-67; T. 197-221; 435-40). No issue at all, with respect to these statements, was raised on direct appeal of the guilt phase. Patton v. State, 467 So. 2d 975 (Fla. 1985). Likewise, at the resentencing, the defense readopted the motion to suppress. Again, no issue, with respect to the statements, was raised on direct appeal of the resentencing. Patten v. State, 598 So. 2d 60 (Fla. 1992). See Atkins v. Dugger, 541 So. 2d 1165 (Fla. 1989)(suppression issues raised at trial should have been raised on direct appeal and were barred in post-conviction motion).

The Appellant argues that new case law, Minnick v. Mississippi, 498 U.S. 146 (1990), and McNeil v. Wisconsin, 501 U.S. 171 (1991), is applicable, in which it was held that once a suspect invokes his Miranda right to counsel, the police cannot "interrogate" him without the actual presence of counsel. As seen by the dates, however, the "new" cases could have been raised at the resentencing appeal, which was not decided until 1992. The State would note that the Appellant has not filed any petition for habeas corpus either. The lower court's procedural bar was thus proper.

In any event, the State notes that the holding of Minnick, relied upon by Appellant and reiterated in McNeil, is "not retroactive" so as to afford Appellant any relief. Bassett v. Singletary, 105 F. 3d 1385, 1387 (11th Cir. 1997). Moreover, the

defendant's claim is without merit even if Minnick is deemed applicable. In the instant case, the trial judge found that the defendant's statements were not a result of "interrogation;" the statements were volunteered and, "the Defendant initiated all statements without interrogation by the police." (T. 435-40).

The testimony at the suppression hearing in the instant case showed that the defendant was arrested and brought to the police station at 5:30 p.m. on September 2, 1981, approximately seven and a half hours after having murdered Officer Broom. (T. 200-01). At this time the police placed him in an interview room, with two detectives present, and advised him of his Miranda rights. The defendant desired an attorney; he mentioned the name of an attorney whom the police knew was an assistant state attorney. (T. 201, 207). The police ceased interrogation, and proceeded to fill out the arrest form. They asked no "questions other than name, date of birth and information like that for the arrest report." (T. 201). The police were also utilizing "a wanted bulletin," prepared earlier in the day, to fill out the arrest form. (T. 202-05). The bulletin had the police case number, date, location and time of the murder, etc. Id. As the form was being filled out, the defendant picked up the bulletin and said, "murder of a police officer, that's heavy, I'll fry for this." The statement was not in response to any question by the police. (T. 201-05; 211). As one of the detectives was completing the arrest form, the defendant

then said, “that will be the last one [arrest form] you will do on me. I dealt my last deal with this one.” Id. Again, the statement was not in response to any question. When one of the detectives either left or came into the interview room, the defendant turned around, looked out the door where two other detectives were standing, and commented, “Oh sure, everybody wants to look at a cop killer.” The detectives closed the door. Id. It is undisputed that these statements were all made within twenty (20) minutes of the defendant having been read his Miranda rights. (T. 209).[20]

Subsequently, the defendant wanted to urinate, and the police needed to process his clothing. (T. 202-05). They then took the Defendant to the men’s room, provided him with a change of clothing and also advised him that they would “swab his hands.” Id. When the technician started to swab the Defendant’s hands, he said, “I know what that’s for, that’s for ballistics, but you won’t get anything.” Id.

The above testimony was from the police officers at the suppression hearing. The defendant never testified, and has never proffered anything to the contrary. The trial judge found that

[20] The defendant was in the presence of the detectives for approximately two hours; apart from completing the arrest report, taking physical tests, and taking his clothing after providing a change thereof, etc., he was also photographed. The officers then transported him to the jail. (T. 218-21).

after the defendant's invocation, "the police proceeded only to perform routine functions necessary to complete the standard 'arrest and booking procedures.'" The judge held, "there was no further interrogation in the meaning of interrogation as defined in Miranda and Innis [Rhode Island v. Innis, 446 U.S. 291 (1980)]." The judge further found, "the procedures involved herein were those normally intended for arrest and custody procedures"; the police "would not reasonably expect" the defendant's statements during these procedures; "the Defendant initiated all statements without interrogation by the police"; all statements were "made freely and voluntarily and spontaneously by the Defendant." (T. 435-40).

The above findings are in accordance with Minnick, where the Supreme Court held that in a custodial interrogation, where the accused requests counsel, interrogation must cease, and the police may not reinitiate interrogation without counsel being present. Here the "interrogation" did cease and was not reinitiated by the police. Interrogation does not encompass routine arrest procedures and questions. See Rhode Island v. Innis, 446 U.S. at 301 ("the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect".); Pennsylvania v. Muniz, 496 U.S. 582, 601-602 (1990)("routine booking questions" and

questions which "appear reasonably related to the police's administrative concerns," fall "outside the protections of Miranda"); Allred v. State, 622 So. 2d 984, 987 n.10 (Fla. 1993)("routine booking questions do not violate the constitutional protection against self-incrimination; they do not constitute interrogation"). The instant claim is procedurally barred and without merit.

XI.

THE CLAIM REGARDING PRESENCE OF POLICE OFFICERS IS PROCEDURALLY BARRED.

The Appellant, in the lower court, claimed that the State, and trial and resentencing judges, failed to prevent the presence of uniformed police officers which in turn intimidated the jury and judge. (PCR. 274-77). There was no mention of any ineffective assistance of counsel; indeed, the defendant stated that his "counsel objected to the presence of these uniformed officers." (PCR. 276). Moreover, this claim was based on the records on appeal and transcripts of the trial and resentencing. The lower court held this claim to be procedurally barred as it could and should have been raised on direct appeal. (PCR. 459). This ruling was proper. Williamson v. Dugger, 651 So. 2d 84, 87 (Fla. 1994)(post conviction claim that security measures undertaken in the presence of the jury prejudiced defendant could and should have been raised on direct appeal); Kelley v. State, 569 So. 2d 754

(Fla. 1990)(where basis for claim is contained in trial record, the issue should have been raised on direct appeal); Woods v. State, 490 So. 2d 24, 26-27 (Fla. 1986)(claim of prejudicial effect of officers' presence is a direct appeal issue). The current assertion of trial and resentencing counsel's ineffectiveness, in this Court, is also barred as same was not raised in the court below. Doyle v. State, 526 So. 2d 909, 911 (Fla. 1990). Moreover, recasting a procedurally barred claim by couching it in terms of ineffectiveness is improper. Valle, 705 So. 2d at 1337 n.6.

In any event, the claim is without merit. The record reflects that five months prior to the original trial, on September 25, 1981, during the course of a bond hearing, uniformed police officers went to court. (T. 31). The judge admonished the officers for their presence, and stated that their presence had no effect on him, just as the presence of defense supporters did not affect him. Id. Thereafter, during voir dire, defense counsel noted that, "a flock of people have wandered into the courtroom." (T. 796). There was no mention of uniformed police officers. Indeed, the trial judge noted that there were 50 spectator seats in the courtroom, all were filled, and only three seats were being occupied by police officers. (T. 796-97). The record also reflects that "during the entire course of the trial, the maximum number of police officers or uniforms have been three." (T. 1538). "[P]ossibly five" police officers were present when the verdict was

read - i.e., after deliberations. Id.

Likewise, at the resentencing proceeding, the defense filed a motion to prohibit attendance of law enforcement officers. (R2. 3513-20). The resentencing judge agreed to limit the presence of officers to eight or nine, in a courtroom with approximately 50 spectator seats, provided that the remainder of the seats were filled by other people and that the officers would not sit in any one section; the number of officers was constantly monitored. (T2. 1162-68, 1135, 1108, 3305). There was no error under these circumstances. Valle, 705 So. 2d at 1335. The instant claim is thus procedurally barred and without merit.

XII.

THE DOUBLE JEOPARDY CLAIM IS PROCEDURALLY BARRED.

In the lower court, the defendant claimed that although the issue of the original sentencing jury having sent a note indicating deadlock prior to voting for death, was addressed on prior appeals, the lower court should have readdressed the claim in light of Wright v. State, 586 So. 2d 1024 (1991). The lower court held the claim procedurally barred as the issue was raised and decided adversely to defendant on both the direct and resentencing appeals. (PCR. 459), See Patton, 467 So. 2d at 980 ("There was no life recommendation in this case"); Patten, 598 So. 2d at 63. The lower court's finding was proper. Eutzy v. State, 536 So. 2d 1014, 1015 (Fla. 1988)(post-conviction attacks and criticisms of the decision

of this Court on direct appeal can be summarily rejected). The State would also note that Wright v. State, now relied upon, was decided prior to the affirmance of the resentencing by this Court, and thus does not constitute new law. Moreover, again the Appellant has not filed any petition for habeas corpus in this Court. In any event, Wright is not applicable herein as it involved a jury recommendation of life; there was no issue of a preliminary deadlock followed by a final recommendation of death as in the instant case. In such cases, this Court, after issuing Wright, has reaffirmed its holding herein that an initial deadlock merely constitutes a preliminary vote and not a final recommendation. Derrick v. State, 641 So. 2d 378, 390 (Fla. 1994); Rose v. State, 675 So. 2d 567, 577 n.10 (Fla. 1996)("this vote [original six-to-six tie"], which the trial court erroneously found to be unacceptable, did not have the legal effect of a jury recommendation for life".) The instant claim is procedurally barred and without merit.

XIII.

THE CLAIM OF INNOCENCE OF DEATH PENALTY IS PROCEDURALLY BARRED.

The Appellant claims that he is innocent of the death penalty pursuant to Sawyer v. Whitley, 505 U.S. 333 (1992), because the aggravating factors of disrupting enforcement of law and avoiding arrest were impermissibly doubled before the resentencing jury.

The lower court properly deemed this claim procedurally barred as it could have been raised on direct appeal. (PCR 459). Indeed, the defendant raised the issue of impermissible doubling of these aggravators on appeal of his resentencing. This Court rejected the claim as the defendant had not requested a doubling instruction, and the judge had merged the aggravators. Patten, 598 So. 2d at 62-63 n.3. Moreover, under Sawyer, innocence of death penalty occurs when a defendant is not eligible for any aggravating factors. The instant claim is without merit in light of the applicability of the merged aggravator, in addition to the defendant's prior violent felony factor. This claim is thus procedurally barred and without merit.

XIV.

THE CLAIM OF DOUBLING OF AGGRAVATORS IS PROCEDURALLY BARRED AS IT WAS FULLY ADDRESSED ON DIRECT APPEAL.

The Appellant, as in the previous claim, again contends that the resentencing court erroneously permitted doubling of the murdering law enforcement/avoid arrest aggravators by the jury. The issue was raised and exhaustively addressed on direct appeal of the resentencing. Patten, 598 So. 2d at 62-63. The lower court thus properly rejected this claim as procedurally barred. (PCR. 459).

XV.

THE CLAIM OF EDDINGS/LOCKETT ERROR IS PROCEDURALLY BARRED AS IT WAS FULLY ADDRESSED ON DIRECT APPEAL.

The Appellant claims that the resentencing judge erred in not finding mitigating circumstances. The lower court found this claim to be procedurally barred as it was raised and rejected on direct appeal (PCR. 459). This Court exhaustively addressed the issue as follows:

> In his fifth claim, Patten contends that the trial court erred by finding that no mitigating circumstances existed with regard to Patten's mental state. In regard to the statutory mental health mitigating factors, one of Patten's own experts, as did the State's, stated that these factors did not apply. This is not a case where the defendant's evidence of mental health mitigating factors was unrefuted. The trial judge did find that Patten had an abused childhood and used drugs, although not to the extent claimed by the defendant. The trial judge also rejected the nonstatutory mitigating factors regarding Patten's alleged mental impairments. This rejection is supported by the evidence, including the

> fact that there is evidence in the record of malingering and testimony that the defendant is simply antisocial. We find no error in regard to this part of the trial judge's sentencing order.

Patten, 598 So. 2d at 63.

XVI.

THE CLAIM OF JOHNSON V. MISSISSIPPI ERROR IS PROCEDURALLY BARRED.

The Appellant alleges that the prior convictions introduced in the resentencing to support the aggravating factor that the Appellant was previously convicted of a violent felony, were unconstitutionally obtained because there was no evidence that the defendant had the effective assistance of counsel during the proceedings surrounding his prior convictions. The lower court properly found this claim procedurally barred. It is well settled that such a claim will not be considered for the first time in a motion to vacate, where 1) the prior conviction has not been vacated, Buenoano v. State, 559 So. 2d 1116 (Fla. 1990); Roberts v. State, 678 So. 2d 1232, 1234 (Fla. 1996); and 2) the issue was not raised on direct appeal; Henderson v. Dugger, 522 So. 2d 835, 836 (Fla. 1988).

XVII.

THE CLAIM OF RACIAL PROSECUTION IS PROCEDURALLY BARRED.

The Appellant claims that the State's decision to seek the death penalty was based upon racial considerations and thus violates the defendant's constitutional rights. No facts are

alleged in support of this claim. The record reflects that the defendant, who was a white male, with prior violent felonies, killed a black police officer who was trying to arrest him for stealing another vehicle; the defendant wanted to avoid violation of his probation. The lower court properly held this claim to be procedurally barred as it could and should have been raised at trial or resentencing or direct appeals thereof. The Appellant did not allege any facts to warrant an evidentiary hearing. Foster v. State, 614 So. 2d 455, 463, 464 (Fla. 1994)(extensive factual and statistical proffer as to racial discrimination insufficient to warrant an evidentiary hearing when proof was not directly related to the defendant's case); McClesky v. Kemp, 481 U.S. 279 (1987).

XVIII.

THE CLAIMS OF CONSTITUTIONAL ERROR ARE PROCEDURALLY BARRED.

A. Burden Shifting

In the court below, the defendant claimed that the State and the resentencing judge shifted the burden of proving mitigating circumstances to him. (PCR. 360-62). The lower court held this claim to be procedurally barred (PCR. 459), as it could and should have been raised on direct appeal, in accordance with the Court's well established precedents. See Smith v. Dugger, 565 So. 2d 1293, 1294 n.2 (Fla. 1990); Buenoano v. Dugger, 559 So. 2d 1116, 1118

(Fla. 1889); Clark v. Dugger, 559 So. 2d 192, 193 (Fla. 1990); Correll v. Dugger, 558 So. 2d 422, 426 n.6 (Fla. 1990). On appeal herein, the Appellant has raised an additional claim, that counsel failed to object, which was never raised in the court below. (PCR. 360-62). As such, the additional contention is barred. Doyle v. State, supra. Moreover, couching procedurally barred claims under the guise of ineffectiveness does not lift the bar. Valle, 705 So. 2d at 1337 n.6. The instant claim is procedurally barred.

B. Caldwell Error

The defendant, in the court below, first claimed that the resentencing jury was advised that its role was advisory and limited to a recommendation, in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). There were no allegations of ineffectiveness with respect to this component of the claim. (PCR. 362-64). The lower court thus found this aspect of the claim procedurally barred in accordance with this Court's well established precedent. Buenoano 559 So. 2d at 1118; Clark, 559 So. 2d at 193; Correll, 558 So. 2d at 426 n.6. To the extent that Appellant now claims ineffectiveness, such a contention can not be raised for the first time in this Court. Doyle, supra. Furthermore, couching the procedurally barred claim under the guise of ineffectiveness does not lift the bar. Valle, 705 So. 2d at 1337 n.6. Moreover, the instant claim is entirely without merit as the resentencing jury was told by both the court and the prosecutor

that their verdict would be given great weight. (T2. 305, 405-6, 3213). The other aspects of this claim have been addressed in claim V (A) herein which is relied upon here by the State. The instant claim is procedurally barred and without merit.

C. Non-Statutory Aggravation

In the court below, the defendant claimed that the State's argument with respect to the victim having been a police officer and the defendant having been a drug dealer, constituted presentation of non-statutory aggravation. Again, there was no claim of failure to object or ineffectiveness. (PCR. 368-69). The lower court found this claim to be procedurally barred as it should have, and indeed was, to a great extent, raised on direct appeal. (R. 459); Patten v. State, 598 So. 2d at 62 (prosecutor's reference to killing of a police officer was allowable to establish aggravating factor of hindering law enforcement, and did not constitute improper statutory aggravating factor). Not only is the claim procedurally barred, but it is without merit. The prosecutor's comments were relevant to the aggravating factors and were in rebuttal of the defendant's claim that he was non-violent and intoxicated by drugs.

XIX.

THE CLAIM OF RULE 3.850 ACCELERATION IS WITHOUT MERIT.

The Appellant claims that he originally filed his first motion for post-conviction relief approximately 10 months prior to the two

year limit allowed in Fla. R. Crim. P. 3.850 and was thus denied due process and equal protection of the law. This claim is without merit. The State would first note that no warrant was signed such that defendant had to file his motion prior to the two year limit. Moreover, such claims have been repeatedly rejected by this Court. Roberts v. State, 568 So. 2d 1255 (Fla. 1990); Cave v. State, 529 So. 2d 293 (Fla. 1988). Finally, the Appellant filed an amended motion on July 22, 1995 (PCR. 202-350), well beyond the two (2) year limit, which expired on April 5, 1995.

CONCLUSION

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

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by prepaid first class mail to **TODD G. SCHER**, Chief Assistant CCRC, CCRC - Southern District, 1444 Biscayne Blvd., Suite 202, Miami, Florida 33132-1422, on this ____day of December, 1998.

_____
FARIBA N. KOMEILY
Assistant Attorney General

/blm