IN THE SUPREME COURT OF FLORIDA

MICHAEL MORDENTI,

Appellant,

vs. CASE NO. 89,959

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE;

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PRELIMINARY STATEMENT

Appellee insists that most of appellant Mordenti's asserted bases for relief may not be considered via motion for post-conviction relief because they are matters which either were or could have been raised on direct appeal and since a Rule 3.850 motion is not a substitute for, nor does it constitute a second, direct appeal consideration of such issues is now precluded. Cherry v. State, 659 So.2d 1069 (Fla. 1995); Medina v. State, 573 So.2d 293 (Fla. 1990); Van Poyck v. State, 694 So.2d 686 (Fla. 1997); L. Clark v. State, 690 So.2d 1280 (Fla. 1997); Raulerson v. State, 420 So.2d 567 (Fla. 1982); Booker v. State, 441 So.2d 148 (Fla. 1983); Palmes v. State, 425 So.2d 4 (Fla. 1983); Hall v. State, 420 So.2d 872 (Fla. 1982); Bundy v. State, 490 So.2d 1258 (Fla. 1986); Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987); Bush v. Wainwright, 505 So.2d 409 (Fla. 1987); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989); Turner v. Dugger, 614 So.2d 1075 (Fla. 1992); Williamson v. Duaaer, 651 So.2d 84 (Fla. 1994).

STATEMENT OF THE CASE AND FACTS

On Mordenti's direct appeal to this honorable Court (Appeal No. 78,753) he raised the following issues:

> "In support of this appeal, he contends that the trial judge erred by: (1) allowing a husband/wife team of prosecutors to try his case; (2) failing to replace a juror; (3) allowing testimony of the victim's mother as to identity and admitting photographs of the victim; (4) allowing evidence to be admitted on three different occasions regarding Mordenti's previous involvement with crime; (5) instructing the jury on the aggravating factor of heinous, atrocious, or cruel; (6) permitting the prosecutor's reference to Mordenti as a "con man" and a "con artist" in the penalty phase closing argument; (7) permitting the State to threaten to rebut the mitigating factor of no significant prior criminal history, thereby prompting the defense to waive a jury instruction on this mitigating factor; (8) giving both the cold, calculated, and premeditated and committed for financial gain aggravating circumstance instructions because the giving of those instructions constituted impermissible doubling; and (9) sentencing Mordenti to death because such a sentence is disproportionate to the circumstances of the offense in this case."

(630 So.2d 1080, at 1083-84)

This Court affirmed the judgment and sentence. Mordenti v. State, 630 So.2d 1080 (Fla. 1994), cert. denied, ___ U.S. ___, 129 L.Ed.2d 849 (1994).

Mordenti filed a two-page document on September 4, 1995 entitled Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend. (R 24-25) On the same

date he filed a more expansive motion urging over thirty claims. (R 83-215) A year later the trial court entered a comprehensive order denying relief without an evidentiary hearing. (R 216-276) The court denied rehearing (R 407) and this appeal follows.

SUMMARY OF THE ARGUMENT

I. The failure of the trial court to conduct a hearing pursuant to Huff, 622 So.2d 982 (Fla. 1993), if error, is harmless error. It is abundantly clear that no evidentiary hearing was required and relief was not warranted on the 3.850 motion. See Groover v. State, ___ So.2d , 22 Florida Law Weekly S509 (Fla. 1997).

II. The trial court correctly denied relief without an evidentiary hearing since the motion did not allege substantial factual allegations which were not refuted by the record meriting an evidentiary hearing. See Lopez v. Singletary, 634 So.2d 1054 (Fla. 1993); Atkins v. Duaaer, 541 So.2d 1165 (Fla. 1989).

III. The trial court did not err reversibly in determining that appellant's Chapter 119 requests were unrelated to his conviction and sentence. The record reflects that the prosecutor provided her complete file and appellant's subsequent filing of notices after the lower court jurisdiction is irrelevant. Alternatively, this Court could permit a limited remand as in Lopez v. Singletary, 634 So.2d 1054 (Fla. 1993), affirmed after remand Lopez v. State, 696 So.2d 725 (Fla. 1997).

IV. Appellant's constitutional rights were not violated by the time parameters of Rule 3.851.

V. Appellant was not denied effective assistance of trial

counsel at guilt phase of his trial and appellant's current speculation amounts to mere hindsight second-guessing. The asserted deficiencies were either not deficiencies or the substance of the deficiencies were considered and rejected on direct appeal, or were refuted by the record or did not satisfy the prejudice prong of Strickland v. Washinston, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

VI. The claim that inadmissible hearsay evidence was introduced at trial was an issue cognizable on direct appeal, not post-conviction and thus is barred.

VII. The claim that there was no reliable appellate review could have been urged on direct appeal as to matters known or reasonably discoverable at that time. The claim is meritless on the allegations asserted.

VIII. The issue of introduction of prejudicial evidence was a claim for direct appeal and is not cognizable collaterally.

IX. Trial counsel did not render ineffective assistance during voir dire.

X. The complaint about the prosecutor's peremptory challenge to a juror was an issue for direct appeal, not Rule 3.850.

XI. The alleged violation of appellant's right to remain silent was a claim for direct appeal and is barred, as well as meritless.

XII. Any complaint about the trial court's alleged erroneous instruction to the jury should have been asserted on direct appeal and is now barred.

XIII. The use of co-conspirator Royston's statements was a matter for direct appeal and is now barred.

XIV. The complaint about alleged use of misleading testimony and improper argument was an issue for direct appeal not collateral challenge.

XV. Trial counsel rendered effective assistance at penalty phase and appellant merely engages in second-guessing by urging that more is better.

XVI. Prosecutorial misconduct claims are matters for direct appeal; the claim is barred.

XVII. Alleged errors by the trial court in the sentencing order were matters for direct appeal review.

XVIII. Complaints about the aggravating factors utilized were matters for direct appeal.

XIX. The complaint that the jury was not told of appellant's good behavior during incarceration is barred as a matter for direct appeal, and meritless.

XX. The challenge to the alleged vagueness of the CCP aggravator instruction is barred as an issue for direct appeal and trial counsel was not ineffective. Harvey v. Dugger, 656 So.2d

1253 (Fla. 1995).

XXI. This Court on direct appeal approved the giving of the HAC jury instruction and thus the claim may not be relitigated.

XXII. The complaint that the jury's sense of responsibility was diminished is barred since it was a claim proper for direct appeal.

XXIII. The claim relating to an alleged burden shifting error is barred as it was an issue for direct appeal.

XXIV. Appellant's challenge to Florida's death penalty statute on constitutional grounds should have been urged on direct appeal and is not cognizable collaterally.

XXV. Mordenti is not innocent of the death penalty as this Court determined on his direct appeal.

XXVI. Claims of improper prosecutorial argument should have been urged on direct appeal and are not properly asserted collaterally.

XXVII. Appellant's complaint about limitations on interviewing jurors cannot support the granting of relief under Rule 3.850; and such rules serve vital governmental interests.

XXVIII. The claim of juror misconduct is barred as it was an issue for direct appeal.

XXIX. The capital sentencing statute is not unconstitutional and this claim is barred since it was a matter for direct appeal.

XXX. No factual support is offered for the cumulative error assertion; if there were any error, it is harmless.

ARGUMENT

ISSUE I

WHETHER APPELLANT IS ENTITLED TO A HEARING PURSUANT TO **HUFF V. STATE,** 622 **SO.2D** 982 (FLA. 1993).

In Jackson v. Dugger, 633 So.2d 1051 (Fla. 1993), this Court approved the summary denial of Jackson's motion for post-conviction relief and **also** denied relief on his claim that he should have had a hearing pursuant to Huff v. State, *622* So.2d 982 (Fla. 1993), i.e., a hearing in the trial court for the purpose of determining whether an evidentiary hearing is required and to hear legal argument relating to the motion since:

> Huff was intended to be applied prospectively only and, therefore, is not **available** to Jackson.

(633 So.2d at 1054)

Thus, we know that the failure to accord a Huff hearing does not constitute fundamental error. Since, as well be shown *infra,* appellant is not entitled to an evidentiary hearing or to any relief and since almost all of his claims are attempts to circumvent this Court's procedural bar enforcement by the presentation of claims not cognizable for a collateral challenge, this Court may properly determine that the failure to provide **a** Huff hearing is harmless error. See Groover v. State, ___ So.2d ___, 22 Florida Law Weekly S509 (Fla. 1997) (even if a Huff hearing

had been required, the trial court's failure to hold one would be harmless error as no evidentiary hearing was required and relief was not warranted on the motion).[1]

[1]Appellee notes that many of the claims below which rest totally on the direct appeal record were urged to be incomplete because of Chapter 119 requests irrelevant to the claims asserted.

ISSUE II

NEED FOR AN EVIDENTIARY HEARING.

Although trial courts are encouraged to have evidentiary hearings on post-conviction motions, if the motion lacks substantial factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied. Steinhorst v. State, 498 So.2d 414, 414-415 (Fla. 1986); Porter v. State, 478 So.2d 33 (Fla. 1985). A hearing is only warranted on an ineffective assistance of counsel claim where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrates a deficiency in performance that prejudiced the defendant. Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995); Jackson v. Duaaer, 633 So.2d 1051, 1055 (Fla. 1993); Mendyk v. State, 592 So.2d 1076, 1079 (Fla. 1992); Roberts v. State, 568 So.2d 1255, 1259-60 (Fla. 1990); Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). Since the motion below did not render the conviction or sentence vulnerable to collateral attack, the trial court properly denied the motion without an evidentiary hearing. See Lopez v. Singletary, 634 So.2d 1054 (Fla. 1993); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989); Puiatti v. Duaaer, 589 So.2d 231 (Fla. 1991).

ISSUE III

WHETHER THE LOWER COURT ERRED REVERSIBLY IN DENYING POST-CONVICTION RELIEF BECAUSE OF ALLEGED VIOLATIONS OF CHAPTER 119.

In his September 4, 1995 motion to vacate (Claim II) appellant claimed that he had not received Chapter 119 records from various state agencies. (R 90-94) On September 30, 1996 the trial court entered its order denying relief, stating:

> The allegations in Ground Two that certain state agencies have failed to comply with Chapter 119 public record requests are wholly unrelated to Defendant's conviction and sentence as required by Rule 3.850(a). As such, the allegations are insufficient as a matter of law, and there is no basis on which to grant the relief requested. Claim Two is denied.

(R 221)

On October 21, 1996, appellant filed his motion for rehearing (R 277-406) which in essence repeated his initial petition. Mordenti did not identify what material had been received and what had not been received under Chapter 119. The trial court denied rehearing on January 7, 1997. (R 407)

The record also reflects that on December 2, 1996, prosecutor Karen Cox wrote a letter to counsel for Mordenti expressing a concern that the rehearing petition asserted that no response had been made to the August 11, 1995 letter requesting arrangements for copying the file when the prosecutor's records reflected that on September 4, 1995 the complete files had been copied with an

invoice issued for $1,633.05 for copying. (SR 2-4)

About a month after the trial court had denied rehearing on the motion for post-conviction relief and after the filing of the notice of appeal on February 6, 1997 (R 408) thereby depriving the lower court of jurisdiction to act, appellant apparently initiated its notices of filing. (SR 5-234)[2]

Since the prosecutor had responded by providing a copy of its entire file and since appellant apparently made no effort from September 1995 until January of 1997 to identify desired documents and fails even now to specify what has been retrieved from the furnished State Attorney's files that might support a legitimate collateral challenge, his claim should be rejected; alternatively, this Court could affirm the trial court's denial of post-conviction relief and permit a limited remand.

See Lopez v. State, 696 So.2d 725 (Fla. 1997) (Court had previously affirmed trial court's denial of post-conviction relief but remanded to trial court to inspect in camera the sealed portions of state attorney records and allowed thirty day window following date of access to any sealed documents to file any new claims in an amended post-conviction motion. Defendant failed to

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[2]This Court by order of July 2, 1997 (SR 1) granted appellant's request for certain notice of filing records and return receipts for February, May and June of 1997. Appellee submits that most of these materials are improper and irrelevant, since they are actions taken by the defense subsequent to the court's ruling and such matters now do not completely inform the Court of responses subsequently submitted by the various agencies.

add new claims after reviewing disclosed materials).

ISSUE IV

WHETHER RULE 3.851 VIOLATES APPELLANT'S RIGHTS UNDER DUE PROCESS AND EQUAL PROTECTION CLAUSES AND THE EIGHTH AMENDMENT.

Appellant complains next about the one-year time parameter established by Rule 3.851 R.Cr.P. As of this writing some forty months have passed since his direct appeal became final with the United States Supreme Court's denial of his certiorari petition on June 20, 1994. The lower court denied the claim for relief on the basis that it was unrelated to appellant's judgment and sentence and a matter more appropriate for consideration by this Court (R 220-221); see commentary to Rule 3.851, A similar claim has previously been rejected by this Court in M. Johnson v. State, 536 So.2d 1009 (Fla. 1988) (rejecting challenge to the two-year time provision of Rule 3.850) and this Court should again reject the claim. See also Remeta v. Duaaer, 622 So.2d 452, 456 (Fla. 1993)(rejecting defense contention that eight-month acceleration requiring the filing of post-conviction pleadings violated his constitutional rights); Roberts v. State, 568 So.2d 1255 (Fla. 1990).

ISSUE V

WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL A T THE GUILT/INNOCENCE PHASE OF TRIAL.

I. THE LEGAL ST-

The courts have repeatedly acknowledged that highly deferential review of counsel's conduct is warranted in an ineffective assistance challenge especially where strategy is involved; intensive scrutiny and second-guessing of attorney performance are not permitted. Spaziano v. Singletary, 36 F.3d 1028 (11th Cir. 1994); Routly v. Singletary, 33 F.3d 1279 (11th Cir. 1994). Judicial scrutiny is highly deferential because the craft of trying cases is far from an exact science and is replete with uncertainties and obligatory judgment calls. Bolender v. Singletary, 16 F.3d 1547 (11th Cir. 1994). The test for determining whether counsel's performance was deficient is whether some reasonable lawyer at trial could have acted under the circumstances as defense counsel acted at trial; the test has nothing to do with what the best lawyers would have done or what most good lawyers would have done. White v. Singletary, 972 F.2d 1218 (11th Cir. 1992).

The standard is not how present counsel would have proceeded in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different outcome. Cherry v. State, 659 So. 2d 1069 (Fla. 1995).

A court considering a claim of ineffective assistance of counsel need not determine whether counsel's performance was deficient when it is clear that alleged deficiency was not prejudicial. Williamson v. Dugger, 651 So.2d 84 (Fla. 1994). The court must determine whether the alleged omissions are of such magnitude as to constitute serious error or substantial deficiency falling measurably outside range of professionally acceptable performance and whether the deficiency compromised the process to such a degree as to undermine confidence in the correctness of the result. Ferguson v. Sinsletary, 632 So.2d 53 (Fla. 1993).

II. THE INSTANT 3.850 MOTION.

Appellant, by essentially repeating almost verbatim the 3.850 Motion asserting ineffective assistance of trial counsel at guilt phase (R 101-127), urges -- without arguing why the trial court's disposition was erroneous -- deficient performance in the following broad categories:

(A) The alleged failure to thoroughly investigate Mordenti's alibi, failure to present corroborating evidence and failure to call witnesses who could verify Mordenti's whereabouts the night Thelma Royston was murdered. (Brief, p. 16)

(B) The alleged failure to conduct adequate voir dire, failure to abject to the introduction of inflammatory and improper evidence, failure to present adequate arguments

to the jury, and failure to request appropriate jury instructions. (Brief, p. 19)

(C) The alleged failure to investigate or elicit testimony regarding Gail Mordenti's financial circumstances, the nature of her divorce from appellant, her romantic relationship with the victim's husband Larry Royston, and the fact that she was immune from prosecution. (Brief, p. 18)

(D) The alleged failure to investigate hotel records where Gail Mordenti and defendant met to further their conspiracy in addition to related telephone records. (Brief, p. 18)

(E) The alleged failure to impeach Ms. Mordenti. (Brief, pp. 20-21)

(F) The alleged failure to investigate and interview cellmate Horace Barnes and failure to move for mistrial after Barnes testified that defendant informed him that he was "in the mob". (Brief, pp. 23-30)

(G) The alleged failure to effectively impeach other state witnesses and failing to object to certain testimony. (Brief, pp. 31-34)

(H) The alleged failure to move for a change of venue. (Brief, pp. 35-36)

(I) The alleged failure to allow appellant to testify in his

own behalf. (Brief, p. 36)

(A) The trial court correctly denied relief on this point (the failure to prepare and present alibi) at R 222:

> "First, Defendant claims that his counsel failed to thoroughly investigate Defendant's alibi, failed to present corroborating evidence and failed to call witnesses who could verify Defendant's whereabouts the night of Thelma Royston's murder. However, the trial record and applicable law refute this contention. Counsel elicited testimony from Donald McCabe, Wayne Pennington, Rolf Grimstad and Anna Lee as to Defendant's whereabouts the night of the murder. The court finds that Defendant's alibi theory was fully developed through these witnesses' testimony, therefore refuting the argument that counsel failed to investigate the alibi. Defendant also claims other witnesses who saw him that evening were not called to testify, specifically naming a waitress who allegedly served him at Shoney's the evening of the murder and two men who were allegedly near the scene of the murder and described suspects unlike Defendant. However,. a facially sufficient motion alleging failure to call a witness must include the identity of the prospective witness, the substance of the witness's testimony, and an explanation as to how omission of this evidence prejudiced the outcome of the trial. Highsmith V. State 617 so. 2d 825 (Fla. 1st DCA 1993). As Defendant fails to identify these witnesses, he is not entitled to relief upon this claim."

In appellant's emphasis to engage in second-guessing of trial counsel's performance he makes little or no effort to acknowledge what counsel did do. For example, collateral counsel asserts that 'Mr. Mordenti had an alibi capable of verification by several people". (Brief, p. 15) In fact trial counsel elicited the testimony of several purported alibi witnesses before the jury. A

records custodian George Fischell testified regarding the receipt of a check signed by Mordenti on June 7, 1989. (TR 804) John Berrisford testified that Mordenti & Associates weighed a two-axle trailer on June 7 (TR 809-811), the deposition testimony of Kathy Leverock read to the jury revealed that Mordenti & Associates hired a tow for two vehicles on that day and the driver was Christopher Fur (TR 818-819). Christopher Fur saw Mordenti when towing a car for him on the day of the murder. (TR 826) Appellant's girlfriend Dawn Simon testified that she saw appellant's ex-girlfriend Anna Lee at his business on June 7. (TR 870-71) Donald McCabe testified that he saw appellant drive away from the business premises with Anna Lee in June of 1989. (TR 908-911) Wayne Pennington testified that he met Anna Lee on June 7, 1989 whom he met through appellant at the Lee County Auto Auction. (TR 914-915) Mordenti was present when he sold a car. (TR 934) Rolf Grimstad also testified that on June 7, 1989 he saw appellant with a woman. (TR 973) Anna Lee stated that she was with appellant at a Fort Myers auto auction on June 7, 1989 (TR 1004) and made love to him in the car at a rest stop. (TR 1028) Thus, to the extent that appellant is suggesting that an alibi was not adequately investigated or presented, the record affirmatively refutes it.[3]

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[3]Additionally, trial counsel introduced testimony and exhibits in the effort to have the jury believe that he did not have financial motive to kill. (See testimony of bank records custodian Kathleen Faulkner and defense exhibits 7, 7A, 8, 8A, 9 and 9A -- TR 970-971.)

To the extent that appellant may be contending that trial counsel was deficient in failing to investigate and present Lynn Bouchard, a waitress at Shoney's Restaurant, as a cumulative alibi witness, the trial record shows that the defense team did list Lynn Bouchard among its alibi witnesses. (Case No. 78,753, R 1632, 1652, 1658) Defense counsel is neither deficient nor is there a reasonable probability of a different outcome in counsel's selecting not to call this witness since numerous other alibi witnesses had testified and also the state had work records indicating that Ms. Bouchard had not worked at the restaurant on the night in question. (Exhibits 22-24, R 1872-1877, TR 1126, 1133, 1136, Case No. 78,753)

Appellant makes a footnote observation that attorney John Atti subsequently resigned his membership in the Florida Bar in lieu of disciplinary proceedings. In any event appellant does not explain why there is any meaningful impediment by this fact since the record reflects the presence at trial of co-counsel Richard Watts who participated in both the guilt and penalty phases of trial. (And Atti's resignation is unrelated to this 1991 trial.)

(B) At page 19 of his brief appellant contends that counsel failed to conduct an adequate voir dire, failed to object to the introduction of inflammatory and improper evidence, and failed to request appropriate jury instructions. The lower court appropriately disposed of these mere conclusions:

> Next, Defendant challenges counsel's failure to conduct adequate voir dire, failure to object to inflammatory and improper evidence, failure to present adequate arguments to the jury, and failure to request appropriate jury instructions. However, Defendant provides no factual context or support for these claims, and therefore does not meet the first Strickland prong.
>
> (R 222-223)

Appellant complains at page 19 of his brief that counsel failed to fully investigate two witnesses who were near the Royston farm at the time of the victim's death. In the same paragraph Mordenti concedes that such testimony was read into evidence but that counsel failed to secure the physical presence of these witnesses. The record reflects that Leroy Baxter's deposition testimony was read to the jury (a pretrial motion to perpetuate testimony since the witness would be out of state during the trial had been granted -- Case No. 78,753, R 1660-61, 1665) and in his testimony he recited that two men whom he would not be able to recognize were standing between two vehicles on the left hand side of the road. (TR 780-86)

(C) The trial court rejected this contention, noting at R 223:

> 'Regarding the testimony of Gail Mordenti, the State's key witness, Defendant claims counsel failed to investigate or elicit testimony regarding her financial circumstances, the nature of her divorce from Defendant, her romantic relationship with the victim's husband, Larry Royston, and the fact that she was immune from prosecution.

> However, the trial record refutes these contentions. Ms. Mordenti's financial background was brought out during direct examination (see transcript, pages 641-642) and upon cross-examination (see transcript, pages 675-676). The circumstances surrounding Ms. Mordenti's divorce from Defendant were fully developed in both the direct and cross-examinations (see transcript, Pages 591-594, 601-602, and 670.) Finally, the fact that Ms. Mordenti was testifying in exchange for prosecutorial immunity was revealed during direct examination (see transcript, page 661) and upon cross-examination defense counsel thoroughly questioned her reasons for testifying at the trial (see transcript, pages 684 and 700-705). Therefore, Defendant is not entitled to relief upon this claim."

Appellant contends that counsel failed to investigate Gail Mordenti's financial dealings and records to show that she stood to gain the most financially from the murder plot; however, the trial transcript reveals -- both on direct and cross-examination of Gail Mordenti -- that she had a job at T&D Auto Marine when Larry Royston continued to press for her assistance with appellant, that Royston gave her $17,000 in cash in several months installments and that appellant loaned her money to pay credit card bills when she brought the Royston money to appellant. (TR 629, 640, 642) Defense counsel adequately examined Gail Mordenti on her financial circumstances (business investment in AUTOMOTION and divorce settlement from appellant) (TR 669-670) and that she subsequently did not repay the loan from appellant because of her bankruptcy claim. (TR 694) Appellant fails to explain what additional factors the defense could have informed the jury about or why it

would have made a difference. As to a claim that Mordenti did not need the money that motivated his committing the murder, the defense did introduce through the testimony of bank records custodian Kathleen Faulkner and defense exhibits 7, 7A, 8, 8A, 9 and 9A evidence to support a thesis that he did not need the money. (TR 965-971) Gail Mordenti's immunity status was explored by both prosecution and defense.

(D) The trial court correctly concluded:

> 'Regarding the allegations that counsel failed to fully investigate the records of the hotel where Ms. Mordenti and Defendant allegedly met to further their conspiracy, in addition to related telephone records, there is no showing that the failure to do so was so prejudicial that it affected Defendant's conviction. Therefore, Defendant is not entitled to relief upon this ground."
>
> (R 223)

The trial record reflects that Gail Mordenti told Corporal Baker the name of the motel over the telephone. (TR 621) At the hearing on the motion for new trial the defense argued that the state had not furnished the name of the hotel, the state responded that at the time of Detective King's deposition he said the officers could find no corroboration but could obtain the name of the motel and the trial court found no intentional or prejudicial conduct. (R 1556-1562 of Appeal No. 78,753) Detective King testified at trial that after interviewing Gail Mordenti he checked the hotel registrations at Days Inn on U.S. 19 and was unable to

find any registration in the name of Mordenti. (TR 509-510, 518)

(E) The trial court correctly disposed of this claim:

> "Defendant attempts to show how counsel failed in several instances to impeach Ms. Mordenti with evidence which would have proved she was lying during her testimony. However, while the evidence that Defendant cites in support of this claim may have provided some useful purpose during trial, it does not demonstrate that Ms. Mordenti was a liar. Regarding the alleged inconsistencies in Ms. Mordenti's testimony which counsel failed to recognize, Defendant does not show how these inconsistencies affected the outcome of the trial. Therefore, Defendant is not entitled to relief upon this claim."

(R 223-224)

Appellee adds that there is no necessary inconsistency in the testimony cited. Gail Mordenti's testimony that appellant admitted shooting the victim and that "she **put up quite a fight"** (TR 637) is not defeated by other testimony that the victim's **hair was not** damaged or frayed (TR 724-726) especially in light of the medical examiner's testimony that the victim was both stabbed and shot (TR 407-409) and that he could not determine whether or not there had been a struggle. (TR 429)

(F) Appellant also complains that counsel was ineffective in his treatment of witness Horace Barnes and the lower court properly rejected this contention:

> Defendant next alleges that counsel **was** ineffective in his failure to investigate and interview cellmate Horace Barnes and failure to move for a mistrial after Barnes testified that Defendant informed him that he was 'in

> the mob". While the Florida Supreme Court did recognize that such testimony was prejudicial error, it found that elimination of that testimony would not have changed the outcome of the case (see Mordenti v. State, 630 So. 2d 1080, 1084-85, (Fla. 1994). Therefore, Defendant is not entitled to relief upon this claim.
>
> (R 224)

Appellee notes that the trial court ruling is supported by this Court's prior consideration on appellant's direct appeal. After noting that it was error for Mordenti's cellmate to testify regarding Mordenti's purported 'mob" association, and that the failure to request a mistrial resulted in a procedural bar, this Court concluded:

> ". . . this testimony was not emphasized and, even if the error were not barred, we find that the elimination of the cellmate's testimony would not have changed the outcome of this proceeding and otherwise constituted harmless error. State v. DiGuilio, 491 So.2d 1129 (Fla.1986)."
>
> (630 So.2d at 1085)

Thus, appellant cannot satisfy the second prong of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

(G) Appellant next complains about alleged deficiencies in the treatment of state witnesses Larry Flynn, Margorie Garberson, Fred Jenkins, FBI Special Agent Gerald Wilkes, John Riley of the Metals Analysis Unit of the FBI, Sheriff's Officer Karen Kirk, pawn broker Fred Long, FBI agent Michael Malone, Detective John King, Glen Donnell whom were not cross-examined and the failure to secure

the presence of Carl Ellwood to impeach Donnell.

The trial court ruled:

> "By failing to impeach particular state witnesses and failing to object to certain testimony, counsel was ineffective, argues Defendant. However, Defendant either fails to allege any facts with which counsel could have impeached these witnesses, or fails to show how the outcome of the case would have been different had counsel taken those actions. Therefore, Defendant is not entitled to relief upon this claim."

(R 224)

Witness Deputy Larry Flynn had secured the crime scene, identified photos of the crime scene and described the demeanor of Isabel Reger and Larry Royston when interviewing them. (TR 328-341) There was no deficiency by counsel.

Margorie Garberson testified about Thelma Royston's habits regarding keeping the lights turned on in the barn between dusk and 10:00 or 11:00 p.m. (TR 381), that she had a sexual relationship with Royston, and that in January of 1989 Royston expressed an interest in his wife's demise and the desirability of making it look like a burglary. (TR 391-392) Obviously counsel felt no need to ask questions since the witness elicited testimony on direct examination that appellant told her "that everybody was blaming him but he wasn't guilty". (TR 403)

Insurance agent Fred Jenkins provided evidence that Larry Royston was the beneficiary on the victim Thelma Royston's life insurance policies. (TR 431-434) The relevance was obvious in

the state's theory that Royston paid Mordenti to perform the killing. Counsel does not identify what cross-examination should have been done.

FBI Special Agent Wilkes did not require cross-examination since his direct testimony revealed that he could not determine the origin of the .22 bullet fragments because of mutilation, even if he had had the murder weapon (TR 447-448) and that other guns furnished to him for testing could not have fired the bullets. (TR 451)

John Riley of the Metals Analysis Unit of the FBI Lab Division explained his educational and experiential background and the basis of his expertise; he concluded that the bullets he examined came from the same box of ammunition. (TR 463-481) There is no deficiency in failing to ask the court to declare the witness an expert.

Glen Donnell testified on direct examination that the day before the murder Royston appeared at his business to see Gail Mordenti and made a phone call from his mobile phone in front of the business. (TR 556) The defense cross-examined him as to how much money he invested with his partners in their business, agreed with the trial court's ruling on a relevance objection and indicated it may call him later as a defense witness. (TR 560-565) The defense later called Glen Donnell. (TR 990-1002) Appellant does not specify with any detail the testimony of Carl Ellwood or

why counsel was deficient in failing to call him.[4]

Detective Karen Kirk briefly testified as to the recovery of a weapon from Gail Mordenti, state's exhibit 12. (TR 708) Appellant does not identify what cross-examination was required for trial counsel to have satisfied the Sixth Amendment. The same is true for the testimony of pawn broker Fred Long regarding the records of firearms he sold, state's exhibit 8. (TR 712)

FBI hair and fiber expert Michael Malone testified that none of the hairs on Thelma Royston or her immediate environment matched appellant's hairs. (TR 724) Mordenti now argues that his testimony proved Gail Mordenti was lying when she said there was a fight. While Malone testified he had no indication of forcibly removed hairs (TR 726), that does not prove Gail Mordenti was lying and trial defense counsel could properly decide that non-damaging testimony need not be cross-examined,

Detective King testified about subpoenaed phone records of Larry Royston's cellular phone in May and June of 1989. (TR 741-7445) But since the phone records exhibit 6 had already been introduced into evidence (TR 461) it is difficult to see how counsel's performance was deficient or how a different result would

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[4]The trial record reflects that defense counsel filed a motion to take deposition to perpetuate testimony of Carl Ellwood on July 10, 1991 which was withdrawn. (R 1679-80, TR 529-33) The defense agreed to table the motion until the next morning (TR 653) and then withdrew the request (TR 754) because 'we have found another way to accomplish the same".

obtain had counsel acted differently.

(H) Appellant complains at page 35 of his brief regarding counsel's failure to move for a change of venue but as the lower court observed, "Defendant fails to demonstrate how the outcome of the trial would have been different had counsel taken such action." (R 224) Appellee also denies that a change of venue was required.

(I) Appellant argues that he was not informed of his constitutional right to testify. The trial court ruled:

> Defendant's next ground is based upon ineffective assistance of counsel due to counsel's alleged failure to allow Defendant to testify on his own behalf. A defendant seeking relief upon such a claim must meet both prongs of Strickland v. Washington 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), demonstrating both deficient performance and prejudice. Oisorio v. State, 676 So. 2d 1363 (Fla. 1996). While Defendant alleges that counsel failed to inform or prepare Defendant for such testimony, Defendant's Motion does not meet the second Strickland prong, in that he fails to demonstrate that the deficient performance prejudiced the defense. Defendant does not reveal what his testimony would have been and how it would have affected the outcome of the trial. Therefore, Defendant is not entitled to relief upon this ground.

(R 224-225)

Additionally, the claim is belied by the record. See transcript of hearing at sentencing argument on September 5, 1991. (R 1528, Appeal No. 78,753)

Appellant also complains about counsel's alleged failure to investigate the failure of law enforcement officers to provide

Miranda warnings, citing TR 505. (Brief, p. 35) The transcript reflects that appellant made a spontaneous statement when being booked that he did not know Mr. Royston. (TR 503-505) See also trial court's order rejecting this contention at R 227-228.

In yet another frivolous contention appellant argues at page 36 of his brief that counsel failed to object to the husband and wife team of prosecutors, a claim directly addressed by this Court on direct appeal:

> "[2] First, we address Mordenti's claim that the husband/wife team's prosecution of this case created an unfair advantage in favor of the State and constituted fundamental error so as to allow this issue to be raised for the first time on appeal. The record reflects that, during the course of the trial, five references were made to the fact the prosecutors were married. Of those five references, one was made during introductions to explain the similarity of the prosecutors' names, one was made by a defense witness, and the remaining three were made in the context of cross-examining that defense witness to clarify who was present during pretrial questioning of that witness. Under the circumstances, we find that no error was created by the fact that the prosecutors were married to each other, much less error that was fundamental."

(630 So.2d at 1084)

Counsel was neither deficient nor did prejudice result.

Appellant also contends that trial defense counsel failed to investigate the Hillsborough County Medical Examiner's office and failed to point out to the jury that no medical examiner was present at the crime scene before critical evidence was tainted and

moved. (Brief, p. 36) Dr. Diggs testified at trial that he arrived at the crime scene and observed the victim's body on the floor. (TR 407-408) Appellant alleges no facts regarding tainted critical evidence about which the jury should have been informed.

ISSUE VI

THE ADMISSION INTO **EVIDENCE** OF **HEARSAY CLAIMS.**

Claims of admissibility of evidence are issues to be raised on direct appeal and are not cognizable for post-conviction collateral challenge. The claim is barred. See Preliminary Statement, *supra*.

Also, the trial court correctly ruled:

> In Ground Five Defendant alleges that counsel was ineffective in failing to object to inadmissible hearsay which prejudicially affected the outcome of the trial. While Defendant points to the testimony of Detective John King, Isabel Reger, Larry Flynn, Sherri Loofelholz Marjorie Garberson and Glenn Donnell, he only refers to three specific statements which were allegedly admitted in violation of the hearsay rule. As to the alleged statement made by Detective John King, the record reflects the elicited testimony to be different than Defendant represents (see Ground Thirteen). Moreover, there is no showing that the statement was prejudicial, in light of the other testimony presented. As to the statement made by Marjorie Garberson that the police thought her life was in danger (see transcript, page 402), again there is no showing that this statement affected Defendant's murder conviction. As to Glen Donnell's statement that Ms. Mordenti was afraid of Defendant (see transcript, pages 548-549), the record reflects that Donnell's testimony was made in response to the question of how Ms. Mordenti's relationship was with Defendant at the time of the divorce and how she reacted towards him at that time. Therefore, as the divorce took place in 1987, it is unreasonable to conclude that the statement prejudicially affected the murder conviction. Therefore, as Defendant fails to demonstrate how these alleged hearsay

statements affected the outcome of the trial, Defendant is not entitled to relief.

(R 225-226)

ISSUE VII

NO RELIABLE APPELLATE REVIEW CLAIM.

To the extent that appellant is complaining of matters known or reasonably discoverable at the time of the direct appeal, they are barred now as matters that should have been urged earlier. See Preliminary Statement, *supra*.

Additionally, as the lower court correctly ruled:

> In Ground Nine Defendant states that omissions in the trial transcript violate his constitutional rights. Specifically he complains that the trial record does not include a transcript of the October 10, 1990 hearing, a transcription of audio tapes played to the jury, and certain discussions at sidebar. The supreme court in Delap v. State, **350 so.** 2d 462 (Fla. 1977) remanded the case for a new trial where requested portions of the trial transcript necessary for appellate review were missing. However, a defendant is not entitled to relief upon this claim where he fails to demonstrate how the defective transcript prejudiced his direct appeal. See Velez v. State, 645 So. 2d 42 (Fla. 4th DCA 1994), citing White v. State 939 F.2d 912, 914 (11th Cir. 1991), cert. denied, White v. Singletary, -- U.S. --, 112 S.Ct. 1274, **117** L.Ed.2d 500 (1992). In this case, Defendant fails to show how the missing portions of the record affect his collateral attack of the judgment and sentence. Therefore, he is not entitled to relief upon this claim.

(R 227)

See also Turner v. Duaaer, 614 So.2d 1075 (Fla. 1992) (failure to record and transcribe charge conference is harmless since instructions proposed and read were in writing and filed with court; absence of transcribed bench conferences did not violate

mandate of F.S. 921.141 and did not prejudice the appeal); Ferguson v. Singletary, 632 So.2d 53 (Fla. 1993) (appellate counsel not ineffective for failing to have transcribed certain portions of the record such as voir dire and charge conference since now transcribed matters do not show error and as to still untranscribed matters defendant does not point to specific errors that occurred); Cherry v. State, 659 So.2d 1069, 1071 fn. 1(10) (Fla. 1995).

Appellant's complaint that the tape played to the jury was not transcribed is meritless since this Court had access to the actual tape for appellate review. The direct appeal record also reflects that on October 10, 1990 the trial court granted a motion for copies and for attendance of next of kin of Thelma Royston at depositions (R 1625-26, Case No. 78,753), a matter which does not impact the instant proceedings.

ISSUE VIII

INTRODUCTION OF ALLEGEDLY PREJUDICIAL EVIDENCE CLAIM.

This too is a claim for direct appeal, not a collateral challenge, and the lower court correctly found that appellant had litigated a gruesome photo issue on his direct appeal. (R 226) Mordenti v. State, 630 So.2d 1080 (Fla. 1994).

See Preliminary Statement, *supra*.

ISSUE IX

INEFFECTIVE ASSISTANCE OF COUNSEL AT VOIR DIRE.

The trial court correctly ruled that appellant failed to establish how the alleged omissions or deficiencies met the second prong of Strickland. (R 227)

Appellee further notes that in Mordenti's direct appeal issue II therein consisted of an argument that the trial court erred by failing to replace juror Haight and this Court deemed the contention so inconsequential as not to require discussion.

Appellant does not offer an explanation why counsel should be deemed ineffective for failing to remove jurors Haight and Baker. (At page 42 of the brief he adds juror Mordenti who obviously was not a juror.) While Haight and Baker may have approved of capital punishment in appropriate circumstances, each indicated an open mind. (TR 175, 195)[5]

[5]In the lower court appellant made the patently frivolous contention that he could not more completely describe the error since Chapter 119 requests were unsatisfied. (R 137-138) Clearly Chapter 119 requests can add nothing to the voir dire transcript of questions asked and answered in July of 1991.

ISSUE X

PROSECUTOR'S PEREMPTORY CHALLENGE TO EXCUSE PROSPECTIVE JTJROR RTJBY CUTLER.

As in most of the other issues presented this too is not cognizable on a collateral challenge; such an issue could be asserted on direct appeal. See Preliminary Statement, *supra*. The trial court correctly pointed out the claim that defense counsel's failure to object to the state's peremptory strike of an African-American venireperson was unaccompanied by any explanation how such an omission prejudiced his case. (R 227)

Appellee adds that the suggestion of ineffectiveness of counsel is refuted by the record. Trial defense counsel Watts withdrew his request for a non-racial reason for excusing Ruby Cutler because "I can anticipate the State's response." (TR 237-238) Only pages earlier venireperson Cutler (juror #13) acknowledged she would have a problem living with herself afterwards if she participated in a decision to send a person to his death (TR 221); the nonracial reason of the prosecutor is obvious.

ISSUE XI

WHETHER APPELLANT'S RIGHT TO REMAIN SILENT WAS VIOLATED.

This claim is not cognizable on motion for post-conviction relief since it could have been urged on direct appeal. See Preliminary Statement, *supra*. The lower court also was correct in its determination:

> In Ground Thirteen, Defendant alleges that his statement made to Detective John King at the time of his arrest that he did not know Larry Royston was used at trial in violation of his Miranda rights, and that counsel was ineffective for failing to object to the testimony of that statement, A review of the transcript reflects the State asked Mr. King, 'and at that time did - were you present when Mr. Mordenti made a statement about his knowledge of Larry Royston?" Mr. King responded, "I believe he said he didn't know him." However, when the court directed the witness to answer the question that was asked, Mr. King responded, "I was there, but I don't recall the exact words." (See transcript, page 505.) Therefore, the record reflects the testimony as elicited by the court was not actually as stated by Defendant in his motion. Moreover, such a claim should have been presented on appeal and is therefore not an appropriate ground for relief in this Motion.

(R 227-228)

ISSUE XII

THE TRIAL COURT'S ALLEGED ERRONEOUS INSTRUCTION ON THE STANDARD TO JUDGE EXPERT TESTIMONY.

Collateral counsel acknowledges that no objection was interposed at trial to the court's instruction on the standard to judge expert testimony. (Brief, p. 46) The lower court correctly ruled that such a claim was cognizable on direct appeal, not on a collateral challenge. (R 226) See Preliminary Statement, *supra*. Counsel was neither deficient nor is there a reasonable probability of a different outcome had counsel acted differently.

ISSUE XIII

THE USE OF CO-CONSPIRATOR LARRY ROYSTON'S STATEMENTS.

The trial court correctly disposed of the claim as barred, not cognizable on collateral challenge since it was an issue for direct appeal. (R 226) See Preliminary Statement, **supra.**

ISSUE XIV

STATE'S ALLEGED USE OF MISLEADING TESTIMONY AND IMPROPER ARGUMENT.

To the extent that appellant is urging some alleged error that was included within the trial record, it is not cognizable on Rule 3.850 since it could have been asserted on direct appeal. See Preliminary Statement, *supra*. Moreover, the trial court correctly rejected this contention by noting:

> Defendant alleges in Ground Sixteen that the State failed to disclose to defense counsel the name of the hotel where Defendant and Ms. Mordenti stayed when they discussed the murder conspiracy. The State also precluded defense counsel from requesting an instruction of "no previous criminal history" at the penalty phase. However, Defendant fails to demonstrate how the omission of such information as the name of the hotel affected the case. As to the penalty phase instruction, the record reflects that in spite of the fact that counsel waived the jury instruction on the issue of previous criminal history, the court did find that fact that Defendant had no significant criminal history to be a mitigating factor. Therefore, any such omission was harmless.

(R 228)

With respect to the prosecutor's alleged 'threat" to rebut the mitigating factor of no significant history as this Court well knows appellant raised that contention in issue VII of his direct appeal brief and the Court deemed it so meritless that no discussion of it was necessary in the opinion.

With respect to the failure to disclose the name of the hotel that was the subject of discussion at the new trial motion and hearing (TR 1550-65, Case No. 78,753) and appellee reiterates that could have been argued on appeal.

ISSUE XV

THE ALLEGED DENIAL OF ADVERSARIAL TESTING AT PENALTY PHASE AND SENTENCING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.

The trial court correctly resolved this issue without the necessity of an evidentiary hearing.[6]

> In Ground Seventeen Defendant avers that counsel was ineffective at the penalty phase by failing to adequately investigate and prepare additional mitigating evidence or that the state failed to disclose exculpatory evidence under Brady v. Maryland. In support, Defendant outlines a lengthy personal background demonstrating such mitigating factors. However, as reflected by the supreme court opinion, the record shows that fifteen witnesses were called by defense counsel at the penalty phase, who testified to all the claims contained in this ground: that Defendant was of value to society, that he served honorably in the military, that he experienced a deprived childhood, that he was a good friend, employer, employee and parent to his girlfriend's children, and that he was fair, hardworking and of good character. As all of these factors were presented to the court, Defendant fails to show how counsel's representation at this phase was deficient. Moreover, he fails to provide any support for the claim that the State failed to disclose any exculpatory evidence. Therefore, Defendant is not entitled to relief upon this claim.
>
> (R 228-229)

Appellant's claim that trial defense counsel failed to investigate or prepare for penalty phase is belied by the record.

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[6]Appellee denies the observation at footnote 13 at page 53 of appellant's brief asserting that the state conceded ineffectiveness of trial defense counsel in its direct appeal brief.

The trial record establishes that trial defense counsel called Max Perez (TR 1375-77, Case No. 78,753) to describe the positive influence appellant had on his children, Said Efran a business associate who believed appellant to be an honest and hard worker (TR 1379-80), business associate Jack White who felt that he was fair and a hard worker (TR 1383-84), welder Robert Newell who "couldn't ask for any better treatment" (TR 1389), David Garrity who testified that appellant helped him get back on his feet financially and was there to help when needed (TR 1392-94), appellant's stepfather Fred Pastore who said he was a good son and that doctors had instructed Mordenti's mother not to be in court for health reasons (TR 1395-96), business associate Chris Domanski who testified to his reliability (TR 1398), Deborah Millett who explained that appellant provided a vehicle and forgave her the debt on it (TR 1400), U.S. Coast Guard Chief Richard Ansell who testified that appellant had an honorable discharge (TR 1404), Delson Correa who described appellant's good works and kindness (TR 1406-09), Emilinha Correa who similarly described appellant's generosity in providing money and jobs (TR 1411), Michael Capestany who stated that Mordenti opened his home to him and treated him like a brother (TR 1415-16), Gene Franklin who testified that appellant provided transportation to him and his wife (TR 1417-18), Bonnie Gould who described Mordenti's helpfulness to her and her husband; he was a good friend (TR 1419-20). Appellant's girlfriend

Dawn Simon described several other good deeds to others and stated that appellant was a good provider. (TR 1421-23) Finally, appellant testified in his own behalf; he stated that he was adopted and lived a lot with his great aunt and her husband Uncle Bill, his background growing up and service in the Coast Guard. (TR 1425-32) At the sentencing argument on September 5, 1991 Mordenti testified that he had no prior convictions and continued to assert his innocence. (TR 1520-25) Trial counsel Atti represented that he had discussed with appellant whether to take the stand; Mordenti confirmed that counsel had recommended against taking the stand at guilt phase. (TR 1524-28)'

The vague assertion that trial counsel fell below Sixth Amendment standards by failing to call appellant's daughter to the stand must be rejected. The Constitution does not require that

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[7]Mordenti alludes to trial record references, suggesting that counsel had not previously met some of his witnesses (R 1387), conceded the presence of aggravating circumstances in closing argument (R 1470) **and at one point counsel asked** the state what non-statutory aggravators it intended to use (R 1644). To put these matters in context, witness Capestany was one witness who had just appeared and the defense provided the state an opportunity to speak to him. (R 1353). There is no requirement for counsel personally to meet with every witness and several appeared to be non-local witnesses (Said Efran from Cairo Egypt - R 1378, Bonnie Gould from Brooksville - R 1419) and counsel acknowledged meeting with them prior to their testimony. (R 1391) In closing argument while defense conceded the existence of aggravating factors - an inevitability since this Court affirmed the judgment and sentence - he carefully pointed out the weight of mitigation was greater. (R 1470-86) The request to the state to recite aggravators (R 1644) occurred in a pretrial motion filed by co-counsel Atti two months prior to trial, and prior to the appearance of penalty phase co-counsel Richard Watts. (R 1651)

sixteen rather than fifteen people who know the defendant well must testify at the penalty phase of a trial. See Woods v. State, 531 So.2d 79, 82 (Fla. 1988)("More is not necessarily better"); Maxwell v. State, 490 So.2d 927, 932 (Fla. 1986)("The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient"); Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987)(the mere fact that other witnesses might have been available or other testimony might have been elicited is not a sufficient ground to prove ineffectiveness); Stewart v. Dugger, 877 F.2d 851 (11th Cir. 1989)(proffer of additional character witnesses would not have had significant impact on the trial as it was merely cumulative); Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991) (failure to present cumulative witnesses did not amount to ineffectiveness); Waters v. Thomas, 46 F.3d 1506, 1511 (11th Cir. 1995) (en banc) ("we have never held that counsel must present all available mitigating circumstance evidence in general. . .").

Thus, even if appellant's daughter or another relative had testified to his good qualities, such cumulative evidence does not render counsel's performance deficient, nor render the result an unreliable one.[8]

While appellant chants the name Brady once at page 50 of his brief as some form of mantra entitling him to an evidentiary hearing it is clear that the absence of any factual averment approaching a valid issue under Brady v. Marvland, 373 U.S. 83, 10 L.Ed.2d 215 (1963) or its progeny precludes either the granting of post-conviction relief or even an evidentiary hearing. See Atkins v. State, 663 So.2d 624 (Fla. 1995); Routly v. State, 590 So.2d 397 (Fla. 1991); L. Clark v. State, 690 So.2d 1280 (Fla. 1997).

'Appellant does not identify by name the daughter who would provide such sterling testimony nor its content. Certainly, it would have been understandable for trial counsel not to call at penalty phase Mordenti's stepdaughter Wendy Mordenti Pearson who testified as a state witness at guilt phase that appellant told her to give a message to her mother Gail Mordenti to 'just leave town" and if she wasn't there "there would be no trial". (TR 735)

ISSUE XVI

PROSECUTORIAL MISCONDUCT.

The trial court correctly determined that complaints about the prosecutor's conduct were a proper matter to urge on direct appeal and thus not cognizable on Rule 3.850. (R 226) See Preliminary Statement, ***supra.***

Additionally, this Court determined that as to the matters urged on direct appeal regarding prosecutorial argument, the claims were either barred or meritless. 630 So.2d at 1084.

As to the assertion that the state conceded trial counsel's ineffectiveness at page 19 of its direct appeal brief, the state denies any such concession of ineffectiveness. The state only pointed out the lack of objection to preserve for appellate review. If that is construed as a concession of ineffectiveness, the state argues alternatively, that this Court's affirmance of the judgment and sentence must constitute a rejection of the ineffectiveness contention and operate as a finding approving counsel's actions in accordance with Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

ISSUE XVII

WHETHER THE SENTENCING COURT ERRED IN REFUSING TO FIND AND WEIGH MITIGATING CIRCUMSTANCES.

The trial court rejected the claim, noting that it had recognized eight mitigating factors. (R 229)

This issue too is one for direct appeal and thus not cognizable on Rule 3.850. See Preliminary Statement, *supra*. This Court's opinion on direct appeal reflects the awareness that Royston who hired Mordenti to commit the murder had "committed suicide". 630 So.2d at 1081. Thus, no viable disparate treatment issue was present; this Court noted the immunity given to Gail Mordenti. 630 So.2d at 1085.

ISSUE XVIII

NONSTATUTORY AGGRAVATING FACTORS CLAIM.

The trial court correctly ruled that any challenge or assertion that nonstatutory aggravating factors were employed was a matter for direct appeal and thus barred as not cognizable for collateral relief. (R 226) See Preliminary Statement, *supra*.

Appellee notes additionally that on direct appeal this Court approved the use of photographs and found that complaints raised about the prosecutor's arguments were summarily rejected, either as procedurally barred or without merit. The Court affirmed ". . . having considered any possible cumulative effect of the error alleged." 630 So.2d at 1085.

ISSUE XIX

THE SKIPPER V. NORTH CAROLINA CLAIM.

Appellant's contention that the jury was not presented evidence of his good behavior for 119 days during incarceration must be rejected since it too was a matter to be urged on direct appeal.

Additionally, the trial court ruled:

> In Ground Twenty-One Defendant claims that counsel's ineffectiveness in failing to present evidence of Defendant's good behavior while awaiting trial deprived him of a reliable sentencing determination. While courts have acknowledged that good behavior while incarcerated may be an appropriate nonstatutory mitigating circumstance, this court does not find counsel's failure to present evidence of 119 days of good behavior during incarceration to be prejudicial, as counsel did present abundant evidence of his good character. Moreover, the court did include as a mitigating factor Defendant's good behavior during trial. Therefore, the court finds that Defendant is not entitled to relief upon Ground Twenty-One.

(R 229)

On Mordenti's direct appeal this Court mentioned the trial court's finding of mitigation that appellant acted appropriately in court during trial. Mordenti v. State, 630 So.2d at 1080, 1083 (Fla. 1994)

ISSUE XX

WHETHER THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR IS UNCONSTITUTIONALLY VAGUE.

The trial court correctly determined that any challenge now to the CCP factor was barred as it could have been urged on direct appeal and that post-conviction motions do not constitute a second appeal. (R 226) See Preliminary Statement, *supra*.

Trial counsel **was** not deficient in failing to object to the given instruction.[9] See Harvey v. Dugger, 656 So.2d 1253, 1258 (Fla. 1995)(trial counsel not ineffective for failing to object to HAC & CCP instructions on vagueness grounds prior to Espinosa v. Florida, 505 U.S. , 120 L.Ed.2d 854 (1992)).

'Defense counsel did not object to the CCP instruction (TR 1443-44, Case No. 78,753) and conceded the applicability of this factor in closing argument to the jury. (TR 1473-74, Case No. 78,753)

ISSUE XXI

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE HAC FACTOR.

The trial court denied relief on this issue because it had been raised and addressed on direct appeal and thus was not cognizable for relitigation via Rule 3.850. (R 226) On direct appeal this Court noted that the given instruction fully defined HAC (it was not the invalid instruction condemned in Esninosa v. State, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992)) and opined that:

> . . .given that conflicting evidence existed as to whether the victim died instantaneously, we find that the trial judge did not err in giving this valid instruction to the jury, even though the trial judge did not rely on this aggravating factor when imposing Mordenti's death sentence.

(630 So.2d 1080, 1085)

An instruction on a factually-insufficient aggravator presents no insurmountable problem because of the jury's capital role in Florida since the jury "is indeed likely to disregard an option simply unsupported by evidence." Sochor v. Florida, 504 U.S. 527, 538, 119 L.Ed.2d 326, 340 (1992).

ISSUE XXII

THE CALDWELL V. MISSISSIPPI ISSUE.

The trial court properly found that Mordenti's challenge to a Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231 (1985), claim diminishing the jury's sense of responsibility was barred since it was an issue proper for assertion on direct appeal. (R 226) See Preliminary Statement, *supra*.[10]

[10]This is yet another issue where appellant frivolously contended below that he could not plead specific facts because of incomplete Chapter 119 reporting. (R 189) It remains unexplained how a Chapter 119 request has anything to do with remarks of the prosecutor or court in the trial transcript.

ISSUE XXIII

THE ALLEGED BURDEN SHIFTING ERROR.

The trial court correctly determined that this claim (issue 25 in trial judge's order) was procedurally barred as it was an issue that could have been raised on direct appeal. (R 226) See Preliminary Statement and cases cited therein, ***supra.***

ISSUE XXIV

WHETHER FLORIDA'S STATUTE ON AGGRAVATING FACTORS IS FACIALLY VAGUE AND OVERBROAD.

The trial court correctly determined that appellant may not belatedly challenge the constitutional validity of the HAC and CCP aggravators; it was an issue to be raised on direct appeal. (R 229-230) See Henderson v. Singletary, 617 So.2d 313 (Fla. 1993) (claim barred for failure to raise on appeal).

ISSUE XXV

APPELLANT'S ALLEGED INNOCENCE OF THE DEATH PENALTY (SAWYER V. WHITLEY, 505 U.S. 333, 120 L.ED.2D 269 CLAIM).

Appellant contends that the trial court found two aggravators: (1) cold, calculated and premeditated and (2) committed for pecuniary gain; that the CCP instruction given was unconstitutionally vague and that pecuniary gain -- standing alone is insufficient to render him death-eligible and that his death sentence is disproportionate. Appellee responds that no challenge on appeal was made to the constitutional validity of the CCP instruction and that even had it been and even if he had prevailed Mordenti would be death-eligible for the remaining unchallengeably valid pecuniary gain aggravator. Appellant may not permissibly relitigate this Court's adverse determination on the proportionality issue. Mordenti is a contract-killer triggerman deserving of the death penalty. Mordenti v. State, 630 So. 2d 1080 (Fla. 1994).[11]

Any challenge to the sentence could have been urged on direct appeal. See Preliminary Statement, *supra*.

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[11]Moreover, this Court has observed that the concept of innocence of death is applicable to the problem of successive habeas petitions. Wuornos v. State, 644 So.2d 1012, 1018 (Fla. 1994)

ISSUE XXVI

IMPROPER PROSECUTORIAL ARGUMENT.

Appellant contends that the prosecutor improperly argued and misled the jury in urging that a death penalty was required or that there was no alternative but the death penalty (citing TR 1456-1469 of direct appeal record).[12] Such a claim is not cognizable on Rule 3.850 **as** it is a claim that can be and should be raised on direct appeal and thus is now procedurally barred. (R 226) See Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989) and cases cited in the Preliminary Statement, *supra.*

[12]Appellant did not object at trial on the basis now urged. Moreover, it is legitimate prosecutorial argument to urge that there was nothing to mitigate this contract killing.

ISSUE XXVII

WHETHER APPELLANT IS UNCONSTITUTIONALLY PROHIBITED FROM INTERVIEWING JURORS.

The trial court denied relief finding that such an argument was not a collateral attack on the conviction or sentence and thus not appropriate for relief under Rule 3.850. (R 230) See, e.g., Foster v. State, 400 So.2d 1 (Fla. 1981).

Additionally, Florida Rule of Professional Conduct 4-3.5(d)(4) is a valid rule because it serves vital governmental interests in protecting the finality of a verdict, preserving juror privacy, and promoting full and free debate during the deliberation process. See Tanner v. United States, 483 U.S. 107, 127, 97 L.Ed.2d 90, 110 (1986); United States v. Hooshmand, 931 F.2d 725, 736-737 (11th Cir. 1991); United States v. Griek, 920 F.2d 840, 842-844 (11th Cir. 1991). See also Cave v. State, 476 So.2d 180, 187 (Fla. 1985) ('This respect for jury deliberations is particularly appropriate where, as here, we are dealing with an advisory sentence which does not require a unanimous vote for a recommendation of death or a majority vote for a recommendation of life imprisonment. To examine the thought process of the individual members of a jury divided 7-5 on its recommendation would be a fruitless quagmire which would transfer the acknowledged differences of opinion among the individual jurors into open court. These differences do not have to be reconciled; they only have to be recorded in a vote."); Songer v. State, 463 So.2d 229, 231 (Fla.

1985)(F.S. 90.607[2][b] does not authorize a juror to testify as to any matter which inheres in the verdict); Johnson v. State, 593 So.2d 206, 210 (Fla. 1992).

ISSUE XXVIII

JUROR MISCONDUCT CLAIM.

The trial court determined that issue 30 in the lower court (juror misconduct) pertaining to juror Baker (it is Mr. Baker Contrary to Mordenti's description [TR 1324, 1502]) and juror Mr. Johnston at TR 1321-29, TR 1342 in the direct appeal record was procedurally barred because it should have been urged on direct appeal and that issues that were or could have been raised on direct appeal are not cognizable in a Rule 3.850 motion. (R 226)[13] Cherry v. State, 659 So.2d 1069 (Fla. 1995); Lopez v. Sinsletary, 634 So.2d 1054 (Fla. 1993). (R 226) The procedural bar may not be circumvented by use of ineffective counsel allegations to serve as a second appeal. Cherry, *supra*; Medina v. State, 573 So.2d 293 (Fla. 1990).

[13]The transcript of the direct appeal, TR 1321-1350, Case No. 78,753 demonstrates that each individual juror was examined by the court and counsel revealing no prejudicial communication.

ISSUE XXIX

WHETHER THE CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL.

The trial court rejected appellant's challenge to the capital sentencing statute, noting that this Court had denied such an argument in Harvard v. State, 486 So.2d 537 (Fla. 1986). (R 230) See also cases cited in Preliminary Statement holding that claims cognizable on direct appeal are not appropriate for collateral attack.

ISSUE XXX

CUMULATIVE ERROR CLAIM.

The lower court correctly rejected this contention below, noting that:

> As Defendant merely cites law for this proposition and provides no factual support, this claim is without merit and Defendant is not entitled to relief.

(R 230)

In this appeal Mordenti makes no effort to identify any such cumulative error. Appellee denies any and requests this Court to affirm.

CONCLUSION

Based on the foregoing arguments and authorities, the order of the lower court denying post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Terri L. Backhus, Esq., Chief Assistant CCR, Office of the Capital Collateral Representative, 405 North Reo Street, Suite 150, Tampa, Florida 33609-1004, this 12th day of November, 1997.

COUNSEL FOR APPELLEE