IN THE SUPREME COURT OF FLORIDA

PAUL ALFRED BROWN, JR.,

Appellant,

vs. **CASE NO. 90,540**

STATE OF FLORIDA,

Appellee.

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ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar I.D. No. 0134101
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607
(813)873-4739

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

(A) The Direct Appeal:

Appellant was convicted of the first degree murder of Pauline Cowell, armed burglary, and attempted murder of Tammy Bird. The Court affirmed the judgment and sentence of death in Brown v. State, 565 So.2d 304 (Fla. 1990), cert. denied, 498 U.S. 992, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990). The facts of the case are succinctly described in that opinion:

> Around 1:30 a.m., March 20, 1986 two gunshots woke Barry and Gail Barlow. Upon entering the Florida room of their home they found Gail's seventeen-year-old sister, Pauline Cowell, dead in her bed. Pauline's friend, Tammy Bird, had also been shot, but was still alive. The room's outside door stood open, missing the padlock with which it had been secured. Pursuant to information indicating Brown might be a suspect, sheriff's deputies began searching for him in places he was known to frequent and found him hiding behind a shed in a trailer park where Brown's brother lived. They arrested Brown and seized a handgun, later linked to the shootings, (FN2) from his pants pocket.
>
> Brown lived with the murder victim's mother, and the victim had only recently moved into her sister's home. Brown confessed after being arrested and, at the sheriff's office, stated that he had broken into the victim's room to talk with her about some "lies" she had been telling. Although he entered the room armed, Brown claimed that he had not intended to kill the girl, but that he planned to shoot her if she started "hollering."
>
> (Id. at 305)

The opinion also recited:

> Turning to the sentencing portion of Brown's trial, the trial court found that three aggravating circumstances had been established, i.e., committed during commission of a felony, previous conviction of a violent felony, and committed in a cold, calculated, and premeditated manner. The court found several items of evidence in mitigation (mental capacity, mental and emotional distress, social and economic disadvantage, nonviolent criminal past), but considered them of so little weight as not to outweigh even any one of the aggravating factors.

(Id. at 308)

Subsequently, after appellant filed an amended motion to vacate and the state filed its response, Circuit Judge Tharpe entered an order denying in part the motion to vacate but requiring an evidentiary hearing on issues 3, 6, 7 and 8 (Vol. III, R. 298-355). Following appellant's motion to ensure compliance with Rule 2.050 (b)(10), Fla. R. Jud. Adm. (Vol. III, R. 361-363), an evidentiary hearing was conducted by Judge Diana Allen who subsequently entered an order denying relief (Vol. III, R. 449-453).

(B) The Evidentiary Hearing:

Director of Evidence for the Clerk of Circuit Court Don Buchanan testified that after a search of the warehouse a pair of bolt cutters that had been introduced into evidence at trial could

not be found (Vol. IV, TR. 34).[1]

Assistant State Attorney Wayne Chalu had previously been an Assistant Public Defender from 1979 to 1993 and had previously tried capital cases before handling the Paul Alfred Brown case in 1986 (Vol. IV, TR. 44-45). Besides his on-the-job training he had attended numerous life-over-death seminars put on by the Public Defender's Association; he was an experienced felony litigator and also appellate litigator prior to moving to capital work (Vol. IV, TR. 47). Chalu was the primary attorney assigned to defend Brown. Another assistant, Carlos Pasos, worked on the case, and Mr. Alldredge subsequently joined to work on the penalty phase, a substantial period of time prior to trial (Vol. IV, TR. 48-50). Both lawyers had access to the investigators and told them what to do; investigator Mark Cox did the initial interview and Tony Webb worked the case with them (Vol. IV, TR. 51). Chalu and Alldredge talked to each other constantly, and each knew what the other was

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[1] The audiotape - In the hearing below a colloquy ensued about a missing audiotape. Prosecutor Bedell stated the only audiotape he knew about concerned Brown's confession and it was not introduced or played at trial; rather, Detective Davis testified to Brown's statement from his report (Vol. IV, R. 39; *see also* Florida Supreme Court Case No. 70,483, Vol. IV, R. 377-382). As the lower court noted if the item was not introduced into evidence the clerk wouldn't have it (Vol. IV, R. 38). CCR stated that it had attempted to obtain the original audiotape to see if the transcript admitted at trial was accurate (Vol. IV, R. 41) and acknowledged that they had a copy of the audiotape but could not use it as a basis for testing by an expert (Vol. IV, R. 43).

No transcript of confession was introduced at trial; only the detective testified.

doing in terms of preparation because they talked all the time (Vol. IV, TR. 52). Chalu hired mental health expert Dr. Berland (Vol. IV, TR. 52). Brown appeared to Chalu to be a slow individual of sub-average intelligence (Vol. IV, TR. 53). Both he and Alldredge were responsible for preparing the experts for testimony, with Chalu handling guilt phase testimony and Alldredge penalty phase (Vol. IV, TR. 54). They only used experts during the penalty phase (Vol. IV, TR. 55). Chalu was familiar with the prosecutor Mike Benito, had tried several cases against him, and knew his methods (Vol. IV, TR. 56). Chalu's theory of defense was dictated by two factors -- Brown's account of what happened and doctors' accounts of his mental state at the time. When the motion to suppress confession was denied, the only real, viable defense remaining was to argue a lesser offense and set up the penalty phase if they lost (Vol. IV, TR. 56-57). The attorneys worked very hard in both phases (Vol. IV, TR. 57). Appellant had told Chalu that he entered the premises without the intent to kill; thus, Chalu's theory was that he was guilty of armed trespass and not armed burglary which would not support a first degree felony-murder. The defense as to premeditated murder was Brown's account to him that he did not have an intent to kill -- only that he wanted to talk to her about why she was lying about him (Vol. IV, TR. 58). It was hoped that the jury would return a second-degree

verdict (Vol. IV, TR. 59). Chalu recalled that the jail psychiatrist had put him on Mellaril, an antipsychotic medication (Vol. IV, TR. 59). Chalu's general practice is to find out what documentation the experts want and provide that to them; he recalled that investigator Webb got the MMPI from the Department of Corrections (Vol. IV, TR. 62). Chalu recalled no difficulty in Webb obtaining the documentary evidence (Vol. IV, TR. 63). Chalu personally spoke with family members prior to trial (Vol. IV, TR. 67). Chalu also felt that it was important to retain both opening and closing final argument (Vol. IV, TR. 69). He felt that he had sufficient time to prepare for trial (Vol. IV, TR. 74). Chalu further explained that the trial court allowed him time to depose the Barlows prior to their testimony and that he would have requested a continuance if he thought that he needed it but he didn't think the testimony was of any great consequence (Vol. IV, TR. 82-83). He didn't think prosecutor Benito was hiding anything, that it was only an oversight (Vol. IV, TR. 83). He recalled the court having an inquiry about an article jurors may have read, but it was too inconsequential to request a mistrial (Vol. IV, TR. 83-84). Chalu recalled that there had been discussion about Brown taking medication at the jail (Vol. IV, TR. 85). Brown was very cooperative and Chalu had dealt with similar clients of comparable intelligence (Vol. IV, TR. 88). Chalu was familiar with Benito's

closing argument about life imprisonment and he understood that subsequently appellate courts had ruled it to be improper, but there were no adverse decisions at the time and Chalu did not deem it prejudicial (Vol. IV, TR. 91). On cross-examination, Chalu testified that he successfully objected to some evidence prosecutor Benito tried to introduce, e.g., reference to the subsequent robbery and shooting was stipulated out entirely and the motive for the crime was kept out, as well as the full extent and trauma to the surviving victim (Vol. V, TR. 97-100). Chalu had explored the possibility of an insanity defense but received no indication from either Dr. Berland or Dr. Afield that would have supported an insanity defense (Vol. V, TR. 108). Chalu recalled that he had previously succeeded in using the defense strategy adopted here (Vol. V, TR. 110-111). The people he deposed -- the Barlows -- were hostile both to Mr. Brown and to Chalu who represented Brown (Vol. V, TR. 111). They would not have assisted in any manner and Chalu didn't care if the state had never found those people (Vol. V, TR. 112). Brown did not indicate to him or the investigators that he could not recall the events of the night of the shooting (Vol. V, TR. 116). And that was one of the reasons that Berland could not conclude that the defendant was under extreme mental or emotional disturbance (Vol. V, TR. 116).

Chalu further testified that he sought to avoid presenting

evidence that would be harmful to the defendant (Vol. VII, TR. 451). Brown had been charged in a companion case with robbing a convenience store and shooting someone on the same day but after the homicide. The motive was to obtain money to get out of town. Brown fired several shots at a civilian in a car chase. His strategy was to keep such matters out of the trial and he succeeded in doing so. Brown entered a plea to those charges and Benito agreed not to use those conviction in penalty phase. Brown did not testify at guilt phase and thus was not subject to impeachment regarding prior convictions (Vol. VII, TR. 452-53). Chalu also was able to keep out of evidence Brown's possible motive for the killing, i.e., he was having sex with the seventeen year old victim (Vol. VII, TR. 454). Material in the 1967 PSI indicated that Brown had been sent to the Okeechobee School for Boys in part for molesting small children, information that he would not have wanted the prosecutor or jury to have (Vol. VII, TR. 456). He opined that the negative information therein was far more damaging and outweighed the positive information contained; it would have been devastating at penalty phase (Vol. VII, TR. 457). The defense succeeded in preventing the jury from learning about any prior criminal act (Vol. VII, TR. 457). The defense had discussed whether to use information that Brown claimed to have been a drug addict but the negative outweighed the positive (Vol. VII, TR. 457-

58). They wanted to portray Brown as one who had one explosion of criminality in an otherwise law-abiding, impoverished, underprivileged life (Vol. VII, TR. 458).

Craig Alldredge, a former Assistant Public Defender in the Hillsborough County office, handled the penalty phase in Mr. Brown's case. In two prior capital trials in which he handled the first phase, Wayne Chalu had been the second phase attorney (Vol. V, TR. 126). In October of 1986 Chalu asked him if he would do the second phase (Vol. V, TR. 127). Alldredge read the depositions, talked about the case with Chalu, discussed the case with Drs. Berland and Afield, met with Brown and interviewed the second phase witnesses before they testified (Vol. V, TR. 128). He was familiar with the aggravating and mitigating circumstances and the relevant case law (Vol. V, TR. 128). The point he sought to make with the jury was that Brown was suffering from severe mental illness and had a horrible childhood, with a low intelligence and on the night of the homicide was not in full control of his faculties (Vol. V, TR. 129). The defense supplied to Drs. Berland and Afield with whatever documentary evidence they had (Vol. V, TR. 130). Alldredge recalled that a MMPI examination performed by the Department of Corrections was provided to both Afield and Berland; he did not recall school records being provided (Vol. V, TR. 132). Neuropsychological testing in the form of a CAT scan or PET scan

was not done. He felt that there was sufficient time to prepare Dr. Afield for his penalty phase testimony and he was aware of what they had (Berland's report and testing, Afield's visit and interview and opinion regarding Brown) (Vol. V, TR. 136). He was not aware that school records apparently had not been supplied. Some materials were missing upon his review of the files (Vol. V, TR. 137). Alldredge interviewed family members prior to their testimony (Vol. V, TR. 139). He recalled that they had a difficult time locating a lot of the witnesses, getting them to come forward with what they remembered about the defendant when he was a youngster (Vol. V, TR. 140). The witness recalled that Berland had requested the D.O.C. MMPI and they supplied him with it (Vol. V, TR. 143). The witness acknowledged that he did not know if the PET scan test was available or had been developed in 1986 -- he certainly had never seen it used back in 1986 (Vol. V, TR. 149). Alldredge stated that he was not aware that prosecutor Benito's argument was improper and he did not object to it (Vol. V, TR. 151). On cross-examination Alldredge testified that Brown was a high school dropout at age fourteen, had started later then usual and would have had a very abbreviated school history (Vol. V, TR. 159). He had no recollection of whether they had reviewed school records; he did not view his role as to go back and review what investigative work had been done (Vol. V, TR. 160). He was more

concerned with dealing with the information that he had (Vol. V, TR. 160). Alldredge stated that Dr. Berland was the most thorough forensic psychologist that he was aware of and he did not deviate from his thorough preparation and analysis in the Brown case. Berland did not tell him there was anything that he had to have in order to render an opinion in this case (other than the MMPI which was furnished)(Vol. V, TR. 161). Berland was able to conclude that Brown suffered from some impairment, some brain damage, that he had diminished control and was more impulsive than he normally would have been, that he was psychotic -- all of which was argued to the jury (Vol. V, TR. 164). The defense was able to call witnesses to testify about the severe conditions of Brown's childhood including his father, brother and stepmother (Vol. V, TR. 164-165). The defense decided to use Berland because he was thorough, they thought he would make a good witness and he had integrity which would be to the client's benefit when he testified. He wouldn't modify his opinion just to say things they wanted to hear (Vol. V, TR. 165). Dr. Berland was able to conclude that Brown had a genuine mental illness. Alldredge added that "it would be great to have Sigmund Freud to tell me he was the craziest man he had ever seen but that just simply wasn't the testimony that was available" (Vol. V, TR. 166). Alldredge testified that the defense investigated and concluded that the statutory mitigator of no

significant history of prior criminal activity did not apply (Vol. V, TR. 176) and reiterated that PET scans were unavailable in 1986 (Vol. V, TR. 177). The defense presented evidence through family members that Brown had sustained head trauma from an accident and a beating (Vol. V, TR. 178). The witness agreed that had a CAT scan been ordered and performed and revealed no evidence of brain damage that would have undermined the testimony of Dr. Berland (Vol. V, TR. 179). Alldredge couldn't say whether Dr. Berland had school records (Vol. V, TR. 180). Alldredge didn't know whether the defense had the school records and simply decided not to use them (Vol. V, TR. 181).

Dr. Steven Szabo, a psychiatrist, testified that on March 28, 1986, was called to evaluate Brown in the county jail after Brown told the medical staff that he had buzzing in the head (Vol. V, TR. 190). Szabo stated that Brown had a blunt affect and complained of hearing voices of people named Pat and Tammy as well as difficulty sleeping (Vol. V, TR. 191). Szabo made diagnostic impression of schizophrenia residual type and possible antisocial personality (Vol. V, TR. 192). Szabo placed him on psychotropic medication Mellaril (Vol. V, TR. 193). He provided a slight increase in the dosage the next time he saw him a month later; Brown was calm, rational and not hallucinating. Szabo gave major credit for the improvement to the Mellaril. In October he increased the dosage

again because Brown apparently had not been getting his medications (Vol. V, TR. 194-195). A psychiatrist or psychologist who went to interview Brown at the county jail would have the benefits of his notes in the medical file (Vol. V, TR. 201). The records indicated that on some occasions Brown refused his medications (Vol. V, TR. 206-07). No medicines were forced upon him (Vol. V, TR. 207).

Dr. Jerry Fleischaker, a psychiatrist at the Child Guidance Center, identified a PSI (Defense Exhibit 2) listing Paul Alfred Brown dated June 25, 1967 containing a 1965 reference to the witness (Vol. V, TR. 214). The witness had no recollection of ever evaluating Brown, nor did he have a copy of the letter he was alleged to have sent that was placed in the PSI report (Vol. V, TR. 219).

Dr. Henry Dee, a psychologist, evaluated Brown in June of 1992 at the request of the Volunteer Lawyers Association (Vol. VI, TR. 232); the "intent was to mitigate post-conviction relief" (Vol. VI, TR. 233). He concluded that appellant suffered organic brain syndrome with mixed features and a long standing emotional disorder (Vol. VI, TR. 233). Dee stated that it would be fair to say that the MMPI profile he did were substantially the same as the results of Dr. Berland (Vol. VI, TR. 240). The witness acknowledged that "heightened premeditation" was a very difficult thing to talk about, "it depends on the court and the circumstance" (Vol. VI, TR.

245). Dee's findings were consistent with Dr. Afield's testimony and diagnosis (Vol. VI, TR. 259). The witness conceded that as to the record material not available to Drs. Berland and Afield "I don't think it would change their opinion" (Vol. VI, TR. 266). On cross-examination Dee stated that he did not have the background information provided to him at the time he spoke to Mr. Brown at the Florida State Prison, nor did he have police reports, a transcript of the confession, the notes or reports or testimony of Drs. Afield or Berland (Vol. VI, TR. 271). He informed Brown that he was there at the request of his attorneys to assess him for possible petitions to the court (Vol. VI, TR. 272). Brown told Dee that he didn't recall the crime and, without the transcript of the confession, Dee was not able to challenge his denial of memory (Vol. VI, TR. 276). Dee acknowledged that when Brown was interviewed by the Public Defender's investigator and attorneys he did not assert an inability to remember what happened. Brown told Dee the first time he knew what had happened was when he woke up in jail three days after the fact (Vol. VI, TR. 277). He acknowledged that Dr. Szabo's report of Brown's complaint of being unable to sleep was contradictory to what Brown was telling Dee (Vol. VI, TR. 278). Dee confirmed that Berland had given Brown multiple MMPIs, at least one orally (Vol. VI, TR. 280). The witness admitted that in the documents provided by CCR some I.Q. test scores were higher

than the one he administered (Vol. VI, TR. 281). Dee did not know the facts of the crime when he talked to appellant (Vol. VI, TR. 284). His findings were consistent with those of Afield and Berland (Vol. VI, TR. 292, 306). The one visit he had with Brown was sufficient time for him to render an opinion (Vol. VI, TR. 293).

Fay Allen Sultan, a clinical psychologist, retained by CCR, evaluated Brown in prison on October 8, 1996 and reviewed certain background information (Vol. VII, TR. 319). The witness opined that Brown was operating under severe extreme psychiatric and organic mental conditions at the time of the offense in 1986 (Vol. VII, TR. 333).

Bessie Conway knew appellant when he was a young boy (Vol. VII, TR. 361). Conway's half-aunt married Brown's father. She recalled once that his father beat him with a belt (Vol. VII, TR. 362). She couldn't recall having conversations with any relatives at the time the murder charges were pending (Vol. VII, TR. 366) and she couldn't remember when this incident occurred but thought Brown was about seven years old.

Daniel Russell Jackson, appellant's stepbrother, claimed that he was beaten when he moved in with appellant's father (his stepfather) (Vol. VII, TR. 372). The witness indicated that when he was about twelve or thirteen (appellant was a year younger --

Vol. VII, TR. 371) Bessie Conway told him that appellant was beaten and the police were called (Vol. VII, TR. 376). The witness talked to investigator Tony Webb over the phone and told him how they were treated (Vol. VII, TR. 383). He mentioned also that appellant had trouble messing with little kids in the neighborhood when he was a teenager (Vol. VII, TR. 384).

Jimmy Lee Brown, appellant's younger brother, similarly stated there was abuse in the family (Vol. VII, TR. 388). This witness had testified at Brown's trial (Vol. VII, TR. 404). He told the defense lawyers about his childhood and beatings (Vol. VII, TR. 406). He testified at trial about appellant's mistreatment by Walter and stepmother Nicie (Vol. VII, TR. 407).

Dr. Robert Berland wrote to the Public Defender's Office in 1986 telling them of his findings after meeting with Mr. Brown and testing him (Vol. VII, TR. 413). Customarily he does not recommend to defense attorneys that their clients undergo a CAT scan because, as indicated in his trial testimony, for most brain injuries there is no change in the shape or contours of the brain; unless they can keep it confidential there is more risk than benefit to seeking a scan. Even if there is some specific physical change, the scan is not always able to picture them (Vol. VII, TR. 415-16). In this case, Berland had found what he thought to be brain damage and he feared performing a CAT scan which might reveal nothing out of the

ordinary would be used to discredit his findings. He gave Brown three MMPIs (Vol. VII, TR. 416). It is appropriate and customary to administer the MMPI orally to some people. His decision to do it orally with Mr. Brown was not cavalier and Dr. Dee's report did not cause him to change his findings (Vol. VII, TR. 419). There was no data anywhere that contradicted Berland's conclusions (Vol. VII, TR. 421). He thought it would be a mischaracterization of his trial testimony to say that Brown was malingering (Vol. VII, TR. 425). Berland added that in 1986 the PET scan was not an accepted device, there was no research data on how to interpret it and is still not approved by the FDA as a medical diagnostic tool (Vol. VII, TR. 446). It wasn't important in the sense that he could form his opinions without it. Berland had enough information to conclude that Brown was psychotic (Vol. VII, TR. 447).

In Brown's Statement of Facts he complains that Judge Allen repeatedly interfered with counsel's direct examination and cross-examined the witness for the state (Vol. VII, R. 330-331, 334, 338, 345-346, 356, 366-368, 377, 386-387). And he adds in a footnote that the court interrupted and criticized counsel or the witness twenty-six times, thus denying him a full and fair hearing (Vol. IV, R. 80, Vol. V, R. 126, 139, 141, 148-149, 150, 152, 156-157, 168, 173, 175-183, 202-204, 217, 219, Vol. VII, R. 330-331, 334, 338, 345, 346, 356, 366-368, 377, 386-387). Since the criticism is

unfair and unwarranted, appellee must respond.

It is true that the court would occasionally interject to clarify a question when it was unclear or misleading (R 80, 139, 141, 148, 149, 150, 152, 157, 330-331, 334, 338, 345-346, 356, 377) or during redirect examination (R. 126, 168) or while counsel paused to decide upon further questioning (R. 156) or after counsel had finished asking questions of the witness (R. 173, 202-204) or to clarify questioning by the prosecutor on recross-examination (R. 175-183) or inquiring about whether documentary evidence was being introduced without testimony by a witness (R. 217-219) or after questioning completed by both sides (R. 366-368, 386-387). Defense counsel did interpose an objection at R 182 and the court responded that rather than assuming the role of the prosecutor “I’m the one that has to make the decision so I need the answers to the questions“ (R. 183). The court allowed defense counsel to interpose follow-up questions and the offer was declined (R. 183)

Appellant omits from his criticism the occasions wherein the lower court interjected and interrupted the prosecutor’s examinations (Vol. V, R 98, 100-102, 104, 106, 107, 111, 163; Vol. VII, R 384, 418). It is understandable since it would undercut appellant’s meritless -- if not frivolous -- assertion that the trial court would not permit a full and fair hearing. The point is that the defense was allowed to call whatever witnesses it chose

and concluded the hearing by announcing it had no further witnesses (Vol. VII, R. 469).

PRELIMINARY STATEMENT

Appellee insists that most of appellant Brown's asserted bases for relief may not be considered collaterally 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); 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. Dugger, 651 So.2d 84 (Fla. 1994).

SUMMARY OF THE ARGUMENT

Issue I: Appellant cannot prevail on a claim that an unconstitutionally vague jury instruction on the CCP aggravator was given since Mr. Brown did not challenge the constitutional validity of the instruction at the time of trial; he objected only to its evidentiary sufficiency. Appellant may not benefit from Espinosa v. Florida, 505 U.S. 1079, 120 L.Ed.2d 854 (1992) since the challenged HAC instruction struck down there was not given *sub judice* nor was HAC found, and any error would be harmless.

Issue II: Appellant was not denied a full and fair hearing but was allowed to present any testimony he chose to submit. Receipt of an adverse decision is not tantamount to an unfair hearing.

Issue III: The trial court properly ruled that trial counsel at the guilt phase acted as a proper advocate under the Sixth Amendment and collateral counsel now merely engages in hindsight second-guessing or Monday morning quarterbacking in an attempt to obtain relief where the best efforts of competent counsel were not successful.

Issue IV: The lower court properly determined that the Sixth Amendment was not violated by counsel at the penalty phase. Counsel properly used mental health experts whose conclusion is even confirmed by the defense's more recent expert, counsel could properly choose not to introduce damaging mitigating evidence, and

counsel was not required to predict future appellate decisions somewhat critical of the prosecutor's argument and properly used it to their advantage.

Issue V: Trial counsel is not deficient by the trial court's refusal to grant additional peremptory challenges and this is an issue for direct appeal.

Issue VI: The claim of the use of an unconstitutional automatic aggravating circumstance is barred as an issue for direct appeal (as well as being meritless).

Issue VII: The trial court correctly ruled that the challenge to the trial court's treatment of mitigating evidence was barred as an issue for direct appeal.

Issue VIII: Appellant's challenge to jury instructions is barred as an issue for direct appeal.

Issue IX: Appellant's complaint that the jury was misled by argument which diluted its sense of responsibility is barred as a claim for direct appeal not collateral challenge.

Issue X: Trial counsel was not ineffective for failure to request a mistrial for alleged jury misconduct.

Issue XI: There are no facts and no merit to the claim that the trial was fraught with error.

Issue XII: The lower court correctly denied relief on the claim that he was not permitted to interview jurors.

Issue XIII: The trial court's alleged erroneous ruling at

trial on the standard to evaluate expert testimony is barred as a question for direct appeal.

Issue XIV: Appellant's claim that it is improper to execute a mentally-retarded defendant is barred as an issue for direct appeal and is meritless.

ARGUMENT

ISSUE I

WHETHER THE DEATH SENTENCE WAS THE PRODUCT OF AN UNCONSTITUTIONALLY VAGUE JURY INSTRUCTION ON THE CCP AGGRAVATOR AND IMPROPER APPLICATION OF THE AGGRAVATOR.

In an order entered November 12, 1996, Circuit Judge Chet A. Tharpe entered a comprehensive order summarily denying relief on this claim (Claim I, below) finding it was an issue appropriate to raise on direct appeal and thus not cognizable via postconviction (Vol. III, R. 302-303).[2]

A. This claim is procedurally barred for failure to object at trial and to offer appropriate instructions.[3]

1. The defendant objected at trial only to evidentiary support for instruction, not to its constitutional validity. *See* R. 616 - 617.

This Court has held in Jackson v. State, 648 So.2d 875 (Fla. 1994) and Walls v. State, 641 So.2d 381 (Fla 1994) that to urge

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[2]Judge Tharpe's order recited that other issues required an evidentiary hearing (Vol. III, R. 306). Brown filed a Motion to Ensure Compliance with Rule 2.050(b)(10) Fla. R. Jud. Adm. on or about February 20, 1997 (Vol. III, R. 361-363). Judge Allen succeeded Judge Tharpe and presided at the evidentiary hearing (Vol IV, p. 29; Vol. III, R. 449-453).

[3]Appellant is not entitled to any relief under Espinosa v. Florida, 505 U.S. 1079, 120 L.Ed.2d 854 (1992) which held that the former jury instruction on the HAC aggravator was vague since no HAC instruction was given to the jury in the instant case (R 658-659) and no HAC finding was made by the sentencing judge in imposing sentence (R 912-916).

that the CCP instruction was unconstitutionally vague: "It is necessary both to make a specific objection at trial or request an alternative instruction at trial and to raise the issue on appeal." (641 So.2d at 387). *See* Occhicone v. State, 618 So.2d 730 (Fla. 1993) (Defendant's habeas corpus attack on the HAC instruction after Espinosa, defendant objected at trial only to evidentiary support for instruction not to the wording or constitutionality and no request for additional clarification language -- we should have mentioned in prior appeal it is procedurally barred and is so now).

See also Lightbourne v. State, 644 So.2d 54 (Fla. 1994) -- 3.850 appeal -- defendant objected at trial to HAC and CCP aggravators but only on grounds that evidence did not support the instructions. Since no specific objection as to validity of the instructions, claim is not preserved for appeal. Johnson v. Singletary, 612 So.2d 575 (Fla. 1993). Espinosa challenge to HAC instruction on habeas corpus is procedurally barred for failure to object to instruction on vagueness or other constitutional defect.

Hodges v. State, 619 So.2d 272 (Fla. 1993) -- on remand from the United States Supreme Court for Espinosa challenge to CCP. At trial the defendant complained that facts did not support finding of CCP and that aggravator was vague. The defendant did not object to form of instruction, nor request an expanded instruction. The Florida Supreme Court stated: "We summarily rejected claim on

appeal but we should have held it procedurally barred because Hodges did not preserve it for review by objection at trial. We now hold sufficiency of CCP instruction has not been preserved for review"; M. Davis v. State, 620 So.2d 152 (Fla. 1993)-on remand from U. S. Supreme Court on Espinosa claim, Florida Supreme Court found challenge to HAC instruction was barred because vagueness of instruction was not raised before trial judge. Wuornos v. State, 676 So.2d 972, 974 (Fla. 1996)(Defendant acknowledges failure to object to CCP instruction below, but argues that 7-5 jury recommendation demonstrates a sufficiently close case that we should lift the procedural bar. Nothing in our law permits such a result. Under Jackson, the failure to object raises a procedural bar that clearly applies here.); Pope v. State, 702 So.2d 221, 223-224 (Fla. 1997)(challenges to vagueness of CCP instruction barred unless specific objection made at trial on that ground and raised on appeal).

(2) Secondly, even if this court were to reject the foregoing procedural default contention by the state, post-conviction relief is unavailable because the decision in Jackson, *supra*, is not the type of major change in law contemplated by Witt v. State, 387 So.2d 922 (Fla. 1980) to warrant the grant of collateral relief. *See, e.g.*, Marvin Johnson v. Singletary, 647 So.2d 106, 109 (Fla. 1994)(decision in Richmond v. Lewis, 506 U.S. 40, 121 L.Ed.2d 411

does not constitute a change in law having retroactive application under Witt); Steinhorst v. State, 638 So.2d 33, 34 (Fla. 1994) (decision in Scott v. Dugger, 604 So.2d 465 was not a jurisprudential upheaval having retroactive effect); Ferguson v. Singletary, 632 So.2d 53, 55 (Fla.1993)(decisions in Corbett v. State, 602 So.2d 1240 and Craig v. State, 620 So.2d 174 are not fundamental changes in the law but rather "nonconstitutional, evolutionary developments in the law"); Turner v. Dugger, 614 So.2d 1075, 1078 (Fla. 1992) (ruling in Campbell v. State, 571 So.2d 415 was not a major constitutional change in the law as to require retroactive application on collateral attack); Routly v. State, 590 So.2d 397, 403 (Fla. 1991) (the decision in Parker v. Dugger, 498 U.S. 308, 112 L.Ed.2d 812 does not constitute a change in law which would require retroactive application); Bolender v. Dugger, 564 So.2d 1057, 1059 (Fla. 1990) (Decision in Maynard v. Cartwright, 486 U.S. 356 is not such a change in law under Witt to lift the procedural bar); Eutzy v. State, 541 So.2d 1143, 1145 (Fla. 1989). (decision in Booth v. Maryland, 482 U.S. 496 need not be retroactively applied to cases in which the claim was not preserved by a timely objection); Kight v. Dugger, 574 So.2d 1066, 1071 (Fla. 1991) (decision in Mills v. Maryland, 486 U.S. 367 is not fundamental change in the law requiring consideration of a barred claim).

3. Harmless Error --

Finally, post-conviction relief must be denied because any error is harmless. This Court has recognized the applicability of the harmless error doctrine when an improper CCP instruction has been given. *See* Walls v. State, 641 So.2d 381 (Fla. 1994) (approving CCP finding for execution-style murder despite vague instruction). *Accord*, Foster v. State, 654 So.2d 112 (Fla. 1995) (Harmlessness exists if the record supports a finding that the murder was, beyond a reasonable doubt, cold, calculated, and premeditated without any pretense of moral or legal justification under any definition of those terms.) Henderson v. Singletary, 617 So.2d 313 (Fla. 1993) (no statutory mitigating factors were established and the nonstatutory mitigating factors presented were of comparatively little weight).

In the instant case, the trial court in the sentencing order found:

> There was, from the evidence a lengthy, methodic, and involved series of events that showed a substantial period of reflection and thought by the defendant. These include, among others, the defendant's securing bolt cutters, going to the victim's home in the middle of the night, cutting the lock, going back to the car to get the weapon, returning and entering where the victims slept, the defendant's confessed knowledge of what [sic] knew he would have to do, the fact that he armed himself to "talk" to a seventeen year old girl and the shot to the head to "make it

> quick". The defendant's act was nothing less than an execution.
>
> (R 913 - 914)

And as this Honorable Court found on direct appeal:

> The psychologist who testified on Brown's behalf at sentencing admitted that Brown made a statement to him indicating he had considered shooting the victim before going to her residence. The psychologist conceded that the homicide may well have been preplanned rather than impulsive. [citation omitted]. The trial court characterized this killing as "nothing less than an execution". On the totality of the circumstances this case demonstrates the heightened premeditation necessary to finding the murder to have been committed in a cold, calculated and premeditated manner.
>
> (565 So.2d 304, at 308 - 309)

Relief must be denied.[4]

Brown provides in his brief a chronology of events describing his challenge on direct appeal to the standard instruction on CCP (although unpreserved at trial by challenge to the constitutional validity) based on Maynard v. Cartwright, 486 U.S. 356, 100 L.Ed.2d 372 (1988) which this Court found to be inapposite and rejected "Brown's attempt to transfer Maynard to this state and to a different aggravating factor". (emphasis supplied). Brown v. State, 565 So.2d 304, 308 (Fla. 1990). As stated previously,

[4]Harmlessness is additionally supported by the trial court's sentencing order which recites -- prior to treatment of the CCP factor -- that either one of the two other remaining aggravators discussed "far outweighs all of the claimed mitigating circumstances". (R 913)

Espinosa[5] cannot serve as a basis for postconviction relief *sub judice* as the HAC jury instruction found to be infirm by the United States Supreme Court was not given in this case nor was any HAC finding made by the trial judge. And contrary to appellant's assertion at Brief, p. 26 that the trial court denied a defense objection and refused to give a limiting construction, the record shows only that the defense complained of evidentiary sufficiency to support a jury instruction on CCP.[6]

---

[5]Espinosa v. Florida, 505 U.S. 1079, 120 L.Ed.2d 854 (1992).

[6]

> THE COURT: Which the Defendant is to be sentenced was committed in a cold, calculated, premeditated manner without any pretense or moral justification.
> MR. BENITO: That's all I have.
> MR. CHALU: I object to that one. There is no basis in the evidence before the Court. It is insufficient evidence to border on the instruction on that.
> THE COURT: Any further objection?
> MR. CHALU: No.

(Florida Supreme Court Case No. 70,483, Vol. VI, TR 616).

ISSUE II

WHETHER MR. BROWN WAS DENIED A FULL AND FAIR HEARING REGARDING HIS PROSECUTORIAL MISCONDUCT CLAIM.

(a) The Claim of Ineffectiveness of Trial Counsel in Failing to Object to the Prosecutor's Closing Argument:

In the penalty phase closing argument prosecutor Benito gave the following unobjected-to argument:

> Now in anticipating Mr. Alldredge's argument, I have to anticipate that Mr. Alldredge is going to get up here and tell you that life imprisonment without the possibility of parole for 25 years is sufficient punishment in this case. Life imprisonment, Mr. Alldredge will argue, is a living hell, torture, in jail for life. Life imprisonment he'll argue, is sufficient punishment.
>
> What about life imprisonment, ladies and gentlemen? What about life imprisonment? Now I am not saying that I would like to spend one day in jail, all right, don't get me wrong, but what about life imprisonment? What can one do in prison? You can laugh; you can cry; you can eat; you can sleep; you can participate in sports; you can make friends; you can watch TV; you can read; in short, you live to learn -- you live to learn about the wonders that the future holds. In short, it is life.
>
> People want to live. Life imprisonment is life. If Pauline Cowell, if she had had it, she would have given Paul Brown the world if he would have just let her live. People want to live.
>
> Life imprisonment if [sic] life, but Pauline Cowell is dead, and she is dead for one reason. She is dead because Paul Alfred Brown decided, decided for himself, that she should die. That man, right there, made that decision, and for making that decision -- for making that decision, he also deserves to die.
>
> The punishment must fit the crime.
>
> If it wasn't for Paul Alfred Brown,

> ladies and gentlemen, Pauline Cowell, 17 years old, would have almost her entire life ahead of her. She was 17, but Pauline Cowell is no more. On this earth for 17 years and now she is gone.
>
> (Florida Supreme Court Case No. 70,483, Vol. IV, R. 636-637).

At the evidentiary hearing below, defense counsel Chalu testified that he was familiar with the prosecutor's penalty phase argument and:

> A. That argument was ruled improper a number of years after this trial, is my understanding, or sometime after this trial. I don't know exactly when after this trial. But at the time that we were in this trial, there was no case law that indicated that argument was improper.
>
> I think the cases that have ruled it improper have pretty much held it to be error but harmless, improper, but not necessarily harmful. There's harmless error there; in other words, per se, not reversible. There was a harmless error there.
>
> I personally don't think it was so bad. I think we capitalized on it, too. Mr. Alldredge sort of capitalized on that. In their closing, it seemed closest to me innuendo if you're alive, you can do these things; if you are not, you can't. I didn't think it was that prejudicial.
>
> (Vol. IV, R. 91)

Similarly, co-counsel Alldredge testified that he was not aware the prosecutor's argument was improper and did not object to it (Vol. V, R. 151). As Chalu testified, defense counsel sought to exploit the prosecutor's comment and turn it to their advantage (Florida Supreme Court Case No. 70,483, Vol. VI, R. 651-653):

Mr. Benito is right in a way because I am going to talk about life in prison, and I remember reading years ago about the classic, and I believe that it was Odysseus who goes to hell and talks to Achilles, and Achilles, you know, is the great hero who died, and goes up to Achilles and says, "Okay. What's it like down here in hell?"

Achilles turns to him and says, "I'd rather be the lowest slave on earth for exchange of hell." In other words, any form of life is better than death.

I am not disagreeing with that, but I think it's important for you to know what life imprisonment is. It's 1987, now. Paul is 37 years old. He will be eligible for parole, if you vote for life, he will e [sic] eligible for parole in 2012, well into the next century, and assume that you and I will be alive to see it. He will be 62 years old when he is eligible for parole.

As I earlier talked to you there is no parole. Remember, fi [sic] you recommend life, the Judge has no choice but to sentence him to life in prison. Life means life. Life doesn't mean in six months Paul will be out. It will be twenty-five years before he is eligible to be considered to be out, and if there is no mechanism, if no machinery to get him out, he'll stay until he dies. He will die in prison. If he doesn't die of a disease, if he is not beaten to death by another inmate, if he doesn't commit suicide, he will die in prison.

Mr. Benito tells you prison ain't that bad. The number one cause of death in Florida State Prison system is suicide, so if it ain't all that bad, there are a lot of men who are obviously making terrible mistakes.

It's a world of reinforced concrete, and steel, and steel doors, and coils of razor wire, and electric fences, and machine guns, and shotguns. Mr. Benito says that he'll make friends and be able to enjoy sports. He will spend the rest of his life with men who society has found their presence so abhorred that they have to be locked away.

Paul Brown will most likely get out of

> prison when he dies. His escape from prison will be one day when he is taken down to the infirmary and pronounced dead and taken away.
>
> He is going to die. We all have to die. His life has been garbage. If he spends the rest of his life in prison, the rest of his life is going to be garbage, too, but it will be life.
>
> When I asked you during voir dire about why you kill people, what's the point of electrocuting people, and you told me deterrents, almost to a man or a woman, and you said deterrents. A lot of you, when I asked you, you said, "Well, we want to deter Paul Brown from ever doing it again. We want to stop him from ever doing it ever again."
>
> If Judge Spicola sentences him to life, as he must -- there's no choice, now, we're talking about life imprisonment and death j-- if Judge Spicola sentences him to life in prison, he will spend life in prison. He's not going to harm another innocent person, again.

After listening to the testimony presented and following Brown's representation that there were no additional witnesses, the lower court entered its order rejecting this claim (Vol. III, R. 451):

> The claim is essentially that trial counsel was ineffective for failing to object to the prosecutor's improper closing argument in second phase, specifically at p. 636, lines 14-23 of the trial transcript:
>
> > What about life imprisonment, ladies and gentlemen? What about life imprisonment? Now I am not saying that I would like to spend one day in jail, all right, don't get me wrong, but what about life imprisonment? What can one do in prison? You can laugh; you can cry; you can eat; you can sleep; you can participate in sports; you can make

> friends; you can watch TV; you can read; in short, you live to learn -- you live to learn about the wonders that the future holds. In short, it is life.
>
> It is undisputed that counsel for the defense did not object. Mr. Chalu was familiar with the prosecutor's use of this argument and was also aware that such argument had not been found to be improper at that time. Mr. Alldredge testified that he was not aware that such argument was improper, that he would have objected had he known, and that he did not object. Assuming without deciding that penalty phase counsel was deficient in his performance for failing to object to this portion of the prosecutor's argument, this Court cannot and does not find that the alleged deficient performance resulted in prejudice which meets the prejudice prong of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), that is, a reasonable possibility that the outcome would have been different.

While it may be understandable that a litigant is disappointed at an adverse result (and about 50% of litigants will be) that does not excuse the false assertion that Brown was denied a full and fair hearing on the claim.

Appellee submits that counsel was neither deficient nor did the performance result in prejudice as required by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Several prior decisions of this Court had affirmed the judgments and sentences of death when the same or similar prosecutorial argument had been given. *See* Hudson v. State, 538 So.2d 829 (Fla. 1989); Jackson v. State, 522 So.2d 802, 809 (Fla. 1988)("We do not,

however, find the misconduct to be so outrageous as to taint the validity of the jury's recommendation"); Hodges v. State, 595 So.2d 929 (Fla. 1992). And these cases were decided after Brown's 1987 trial. This Court first reversed a judgment and sentence based on such a prosecutorial argument in Taylor v. State, 583 So.2d 323 (Fla. 1991) -- decided some four years after appellant's trial.

Counsel is not required to anticipate future appellate decisions. Elledge v. Dugger, 823 F.2d 1439, 1443 (11th Cir. 1987); Provenzano v. Dugger, 561 So.2d 540 (Fla. 1990); Nelms v. State, 596 So.2d 441 (Fla. 1992); Stevens v. State, 552 So.2d 1082, 1085 (Fla. 1989); Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982); Lambrix v. Singletary, 641 So.2d 847 (Fla. 1994).

Counsel could reasonably decide in the instant case that the prosecutor's remark constituted a mere tautology (life imprisonment is life) and a reference to there being a difference between life and death ". . . appear to reflect common knowledge and are probably the sentiments of a large number of people" Breedlove v. State, 413 So.2d 1, 8, n 11 (Fla. 1982) and that it was preferable to utilize the prosecutor's comment in the final defense response for a more effective result.[7] And contrary to appellant's suggestion the prosecutor did not give an improper "message to the community" argument, but rather argued that the facts of the case

[7]It can hardly be argued that this Court's 1988 rebuke of the prosecutor's argument fell on deaf ears to Mr. Benito in his 1987 argument in the instant case.

demonstrated the presence of multiple aggravators for this brutal crime, that the punishment should fit the crime and appellant deserved to die (Florida Supreme Court Case No. 70,483, Vol. VI, R. 625-637). There simply was no improper prosecutorial argument permeating the case.[8]

Interestingly, appellant now contends that Mr. Chalu's opinion on the matter is irrelevant since he was primarily the guilt phase defense counsel. It apparently was not too irrelevant to solicit and elicit his testimony at the evidentiary hearing and now -- having obtained an undesired response -- Brown seeks to avoid it. Chalu testified that he and co-counsel Alldredge knew what each other were doing in terms of preparation "because we talked about it all the time" (Vol. IV, R. 52) and they both prepared the experts for testimony and Chalu was concerned with what the experts could give in the way of both guilt and penalty phase defenses (Vol. IV, R. 54). Chalu did "most of the legal work in this case" (Vol. IV, R. 70) and was responsible for preparing motions and jury instructions for both phases (Vol. IV, R. 71, *see also* Florida Supreme Court Case No. 70,483, Vol. VI, R. 612-624, and Vol. VIII, R. 840-857, R. 897-900).

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[8]Unlike Nowitzke v. State, 572 So.2d 1346 (Fla. 1990) the prosecutor in the instant case did not denigrate the mental health profession; he only noted the inconsistencies in the testimony of Dr. Afield and Dr. Berland, a permissible prosecutorial function.

(b) Alleged Prosecutorial Misconduct at the Evidentiary Hearing:

Prior to the evidentiary hearing the court heard argument on appellant's second motion to disqualify the state attorney's office[9] and a Motion to Quash Subpoena on Material sought by the Prosecutor (Vol. IV, R. 4-27; Vol. III, R. 364-419). CCR complained that prosecutor Bedell had been looking through microfiche copies of the trial attorney's files in the Public Defender's office and served a subpoena for the trial attorney and investigator notes and CCR was claiming certain exemptions for the court's review. The prosecutor answered that Mr. Chalu had informed him that some of the notes were missing from the file and since Ms. Backhus was in a meeting he left the subpoena. The prosecutor wanted the court to review an information sheet CCR claimed as an exemption. The court reviewed the two letters and information sheet and stated that she couldn't see the relevance of the materials to these proceedings but also didn't see the point in exempting the documents (Vol. IV, R. 7-16). After reading Reed v. State, 640 So.2d 1094 (Fla. 1994) the court concluded:

> Okay, I don't see how these documents are unrelated to, as anticipated by Reed, unrelated to the crimes for which the defendant was convicted, such as evidence of other crimes. I can understand how if you have a document in the file where the defendant is admitting to other crimes for which he was not tried and perhaps other

[9]The first motion to disqualify had been granted by Judge Sexton (Vol. I, R. 107-120) and that order was quashed by this Court on January 31, 1995 (Vol. III, R. 414), rehearing denied May 1, 1995.

> crimes that had never been tied to him by the State and never prosecuted, I can certainly understand how that would be an exclusion or an exemption under this, but looking at these documents, I don't see how this comes within the purview at all of the exemption.
>
> (Vol. IV, R. 18)

The court added that the documents may be relevant to the constitutionality of sentencing procedures "so I'm going to release them" (Vol. IV, R. 18). The state then withdrew the subpoena (Vol. IV, R. 20). On the Motion to Disqualify prosecutor Bedell explained:

> MR. BEDELL: And what had happened in this case from my perspective was that a couple of years ago, I had asked Mr. Lopez, who was then the Chief Assistant at the Public Defender's Office, if they had the file so that Mr. Chalu and Mr. Alldredge could look at it. And I did that knowing that this day was going to come sometime, and he told me that they couldn't find the file. And so I didn't do anything for quite awhile.
>
> And I called back after he was elected judge and spoke with him before he left office one more time, and he turned over to me some microfiche, which I never looked at. I suspect that they are duplicates of the microfiche that they have at the Public Defender's Office. However, what's on the microfiche is not even the case where Mr. Brown is charged with first-degree murder.
>
> What I finally figured out was that it is the case where he was charged with attempted first-degree murder and armed robbery, an entirely separate case. But I looked through that looking for the notes because, again, Mr. Chalu had told me that they had not been able to find or see the handwritten notes that they said should have been in Mr. Brown's file.
>
> In addition to that --
>
> THE COURT: Okay, you're talking about

> the hard copy of the file. I assume the hard copy of the file was turned over to Ms. Backus.
>
> MR. BEDELL: Right. But when I talked with Mr. Lopez way back then, he didn't even know that. Quite frankly, it wasn't until I went out to their office and looked at it that I was able to confirm that the original file even existed any longer, and all that's on the microfiche. For the capital case is the sentencing order. That's it.
>
> THE COURT: That's what you looked at?
>
> MR. BEDELL: No, I looked at the other file and finally figured out after I had looked at a number of depositions that were in it, a number of transcripts and some pages and matching up numbers because they have a separate numbering system that they use, that you can't -- that it's not -- it doesn't directly correspond to the clerk's numbers, that what I was looking at was not even the capital case; it was the attempted murder case that was prosecuted simultaneously with the capital case and which Mr. Brown ultimately pled guilty to.
>
> However, what I saw in that file and what I made copies of and what I have right here that the Court can look at if you want to is virtually identical to what Ms. Backus turned over to me. And the purpose of making those copies again was to get Mr. Chalu and Mr. Alldredge to look at them so that they could be prepared to answer the questions that they were going to have to answer in this hearing. It wasn't to go snooping around to try to find out secrets of Mr. Brown. I wanted to know simply what he had disclosed to his lawyers and whether they had diligently pursued the information that he had given to them, and that's what happened.

(Vol. IV, R. 22-24)

The lower court noted that the defense was outraged but inquired what was the point if the prosecutor didn't see anything. The prosecutor added that the other case of attempted murder and

armed robbery was not brought out by the prosecution at trial (prosecutor Benito had expressly waived it as an aggravator). The lower court denied the motion to disqualify (Vol. IV, R. 25-27).

Appellant's contention that the lower court should have disqualified the State Attorney's Office because Mr. Bedell looked at the Public Defender's files to see if notes of former Assistant Public Defender Chalu and supporting staff were missing is meritless. As Bedell stated what he looked at and copied was identical to what attorney Backhus turned over. Certainly attorneys Chalu and Alldredge were entitled to become familiar with their notes and files prior to being exposed to rigorous cross-examination under oath at the imminent evidentiary hearing. And even if Mr. Bedell had not been there, Mr. Chalu would certainly have been permitted to testify as to his trial actions, strategy and conduct which included keeping the jury unaware of other violent offenses committed by the appellant.

The lower court properly denied appellant's insubstantial request.

ISSUE III

WHETHER MR. BROWN WAS DENIED A FULL AND FAIR HEARING REGARDING THE EFFECTIVE ASSISTANCE OF COUNSEL AT GUILT PHASE OF HIS TRIAL.

The record reflects that on the morning of March 3, 1997, counsel for Mr. Brown announced ready to proceed on the scheduled evidentiary hearing for issues 3, 6, 7, and 8 (Vol. IV, TR. 29). The record further reflects that on March 4, 1997, Brown's counsel announced that it would rest its case in chief (Vol. VII, TR 411) and declined an offer to present additional witnesses when the state had completed its presentation (Vol. VII, TR 469). Nevertheless, appellant urges that he was denied a full and fair haring. Appellee disagrees. *See* Statement of Facts, *supra*.

Appellant points out that Judge Allen's final order denying relief cites in pertinent part:

> Claim 7 alleges ineffective assistance of counsel at guilt phase for failure to adequately investigate, object and prepare a challenge to the State's case and/or because the State withheld material evidence. The testimony of Mr. Chalu, guilt phase counsel for the defense, refutes any deficiency in investigation, objections, or preparation and the Defendant has failed to show any deficiency. Guilt phase counsel had a clear theory of defense, i.e., lack of intent, and the record shows that he meticulously prevented the introduction of highly prejudicial evidence against his client. Assuming once again that the Defendant could show some deficient performance, he does not show how such resulted in prejudice. Even with the benefit of hindsight, it does not

> appear that guilt phase counsel would have done things differently.
>
> (Vol. III, R. 451-452)

Appellant criticizes the lower court for failing to make attachments to its order but the court is not required to add attachments unless there is a summary denial and Judge Allen presided over an evidentiary hearing. Additionally, Judge Allen found "no reason to disturb the Order denying in Part those claims entered on November 12, 1996" (Vol. III, R. 450). That order by Judge Tharpe does contain attachments supporting the summary denial of those claims (Vol. III, R. 298-355).

In any event, appellant appears unsatisfied with the lower court's order. Brown's contention that he did not understand the implications of Mr. Chalu conceding guilt is unsupported by any testimony by Brown himself.[10] If appellant's team chose not to present additional testimony that was their choice. Hall v. State, 420 So.2d 872, 874 (Fla. 1984).

(1) The Concession of Guilt Allegation:

Mr. Chalu explained at the hearing that his theory of defense was dictated by two factors, Brown's account of what had happened and doctors' accounts of his mental state at the time. When the motion to suppress confession was denied, the only real, viable

[10]The only witnesses called below by the defendant at the evidentiary hearing were Mr. Buchanan, Mr. Chalu, Mr. Alldredge, Dr. Szabo, Dr. Fleischaker, Dr. Dee, Fay Sultan, Bessie Conway, Daniel Russell Jackson, and Jimmy Lee Brown.

defense remaining was to argue a lesser offense and, if unsuccessful, be prepared at penalty phase. Counsel worked hard in both phases (Vol. IV, TR. 56-57). Appellant had told Chalu that he entered the premises without the intent to kill, but to talk. Counsel's theory was that he was guilty of armed trespass and not armed burglary, the significance of which was that it would support a third-degree murder but not a first-degree felony murder. The defense as to premeditated murder was Brown's account to police that he was not planning to shoot her and even though he contemplated he might have to shoot her that was not his plan, and the shooting was impulsive when she started screaming. He hoped the jury would return a lesser degree of homicide (Vol. IV, TR. 58-59). Chalu had been successful in at least one other case urging the jury to return a lesser second-degree murder verdict (Vol. V, TR. 110-111). Thus, trial counsel's argument to the jury that Mr. Brown's culpability did not extend beyond second-degree murder (Florida Supreme Court Case No. 70,483, TR. 478) is understandable and consistent with his role as an advocate under the Sixth Amendment. In an abundance of caution Chalu had retained Dr. Berland for possible guilt phase defenses as well as mitigation and neither of the mental health experts were able to provide anything for guilt phase (Vol. IV, TR. 54-55).

Chalu testified that he took great pains to make sure Brown understood what they were saying because he was a little slow, that

he had previously dealt with clients with similar disabilities and Brown was very cooperative and:

> Mr. Brown was pretty much agreeable to pretty much everything we did, to be honest with you.
>
> (Vol. IV, TR. 88)

Appellant cites Harvey v. State, 656 So.2d 1253 (Fla. 1995) as authority for a remand for an evidentiary hearing where it was unclear whether the client was informed of the strategy to concede guilt and argue for second-degree murder. While Harvey may have originally been deprived of an opportunity to prove his claim at an evidentiary hearing, Mr. Brown was not and he simply did not present testimony that he was unaware of counsel's strategy. Nor is appellant aided by United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991). There, defense counsel in opening argument commented that witnesses had varied in their recollection not because he was trying to raise reasonable doubt "because again I don't want to insult you intelligence" and that if they found defendant guilty they should not "ever look back" and agonize whether they had done the right thing. Id. at 1071. The Court concluded that counsel's action was not a strategy to gain a favorable result that misfired but rather conduct that tainted the integrity of the trial, an abandonment of the client at a critical stage of the proceedings. But unlike Swanson, trial counsel Chalu did not inform the jury his view that there was no reasonable doubt regarding the only factual issues that are in dispute. Rather, he argued that the evidence

demonstrated a lesser degree of culpability than the first-degree murder advocated by the prosecutor (Florida Supreme Court Case No. 70,483, R. 478-486). *See* Williams v. Calderon, 52 F.3d 1465, 1470 (9th Cir. 1995) (declining to equate an unwinnable case with abandonment; instead counsel did all he could with the evidence he had). It is one thing to urge the jury to find one's client guilty as in Swanson and quite another to argue that only second-degree, not first-degree, murder has been proven and that the state had failed to prove the crime charged in the indictment. *See* McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984) (counsel may argue that at best the government proved manslaughter in a first-degree murder case without defendant's prior knowledge or consent); Lobosco v. Thomas, 928 F.2d 1054 (11th Cir. 1991) (even if direct concession of guilt in closing argument, the defendant had also confessed his guilt to the police); *see also* Clozza v. Murray, 913 F.2d 1092, 1099 (4th Cir. 1990) (drawing a distinction between a remark which amounts to a tactical retreat and one which amounts to a complete surrender and distinguishing a case like Francis v. Spraggins, 720 F.2d 1190 where counsel argued a belief in the client's guilt after the client had testified and denied any knowledge of participation in the offense). *Accord*, Nielsen v. Hopkins, 58 F.2d 1331, 1336 (8th Cir. 1995).

(2) The Desire for Opening and Closing Argument:

Appellant suggests that counsel failed to properly investigate the case and his performance was marred by the desire to retain opening and closing argument. Brown ignores Chalu's testimony. Chalu spoke to family members (Vol. IV, TR. 67) and determined they were not able to offer anything for guilt phase. The defense had an uphill battle once the motion to suppress confession had been denied and it was important tactically to try to maximize the chances of succeeding in their theory of defense (Vol. IV, TR. 69). This Court has agreed on the significant role of retaining closing argument by holding that improper denial of that benefit to the defense constitutes automatic reversal. Birge v. State, 92 So.2d 819 (Fla. 1957); *see also* Wike v. State, 648 So.2d 683 (Fla. 1994). *See* VanPoyck v. State, 694 So.2d 686 (Fla. 1997) (approving tactical choice made by defense counsel to retain the advantage of opening and closing argument). Chalu testified that with regard to intoxication the defense investigator notes reveal that Brown stated he was not high or intoxicated on the date in question (Vol. V, TR. 107) and Brown had similarly told Detectives Raney and Davis that he was not under the influence of drugs or alcohol and did not drink (Vol. V, TR. 108). Chalu explored a possible insanity defense with Dr. Berland and Dr. Afield and there was no indication from either that would have supported an insanity defense (Vol V, TR. 108). Chalu did not fail to put on evidence solely to retain

closing argument but in addition given the state of the evidence, witnesses and doctors' reports they didn't need them to bolster the defense and there was no mental health defense recognized which would have been permitted in the first phase; thus unnecessary witnesses should be avoided (Vol. V, TR. 109). Appellant did not indicate to Chalu or his investigators that he did not recall the events of the night of the shooting and indeed Brown's good recollection was one reason why Dr. Berland could not opine his emotional disturbance was extreme or his capacity to conform his conduct was substantially impaired (Vol. V, TR. 116-117). Chalu explained that the main decision in the area regarding diminished capacity at that time was Gurganus v. State, 451 So.2d 817 (Fla. 1984) (Vol. V, TR. 117) and he thought that the Sireci[11] and Mason[12] precedents were not helpful since he had two competent mental health experts -- one a psychologist, the other a psychiatrist -- and they were not providing anything useful for the guilt phase. Brown was not in the retarded range of intelligence, he had nothing to argue lack of specific intent (Vol. V, TR. 119).[13] *See* Remeta

[11]State v. Sireci, 502 So.2d 1221 (Fla. 1987)

[12]Mason v. State, 489 So.2d 734 (Fla. 1986)

[13]In Gurganus v. State, 451 So.2d 817 (Fla. 1984) this Court held that the defense should have been permitted to introduce expert testimony to support a voluntary intoxication defense to first-degree murder. In Chestnut v. State, 538 So.2d 820 (Fla. 1989) -- decided two years after Brown's trial -- this Court held that evidence of abnormal mental condition not constituting legal insanity is inadmissible to prove that accused could not or did not entertain the specific intent or state of mind essential to proof

v. Dugger, 622 So.2d 452 (Fla. 1993) (rejecting contention that trial counsel was ineffective in failing to present an intoxication defense since the decision "was a tactical one based on what Remeta's counsel felt the facts of the case supported" and not ineffective at penalty phase since mental health expert's original testimony would not have significantly changed even with additional information).

Appellant can obtain no relief pursuant to Riggins v. Nevada, 504 U.S. 127, 118 L.Ed.2d 479 (1992) which held that it may violate a defendant's Sixth and Fourteenth Amendment rights to forcefully administer antipsychotic drugs during a trial. In the instant case defense witness Dr. Steven Szabo testified that he saw Mr. Brown in the county jail in March of 1986 and treated him with the antipsychotic medication Mellaril and gave him a slight increase in June of 1986 (Vol. V, R. 193-194). He increased the dosage in October of 1986 because he apparently was not getting his medications (Vol. V, R. 195). Brown improved on the medication (Vol. V, R. 196). The witness added that the records showed that on some occasions appellant refused the medication and the medicine "was never forced upon him" (Vol. V, R. 206-207). Appellant's

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of the offense. In Bunney v. State, 603 So.2d 1270 (Fla. 1992) -- decided five years after appellant's trial -- the Court held that evidence of epilepsy was admissible to show lack of specific intent to commit first-degree felony murder.

Chalu testified that appellant informed him that alcohol intoxicants were not significant and officers who came in contact after Brown's arrest indicated nothing special insofar as drugs and intoxicants were concerned (Vol. IV, R. 89-90; Vol. V, R 107-108).

trial occurred in February of 1987. Riggins is inapplicable.[14]

Additionally, unmentioned by appellant is that Chalu kept damaging information out of the jury's consideration. He successfully objected to evidence prosecutor Benito wanted to introduce (e.g., reference to the subsequent robbery and shooting was stipulated out entirely and the motive for the crime as well as the full extent and trauma to the surviving victim) (Vol. V, TR. 97-100). By Brown's entering a plea to the other offense, prosecutor Benito agreed not to use those convictions in the second phase. That evidence would have been very prejudicial (robbery and shooting) and with Brown not taking the stand the prosecution could not impeach with the fact of these prior convictions (Vol. VII, TR. 453). The motive Chalu wanted kept out pertained to the thirty-six year old Brown having sex with a seventeen year old victim and material in a 1967 PSI regarding allegations of sexually molesting children he would have wanted kept away from the jury (Vol. VII, TR. 454-456).

(3) The Failure to Request a Mistrial:

Appellant challenges counsel's failure to move for mistrial when a juror had become exposed to a newspaper article. Chalu testified that he recalled the court having an inquiry about an article jurors may have read but that it was too inconsequential

[14]As to the alleged deficiency of trial counsel for not informing the jury of appellant's use of Mellaril, suffice it to say that both Drs. Berland and Afield testified as to his taking this medication at the county jail (Vol. VI, R 538, 585, 588).

for a mistrial request (Vol. IV, TR. 83-84). The trial record reflects that Chalu had expressed a concern that the article although accurately reporting what had happened in court but had mentioned other crimes. The court made inquiry of the jurors and one juror answered that she had only seen the headline, there had been no discussion among jurors and no further inquiry was sought (Florida Supreme Court Case No. 70,483, TR. 303-306). Appellant's complaint that Judge Allen did not specifically address the issue is answered by the fact that Judge Tharpe had previously addressed, considered and rejected the claim (Vol. III, R. 304-305) and Judge Allen found no reason to disturb the ruling (Vol. III, R. 450).

(4) <u>The Disclosure of Gail and Barry Barlow</u>:

In this claim appellant appears to make a dual argument that the prosecutor provided inaccurate information about discovering the whereabouts of witnesses Gail and Barry Barlow and that trial counsel was ineffective in impeaching them or using them to defense benefit.[15] The direct appeal record shows that the Barlows were allowed to testify even though they did not appear for deposition, but after defense counsel did take their depositions (Florida Supreme Court Case No. 70,483, TR. 254-258, 259, 334, 406).

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[15]Brown argues at page 52 of his brief that collateral counsel has learned that prosecutor Benito had the witnesses' new address ten months prior to trial, an assertion repeated from the amended motion to vacate (Vol. II, R. 174). No testimony nor document evidence was adduced at the evidentiary hearing to support the assertion and if this is intended to be appellate testimony, the state objects.

Defense counsel had reviewed their depositions prior to their testimony. He did not cross-examine them and the witnesses had briefly testified they had not given appellant permission to enter the premises where the victim was killed (Florida Supreme Court Case No. 70,483, TR. 411-424). Mr. Chalu's testimony at the evidentiary hearing was enlightening -- the Barlows were hostile to both appellant Brown and to Chalu, they would not have assisted in any manner and Chalu wouldn't have cared if the state had never found those people (Vol. V, TR. 111-112). And Chalu didn't think that prosecutor Benito was hiding anything -- it was only an oversight (Vol. IV, TR. 83). Appellee notes that Brown did not produce the Barlows at the evidentiary hearing to offer supportive testimony.

(5) <u>The Failure to Use Witness Jimmy Brown</u>:

Jimmy Brown testified at the evidentiary hearing regarding the circumstances of his growing up (Vol. VII, R. 387-411). He also testified at the penalty phase of trial on behalf of appellant (Florida Supreme Court Case No. 70,483, R. 591-597).[16] He also testified below that the night before the murder he saw appellant grab a swing blade and start killing the grass (Vol. VII, R. 401-402). He felt that he might as well be executed if appellant were

[16]It would be understandable if trial defense counsel did not want to use Jimmy Brown at guilt phase who did not know of the shooting until police arrived that morning, lest he admit that he has known appellant "to be a very violent person" (Florida Supreme Court Case No. 70,483, Vol. VI, R. 596).

(Vol. VII, R. 403). The witness stated that before he went inside on the evening before the murder appellant was “acting okay” (Vol. VII. R. 409). Thus, counsel was not deficient nor is there a reasonable probability of a different outcome had trial counsel called Jimmy Brown to testify in the guilt phase.

ISSUE IV

WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT PENALTY PHASE.

I. THE LEGAL STANDARD.

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 whether the deficiency compromised the process to such a degree as to undermine confidence in the correctness of the result. Ferguson v. Singletary, 632 So.2d 53 (Fla. 1993). *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. . .").

II. THE LOWER COURT'S RULING.

After considering all the evidence submitted by Mr. Brown at the evidentiary hearing, the lower court ruled as follows:

> Claim 8 alleges ineffective assistance of penalty phase counsel for failing to obtain necessary background information. Most of the evidence presented addressed this issue, but it boils down to defense counsel failing to discover an earlier "presentence investigation report," and some school records. While Mr. Alldredge expressed dissatisfaction with the level of investigation provided by his office, the records eventually located by the Defendant did not in any way change the opinion of the mental health experts and the

> opinion of the defense's mental health experts at the evidentiary hearing did not differ from the opinions offered at trial. The essence of the Defendant's allegation seems to be that the experts' opinions would have been given greater weight if they had the additional records upon which to base their opinions at trial, but the psychologist who testified at the hearing stated that although the additional information might have been helpful, his opinion was unchanged. Counsel for the defense further claims that penalty phase counsel was ineffective for failing to call as lay witnesses family members and friends to testify concerning the Defendant's abuse as a child and low intelligence, but, in fact, two family members did testify to neglect and abuse and low intelligence (see pp. 521-531 and pp. 591-597 of trial transcript and Defense Exhibit No. 4 - video taped testimony of Wanda Brown). The defense has failed to show any prejudice to the Defendant for failing to call a neighbor who saw the Defendant receive a whipping with a belt one time or a stepbrother who testified to essentially the same thing as the brother did at trial.
>
> No reasonable probability has been shown that but for deficient performance by counsel at the guilt or penalty phase, the result would have differed.

(Vol. III, R. 452-453)

On this appeal, Brown complains that counsel failed to provide his client with a competent psychiatrist to conduct an appropriate examination and the professionals were not provided with background materials. But trial defense expert Dr. Berland (whom the defense recognized below as an expert - Vol. VI, R. 413) noted that he did not alter his opinion from reviewing Dr. Dee's subsequent report that Brown was psychotic and brain-damaged (Vol. VI, R. 42) and

that it would be a mischaracterization of his testimony that Brown was malingering (Vol. VI, R. 425) and juvenile or school records "wasn't important in the sense that I could form my opinions without it (Vol. VI, R. 446). Moreover, Berland stated that the seriousness of disturbance twenty years before would have no bearing on the seriousness of his disturbance at the time the act was committed (Vol. VI, R. 447). And Dr. Berland noted that there was both good and bad material reflected in the earlier PSI because it corroborated that Brown had a long term history as a sex offender which is not necessarily connected with psychosis (Vol. VI, R. 436-437), a matter which counsel Chalu also explained that he would have wanted to keep away from the jury any information of prior sexual molestation of children (Vol. VI, R. 456).

Additionally, as trial counsel Chalu testified at the evidentiary hearing one of the reasons that Dr. Berland was not able to come to a conclusion that Brown was under extreme emotional or mental distress and that his capacity to conform his conduct was not substantially impaired when the crime occurred was that appellant was able to give very detailed accounts of what happened (Vol. V, R. 116-117; *see also* Addition to Vol. III, R. 474-477, State Exhibit 7 [February 11, 1987 letter from Dr. Berland]). Even the additional defense expert below, Dr. Dee, conceded that as to the record material not provided to Drs. Berland and Afield "I didn't think it would change their opinion" (Vol. VI, R. 266).

Appellant next refers to a 1965 letter from Dr. Fleischaker. That witness testified he had no recollection of ever evaluating Paul Alfred Brown and he could not identify appellant sitting in court (Vol. V, R. 219). He did not have a copy of the letter he had allegedly sent to someone that was placed in a PSI and didn't know whether his letter was available to Brown's attorneys in 1986 (Vol. V, R. 219-221). The defense indicated that it would recall Dr. Fleischaker the next day (Vol. V, R. 222) but did not do so.

During the testimony of defense witness psychologist Fay Sultan the witness identified defense exhibits 5 and 6 as background information she had reviewed (Vol. VII, R. 320-321). The prosecutor asserted that the state was not contesting that the witness might rely on the materials in Exhibits 5 or 6 but that didn't make them all relevant or admissible (Vol. VII, R. 326). The court inquired what the purpose of their admission was and noted that appellate courts already had penalty phase transcripts and its prior opinion and when defense counsel failed to explain why duplication of the exhibits should be introduced, the court denied admissibility of it "at this point" (Vol. VII, R. 327-329). The witness completed her testimony (Vol. VII, R. 329-359) and after three additional witnesses the defense rested (Vol. VII, R 411). The state called Dr. Robert Berland who testified that he reviewed his trial testimony, a report by Dr. Dee and the PSI report identified as Defense Exhibit 2 (a PSI which included a

reference to Dr. Fleischaker's comment) (Vol. VII, R. 414). He found nothing in that report contradicting his findings (Vol. VII, R. 421). On cross-examination he stated he reviewed the defense exhibit 4 school records which reported bizarre incidents but not clearly psychotic behavior (Vol. VII, R. 436). That someone said appellant was psychotic at age 10 would only be cumulative to his own evaluation that Brown was psychotic (Vol. VII, R. 447).

The defense subsequently rested without any further attempt to introduce any exhibits, apparently satisfied that the testimony of the witnesses was sufficient. Appellee objects to the belated attempt at page 68 of the brief, for example, and elsewhere to quote from a document if it was not introduced below into evidence.

Appellant also complains that trial counsel failed to conduct brain testing. Dr. Berland testified at the evidentiary hearing that he customarily does not recommend that lawyer's clients undergo a CAT scan and that in one case he made an exception and regretted it deeply; that CT scan is a relatively imprecise medical assessment which tries to picture the shape of the brain so it wouldn't be expected that you would see any change for most injuries other than a penetrating injury to the brain. There's more risk than benefit unless you can keep the test confidential. He feared a CAT scan would reveal nothing out of the ordinary, a factor that could be used against Berland's findings that he was brain damaged. He gave Mr. Brown three MMPIs (Vol. VI, R. 415-

416). PET scans were not available in 1986, the machinery was being invented, there were no norms, no research data on how to interpret it (Vol. VI, R. 446). Both Dr. Dee and Dr. Berland gave appellant the Wechsler Adult Intelligence Test (Vol. VI, R. 235; Florida Supreme Court Case No. 70,483, Vol. VI, R. 540) and as stated previously Dr. Dee and Dr. Berland were in agreement.

Dr. Fay Sultan's contribution appears to be that she evaluated appellant about five months prior to this evidentiary hearing, interviewed relatives and reports of others (Vol. VII, R. 319-324) and opined that the two statutory mental mitigators were present (Vol. VII, R. 332-333). She also noted facial grimaces and body tics (Vol. VII, R. 351). Dr. Berland testified that when he interviewed appellant back in 1986 prior to his testimony he saw him more than once, made no note of having observed any tic or facial movement connected with brain damage (Vol. VII, R. 421); he recalled no reports by Dr. Afield mentioning tics, nor did defense witness Dr. Dee mention it in his 1992 report (Vol. VII, R. 422-423). He explained that there are twitching-like facial movements that are not the result of brain damage (Vol. VII, R. 423-424). Dr. Sultan opined that her one-day interview with appellant by itself probably would not be sufficient time to make a valid and competent mental health examination (Vol. VII, R. 352). The other defense expert at the hearing, Dr. Dee, only saw appellant once, in 1992, had virtually no materials provided to him (such as police

reports, transcript of confession, notes or reports of testimony of Dr. Berland or Dr. Afield) and didn't know what the crime was when he interviewed Brown (Vol. VI, R. 270-272). The material that he subsequently received did not require him to return for a second interview (Vol. VI, R. 275). Appellant told him he didn't recall the crime and Dee subsequently learned that he had given a detailed confession to the detectives (Vol. VI, R. 276) and that he did not tell Public Defender attorneys he couldn't remember what happened (Vol. VI, R. 277), yet he told Dee the first time he knew what had happened was when he woke up in jail three days after the fact (Vol. VI, R. 277). It was possible appellant was lying to him (Vol. VI, R. 278). He admitted that CCR's office had provided IQ scores -- in the average range -- higher than the results Dee achieved (Vol. VI, R. 281-282). After reviewing the confession Dee learned that appellant purchased bolt cutters in advance of the day he committed the murder (Vol. VI, R. 284).

Appellant argues that trial counsel failed to investigate the effects of early incarceration on him. But both attorney Chalu and Dr. Berland pointed out that there were negative aspects contained in Brown's earlier PSI. Chalu testified that he was able to keep a possible motive for Brown's killing the victim -- a sexual one (appellant was 36 and the victim 17) -- away from the jury and the 1967 PSI indicating Brown's imprisonment for stealing a car indicated that appellant had been sent to the Okeechobee School for

Boys for sexually molesting children and he certainly did not want the prosecutor or jury to focus on such factors:

> . . . it's my opinion that the negative information in the PSI was far more damaging and outweighed the positive value of the PSI . . .

(Vol. VII, R. 456)

This material "would have been very, very devastating to his case in the second phase" (Vol. VII, R. 456-457). Rather, the defense strategy was to "portray him as a person who had one explosion of criminality in an otherwise law abiding, impoverished, underprivileged life." (Vol. VII, R. 458). *Cf*. Porter v. Singletary, 14 F.3d 554 (11th Cir. 1994), cert. denied, ___ U.S. ___, 130 L.Ed.2d 435 (1994).

Appellant complains that counsel failed to put on evidence of severe physical abuse suffered as a child. But that is not true. At penalty phase the defense elicited through Paul Brown, Sr. that appellant when in the custody of the mother lived in rot (Florida Supreme Court Case No. 70,483, Vol. VI, R. 523) and when in the custody of Juanita Morgan was mistreated (whipping with a wet rag and corn shucks - Florida Supreme Court Case No. 70,483, Vol. VI, R. 526). This was confirmed by the testimony of Jimmy Brown (Florida Supreme Court Case No. 70,483, Vol. VI, R. 593-594) who added that:

> . . . we both had a very bad childhood, which most of my relatives mistreated him more than they did me . . . There had been many a times he took a punishment for me.
>
> (Florida Supreme Court Case No. 70,483, Vol. VI, R. 596)

The lower court properly concluded that no prejudice was shown by the failure to call an additional witness who saw a single beating with a belt (Vol. III, R. 453). *See* J. Robinson v. State, ___ So.2d ___, 23 FLW S85 (Fla. 1998) (even if trial counsel's performance deficient somewhat in failing to investigate and present available mitigating evidence, failing to furnish mental health experts with relevant information to support their testimony about mitigating factors and failing to call family members to testify about childhood abuse, trial court's conclusion that there is no reasonable probability of a different outcome was proper); Breedlove v. State, 692 So.2d 874 (Fla. 1997) (alleged deficient performance in not preparing for penalty phase did not result in prejudice to meet the second prong of Strickland; experts who testified at penalty phase stated that additional materials might have been helpful but their opinions were unchanged as to matters about which they testified. And failure to put on additional asserted mitigation would have opened door to violent or criminal character). The trial court applied the correct standard and this Court need not substitute its view for that of the lower court. *See* Melendez v. State, ___ So.2d ___, 23 FLW S350 (Fla. 1998); Diaz v. Dugger, ___ So.2d ___, 23 FLW S332 (Fla. 1998); Grossman v.

Dugger, 708 So.2d 249 (Fla. 1997).

The Court should affirm the denial of relief on this point.

ISSUE V

MR. BROWN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S ACTION WHEN IT REFUSED TO GRANT ADDITIONAL PEREMPTORY CHALLENGES. (ISSUE IX, BELOW)

Appellant may not litigate via Rule 3.850 the substantive claim of the trial court's ruling concerning peremptory challenges as that is an issue which must be urged on direct appeal and Rule 3.850 does not constitute a second appeal.

Trial defense counsel cannot be deemed deficient for the trial court's alleged denial of his request for relief. There is neither deficient performance nor the likelihood of a different result.

The trial court correctly ruled:

> In ground 9, Defendant alleges counsel was rendered ineffective by the trial court's action when it refused to grant additional peremptory challenges. However, this claim essentially claims error by the trial court. Counsel cannot be held ineffective simply because a defendant disagrees with the trial court's ruling. The trial court's failure to grant additional peremptory challenges is an issue which should have been raised on direct appeal. As such, no relief is warranted upon this ground.

(Vol. III, R. 304)

ISSUE VI

MR. BROWN'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, LOWENFIELD V. PHELPS, AND THE EIGHTH AMENDMENT. COUNSEL'S FAILURE TO OBJECT WAS INEFFECTIVE ASSISTANCE OF COUNSEL. THUS, MR. BROWN, WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Appellant may not utilize Rule 3.850 as a vehicle to raise ab initio the substantive question whether an unconstitutional automatic aggravating factor was utilized. That was an issue to be raised, if at all, on direct appeal. The claim is now procedurally barred. *See* Preliminary Statement and cases cited therein.

Counsel cannot be deemed deficient for failing to object as this meritless claim has been repeatedly rejected. *See* Clark v. State, 443 So.2d 973 (Fla. 1983); Porter v. Wainwright, 805 F.2d 930, 943, n. 15 (11th Cir. 1986).

Counsel need not spend time on meritless claims. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989).

ISSUE VII

MR. BROWN WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE REFUSED AND FAILED TO FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS. (ISSUE V BELOW).

Appellant's claim that the sentencing court failed to consider or find mitigating evidence is not cognizable on Rule 3.850; it is a question to be asserted on direct appeal. It is procedurally barred, and trial court correctly so found (Vol. III, R. 302).

See, Preliminary Statement, *supra*.

ISSUE VIII

MR. BROWN'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO MR. BROWN TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING MR. BROWN TO DEATH. FAILURE TO OBJECT OR ARGUE EFFECTIVELY RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.

Any complaint regarding jury instructions should have been urged on direct appeal, are not cognizable on a Rule 3.850 proceeding; consequently, this claim is procedurally barred.

Appellant may not attempt to relitigate the claim to the extent that he may be reasserting a claim previously heard, considered and denied on direct appeal.

No facts are alleged to support an ineffectiveness of counsel claim. Finally, no constitutional error occurred on this point, and counsel was not ineffective.

ISSUE IX

MR. BROWN'S SENTENCING JURY WAS MISLED BY ARGUMENT WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Any complaint appellant may be urging pertaining to a violation of Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985) is now procedurally barred. Such claims must be asserted on direct appeal and may not be reargued in a motion for post-conviction relief. *See* cases cited in Preliminary Statement. If the merits could be reached, the claim is meritless.

ISSUE X

MR. BROWN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S ACTION. TRIAL COUNSEL FAILED TO OBJECT OR MOVE FOR MISTRIAL WHEN JURY MISCONDUCT WAS EVIDENT. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

Appellee denies that trial counsel rendered ineffective assistance, violative of Strickland v. Washington, and denies that sufficient factual allegations have been made to support the claim. Counsel was not deficient in requesting that the court make the satisfactory inquiry that it did (R 304 - 306).

As the trial court correctly ruled:

> In ground 12, Defendant alleges counsel was ineffective by failing to move for mistrial when jury misconduct was evident. He claims the jury was tainted by a newspaper article in the Tampa Tribune. However, counsel made an appropriate request for the court to voir dire the jury concerning the article. (See Transcript, p. 303, attached). The court inquired whether any jurors had read the article or discussed it with anyone. (See Transcript, p. 305-306). Only one juror had read the headline of the article. (See Transcript, p. 305, attached). No other jurors had read the article. (See Transcript, p. 303-306, attached). The court also instructed the jury again not to read anything about the case. (See Transcript, p. 307, attached).
>
> As such, Defendant fails to demonstrate deficient performance by counsel or that there is a reasonable probability that the outcome of the proceeding would have been different absent counsel's alleged deficient performance. Since Defendant has failed to

meet both prongs of Strickland, no relief is warranted upon this ground.

(Vol. III, R. 304-305)

ISSUE XI

WHETHER BROWN'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS.

This claim must be rejected as appellant fails to allege any facts to support his claim. Appellee continue to assert that Brown is procedurally barred from arguing claims that he either did raise or could have asserted earlier at trial and on appeal.

ISSUE XII

WHETHER RULES PROHIBITING JURORS FROM BEING INTERVIEWED BY LAWYERS VIOLATES THE CONSTITUTION.

Appellee first submits that whatever Florida's policy may be with respect to protecting jurors from subsequent harassment, intimidation, or otherwise being bothered after performing their civic duty, any challenge thereto should be unavailable pursuant to Rule 3.850 because such policy cannot affect the constitutional validity of Brown's judgment and sentence. *See* Foster v. State, 400 So.2d 1, 4 (Fla. 1981); *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).

Similarly, the United States Supreme Court has held that

"long-recognized and very substantial concerns" justify protecting jury deliberations from the intrusive inquiry which the defendant's attorneys are seeking to conduct in this issue. Tanner v. United States, 483 U.S. 107, 127, 107 S. Ct. 2739, 97 L.Ed.2d 90 (1986). Federal courts have consistently upheld the federal restrictions on post-trial juror interviews against constitutional challenges much like those presented in the instant motion. *See* United States v. Hooshmand, 931 F.2d 725, 736-737 (11th Cir. 1991); United States v. Griek, 920 F.2d 840, 842-844 (11th Cir. 1991). If appellant is referring to the trial court's inquiry regarding whether jurors read the Tampa Tribune article at R 305-306, the court made adequate inquiry and the defense then sought no additional inquiry.[17] Since counsel was satisfied at that point -- and if he was not it could have been argued as an issue on direct appeal -- there is not basis now years later to initiate an inquiry. Appellant has not satisfied the requirement of Rule 4-3.3(d)(4), Rules of Professional Conduct, that grounds for such challenge may exist.

[17]Appellant cites R 412 and R 465. R 412 contains testimony of witness Barlow and R 465 is an excerpt of closing argument.

ISSUE XIII

WHETHER THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON THE STANDARD TO EVALUATE EXPERT TESTIMONY.

This claim (claim 15, below) is not cognizable on a post-conviction challenge as it is an issue that could have been urged on direct appeal. Rule 3.850 is not a second or substitute appeal. *See* Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987).

ISSUE XIV

WHETHER EXECUTION OF A MENTALLY RETARDED, BRAIN DAMAGED INDIVIDUAL CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

This issue is not cognizable on a post-conviction relief challenge; it is an issue that could have been asserted on direct appeal and the failure to present it at that time constitutes a procedural default. *See* Scott v. Dugger, 604 So.2d 465, 467 (Fla. 1992); Hall v. State, 614 So.2d 473 (Fla. 1993)(rejecting on direct appeal Justice Barkett's dissenting view that it would be inappropriate to execute the mentally retarded); Doyle v. State, 526 So.2d 909 (Fla. 1988)(issue that execution of the mentally retarded constitutes cruel and unusual punishment procedurally barred for failure to urge on direct appeal).

The trial court correctly concluded that the claim (issue 16, below) was procedurally barred as an issue that was or could have been raised on direct appeal (Vol. III, R. 302).

Nor does appellee concede that Mr. Brown is retarded.

CONCLUSION

Based on the foregoing arguments and authorities, the lower court's order should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar I.D. No.: 0134101
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR APPELLEE

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, Post Office Box 3294, Tampa, FL 33601-3294, this _____ day of August, 1998.

COUNSEL FOR APPELLEE