IN THE SUPREME COURT OF FLORIDA

JAMES ROGER HUFF,

Appellant,

v. CASE NO. 91,913

STATE OF FLORIDA,

Appellee.
______________________________/

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JUDY TAYLOR RUSH
Assistant Attorney General
Fla. Bar #438847
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118

(904) 238-4990

COUNSEL FOR APPELLEE

CERTIFICATE OF FONT

This brief is typed in Courier New 12 point.

TABLE OF CONTENTS

CERTIFICATE OF FONT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE FACTS 1

SUMMARY OF THE ARGUMENTS 13

ARGUMENT I 15

ARGUMENT II 25

ARGUMENT III 93

CONCLUSION 95

CERTIFICATE OF SERVICE 96

TABLE OF AUTHORITIES

CASES

Alford v. Wainwright,
725 F.2d 1282 (11th Cir.), *modified*, 731 F.2d 1486
cert. denied, 469 U.S. 956 (1984) 18

Anderson v. State,
627 So. 2d 1170 (Fla 1993) 25, 32

Bell v. State,
699 So. 2d 674 (Fla. 1997), ... 75
cert. denied, 118 S.Ct. 1067 (1998)

Bland v. State,
563 So. 2d 794 (Fla. 1st DCA 1990), ... 28, 49, 60
rev. dismissed, 574 So. 2d 139 (Fla. 1990)

Brady v. Maryland,
373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 214 (1963) . 54, 55, 58

Buenoano v. Dugger,
559 So. 2d 1116 (Fla. 1990) 87

Butterworth v. Kenny,
714 So. 2d 404 (Fla. 1998) 69, 92

Byrd v. Armontrout,
880 F.2d 1 (8th Cir. 1989) 18

Caldwell v. Mississipi,
472 U.S. 320 (1985). 67

Cave v. State,
529 So. 2d 293 (Fla. 1988) 68

Clark v. State,
460 So. 2d 886 (Fla. 1984) 27

Cole v. State,
701 So. 2d 845 (Fla. 1997),

cert. denied, 118 S.Ct. 1370 (1998) 78

Combs v. State,
555 So. 2d 853 (Fla. 1988) 68, 74

Craig v. State,
685 So. 2d 1224 (Fla. 1996) 54

Demps v. State,
515 So. 2d 196 (1987) 67

Duest v. Dugger,
555 So. 2d 849 (Fla. 1990) 27, 30, 32, 33, 36
37, 38, 40, 41, 43
44, 46, 50, 51, 52
58, 61, 62, 64, 65
66, 67, 70, 71, 72
76, 79, 80, 84, 86
87, 89, 91

Eutzy v. State,
536 So. 2d 1014 (Fla. 1988) 27

Fennie v. State,
648 So. 2d 95 (Fla. 1994),
cert. denied, 115 S.Ct. 1120 (1995) 80

Francis v. State,
529 So. 2d 670 (Fla. 1988) 27

Funchess v. Wainwright,
486 So. 2d 592 (Fla. 1986) 52, 53

Funchess v. Wainwright,
788 F.2d 1443 (11th Cir. 1986) 53

Giglio v. United States,
405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). . 54, 55, 56

Gorham v. State,
521 So.2d 1067 (Fla. 1988) 16, 26

Groover v. Singletary,

656 So. 2d 424 (Fla. 1995) 69

Haliburton v. Singletary,
691 So. 2d 466 (Fla. 1997) 18

Huff v. State,
495 So. 2d 145 (Fla. 1986) 14, 29, 30, 32, 33
36, 39, 43, 51, 52
63, 64, 65, 66, 72
74, 75, 76, 78, 80
81, 82, 87, 93, 94

Johnson v. State,
593 So. 2d 206 (Fla. 1992),
cert. denied, 115 S.Ct. 1120 (1992) 26, 27, 32, 33, 34
35, 36, 37, 39, 40
43, 57, 69, 71, 73
79, 86

Johnson v. State,
660 So. 2d 637 (Fla. 1995),
cert. denied, 116 S.Ct. 1550 (1996) 80

Jones v. State,
446 So. 2d 1059 (Fla. 1984) 16

Jones v. State,
591 So. 2d 911 (Fla. 1991) 54, 56, 57, 60, 61

Kelley v. State,
569 So. 2d 754 (Fla. 1990) 71

Kennedy v. State,
547 So. 2d 912 (Fla. 1989) 15, 16, 25, 26, 35
41, 62, 66, 69, 71
73, 77, 82, 83, 88

Kight v. Dugger,
574 So. 2d 1066 (Fla. 1990) 25, 27

Larzelere v. State,
676 So. 2d 394 (Fla. 1996),
cert. denied, 117 S.Ct. 615 (1996) 75

Medina v. State,
573 So. 2d 293 (Fla. 1990) 27, 52, 54, 71, 78
80, 86, 87

Mills v. State,
684 So. 2d 801 (Fla. 1996) 29, 31

Monlyn v. State,
705 So. 2d 1 (Fla. 1997),
cert. denied, 141 L.Ed.2d 745 (1998) 74

Montana v. State,
597 So. 2d 334 (Fla 1992), *cert. denied*,
118 S.Ct. 2378 (1998) 75

Neil v. State,
457 So. 2d 481 (Fla. 1984) 73, 79

Oats v. Dugger,
638 So. 2d 20 (Fla. 1994) 52

Pennsylvania v. Finley,
481 U.S. 551 (1987) 69, 92

Quince v. State,
477 So. 2d 535 (Fla. 1985),
cert. denied, 475 U.S. 1132 (1986) 29

Rivera v. Dugger,
629 So. 2d 105 (Fla. 1993) 39, 76

Roberts v. State,
568 So. 2d 1255 (Fla. 1990) 25, 35, 62, 69, 71
73, 77, 82, 83, 88

Roberts v. State,
678 So. 2d 1232 (Fla. 1996) 29

Rose v. State,
617 So. 2d 291 (Fla. 1993),
cert. denied, 510 U.S. 903 (1993) 28, 49

Rose v. State,
675 So. 2d 567 (Fla. 1996) 57

Rutherford v. State,

727 So. 2d 216 (Fla. 1998) 27, 32, 33, 34, 36, 37, 39, 40, 43, 48, 57, 69, 71, 72, 73, 79, 83, 86

San Martin v. State,
705 So. 2d 1337 (Fla. 1997), *cert. denied*,
119 S.Ct. 105 (1998) 79

Smith v. State,
445 So. 2d 323 (Fla. 1983) 15, 27, 28, 32, 33 34, 35, 36, 37, 39 40, 43, 50, 57, 69 71, 73, 79, 86

Sorgman v. State,
549 So. 2d 686 (Fla. 1st DCA 1989) 27, 44, 62

State v. Bolender,
503 So. 2d 1247 (Fla. 1987),
cert. denied, 484 U.S. 873 (1987) 18

State v. Lambrix,
698 So. 2d 247 (Fla. 1996),
cert. denied, 118 S.Ct. 1064 (1998) 69, 92

Steinhorst v. State,
412 So. 2d 332 (Fla 1982) 40

Stewart v. State,
549 So. 2d 171 (1989),
cert. denied, 497 U.S. 1031 (1989) 86

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052,
80 L.Ed. 2d 674 (1984) 16, 18, 19, 24, 26 35, 36, 38, 41, 42 43, 44, 45, 46, 74 78, 82, 84, 85

Tafero v. State,
561 So. 2d 557 (Fla. 1990),
cert. denied, 495 U.S. 925 (1990) 68

Thomas v. State,
421 So. 2d 160 (Fla. 1982) 50

Turner v. Dugger,
614 So. 2d 1075 (Fla. 1992) 29

Van Poyck v. State,
694 So. 2d 686 (Fla. 1997),
cert. denied, 118 S.Ct. 559 (1997) 27

Waterhouse v. State,
522 So. 2d 341 (Fla. 1988),
cert. denied, 488 U.S. 846 (1988) 18

Webber v. State,
662 So. 2d 1287 (Fla. 5th DCA 1995) 67, 79

White v. State,
456 So. 2d 1302 (Fla. 2d DCA 1984) 46

Woods v. State,
531 So. 2d 79 (Fla. 1988) 67

Zeigler v. State,
654 So. 2d 1162 (Fla. 1995) 29

OTHER AUTHORITIES

Florida Rule of Criminal Procedure 3.850 . .1, 11, 12, 13, 14, 15
22, 27, 28, 31, 32, 33
34, 35, 43, 46, 50, 70
71, 93, 94

Florida Statute, §921.141 64

Rule 4-3.5(d), Rules Regulating the Florida Bar 63

STATEMENT OF THE FACTS

The Honorable Richard Tombrink, Jr. granted Appellant, James Roger Huff, an evidentiary hearing on one of the sub-issues of his Rule 3.850 motion claim V. The hearing was held on August 8, 1997. The court heard evidence relating to Huff's claim that he received ineffective assistance of counsel in connection with the making and refusal of alleged plea bargain(s).

The head prosecutor, James Martin Brown, was the first witness at the hearing. (R 177). When Mr. Brown prosecuted Huff's case, he had the authority to engage in plea negotiations, but not to conclude them. (R 179-180). Mr. Brown said that although there "may have been an offer in the 1980 prosecution prior to . . . trial," (R 180), there definitely was no plea offer extended in regard to the 1984 prosecution. (R 180-181). Further, regarding the 1984 retrial, Mr. Brown testified that none of Huff's three attorneys approached him with any type of plea offer. (R 183).

Mr. Brown "[a]bsolutely" did not ever offer Huff a plea to second-degree murder with consecutive life sentences. (R 184). Further, even if he had done so, his supervisor would not have approved it. (R 184). Regarding the retrial, the State was "never presented with a formal offer from the defense . . . and . . . did not offer anything to the defense." (R 190).

Recalled, Mr. Brown testified that if the State had made an offer to Huff, "there . . . most likely . . . would be something . . . somewhere in the file." (R 248). If Huff had made an offer, a letter would have been sent to defense counsel. (R 253-254). However, the absence of a written note in the State's file does not mean that a plea offer was not made. (R 255).

Huff's next witness, Arthur T. Blundell, was with Lake Investigation Agency when the company was hired in 1984 to investigate Huff's case. (R 192, 193). He identified his and Huff's signatures on a document labeled State's Exhibit A and "dated March 19th" 1984. (R 193-194, 195, 198). However, he had no recollection of the document itself or of when or where it was signed. (R 194, 195, 200). Mr. Blundell had no recollection of having communicated to Huff, or being present when anyone else communicated to Huff, a plea offer from the State regarding consecutive life sentences for second degree murder. (R 199). He had no memory of any type of plea offer from the State to Huff. (R 200). Mr. Blundell said that although there were discussions about "'[m]aybe we can make an offer to the State,'" he did not "ever recall any offer coming from the State." (R 203-204).

Mr. Blundell testified that he got to know Huff "quite well" and based on the frequent, "close contact" he had with the

defendant, he believed "Huff is probably average to above average intelligence." (R 202). He added that Huff "could be" "articulate and well-spoken." (R 202).

Huff's next witness, Jeffery Mark Pfister, was "second chair" to lead prosecutor Brown, who made "the strategic decisions." (R 209, 210, 226). Although he was "not involved in the first trial," he "was fully involved in the case" on retrial. (R 211). He recalled a plea offer of some type: "I recall him being offered, non-death penalty, which meant life or lifes, first or second, you know, meaning concurrent consecutive lifes." (R 212). However, his recollection was "vague." (R 234-235). He said that he could not say with absolute certainty that his recollection was not based on something he heard about from the original trial. (R 236).

Huff's next witness was the Honorable Leslie Robert Huffstetler, Jr. (R 258). He identified a letter he wrote dated March 23, 1984, although he did not recall writing it. (R 260-261, 265). Likewise, he did "not recall the circumstances leading up to the writing of this letter." (R 261). He added that "from the import of the letter," he "would assume . . . that there had not been any seriously considered offers one way or the other." (R 261, 265). The judge agreed that he could not have stopped a guilty plea to two second degree murder charges. (R 263).

However, he did not recall any plea discussions or negotiations being communicated to him regarding Huff's case. (R 265-266). The letter was received as Defendant's Exhibit 1. (R 265-267).

Horace Danforth Robuck, Jr. was called by Huff. (R 267). His law firm was retained to represent Huff at the retrial. (R 268). He said that the handwriting on the "Plea agreement and Waiver of Right to Appeal" was his.[1] (R 276). Although Mr. Robuck could not recall any specifics of any conversations he had with Huff, he opined that "someone would have discussed it," because "this is something that he would have wanted . . . I would not have been worried about him being reprocessed. I wouldn't have thought that up." (R 281). He added that if Huff had told him "he would plead guilty to two second-degree murders for consecutive life sentences," he would have "communicated that to the State . . .." (R 283). The fact that the plea form did not have Huff's signature on it "tells me that either it was done ahead of time or . . . the defendant, after we wrote it, wouldn't sign it. One of the two. I honestly don't remember." (R 284). Mr. Robuck could not remember communicating the plea offer to anyone, and did not know if Mr. Hill had disclosed it to the State Attorney. (R 285). He

---

[1]Judge Hill also identified Mr. Robuck's handwriting on Defendant's Exhibit 3. (R 317).

said that if he did communicate the offer to the State, he would have done so by phone. (R 287). The proposed plea agreement was admitted into "evidence as Defendant's Exhibit Number 3." (R 287).

Regarding another document, State's A for identification, Mr. Robuck testified that if Mr. Blundell said he had signed the document as a witness to Huff's signature, it was done on the instruction of defense counsel. (R 289). He did not recall ever discussing the plea offer referenced in the document with Huff. (R 289). Neither did he recall anything about Huff wanting to "only accept two manslaughters and time served." (R 290).

Mr. Robuck identified a memo dated April 3, 1984 "'[t]o Huff file . . ..'" (R 291). That memo was later introduced into evidence as Defendant's Exhibit 5. (R 442).

Judge Mark Hill was next called by Huff. Judge Hill had been one of Huff's defense attorneys at the retrial. (R 312). Judge Hill testified that the plea agreement was a document which he had his secretary type and that Huff signed it. (R 315). It was introduced into evidence as Defendant's Exhibit 4. (R 315-316).

Judge Hill testified that he was "not sure that the State communicated this offer [Defendant's Exhibit 4] to me." (R 317). He testified: "Negotiations were all one sided." (R 320). The defense was constantly seeking an offer. (R 320). Judge Hill

opined that he probably had Huff sign the rejection to "cover my tail" since Huff "was a very intelligent fellow, said from the very beginning that he wouldn't take any deals." (R 320). The bottom line was that "after thirteen years . . . I cannot recall whether they ever made an offer to me." (R 322).

The judge added that:

> the best as I can recall from the first time that I interviewed Mr. Huff, he told me if he . . . would be convicted of first-degree murder . . . he did not want life, that he wanted the electric chair, that he believed . . . it was a fast track appeal to the Florida Supreme Court and he did not want ever to be in population. . . ..

(R 323-324). Judge Hill added: "[A]s best my recollection, that I received no offers from the State Attorney's office." (R 324). The judge had "no independent recollection" of plea discussions with Huff, although he admitted that his time records indicated that he had such discussions. (R 324-325). He said that the billing references to telephone calls to Prosecutor Brown regarding pleas were most likely his calling Mr. Brown and trying to interest him in something. (R 325). He testified he told Huff "'You ought to save your life' [and] 'come off your . . . desire [of] the electric chair.'" (R 327). Huff merely reindicated that "he did not want to be in population . . . he wanted a direct appeal to the Florida Supreme Court." (R 327). Huff "was confident that the

Supreme Court would, as the case went on, reverse it." (R 328). Indeed, Judge Hill "thought we had a pretty good shot at it" [winning the case outright]. (R 329). Judge Hill said that he communicated plea offers to the State and "they rejected them. I don't remember what they were." (R 336). He said that he does "not recall whether there was an offer ever made by the State Attorney's office." (R 351). He clarified "there was no offer from the State." (R 351). Judge Hill believed that the "acknowledgment" "was an offer that was made by us." (R 351). Regarding whether he told Huff he "could get him two second degrees on a nolo plea with consecutive lifes," Judge Hill replied: "I don't think I could have told him that." (R 352).

Judge Hill said he got to know Huff well and opined that "Jimmy's smart. He's very intelligent and rather humorous." (R 354). He had completed "[o]ne year of college." (R 393). Judge Hill "wanted to win." (R 361). He "liked him" and still does. (R 361).

Huff had maintained from the first interview through the sentence in this case that "if he went to trial and lost at the guilt phase, . . . he wanted the death penalty because he had a fast track direct appeal to the Florida Supreme Court and he was very stubborn about it." (R 355). Huff conceded this at the

hearing. (R 399). Another reason for that position was that Huff "didn't want to be out in [prison] population." (R 356).

Judge Hill "never got an offer from Mr. Brown." (R 357). He "would float deals out there. Fishing expeditions . . . and say, 'Has your attitude changed?'" (R 358).

Huff's next witness was himself. (R 376). At the time of the hearing, Huff had been in jail or prison "for four years," had been "through a full trial," and a "direct appeal." (R 394).

Huff said that "Mr. Hill told me that he had an offer from the State for two second degrees, eight to fourteen, credit for time served, plus statutory gain time." (R 379). He "assumed I would be doing about four years." (R 379). Huff's response was that he "would take time served." (R 380).

Huff said that he "asked for advice" regarding the merits of the plea offer, but "they said, 'The decision is yours.'" (R 380). He added: "He said the decision was mine, that he couldn't give me advice on that. It was my life, to think it over for a couple of days, and they would get back to me." (R 380). "[T]hey did not advise me to take it or not to take it." (R 400). Huff "rejected the plea offer." (R 383).

Huff identified both his and Mr. Blundell's signatures on Defense Exhibit 4. (R 383). He said that he wrote "I will accept

no plea" on the document "[b]ecause Mark [Hill] told me to." (R 384). He claimed it was a strategic move to try to get the offer lowered to manslaughter. (R 384-385). He did not know whether the two manslaughter pleas were conveyed to the State. (R 405).

Huff said that he wrote a letter to Defense Counsel Hill on April 8, 1984 because he "was distressed at the way the case was going." (R 385). He had concerns about the lack of expert witnesses, especially "a crime scene expert." (R 385). The trial judge refused to permit the letter to be introduced into evidence. (R 386).

Huff claimed that "about a week before trial," he told his defense attorneys that he had decided to accept the State's plea offer to second degree murder. (R 388). He did so because he "didn't want to put the rest of the family through another trial" and because "of the way the case was going . . .." (R 388). However, he added as conditions to accepting the State's offer that he would plea "guilty in his best interest" and would "do my time in Lake County Correctional so I would be closer to my family." (R 389). He was also concerned about staying out of "U.C.I." and "F.S.P." because if either appeared on his "jacket," he would not "make parole." (R 390). Huff said his attorneys "made some notes," but did not present him anything in writing. (R 390-391).

Huff did not hear the offer communicated to anyone, (R 391), although "they told me they left to go talk to Jimmy Brown." (R 399). Huff could not say that the plea was not communicated to the State. (R 398). Later, he opined that "it was apparently rejected by somebody." (R 402). He "was told that the Judge refused the plea bargain . . .." (R 391).

Huff also testified that the "handwritten notes of Mr. Robuck," Defendant's Exhibit 3, the alleged plea offer from Huff to the State "came directly from me." (R 402). That document was not signed by Huff. (R 284).

Huff opined that the failure to communicate his offer to the State "would be a breach of ethics." (R 402). He said that he did "not want to accuse" his attorneys "of breaching ethics." (R 402). "So I would assume it was communicated to the State." (R 402). "And it was apparently rejected by somebody." (R 402). Thereafter, the defense rested. (R 409).

The State's first witness was Judge Hill. (R 411, 412). Regarding whether he had a conversation with Huff in which he conveyed that he had received a plea offer from the State, Judge Hill reiterated: "I just don't recall. That's the best answer I can give you." (R 413). Neither could he recall whether he had advised Huff to write he would accept no plea on the

"acknowledgment." (R 413). Indeed, he did not recall that document "at all." (R 414). Judge Hill testified that he recognized his ethical obligation to convey any offers from his client to the State. (R 416-417).

The State's next witness was Horace Danforth Robuck, Jr. (R 424). He said that he "was not involved in the day-to-day handling of the case," but if he had received any plea offers, he would have gotten that information to Mark Hill. (R 426). Mr. Robuck could remember having meetings with Huff, but he did not remember when and where they occurred. (R 431). He said that if Huff had indicated to him that he wanted to accept a previously offered plea, he "[w]ould have immediately tried to get a plea, would have contacted probably Jimmy Brown first, and if he had said no, then I would have contacted Gordon Oldham. And . . . would have called Judge Huffstetler." (R 436). He could not remember whether he engaged in that type of activity. (R 437).

Mr. Robuck wrote a memo to Huff's file wherein he questioned whether the defense had obtained "our crime scene expert." (R 439). He acknowledged that he "recognized the need for scientific experts on April 3rd." (R 441). Ruling that the State opened the door to the evidence, the judge ruled that Mr. Robuck's memo to Huff's file be admitted into evidence "in light of the issue that

was raised about the crime scene investigator." (R 442).

After ordering closing memorandums within twenty days, the trial judge concluded the evidentiary hearing. (R 457-458). Having received and considered the memorandums, the trial judge entered his order denying Claim V of the Rule 3.850 motion. (R 2349). In so doing, the trial court specifically found:

> a. There is no proof . . . that there ever was a plea offer extended from the State to the defense . . .; neither [of] the principals . . . (Mr. Brown for the State, and Mr. Hill for the Defense) have any recollection of there being such a plea agreement.
>
> b. . . . [H]ad any plea offer been extended, Mr. Huff would have rejected it.
>
> c. There being no substantial competent evidence of a plea agreement from the State, and . . . [if an offer] it was not acceptable to the Defendant, and he refused it, there is . . . no evidence . . . there is any prejudice to the Defendant . . ..
>
> d. There is no evidence that the defense counsel failed to submit any plea offer from the Defendant to the State, and there is no evidence whatsoever that the State would have been interested in such an agreement. . . . [T]he State was not interested in any plea negotiation in this cause, and even if it was, . . . Judge Huffstetler . . . would not have accepted such plea agreements anyway.
>
> Accordingly, there could be no prejudice to the Defendant on this issue.

(R 2348-2349). The trial court denied "[b]oth the unplead (sic) claim (failure to convey defense plea offer to the State) and the issues contained in Paragraph 8, 9, and 10 of Claim V (plea offers

and discussions). (R 2349).

On October 27, 1997, the trial judge issued an order denying the remainder of Huff's claims raised in his pending Rule 3.850 motion. (R 2374-2420). The court found that all 42 of the remaining issues and 23 sub-issues were procedurally barred, legally insufficient, and/or refuted by the record. (R 2378-2420). Huff's rehearing motion was filed on November 12, 1997 (R 2421) and denied on November 14, 1997. (R 2587-2588). On November 24, 1997, Huff filed his Notice of Appeal. (R 2589).

SUMMARY OF THE ARGUMENTS

Argument I:

The trial court correctly denied Appellant's Rule 3.850 motion alleging ineffective assistance of trial counsel in connection with alleged plea offer(s). The evidence adduced at the hearing established that there was no plea offer from the State. Moreover, if there was a plea offer from the State, Appellant's attorneys fully discussed it with him, and Huff rejected it. Further, any plea offers from the defense were rejected by the State. Appellant failed to carry his burden to demonstrate ineffective assistance of counsel.

Argument II:

Appellant presents a hodge-podge of issues and complains that the trial court granted an evidentiary hearing as to only one of them. However, rather than specify the particular issues which he believes deserved a hearing, Appellant tersely states the general point raised in each claim in the lengthy motion. For the vast majority of the 65 claims raised in Argument II of his initial brief, he offers absolutely no caselaw, facts, or argument. Such "barebones" pleading is sufficient reason to deny relief on appeal. Moreover, most of the 65 claims are procedurally barred, and the remainder are legally insufficient. None have merit. This Court

should affirm the trial court's order denying these claims.

Argument III:

The trial court did not err in refusing to permit Appellant to amend his Rule 3.850 motion after the *Huff* hearing. At the hearing, Appellant took the position that his claims were legally sufficient and needed no amendment. He thus waived the instant claim.

<u>ARGUMENT I</u>

THE TRIAL COURT DID NOT ERR IN RULING THAT DEFENSE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE IN CONNECTION WITH EITHER THE ALLEGED PLEA OFFER FROM THE STATE OR THE ALLEGED PLEA OFFER FROM THE DEFENDANT.

In his Florida Rules of Criminal Procedure 3.850 motion for post-conviction relief, Huff alleged that his trial attorneys did not "communicate a plea offer to Mr. Huff and discuss the advisability of accepting the offer." (R 1443). He said he was unable to decide whether to accept the State's alleged offer "because defense counsel failed to discuss whether it was advisable to accept the offer." (R 1443). He alleged that "[h]ad counsel provided . . . the . . . consultation, there is a strong likelihood that he would have accepted the offer." (R 1443). He concluded that "failing to advise his client fully on whether the plea to the charge was desirable constitutes ineffective assistance." (R 1444).

As Huff concedes, he has the burden to prove that his counsel rendered him ineffective assistance. (IB 26). *See Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983). To show ineffective assistance of trial counsel, the defendant must demonstrate that his attorney's performance fell outside the wide range of reasonable professional assistance. *Kennedy v. State*, 546 So. 2d 912 (Fla. 1989). There

is a strong presumption that counsel rendered effective assistance, and the defendant carries the burden to prove otherwise. *Id.* The distorting effects of hindsight must be eliminated and the action, or inaction, must be evaluated from counsel's perspective at the time. *Id.* *See Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed. 2d 674 (1984). Even if the defendant shows deficient performance, he must also prove that the deficiency so adversely prejudiced him that there is a reasonable probability that except for the deficient performance, the result would have been different. *Id.*; *Gorham v. State*, 521 So. 2d 1067, 1069 (Fla. 1988)(*citing Strickland*, 466 U.S. at 687). Huff has made neither showing.

Findings of fact made after an evidentiary hearing are presumed correct. *See Jones v. State*, 446 So. 2d 1059 (Fla. 1984). The evidence adduced below well supports the trial judge's conclusion based on his factual findings (R 2348) that the State did not extend a plea offer to Huff, and therefore, there was nothing to communicate. Chief prosecutor, James Brown, testified that he "[a]bsolutely" did not offer Huff a plea to second-degree murder. (R 184). Defense investigator, Arthur Blundell, said that although there were discussions about making plea offers to the State, he did not "ever recall any offer coming from the State."

(R 203-204). Chief defense counsel, Mark Hill, testified that the plea "[n]egotiations were all one sided." (R 320). He was constantly seeking an offer from the State, (R 320), but to the "best of my recollection, . . . I received no offers from the State Attorney's office." (R 324). Later, Judge Hill said "there was no offer from the State." (R 351). He believed that Defense Exhibit 4 "was an offer that was made by us." (R 351). Despite his many "[f]ishing expeditions," Judge Hill "never got an offer from Mr. Brown." (R 357, 358). Thus, the evidence presented below well supports the trial judge's conclusion that the State did not offer a plea bargain to Huff.[2]

Moreover, Huff's claim that his attorneys failed "to tell him about a plea offer" (IB 26) is irreconcilable with his own testimony at the evidentiary hearing. He testified: "Mr. Hill told me that he had an offer from the State for two second degrees, eight to fourteen, credit for time served, plus statutory gain time." (R 379). Thus, Huff has utterly failed to prove that his

---

[2]Other than Huff's self-serving hearsay testimony that his attorney told him that the State had made such an offer, the only other testimony which remotely supports Huff's claim is that of "second chair" prosecutor, Jeffery Pfister. Mr. Pfister testified that he vaguely recalled a plea offer of some type, something less than death. (R 212, 234-235). However, he could not say with absolute certainty that his vague recollection was not based on something he heard about from the original trial. (R 236).

attorney failed to tell him about a plea offer.

Further, even if the State made a plea offer, the evidence establishes that the offer and terms were fully communicated to Huff. After thinking it over for some time, Huff refused the offer. (R 383, 384). In so doing, he and his attorney made a strategic decision to refuse the offer in the hope that the State would offer a plea to manslaughter. (R 384-385).

Reasonable strategic decisions of trial counsel will not be second-guessed. *Haliburton v. Singletary*, 691 So. 2d 466 (Fla. 1997). "'Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected.'" *Rutherford v. State*, 727 So. 2d 216 (Fla. 1998), *quoting*, *State v. Bolender*, 503 So. 2d 1247, 1250 (Fla. 1987), *cert. denied*, 484 U.S. 873 (1987). "To hold that counsel was not ineffective[,] we need not find that he made the best possible choice, but that he made a reasonable one." *Byrd v. Armontrout*, 880 F.2d 1, 6 (8th Cir. 1989). Trial counsel "cannot be faulted simply because he did not succeed." *Alford v. Wainwright*, 725 F.2d 1282, 1289 (11th Cir.), *modified*, 731 F.2d 1486, *cert. denied*, 469 U.S. 956 (1984). A defendant is "not entitled to perfect or error-free counsel, only to reasonably effective counsel." *Waterhouse v. State*, 522 So. 2d 341, 343 (Fla. 1988), *cert. denied*,

488 U.S. 846 (1988).

Huff and his counsel decided upon a trial strategy which it was hoped would bring in a favorable plea offer from the State. That the strategy did not succeed does nothing to render counsel's performance in suggesting, and pursuing, it deficient. Thus, Huff has not met the first prong of the *Strickland* standard.

Neither can he establish prejudice. His personal refusal of the offer comports with his long-standing, "stubborn" insistence that if found guilty, he wanted the death penalty for specific strategic reasons. (R 355). As a result, there is no reason to believe that, even if counsel had not suggested a bargaining strategy, Huff would have accepted the alleged offer. Certainly, he did not so testify at the hearing. Thus, he has not met the second prong of the *Strickland* standard.

Huff also complained that he did not make an informed decision to reject the State's alleged offer because his attorneys failed "to discuss whether it was advisable to accept the offer." (IB 26). Later, he charges that his "trial counsel failed him prior to trial in two ways regarding the plea offer." (IB 29). He "failed to advise him of the weaknesses in his case and the advisability to seriously consider the plea offers for life sentences." (IB 29). There are several problems with this claim, one being that the

alleged plea offer from the State was not for a life sentence. According to Huff's own testimony at the hearing, the State's alleged offer was for a range of years (eight to fourteen) which he believed would amount to his "doing about four years." (R 379).

After being told about the alleged State offer, Huff discussed "where the case was" with his trial attorneys, Mr. Hill and Mr. Robuck. (R 381). They discussed "what we felt the case was," including discussion about "the crime scene investigator . . . a forensics expert" and the development of impeachment evidence to be used against a key State witness. (R 381).

Huff testified that he "knew the case as well as anybody . . .." (R 381). He said that his attorneys did not tell him "particularly" what the weaknesses were because "they thought I knew what the weaknesses were." (R 381-382). Huff did not testify that he did not know what they were, and there is no reason to believe that he did not know them.[3]

Likewise, the evidence soundly refutes the claim that Huff's trial attorneys failed to advise him to seriously consider the alleged State offer. At the evidentiary hearing, Huff testified

---

[3]It is important to remember that this was a **re**trial. Huff, an intelligent man, (R 202, 354), would well know the weaknesses of his case from the first trial.

that defense attorney Hill told him of the alleged plea offer from the State. (R 380). Huff claims he "asked for advice and they said, 'The decision is yours.'" (R 380). Mr. Hill said "that he couldn't give me advice on that. It was my life, to think it over for a couple of days, and they would get back to me." (R 380). "A couple days later . . . he and Mr. Robuck both came over." (R 380). The three went into a conference room and "discussed the plea offer" and "discussed the case." (R 381). Included in those discussions was "where the case was" and "what we felt the case was." (R 381). Those discussions included potential expert testimony and impeachment possibilities. (R 381). Thus, it is clear that this man of above average intelligence well knew that his attorneys wanted him to seriously consider the alleged plea offer from the State.

Further, Judge Hill testified that he remembered telling Huff "you ought to save your life [and] come off your animate (sic), stubborn . . . desire [of] the electric chair." (R 327). Judge Hill repeatedly communicated offers to the State who rejected them. (R 336). Again, the record establishes that Huff well knew that his attorneys wanted him to seriously consider working out a deal

with the State.[4]

Thus, Huff has not established that his trial counsel failed to advise him of weaknesses in his case, and therefore, has failed to establish deficient performance in this regard. Neither has he established prejudice - he did not testify that he did not, in fact, know what the weaknesses of his case were. Likewise, he has not shown that his attorneys failed to advise him to seriously consider the alleged plea offer from the State, and therefore, he has not established deficient performance on this claim, either. Further, it is clear from the evidentiary hearing that his attorneys made it clear to Huff that they wanted him to seriously consider working out a plea agreement with the State. Finally, he has not shown prejudice in any failure to advise him to seriously consider the alleged plea offer because he did not testify that he did not seriously consider that offer before rejecting it. Thus, Huff has failed to meet his burden to establish either, much less both, prongs of the *Strickland* ineffective assistance test regarding his attorneys' advice to accept or reject the alleged

---

[4]Huff testified that he had many conferences with Mr. Hill and spoke with him on "a fairly frequent basis" as shown by the thirty-five to forty conferences indicated on the law firm’s billing records which Huff entered into evidence. (R 395). He spoke to both Attorneys Hill and Robuck at length before making his decision to reject the alleged plea offer. (R 380-383).

State offer.

At the evidentiary hearing, Huff raised another issue. He claimed that he made a plea offer which his attorneys failed to convey to the State. (R 388-391). The trial judge heard evidence on that issue even though it was not raised in the Rule 3.850 motion.

Huff claimed that a few weeks after he rejected the alleged State offer, he changed his mind and wanted to accept the offer. This decision was made when he realized that he would not have a crime scene expert at trial.[5] (IB 27). However, in his brief he alleges that the offer he wanted to accept was to "plead guilty to the murders in exchange for life sentences and other considerations." (IB 27). By his own testimony at the hearing and his admission on the record, that was not the terms of the offer he allegedly received from the State.[6] (R 414).

Moreover, since Huff had already rejected the alleged State offer, it was no longer viable for acceptance. Further, Huff

---

[5]The trial judge did not rule that the crime scene expert obtained by the defense could not testify until the retrial was already in progress. *See* R 2425-2427. Huff testified that he "told Dan and Mark both together about a week before trial" that he wanted to take the alleged plea offer from the State. (R 388).

[6]Huff himself testified that the terms of the alleged State offer were "two second degrees, eight to fourteen, credit for time served, plus statutory gain time." (R 379).

changed the terms of the State offer, and therefore, had it still been open, the deal Huff claims he sought was clearly a counter-offer. Thus, the claim is that Huff's attorneys failed to communicate his offer to enter a plea to the State.

Assuming *arguendo* that Huff directed his attorneys to make such an offer,[7] he failed to establish ineffective assistance of counsel in regard thereto. First, the evidence fails to establish that Huff's attorneys did not communicate his plea offer to the State. Mr. Robuck testified that if Huff had agreed to plead guilty to two second-degree murders, he would have "communicated that to the State . . .." (R 283, 286). Judge Hill testified that he often called Prosecutor Brown "trying to interest him in something." (R 325). He communicated plea offers to the State and "they rejected them." (R 336). He "would float deals out there. Fishing expeditions . . . and say, 'Has your attitude changed?'" (R 358). Judge Hill acknowledged his understanding at the time that he had an ethical obligation to communicate any offers his

[7]The record indicates that there may have been no such offer communicated from Huff to his attorneys. At the hearing, Huff said that he had produced the document Mr. Robuck handwrote. (R 402). Mr. Robuck testified that the fact that Huff had not signed that document indicated "either it was done ahead of time or . . . the defendant, after we wrote it, wouldn't sign it." (R 284). Given that Huff produced the handwritten document, it appears that Huff, in keeping with his prior statements, refused to sign the offer his attorneys proposed to make to the State.

client wanted to make to the State. (R 417). Not even Huff was willing to accuse Judge Hill of being unethical. (R 402). Thus, Huff has failed to establish that his attorney did not communicate the alleged plea proposal to the State, and therefore, he cannot show deficient performance. Neither can he show prejudice because he has not shown that had the offer been communicated, it would have been accepted by the State. In fact, the evidence at the hearing was firmly to the contrary. Prosecutor Brown testified that he would not have agreed to a no contest plea, nor would he have agreed to any type of a plea to second-degree murder. (R 188). Thus, any failure to communicate the subject plea proposal to the State did not prejudice Huff, and therefore, Huff has failed to meet the second prong of the ineffectiveness standard.

Having utterly failed to meet the requirements of the *Strickland* test, Huff is entitled to no relief on this claim.

ARGUMENT II

THE TRIAL CORRECTLY RULED THAT HUFF WAS NOT ENTITLED TO AN EVIDENTIARY HEARING ON ANY BUT ONE OF THE ISSUES HE RAISED IN HIS 3.850 MOTION.

Huff filed a 238 page motion and supplemented it with a 20 page "correction." (R 1659, 1660). The trial judge correctly ruled that only one of the 42 claims and subclaims he raised merited an evidentiary hearing.

Where the 3.850 motion and record conclusively demonstrate that the defendant is entitled to no relief, an order denying the claims may be entered without holding an evidentiary hearing. *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990); *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). A trial court must either state its rationale in its decision, or attach those specific parts of record that refute each claim presented in the motion. *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla 1993). A claim consisting of conclusory allegations does not merit a hearing. *Roberts*, 568 So. 2d at 1259; Kennedy, 547 So. 2d at 913. Summary denial is appropriate where claims are insufficiently pled. *See Kight v. Dugger*, 574 So. 2d 1066, 1073 (Fla. 1990).

Regarding claims of ineffective assistance of counsel, "[t]he defendant must allege specific facts that, when considering the

totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant." *Kennedy*, 547 So. 2d at 913. This standard is sometimes called the *Strickland*[8] test. *Id.*

To show ineffective assistance of trial counsel, the defendant must demonstrate that his attorney's performance fell outside the wide range of reasonable professional assistance. *Kennedy,* 546 So. 2d at 913. There is a strong presumption that counsel rendered effective assistance, and the defendant carries the burden to prove otherwise. *Id.* The distorting effects of hindsight must be eliminated and the action, or inaction, must be evaluated from counsel's perspective at the time. *Id.* *See Strickland v. Washington,* 466 U.S. 668 (1984). Even if the defendant shows deficient performance, he must also prove that the deficiency so adversely prejudiced him that there is a reasonable probability that except for the deficient performance, the result would have been different. *Id.; Gorham v. State*, 521 So. 2d 1067, 1069 (Fla. 1988)(*citing Strickland*, 466 U.S. at 687). "Moreover, a court considering a claim of ineffectiveness of counsel need not determine whether counsel's performance was deficient when it is clear that the alleged deficiency was not prejudicial." *Johnson v.*

[8] *Strickland v. Washington*, 466 U.S. 668 (1984).

State, 593 So. 2d 206, 209 (Fla. 1992), *cert. denied*, 113 S.Ct. 119 (1992).

Where counsel is alleged to be ineffective for failing to call a witness, the claim is facially insufficient unless it includes the identity of that witness and his/her specific potential testimony. *Sorgman v. State*, 549 So. 2d 686, 687 (Fla. 1st DCA 1989). Neither can claims be raised by merely referencing the arguments contained in the 3.850 motion. *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990).

Issues that could have been, but were not, raised on direct appeal are procedurally barred in a Rule 3.850 proceeding. *Rutherford v. State*, 727 So. 2d 216 (Fla. 1998); *Johnson v. State*, 593 So. 2d 206, 208 (Fla. 1992), *cert. denied*, 113 S.Ct. 119 (1992); *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983), *cert. denied*, 467 U.S. 1220 (1984). Likewise, matters that could have been, but were not, objected to at trial are procedurally barred. *Van Poyck v. State*, 694 So. 2d 686, 698-699 (Fla. 1997), *cert. denied*, 118 S.Ct. 559 (1997). Issues that were raised on direct appeal are also barred. *Francis v. State*, 529 So. 2d 670, 672 n.2 (Fla. 1988). *See Clark v. State*, 460 So. 2d 886, 888 (Fla. 1984).

Rule 3.850 may not be used as a second appeal. *Rutherford*, 727 So. 2d at 218-219 n.2; *Medina v. State*, 573 So. 2d 293, 295

(Fla. 1990). This procedural bar cannot be avoided by phrasing the issue in terms of ineffective assistance of counsel. *Kight v. Dugger*, 574 So. 2d 1066 (Fla. 1990); *Clark*, 460 So. 2d at 288-289. Criticism of, and argument with, precedential opinions of this Court should be summarily rejected. *Eutzy v. State*, 536 So. 2d 1014 (Fla. 1988). Neither may different arguments be used to relitigate an issue raised on direct appeal. *Medina*, 573 So. 2d at 295.

Throughout his appellate brief, Huff complains that the trial judge did not attach the relevant points from his initial brief on direct appeal to the order under review. The State contends that such attachment is wholly unnecessary. The defendant is charged with knowing what he has previously raised and filed in his case in this Court. The lower court's citation to the particular point on direct appeal well supports a finding of the procedural bar.

Likewise, throughout his appellate brief, Huff complains that the trial judge did not attach the relevant documents from the record. The State contends that such attachment is wholly unnecessary where the document referred to is included in the record before this Court. *Bland v. State*, 563 So. 2d 794, 795 (Fla. 1st DCA 1990), *rev. dismissed*, 574 So. 2d 139 (1990). The lower court's citation to the particular pages of the record in

this case is sufficient support for the summary denial. Where the trial record . . . conclusively rebuts the 3.850 claim, summary denial will be upheld. *See Rose v. State*, 617 So. 2d 291, 296-297 (Fla. 1993), *cert. denied*, 510 U.S. 903 (1993).

Similarly, throughout his appellate brief, Huff charges that the trial judge failed to explain how the point raised on direct appeal related to that raised in the 3.850 motion. First, it is important to remember that it is Huff's burden to show that he is entitled to Rule 3.850 relief. *See Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983). The motion does not allege how the point raised on appeal is different from that raised in the 3.850 proceeding. Neither does the appellate brief do so. The burden is Huff's, and he has utterly failed to meet it. Further, a movant may not use a different argument to raise the same issue. *Zeigler v. State*, 654 So. 2d 1162, 1164 (Fla. 1995); *Turner v. Dugger*, 614 So. 2d 1075, 1078 (Fla. 1992); *Quince v. State*, 477 So. 2d 535, 536 (Fla. 1985), *cert. denied*, 475 U.S. 1132 (1986). Thus, differences in the presentation of an issue raised in different proceedings are irrelevant to 3.850 review.

Finally, in *Mills v. State*, 684 So. 2d 801, 804 (Fla. 1996), the defendant cried reversible error for entry of a summary denial "without attaching those portions of the record conclusively

showing that he was entitled to no relief." This Court found "no reversible error" for failure to attach documents where the trial court summarily denied claims "'for the reasons contained [in] the State's Response.'"[9] *Id.* In the instant case, at the *Huff* hearing, the trial court denied "each and everyone" of Huff's 3.850 claims, adopting "the State's analysis" and "reasons stated in the State's answer." (R 2220).

Motion Claim I:

In his first claim, Huff says that "public records from various agencies have not been received . . . or . . . are incomplete." (R 1425). In his brief, he complains that "[t]he court erroneously ruled the government agencies had complied." The "barebones" appellate brief fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850

---

[9]This Court distinguished its prior opinion in *Roberts v. State*, 678 So. 2d 1232, 1236 (Fla. 1996) "because in that case, the trial court not only failed to attach any portions of the record, but also did not give any explanation for the basis of the court's ruling."

motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated. (IB 39). The order correctly denies the motion as "legally insufficient" due to "indistinct" allegations. (R 2378).

To the extent that Huff complained about a "rear view mirror," the claim is procedurally barred because it was raised in the direct appeal (Point 1). (R 1428). This Court ruled this issue to be "without merit." *Huff v. State*, 495 So. 2d 145, 153 (Fla. 1986).

In his motion, Huff identifies two alleged outstanding requests: (1) The Sumter County Sheriff's Office has not turned over evidence which "is missing:" and, (2) the State Attorney's Office "has still not turned over audio tapes and reports[10] (1427-1428). Neither the allegedly "missing" evidence, nor the "tapes and reports" are identified in the motion. Further, he did not

---

[10]He also complains that he only received the evidence from the Sumter County Clerk's Office "four (4) days ago" and needs more time to review them. (R 1428). The State points out that the Amended Rule 3.850 containing this allegation was filed on November 8, 1996; (R 1422); however, Huff filed his corrected 3.850 on November 12, 1996. (R 1660). Although the correction added extensively to Huff's Amended 3.850 motion, he did not address the evidence provided by the Sumter County Clerk's Office, or complain that he needed still more time to further review it. The State submits that any claim of inadequate time to review that information was waived by the failure to reassert it in the later filing.

move for an order compelling that those records be provided. Neither did he claim that any of them were relevant to his 3.850 issues or that they would support any new or additional 3.850 claims. Indeed, he has not alleged, much less established, any need for, relevance of, or entitlement to, any of the vaguely referenced public records. Moreover, regarding the "missing" evidence, a court need not order public records disclosed where the agency "does not have the requested document." *Mills v. State*, 684 So. 2d 801, 806 (Fla. 1996). As the judge explained in his order, "[t]his public records issue has been exhaustively developed in hearing after hearing and the matter has been resolved." (R 2379).

It is axiomatic that where the allegations contained in a Rule 3.850 motion are legally insufficient, they may be denied on that basis without attachment of any documents or records refuting the insufficient claims. *See Anderson*, 627 So. 2d 1170, 1171 (Fla 1993). Thus, there was no error in regard to this motion claim.

Motion Claim II:

Huff says that the trial court erroneously ruled that his waiver of his *Miranda* rights issue was procedurally barred. (IB 39). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and

need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

Moreover, Huff acknowledges that the court based its ruling on the ground that "he raised this issue in point IV of his brief." (IB 39). Issues raised on direct appeal are procedurally barred when raised in a Rule 3.850 motion. *Rutherford*, 727 So. 2d at 219 n.2 (Fla. 1998); *Johnson v. State*, 593 So. 2d at 208; *Smith v. State*, 445 So. 2d at 325. This Court has twice found no merit to Huff's *Miranda* issues. *Huff v. State*, 495 So. 2d at 149.

Motion Claim III:

Huff says that the trial court erroneously ruled that his insufficient advice of right to counsel issue was procedurally barred. (IB 39). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

Huff acknowledges that the court based its ruling on the

ground that the issue was raised in Point IV of the Initial Brief on direct appeal. (IB 39). This Court found Huff's instant claim "without merit." *Huff v. State*, 495 So. 2d at 153. Issues raised on direct appeal are procedurally barred when raised in a Rule 3.850 motion. *Rutherford v. State*, 727 So. 2d at 219 n.2 (Fla. 1998); *Johnson v. State*, 593 So. 2d at 208; *Smith v. State*, 445 So. 2d at 325.

Motion Claim IV:

Huff says that the trial court erroneously ruled that his inculpatory statements issue was procedurally barred. (IB 40). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

Huff acknowledges that the court based its ruling on the ground that the issue was raised in Point IV of the Initial Brief on direct appeal. (IB 40). Issues raised on direct appeal are procedurally barred when raised in a Rule 3.850 motion. *Rutherford v. State*, 727 So. 2d at 219 n.2 (Fla. 1998); *Johnson v. State*, 593

So. 2d at 208; *Smith v. State*, 445 So. 2d at 325.

<u>Motion Claim V</u>: (Includes 14 sub-issues):

Sub 1. This issue was the basis of the evidentiary hearing which is the subject of Argument I, *supra* at 15. The trial court's disposition of this claim was correct. *See* Argument I, *supra*, at 15-24.

Sub 2. In this claim, Huff says that trial counsel "failed to adequately prepare their crime scene expert," A. L. White. (IB 40). In denying this claim, the trial judge pointed out: "Mr. White was provided with all police reports, the transcribed trial testimony of three on-scene investigators, as well as a number of photographs, lab sheets and a crime scene diagram." (R 2380-2381). The judge also noted that he could conceive of no value "in sending Mr. White to a vacant lot" some three plus years after the crime.[11] (R 2381). The judge ruled that based on these record facts, it was

[11]At trial, Defense Counsel reminded the court that the proposed witness, Mr. White, had testified in court "at least a half a dozen times as an expert in his field . . . where he has not visited the crime scene." (RTR 2475). ("RTR" means retrial record). He argued that it was not necessary for Mr. White to visit the crime scene in order to be able to render a valid opinion. (RTR 2461-2462). Indeed, Prosecutor Brown pointed out that the crime scene in the instant case was not just "a geographical area." (RTR 2473). Thus, this matter was fully considered below, and Huff's disagreement with the conclusions reached by the court below does not entitle him to a hearing on this issue on his Rule 3.850 motion.

clear that trial counsel's performance was not deficient in terms of the preparation of Mr. White.

Although Huff complains that his attorneys did not properly prepare Mr. White, they do not state what trial counsel could have done to better prepare the proposed witness. It is the defendant who has the burden to establish the legal sufficiency of his claims. *Smith v. State*, 445 So. 2d at 325. A mere conclusory allegation that preparation was inadequate is wholly insufficient on which to base an evidentiary hearing on a Rule 3.850 motion. *Id.; See Roberts v. State*, 568 So. 2d at 1259; *Kennedy v. State*, 547 So. 2d at 913.

On appeal, Huff takes issue with the trial court's conclusion that he did not show deficient performance, however, he does not address the court's finding on the prejudice component of the two-part *Strickland* test. (IB 43). The motion was legally insufficient in that Huff fails to even allege that any deficient performance so prejudiced him as to undermine confidence in the reliability of the outcome. (R 1447-1450). Where no prejudice is alleged, deficient performance need not be determined. *Johnson v. State*, 593 So. 2d at 209.

Indeed, **this** Court has previously determined that it does not do so. In *Huff v. State*, 495 So. 2d at 148, this Court said:

> [A]t best, White's testimony would have been a general critique of proper police practice in processing crime scenes, a collateral and irrelevant issue. His testimony would have presented no probative evidence of appellant's guilt or innocence.

Thus, Huff clearly cannot meet the second *Strickland* prong. This issue was properly disposed of without an evidentiary hearing.

Sub 3. Huff complained that defense counsel did not adequately challenge the State's evidence regarding the involvement of an automobile in the instant crime. (IB 43). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

As pled in his motion, Huff contends that his trial counsel repeatedly objected to the subject evidence. (RTR 1479-1480, 1488-1489). Thus, as the trial judge concluded, this issue could, and should, have been raised on direct appeal, (R 2381-2382), and the failure to so raise it procedurally bars it in this proceeding. *Rutherford v. State*, 727 So. 2d at 219 n.2 (1998); *Johnson v. State*, 593 So. 2d at 208; *Smith v. State*, 445 So. 2d at 325.

Sub 4. As stated in the initial brief, paragraph 4 under Claim V is identical to, a verbatim restatement of, that contained in paragraph 3. Thus, the State reasserts and incorporates its response in paragraph 3 above.

Sub 5. Huff complained that Microanalyst, Dale Nute's, technique for comparing tire tracks was flawed.[12] (IB 44). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

Mr. Nute, a well-established expert, testified to two things: (1) a vehicle could stop and restart without leaving any sign, and (2) the victims' Buick could have left the tire prints found at the crime scene. (R 2382-2383). The first was objected to, and therefore, is procedurally barred because it could and should have been raised on direct appeal. *Rutherford v. State*, 727 So. 2d at

[12]The initial brief does not raise the ineffective assistance of counsel component referenced in the motion and in the lower court's order. (*Compare* IB 44 *with* R 2382 and R 1452). Thus, this issue has been abandoned on appeal.

219 n.2 (1998); *Johnson v. State*, 593 So. 2d at 208; *Smith v. State*, 445 So. 2d at 325. Regarding the second, on appeal Huff offers no basis on which this part of the expert's opinion was objectionable or could be challenged. Thus, he has not adequately stated a claim on which relief could be granted in this appellate proceeding. Further, in his 3.850 motion, Huff alleges that "[i]t is not possible to resolutely conclude that a given automobile made certain tracks based on the measurements . . .." (R 1451). This statement, if true, is irrelevant because the expert did not so testify. Rather, he said only that the Buick could have made the prints - not that it did so. Thus, neither the initial brief, nor the 3.850 motion, adequately allege deficient performance by trial counsel.

Moreover, neither has he alleged that without the subject testimony, he would not have been convicted or sentenced to death. Thus, his claim is legally insufficient in that it complies with neither prong of the *Strickland* standard.

Sub 6. Huff's next claim is that "jocular bantering" between counsel and the trial judge "prejudiced his case." (IB 44). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and

need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

This issue was raised on direct appeal (Point XI), and therefore, it is procedurally barred. *Rutherford v. State*, 727 So. 2d at 219 n.2 (Fla. 1998); *Johnson v. State*, 593 So. 2d at 208; *Smith v. State*, 445 So. 2d at 325. Moreover, had it not been raised on direct appeal, it could and should have been so raised, and therefore, is procedurally barred. *See Id.*

Finally, in neither his brief nor his motion, does Huff identify even a single episode of "jocular bantering." Neither does he identify anything which communicated to the jury that Huff's "trial for capital murder was a festive event, or at least not one to be taken seriously." (R 1453). Huff makes no factual averments in support of his single-sentence conclusory claim. Neither does he indicate why he thinks the referenced action and/or inaction constitutes deficient performance or how such performance prejudiced him. Such "barebones" pleading is frivolous and should not be tolerated.

Sub 7. Next, Huff says that he was absent from three critical proceeding portions of his trial is also procedurally

barred. This "very complaint was raised . . . on direct appeal . . .," (R 2384-2385), and was rejected by this Court. *Huff v. State*, 495 So. 2d at 153. Had it not been so raised, it is still procedurally barred because it could have been raised on direct appeal. *See Rivera v. Dugger*, 629 So. 2d 105 (Fla. 1993).

Sub 8. Huff says that trial counsel were ineffective in failing to object to the trial court's absence from an unidentified "part of the trial." (IB 45). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

The 3.850 motion specifies the "part of the trial" at issue. (R 1454-1456). The claim was raised on direct appeal (Point XI), and therefore, is procedurally barred. *Rutherford v. State*, 727 So. 2d at 219 n.2; *Johnson v. State*, 593 So. 2d at 208, *Smith v. State*, 445 So. 2d at 325.

Sub 9. Huff says that the trial court summarily denied his claim that defense counsel ineffectively failed to rebut the testimony of Dr. Rojas. (IB 46). Huff concedes that his attorneys

objected to this testimony. (IB 46). Thus, the issue is clearly procedurally barred as it could have been raised on direct appeal.[13] *See generally Steinhorst v. State*, 412 So. 2d 332, 338 (Fla 1982) [Issues preserved by objection may be raised on appeal]. Moreover, the initial brief fails to identify any particular testimony of Dr. Rojas, muchless allege how the absence of that testimony would have precluded his conviction and/or death sentence. Such "barebones" pleading is legally insufficient, and the denial of this issue should also be affirmed on that basis. Moreover, having utterly failed to allege the prongs of the *Strickland* standard, the ineffective assistance claim as pled in the initial brief is legally insufficient. *Kennedy v. State*, 546 So. 2d at 913.

Sub 10. Next, Huff says that trial counsel should have moved to recuse the State Attorney's Office. (IB 47). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and

[13]Dr. Rojas' testimony is the only portion of the issue raised in the 3.850 motion which is pursued on appeal.

should not be tolerated.

The basis given in the 3.850 motion is that the two prosecutors were listed on the defense's witness list. (R 1457). Although Huff charges that these prosecutors had "relevant and material evidence," not a single incidence of such evidence is revealed in the motion. (R 1457). Likewise, he claims that the failure to move to disqualify the prosecutors as witnesses "caused substantial prejudice to Mr. Huff's claims of innocence." (R 1457). However, again, he fails to allege any facts which, if proved, could support such a conclusion. Thus, the claim is legally insufficient, falling far short of adequately alleging either prong of *Strickland*.

Sub 11. In this claim, Huff says that his "attorneys were ineffective because they failed to object to numerous prosecutorial mistakes, failed to object to [the] prosecution's loss of the vanity mirror as evidence, and stipulated to the expertise of state witnesses." (IB 47). In his motion, Huff listed some 15 situations which he feels his trial attorneys should have objected to. (R 2387). However, the list itself is vague;[14] for example, Huff complains about the "Prosecutor giving personal opinion during

---

[14]And, as the trial judge noted, "Huff does not provide one single citation to the trial transcript for any of the circumstances he now complains about." (R 2388).

opening statement," but fails to identify the statements he regards as such. (R 1458). Likewise, he has failed to identify any witness to which defense counsel ineffectively stipulated to the expertise of; nor has he alleged in general, much less provided an example of, a witness stipulated to who would not otherwise have qualified as an expert. Thus, regarding these issues, he has failed to sufficiently allege either deficient performance or prejudice as required by *Strickland*. These claims are legally insufficient on their face.

Regarding the third sub-sub-issue of this claim, the vanity mirror, the trial judge correctly ruled that this issue is procedurally barred because it was raised on direct appeal. (R 2388). *See* Initial Brief on Direct Appeal, Point XII, at 59-60. This Court ruled this issue to be "without merit" in *Huff v. State*, 495 So. 2d at 153. Issues raised and decided on direct appeal are not appropriate for consideration under Rule 3.850. *Rutherford*, 727 So. 2d at 219 n.2 (Fla. 1998); *Johnson v. State*, 593 So. 2d at 208; *Smith v. State*, 445 so. 2d at 325.

Sub 12. In his brief, Huff says that his counsel "should have cross-examined Dr. Shutze about his autopsy procedure and the physical evidence at the scene." (IB 48). His entire argument on this point is to assert that an evidentiary hearing "was needed" to

"provide the evidence which would met (sic) the *Strickland* test." (IB 48). This mere statement of Huff's disagreement with the decision reached by the trial court does nothing to indicate that the trial court erred in deciding that a hearing on this issue was not warranted.

Further, the "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

Moreover, the record shows that trial counsel extensively cross-examined Dr. Shutze. Counsel specifically inquired about the "trajectories of bullets," blood spatter, and order of the gunshots (RTR 1674-1683, 1694-1695). There is nothing about his performance here that smacks of any professional deficiency.

Further, although he claims that his attorneys on retrial should have obtained an expert to discredit Dr. Shutze's conclusions, he utterly fails to allege that one was available for this purpose, muchless identify him, the substance of his testimony, and state how its omission prejudiced the trial's

outcome. *See Sorgman v. State*, 549 So. 2d 686, 687 (Fla 1st DCA 1989). Afterall, the crime had occurred more than three years earlier, and

> any independent expert would have been unable to examine the bodies, examine the car, attend the autopsy, or view the crime scene as it existed on the day of the murders, all of which Dr. Shutze actually did.

(R 2390). Thus, he has failed to meet the *Strickland* test, and this claim, too, is legally insufficient.

Sub 13. In his brief, Huff says that his trial counsel "failed to investigate the existence of other suspects or a secondary crime scene." (IB 48). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

In his 3.850 motion, Huff complains that counsel should have investigated "the existence of" other suspects. (R 1461). He does not allege that there were other suspects,[15] muchless name one. His

---

[15]The closest he comes is the allegation that "others were under investigation" - which does not equate to were "murder suspects." (R 1461).

secondary crime scene allegation is also deficient in that there is no allegation that any such scene was relevant to the conviction and/or sentence Huff received. Moreover, as the trial judge commented, any such scene "was more than 3 years old when counsel were first retained." (R 2391). Finally, Huff does not allege that if "the existence of other suspects" and the possibility of "a second crime scene" had been investigated by his trial attorneys, he would not have been convicted and/or sentenced to death. Thus, his claim does not state one for which relief can be granted under *Strickland*, and it is legally insufficient.

Sub 14. In his brief, Huff repeats his lower court complaint that his counsel did not ask a witness about "a legitimate source of money" Huff had to buy some land, expected to receive money in his divorce proceeding, and failed to show that a law officer was biased against him. (IB 48-49). He complains that the trial court's ruling that the information would have been inadmissible hearsay is insufficient, not because it is incorrect, which it is not, but solely because "[t]here is nothing attached to the order to show that the record conclusively showed such information on the part of the police officer would have been hearsay." (IB 49). Clearly, it is not necessary for a trial judge to attach excerpts from the evidence code to an order denying a claim in a 3.850

motion. The rule against such hearsay is a basic one used everyday by criminal trial practitioners. Appellate counsel's apparent unfamiliarity with it does not entitle Huff to relief.

Further, there is no allegation of how the hearsay evidence would have been relevant. Neither is there a claim that if that evidence had been introduced, the result of the trial and/or penalty phase proceeding would have been different. Thus, neither *Strickland* prong is met, and the claim is legally insufficient.

Moreover, the trial court's ruling on this evidentiary issue could have been raised on direct appeal. *Duest v. Dugger*, 555 So. 2d 849, 851 (Fla. 1990). A defendant is procedurally barred from asserting in a Rule 3.850 proceeding that evidence was improperly excluded. *Id.*; *White v. State*, 456 So. 2d 1302 (Fla. 2d DCA 1984).

Motion Claim VI:

Huff says that his counsel rendered ineffective assistance "because they failed to obtain a longer delay between receipt of the verdict and the sentencing procedure." (IB 49). As the trial court properly concluded, this claim is refuted by the facts on the trial record. (R 2392-2393). They are also disputed by the evidence presented at the August 8, 1997 evidentiary hearing, including Huff's own testimony.

The record shows that Huff, after being convicted of his

parents' murder a second time in four years, stated that he wanted to waive the penalty phase and be sentenced to death. He so advised the court around 7:00 p.m. on Friday, June 1, 1984. When it was suggested that he take time to think about that decision, Huff responded: "I've had four years to think about it." (RTR 3095). Nonetheless, the trial judge recessed the proceedings and did not reconvene them until 11:15 a.m. Saturday, June 2, 1984. (R 2393). At that time, Huff presented "a written waiver of the sentencing phase and a hand-printed letter from the Defendant . . . ." (R 2393). The letter was attached as an exhibit to the order summarily denying this claim. (R 2393). Thereafter, the court thoroughly inquired of Huff regarding the waiver and the voluntary and intelligent making of same. (R 2394).

Moreover, at the August 7, 1997 evidentiary hearing, defense counsel testified that it had been Huff's pronounced and steadfast intention to waive the penalty phase proceeding and ask for the death penalty if convicted. (R 323-324, 327, 355). Huff admitted this at the hearing. (R 399). Indeed, Huff rejected his attorney's pleas that he "'come off your . . . desire [of] the electric chair.'" (R 327). Huff had a strategic reason for this decision, and "he was very stubborn about it." (R 355). Huff wanted an immediate direct appeal to the Florida Supreme Court, and

had he received any sentence other than death, he would not have gotten it.

Thus, it is clear that Huff had a carefully considered strategic reason for waiving the penalty phase and asking the court for the death penalty. He had repeatedly talked to his attorneys about his desire for an immediate direct appeal to this Honorable Court. That his attorneys could not dissuade Huff, who had already tried the penalty phase option in his first trial, from his "stubborn" insistence to proceed with his appellate strategy does not constitute deficient performance. Cf. Rutherford, 727 So. 2d at 223 [As long as alternative courses are considered, strategic decisions do not constitute deficient performance].

Moreover, the trial proceedings show that Huff was "an intelligent, mentally healthy, educated and competent" person, who was "competent, alert and in control of his faculties" when he entered the decision to waive the penalty phase proceeding. (R 2394). Indeed, in November, 1988, Dr. Krop, after examining Huff, opined that he is "an intelligent individual who has led a fairly stable life style . . .." (R 1468). He has "no history of mental illness, alcohol or drug abuse" and "derives from a stable family environment." (R 1468). Although he declined to offer an opinion as to his competency to waive the sentencing phase in 1984, Dr.

Krop found no "significant emotional disorder." (R 1469). Moreover, Huff's lengthy trial testimony verifies the conclusion that Huff is an intelligent man who well knew what he was doing when he waived the penalty phase proceeding. (*See* RTR 2613-2839).

Finally, the record of the evidentiary hearing also shows that Huff was an intelligent man who had excellent command of his mental faculties. Investigator Blundell testified that he got to know Huff "quite well" and based on the frequent, "close contact" he had with the defendant, he believed Huff to be intelligent, "articulate and well-spoken." (R 202). Defense counsel Hill testified that he got to know Huff well and opined: "Jimmy's smart. He's very intelligent and rather humorous." (R 354). Indeed, in his instant brief, Huff alleges that his "brother" would have testified at any penalty phase held after the second conviction that Huff "was fairly intelligent." (IB 52).

Thus, the record clearly refutes the claim that this intelligent, death penalty experienced defendant needed more time to think about his decision to waive the penalty phase proceedings and ask for the death penalty. The trial court's record citations are sufficient to establish the same. *See Bland v. State*, 563 So. 2d 794, 795 (Fla. 1st DCA 1990), *rev. dismissed*, 574 So. 2d 139 (Fla. 1990). The instant record further underscores the validity

of the lower court's conclusions, and therefore, the summary denial should be upheld. *See Rose*, 617 So. 2d at 296-297.

Moreover, in his appellate brief, Huff admits that "[i]t is not clear whether a defendant can waive the penalty phase of a capital trial." (IB 50). Neither is it "clear whether counsel is under an obligation to present evidence in mitigation . . . even after his client has waived a jury recommendation." (IB 52). Assuming for the sake of argument that that is true, same defeats his claim that his trial counsel was ineffective for not preventing his waiver. Counsel cannot be deemed ineffective for failing to raise an "unclear," or novel, issue of law. *See Thomas v. State*, 421 So. 2d 160, 165 (Fla. 1982)["counsel need not be expected to anticipate developments in the law which make possible the raising of novel issues"]. Further, it is Huff's burden to demonstrate Rule 3.850 error, *Smith*, 445 So. 2d at 325, and the State submits that an allegation of "unclear" law does not meet that burden.

Motion Claim VII:

In his brief, Huff says that "his right to confrontation was violated with reference to Sheriff Johnson's testimony." (IB 53). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be

further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

Moreover, the trial judge correctly ruled that this claim is procedurally barred because it was raised on direct appeal (Claim XIII). (R 2395). Further, this Court found this claim to be "without merit." *Huff*, 495 So. 2d at 153.

Motion Claim VIII:

In his brief, Huff says that "his right to remain silent was impermissibly commented upon." (IB 53). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

Further, the trial judge correctly ruled that this claim is procedurally barred because it was raised on direct appeal (Claim XVII). (R 2395). Moreover, this Court found this claim to be "without merit." *Huff*, 495 So. 2d at 153.

Motion Claim IX:

In his brief, Huff says that "his constitutional right against cruel and unusual punishment was violated by the trial court not construing all mitigating circumstances in Huff's favor." (IB 54). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

The trial judge correctly ruled that this claim is procedurally barred because it was raised on direct appeal (Point XIX). (R 2395). Moreover, this Court found this claim to be "without merit." *Huff*, 495 So. 2d at 153. Had it not been so raised, it is still barred because it should have been raised on direct appeal. *Oats v. Dugger*, 638 So. 2d 20, 22 (Fla. 1994). Further, to the extent that the issue raised on direct appeal differs from that raised in the 3.850 motion, it is barred because different arguments may not be used to relitigate an issue raised on direct appeal. *Medina*, 573 So. 2d at 295.

Motion Claim X:

In his brief, Huff reiterates his 3.850 motion claim that "the state was systematic in its exclusion of death scrupled jurors by use of its peremptory challenges." (IB 54). "Huff's claim . . . involve[s] . . . prospective jurors who indicated varying degrees of reservation against the death penalty." (IB 54-55). Since the State excused them with its peremptories, "[t]his led to a jury more conviction prone than average, and more prosecution prone." (IB 55). The trial judge found "no legal authority for this position," and ruled the "issue is legally insufficient." (R 2396).

In fact, the legal authority is to the contrary. In *Funchess v. Wainwright*, 486 So. 2d 592 (Fla. 1986), this Court confronted the instant issue raised in a habeas corpus petition after issuance of a death warrant. This Court concluded that the failure to raise the issue on direct appeal constituted a procedural bar. 486 So. 2d at 593. A further procedural bar existed where "counsel failed to object . . . because any error "would not be fundamental." *Id.* This Court emphasized: "[W]e have previously rejected the argument that death-qualified juries are . . . conviction prone." [citations omitted] *Id.* Funchess was denied a stay of execution. *Id.* at 594. On appeal to the 11th Circuit, this claim was likewise rejected by the federal court. *Funchess v. Wainwright*,

788 F.2d 1443, 1446 (11th Cir. 1986).

Huff did not raise the instant issue on direct appeal, and it is, therefore, procedurally barred. *Funchess*, 486 So. 2d at 593. Neither does he allege that he made this specific objection in the lower court, and therefore, it is barred by a second layer of procedural default. *Id.* Finally, even had this claim been preserved, it is without merit. *Id.; Funchess v. Wainwright*, 788 F.2d at 1446.

Motion Claim XI:

In his brief, Huff says that "(1) critical, exculpatory, and impeachment evidence was suppressed by the state (2) the state used 'false and misleading evidence and argument, (3) trial counsel failed to investigate and present evidence in challenging the State's case." (IB 62). The trial judge denied the claims holding that they were vaguely and conclusorily pled. (IB 62).

To establish a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 214 (1963), Huff must show that the State withheld exculpatory evidence which has been newly discovered. He must then show that "there is a reasonable probability that 'had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Medina v. State*, 573 So. 2d 293, 296 (Fla. 1990)(*citing Duest v. Dugger*, 555 So. 2d 849, 851

(Fla. 1990)). For evidence to be newly discovered, it must have been “unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence.” *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991)[*quoting Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)]. Even if there is newly discovered evidence, to merit relief, it must be so substantial that it would probably produce an acquittal on retrial. *Id.* at 911.

To establish a *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) violation, he must show: (1) The testimony was false; (2) the prosecutor knew it was false; and, (3) the false testimony was material to the conviction and/or sentence. *Craig v. State*, 685 So. 2d 1224 (Fla. 1996)(*citing United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). Huff has not properly alleged, much less shown, either a *Brady* or a *Giglio* violation.

1. Huff complained that "the State failed to disclose a twenty-four hour dispatch tape." (R 2397). The trial court ruled the claim legally insufficient because it "provides no specific details about the State's alleged failure to disclose the tape" or "any prejudice actually suffered by him related to the tape." (R

2397). In his motion, Huff vaguely alleged that the dispatch concerned "police calls made at the scene." (R 1510). Nothing about this allegation meets the *Brady* requirements, and it is, therefore, legally insufficient.

Later, however, Huff returns to the issue of the dispatch tape and claims that an officer at the scene was assigned to keep Huff from washing his hands until a test could be made to determine whether he had recently fired a gun. (R 1512). At trial, the testimony was that Huff rubbed his hands on his pants prior to the test. (R 1512). Huff claims that had the jury heard the instruction not to let Huff wash his hands, it might have rejected the officer's testimony that Huff rubbed his hands on his pants and then used the negative reading on the gun residue test as proof of innocence. (R 1512). The State asserts that no reasonable jury would have reached that conclusion. Moreover, Huff has alleged no basis on which to avoid a hearsay objection to the tape.

The trial judge correctly ruled that this component of the claim "involves nothing more than unsubstantiated conclusions" and "provides no detail about the State's alleged failure to disclose the tape." (R 2398). There is no allegation that the defense did not know of the existence of dispatch tapes or could not have known of it by the use of diligence. Thus, the *Jones* standard is not

met.

2. Huff complained that the State presented "false evidence and testimony related to the cause and location of [the victims] deaths and the trajectories of bullets." (IB 65). The trial judge dubbed this "nothing but a self-serving conclusion." (R 2398).

The claim does not indicate that the alleged "false evidence and testimony" given by the State's expert at trial could not have been discovered with due diligence. There is no claim that Huff could not have found and produced a defense witness to contradict the State's expert at the time of trial. Thus, again, Huff has failed to allege the *Jones* standard, and therefore, his claim of newly discovered evidence is legally insufficient.

Likewise, Huff has not alleged that the State knew that the alleged false testimony of the medical expert was false. Thus, he has failed to allege the *Giglio* standard, again rendering his claim legally insufficient.

3. Huff also claimed that Dr. Shutze, the medical examiner, conducted an "inadequate" autopsy. (IB 65). He says that the "failure of the pathologist to shave the area of the wounds" made it "difficult to determine angels (sic) of entry and exit . . .." (IB 65). He opines that he could have obtained "[a]n independent pathologist" to "state that due to the nature of Geneviere Huff's

injuries . . . it is highly unlikely that she was shot in the vehicle." (IB 66). He does not reveal how such testimony would have produced his acquittal.

Further, at trial Defense Council asked the following question: "All of the bullet wounds were inflicted while the victims were inside the car; correct?" (RTR 1697). Dr. Shutze responded: "I don't know that." (RTR 1697). Thus, Dr. Shutze's testimony did not foreclose whatever point Huff hoped to make with his claim that his parents were shot outside the vehicle. There is no reasonable likelihood that the testimony Huff now claims could have been presented through an unnamed pathologist would have produced an acquittal. Certainly, Huff has not adequately alleged same, and therefore, his 3.850 motion fails to meet the *Jones* standard. Moreover, this claim regarding the adequacy of the autopsy could have been raised on direct appeal. *See Rose v. State*, 675 So. 2d 567, 577 n. 1 (Fla. 1996). Since it was not so raised, it is procedurally barred. *Id.*; *Rutherford*, 727 So. 2d at 216 (Fla. 1998); *Johnson*, 593 So. 2d at 208; *Smith*, 445 So. 2d at 325.

4. In his brief, Huff says, "former Sheriff Johnson received a special consideration for his testimony." (IB 66). That is the entirety of this ‘barebones" appellate subclaim. The brief states

no facts or other support for the claim. Thus, the issue as presented to this Court is legally insufficient on its face and should not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleadings is frivolous and should not be tolerated.

In his motion, Huff "accuses the State of having 'purchased' Sheriff Ernest Johnson's testimony for $15.00 . . .." (R 2396). The witness received a parking ticket while in court testifying against Huff. (R 1508). As the trial court correctly concluded: "Mr. Huff fails to suggest a credible showing of any impropriety or any reasonable possibility that this parking ticket affected the outcome of this case." (R 2397). Certainly, he has not specifically alleged that Sheriff Johnson would not have testified against him had he been required to pay the ticket; nor has he alleged that the content of the Sheriff's testimony would have changed. Thus, he has failed to allege the facts necessary to state a facially sufficient claim of newly discovered *Brady* evidence. Further, even if the allegations were otherwise sufficient, the summary denial was still appropriate because there is no reasonable possibility, much less probability, that impeachment of Sheriff Johnson with the $15.00 parking ticket would

produce Huff's acquittal on retrial.

Also noteworthy is that Huff claims that he gave the testimony in exchange for the state fixing a ticket that he received while "in the courtroom" testifying in this case. (R 1508). Since the witness did not even have the ticket until after he gave the testimony, Huff's claim is impossible. Thus, the claim is legally insufficient and properly summarily denied.

5. Huff "alleged that he (sic) state had threatened a vital defense witness to get her to recant her previously favorable testimony . . .." (IB 66-67). According to Huff's brief, this unnamed "witness noticed that the driver [Huff] was visibly shaken as he handed her the money . . . [and] recalled that there was a fourth unidentified passenger seated in the back of the car." (IB 67). He claims "State officials threatened, coerced, or otherwise induced the witness to renounce her previously truthful, exculpatory, sworn testimony and precluded the witness from presenting such truthful testimony in exchange for lenient treatment for her son's pending criminal charges . . .."[16] (IB 68).

In summarily denying an evidentiary hearing on this issue, the

---

[16]In his 3.850 motion, Huff alleged that the witness gave her initial allegedly truthful statement on May 1, 1980 and "recounted (sic) it on April 20, 1980." (R 1513). Obviously, it would be impossible to recant a statement not yet given.

trial judge explained:

> Mr. Huff has apparently renounced that same testimony. The recanting witness originally swore that Mr. Huff drove up to her store and purchased three cold drinks shortly before the murders, that in his company were his parents in the front seat and that in the back sat the purported kidnapper and soon-to-be-killer. Shortly before retrial, this witness signed an affidavit stating she made the whole thing up.
>
> . . . [A]t the time of his arrest, Mr. Huff never mentioned having been forced by the kidnapper to stop anywhere or to buy anything. At trial, Mr. Huff testified . . . he was forced to drive directly from the point where he was kidnaped to the scene of the murders with, again, no mention of any stop at a store . . ..

(R 2400). Thus, Huff's record testimony refutes this claim, and the trial judge's citation to the pages of the record at which that testimony can be found is sufficient on which to base the summary denial. *Bland*, 563 So. 2d at 795.

Further, Huff did not allege that the witness subscribes to his instant theory. He attached no affidavit in which the witness says that her original story was true and law enforcement pressured her to recant it. Without such, the claim is legally insufficient and was properly summarily denied.

Moreover, Huff cannot meet the requirements of *Jones* in that the witness's statement was well-known at the time of the original trial. Further, the recantation had already occurred at the time of the retrial, which commenced on May 1, 1984. Huff does not

allege that the information that the State offered to treat the witness's son more leniently in exchange for her recantation was recently discovered or that it could not have been discovered at the time of the recantation and prior to the retrial. In short, Huff does not allege how this information is newly discovered evidence or constitutes a *Gigilio* violation. In fact, he does not specifically allege that it is either. (R 1512-1514). Thus, his claim is legally insufficient.

Finally, he does not allege that had the unidentified witness’s original statement been introduced at the retrial, he would have been acquitted. Certainly, the alleged evidence does not rise to that standard. Thus, the alleged recantation does not meet the *Jones*’ test for admissibility.

6. His final subissue in this claim is that "[l]aw enforcement officers suspected that there was another crime scene involved in the homicides." (IB 68). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not e further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be

tolerated.

In his motion, Huff alleges that "[**t**]**his** scene was processed and investigated." (R 1514) (emphasis added). He does not identify who the allegedly suspicious officers were, where the second scene was, or how that scene would have impacted Huff's convictions and/or sentences. Thus, the trial court correctly determined that this claim is legally insufficient. (R 2401). *See Sorgman*, 549 So. 2d at 687.

In a general discourse on the law according to Huff, he submits: "To the extent that trial counsel should have known about the evidence discussed herein, counsel rendered deficient performance which prejudiced Mr. Huff." (R 1520). First, that issue is **not** raised in the appellate brief, and therefore, it is procedurally barred in this Court. Second, it is a conclusory, "barebones," claim which is utterly insufficient on which to base 3.850 relief. *Roberts*, 568 So. 2d at 1259; *Kennedy*, 547 So. 2d at 913. Third, the claims alleged, when viewed in light of the facts established on the record and the prevailing law, do not constitute even a *prima facie* case of deficient performance.

Motion Claim XII:

In his brief, Huff repeats his lower court claim that "he is innocent of First Degree Murder and . . . the death penalty." (IB

69). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

The trial judge correctly ruled that this claim is procedurally barred because it was raised on direct appeal (Claim VIII). (R 2402). Moreover, this Court found this claim to be without merit. "No evidence whatsoever was introduced to support appellant's story; in fact, all of the evidence . . ., with the exception of appellant's testimony, pointed to his guilt." *Huff*, 495 So. 2d at 150.

Motion Claim XIII:

In his brief, Huff says "various constitutional rights were violated by the Florida Rules of Professional Conduct which generally prohibit counsel from interviewing jurors." (IB 70). He complains that the "jocular bantering" between the court and the prosecutor had an unspecified "adverse affect on the jury." (IB 70-71). He fails to specify what this "affect" consisted of, or to allege that it resulted in a conviction or sentence which he would

not otherwise have received, and therefore, this claim is legally insufficient.

Further, Huff's claim that the ethical rules prevented him from inquiring of the jury is not correct. The rule requires only that he seek leave of court before doing so. See Rule 4-3.5(d), Rules Regulating the Florida Bar.

Moreover, this point could have been raised on direct appeal, and since it was not, it is procedurally barred. See Argument II, Motion Claim V, sub-6, at 38.

Motion Claim XIV:

In his brief, Huff says "his constitutional rights were violated by ***Florida Statute F.S. 921.141*** on the aggravating circumstances." (emphasis in original) (IB 71). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

The trial judge correctly ruled that this claim is procedurally barred because it was raised on direct appeal (Claim

XIX). (R 2403). Moreover, this Court found this claim to be "without merit." *Huff*, 495 So. 2d at 153.

Motion Claim XV:

In his brief, Huff says that Florida's sentencing scheme is unconstitutional. (IB 71). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

The trial judge correctly ruled that this claim is procedurally barred because it was raised on direct appeal (Claim XIX). (R 2403). Moreover, this Court found this claim to be "without merit." *Huff*, 495 So. 2d at 153.

Motion Claim XVI:

In his brief, Huff says that "if no single error constituted a bases for relief then the cumulative effect of the errors did." (IB 72). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims

cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

The lower court correctly ruled that this claim is procedurally barred because it was raised on direct appeal (Claim XVII). (R 2404). Moreover, this Court found this claim to be "without merit." *Huff*, 495 So. 2d at 153.

Motion Claim XVII:

In his brief, Huff says that "the court and counsel for the State engaged in misconduct that interfered with the jury's ability to be impartial." (IB 72). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

In his motion, Huff added that "the Court did not recognize the seriousness of the trial and was responsible for the trial having a 'festive atmosphere.'" (R 2404) (*citing* R 1536). The lower court correctly ruled that this claim is procedurally barred because it was raised on direct appeal (Claim XI). (R 2404).

Moreover, this Court found this claim to be "without merit." *Huff*, 495 So. 2d at 153.

Motion Claim XVIII:

In his brief, Huff says "he had newly discovered evidence." (IB 72). That is the sum total of the claim. Again, the State strongly objects to the "barebones" pleading and contends that such a pleading fails to state a claim upon which appellate relief can be granted. Claims cannot be raised on appeal by merely referencing arguments made in a 3.850 motion. *Duest*, 555 So. 2d at 852. Thus, Huff is entitled to no relief from the summary denial.

In his motion, he does no better. (R 1543-1555). Clearly, he failed to state a claim upon which relief could be granted. The trial court correctly held that this claim is legally insufficient. (R 2405). *See Kennedy v. State*, 547 So. 2d 912 (Fla. 1989).

Motion Claim XIX:

In his brief, Huff says "during voir dire the trial judge and prosecutor denigrated the jury's role in the penalty phase . . .." (IB 72). He does not identify a single incident by either the judge or prosecutor which he claims was improper. The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further

considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous should not be tolerated.

In his motion, Huff complains that the jury was "led to believe that the judge was the ultimate sentencer," and the judge "repeatedly told" the prospective jurors "that their role in the penalty phase was only advisory."[17] (R 1548). This issue involving a claim of improper voir dire should have been raised on direct appeal and is procedurally barred. *See Webber v. State*, 662 So. 2d 1287 (Fla. 5th DCA 1995). To the extent that Huff asserts a *Caldwell*[18] claim, same does not overcome a procedural bar. *Demps v. State*, 515 So. 2d at 196, 197 (Fla. 1987). Further, it provides no relief in postconviction proceedings. *Woods v. State*, 531 So. 2d at 79, 83 (Fla. 1988), and is inapplicable in Florida. *Combs v. State*, 555 So. 2d 853 (Fla. 1988),; *Tafero v. State*, 561 So. 2d 557, 559 n.2 (Fla. 1990), *cert. denied*, 495 U.S. 925 (1990).

Moreover, "advising the jury that its sentencing recommendation is advisory only is an accurate statement of the

---

[17]As the trial judge pointed out, "the jurors were told that their penalty recommendation would be given 'great weight' by the sentencing judge," and the record page citations were included in the order. (R 2405).

[18]*Caldwell v. Mississipi*, 472 U.S. 320 (1985).

law." *Cave v. State*, 529 So. 2d 293, 296 (Fla. 1988). Finally, there was no penalty phase jury, as Huff waived the entire penalty phase proceeding. Thus, any diminution of responsibility for the penalty which the jurors might have experienced as a result of the complained-of comments was harmless.

Motion Claim XX:

In his brief, Huff says "the record of [his] trial proceeding is 'incomplete in a way which prevented the Florida Supreme Court from conducting meaningful appellate review.'" (IB 73). Nowhere does he identify how or why the record is "incomplete." Nor does he reveal how this Court was prevented from conducting a meaningful review. Again, the State strongly objects to the "barebones" pleading and contends that such a pleading fails to state a claim upon which appellate relief can be granted. Thus, Huff is entitled to no relief from the summary denial.

In his motion, Huff does only slightly better. He complains that "a number of unreported sidebars and discussions in chambers" precluded meaningful appellate review. (R 1551). He purports to identify "but a small fraction" of them. (R 1551). There is no indication why these proceedings were not recorded, what appellate issues were obscured, or minimized, by the failure to report them, or even, who decided not to report the proceedings. Thus, this

claim as pled in the motion is legally insufficient to state a basis for relief in this Court. It is also procedurally barred because it could have been raised on direct appeal. *Rutherford*, 727 So. 2d at 219 n.2; *Johnson*, 593 So. 2d at 208; *Smith*, 445 So. 2d at 325.

In his motion, regarding his complaint that "initial qualification of the venire panel" was not reported, Huff alleges "[t]o the extent counsel waived the recording of this procedure, trial counsel rendered appellate counsel and post-conviction counsel prejudicially ineffective by precluding adequate presentation of claims challenging the composition of the jury." (R 1550). First, that issue is **not** raised in the appellate brief, and therefore, it is procedurally barred in this Court. Second, it is a conclusory, "barebones," claim which is utterly insufficient on which to base 3.850 relief. *Roberts*, 568 So. 2d at 1259; *Kennedy*, 547 So. 2d at 913. Third, the appropriate vehicle for claims of appellate ineffectiveness is a petition for writ of habeas corpus. *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995). Fourth, there is no right to effective collateral counsel, *State v. Lambrix*, 698 So. 2d 247, 248 (Fla. 1996), *cert. denied*, 118 S.Ct. 1064 (1998), and therefore, there is no legal basis for this claim. *See Pennsylvania v. Finley*, 481 U.S. 551 (1987);

Butterworth v. Kenny, 714 So. 2d 404, 407-408 (Fla. 1998).

Motion Claim XXI:

In his brief, Huff says "the prosecutor's choice of words during the trial prejudiced Huff." (IB 73). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

In his motion, Huff complains that the prosecutor "referred to the victim's car as the 'death vehicle'" (as did this Court in its opinion on direct appeal), to a specific wound "as an 'insurance wound' and a 'coupe de grace' over defense objection," "commented on the credibility of a key [but unidentified] witness," "vouched for the grand jury indictment and expressed a personal opinion about Mr. Huff's guilt," "implied . . . a verdict of not guilty, . . . would have been a waste of time," called the jury "the last bastion against crime," and "mix[ed] his opinion of the evidence with his Golden Rule argument." (R 1556-1557). Other than the wound descriptions, Huff does not reveal whether objections were

made to the complained-of comments. Rather than plead with the specificity required by Rule 3.850, he throws in his frequently reoccurring catch-all, conclusory phrase: "To the extent counsel failed to object or raise this issue at trial, Mr. Huff was denied effective assistance of counsel." (R 1559). However, that issue is **not** raised in the appellate brief, and therefore, it is procedurally barred in this Court. Second, it is a conclusory, "barebones," claim which is utterly insufficient on which to base 3.850 relief. *Roberts*, 568 So. 2d at 1259; *Kennedy*, 547 So. 2d at 913.

Moreover, his claims of prosecutorial misconduct could, and should, have been raised on direct appeal. *Kelley v. State*, 569 So. 2d 754 (Fla. 1990). Indeed, Huff raised several, some of which are also complained of in the instant motion. *See* Initial Brief of Appellant, No. 65,695, Points II and VII. The failure to raise these claims on direct appeal, or their denial where raised, constitutes a procedural bar to consideration in the instant proceeding. *Rutherford*, 727 So. 2d at 219 n.2; *Johnson*, 593 So. 2d at 208; *Kelley*, 569 So. 2d at 756; *Smith v. State*, 445 So. 2d at 325. Rule 3.850 does not serve to provide a second direct appeal. *Rutherford*, 727 So. 2d at 219 n.2; *Medina*, 573 So. 2d at 295.

Motion Claim XXII:

In his brief, Huff says that "the trial judge absented himself, 'during the proceedings' therefore violating several of the defendant's constitutional rights." (IB 73). Merely

referencing arguments in the motion is insufficient. *Duest*, 555 So. 2d 852. This "barebones" appellate pleading fails to even so much as name the "constitutional rights" allegedly at issue, and it is, therefore, legally insufficient claim on which to base any relief.

Moreover, the trial judge correctly ruled that this claim is procedurally barred because it was raised on direct appeal (Claim XIX). (R 2403). Moreover, this Court found this claim to be "without merit." *Huff*, 495 So. 2d at 153.

Motion Claim XXIII:

In his brief, Huff says "the court denied the public the right to access to the proceedings and compromised Huff's right to a fair trial." (IB 74). Merely referencing arguments in the motion is insufficient. *Duest*, 555 So. 2d 852. That is the sum total of the appellate claim. Again, the State strongly objects to the "barebones" pleading and contends that such a pleading fails to state a claim upon which appellate relief can be granted. Thus, Huff is entitled to no relief from the summary denial.

In his motion, Huff complains of a "thirty minute discussion" between the jurors and "the lawyers who had tried the case." (R 1563). "Reporters and the public were barred from attending" "to allow the jurors to more candidly express their opinions." (R 1563). Neither Huff, nor a court reporter, were present. (R 1563).

This claim is procedurally barred because it could, and should, have been raised on direct appeal. *Rutherford*, 727 So. 2d at 219 n.2; *Johnson*, 593 So. 2d at 208; *Smith*, 445 So. 2d at 325. Moreover, the State submits that Huff lacks standing to bring this claim insofar as he contends the Public's "right" was affronted.

Finally, he has not suggested how he was prejudiced by this discussion which occurred "after the trial and sentencing proceedings were over." (R 2407). *See* RTR 3115. Therefore, the trial judge's summary denial of this claim was correct.

Motion Claim XXIV:

In his brief, Huff says that "the state used its peremptory challenges in a racially discriminatory way," and "his counsel failed to make a record of the racial composition of the jury and therefore was ineffective in preserving the issue." (IB 74). Regarding the allegation of racially discriminatory use of peremptories, that issue could and should have been raised at

trial. The failure to so raise it constitutes a procedural bar in this proceeding. *Rutherford*, 727 So. 2d at 219 n.2; *Johnson*, 593 So. 2d at 208. Further, where not raised at trial or on appeal, the *Neil v. State*, 457 So. 2d 481 (Fla. 1984) holding regarding racially biased jury selection is not applicable. 457 So. 2d at 488.

Regarding the allegation of ineffective assistance for not making "a record of the racial composition of the jury," same is a conclusory, "barebones," claim which is utterly insufficient on which to base 3.850 relief. *Roberts*, 568 So. 2d at 1259; *Kennedy*, 547 So. 2d at 913. Finally, even assuming that the failure to "make a record" in this regard constitutes deficient performance (and the State contends that it does not), Huff has failed to show the requisite prejudice. He has not alleged, much less demonstrated, that the outcome of his trial or sentencing would have been different had counsel made such a record. Thus, the *Strickland* standard has not been met, and the claim is legally insufficient as the trial judge correctly ruled. (R 2408).

<u>Motion Claim XXV</u>:

In his brief, Huff says that the cold, calculated, premeditated aggravator is unconstitutional. (IB 74). The "barebones" appellate brief again fails to state any facts or other

support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 853. Such pleading is frivolous and should not be tolerated.

The trial judge ruled that this claim is procedurally barred because it was raised on direct appeal (Claim XIX). (R 2403). If so, this Court found this claim to be "without merit." *Huff*, 495 So. 2d at 153. Moreover, this crime would be deemed cold, calculated and premeditated under any definition of that aggravator. *See Monlyn v. State*, 705 So. 2d 1, 5-6 (Fla. 1997), *cert. denied*, 141 L.E. 745 (1998); *Bell v. State*, 699 So. 2d 674, 678 (Fla. 1997), *cert. denied*, 118 S.Ct. 1067 (1998); *Larzelere v. State*, 676 So. 2d 394, 408 (Fla. 1996), *cert. denied*, 117 S.Ct. 615 (1996).

Motion Claim XXVI:

In his brief, Huff says that the evidence against him was insufficient to support his conviction. (IB 75). The trial judge correctly ruled that this claim is procedurally barred because it was raised on direct appeal (Claim VIII). (R 2409). Moreover, this Court found: "No evidence whatsoever was introduced to support

appellant's story; in fact, all of the evidence . . ., with the exception of appellant's testimony, pointed to his guilt." *Huff*, 495 So. 2d at 150. This claim, having previously been decided adversely to Huff on direct appeal, was properly summarily denied. Moreover, sufficiency of the evidence to support a conviction or sentence cannot be raised on 3.850. *Montana v. State*, 597 So. 2d 334 (Fla 1992), *cert. denied*, 118 S.Ct. 2378 (1998).

Motion Claim XXVII:

In his brief, Huff reiterates the claim raised in the preceding claim, i.e., sufficiency of the evidence against him. (IB 77). The trial judge correctly ruled that this claim is procedurally barred because it was raised on direct appeal (Claim XIX). (R 2409). *See* Argument II, Motion Claim XXVI, *supra*, at 75.

It is also inappropriate on 3.850. *Id*.

Motion Claim XXVIII:

In his brief, Huff says that his "absence from critical stages of the proceedings prejudiced" him. (IB 78). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on

appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

The lower court correctly ruled that this claim is procedurally barred because it was raised on direct appeal (Claim XVI). (R 2409). Moreover, this Court found this claim to be "without merit." *Huff*, 495 So. 2d at 153. Had it not been so raised, it is procedurally barred because it should have been. *See Rivera v. Dugger*, 629 So. 2d 105 (Fla. 1993).

Motion Claim XXIX:

In his brief, Huff says that "the trial court erred in allowing individuals lacking the proper qualifications to testify as experts." (IB 79). The lower court correctly ruled that this claim is procedurally barred because it "could have been raised on appeal." (R 2410).

In his 3.850 motion, Huff also complained that "[t]o the extent trial counsel faile*d to* adequately object or conduct voir dire of the State's witnesses, counsel was prejudicially ineffective." (R 1588). Since that issue is **not** raised in the appellate brief, it is procedurally barred in this Court. Further, it is a conclusory, "barebones," claim which is utterly

insufficient on which to base 3.850 relief. *Roberts*, 568 So. 2d at 1259; *Kennedy*, 547 So. 2d at 913. Finally, the claims alleged, when viewed in light of the record facts, including that defense counsel repeatedly objected to the witnesses specified in the motion, (R 2410), and the prevailing law, do not constitute even a *prima facie* case of deficient performance, much less prejudice.

Motion Claims XXX:

In his brief, Huff says that his "trial was conducted by an Assistant State Attorney lacking constitutionally-conferred jurisdiction to prosecute." (IB 80). That is the sum total of his appellate claim. No attorney is identified, and no reason for the alleged lack of jurisdiction is given. Thus, again, the "barebones" presentation in the appellate brief is wholly insufficient to raise a claim on which relief could be granted by this Court.

In his 3.850 motion, Huff's primary complaint is that the Governor, in reassigning the case to be tried in a different circuit, on Huff's motion for change of venue, should not have permitted the Fifth Judicial Circuit's State Attorney to conduct the trial held in the Sixth Judicial Circuit. (R 1590-1592). Clearly, all the facts and circumstances pertaining to this issue were known at the time of trial. Huff has not alleged that his

trial counsel objected to the procedure at trial, and the failure to do so constitutes a procedural bar. Further, even if a proper objection had been made, the claim is still procedurally barred because, as the trial judge held, (R 2410), it could have been raised on direct appeal. *See Cole v. State*, 701 So. 2d 845, 854 (Fla. 1997), *cert. denied*, 118 S.Ct. 1370 (1998).

Moreover, Huff's motion fails to allege prejudice resulting from the prosecution by the Fifth Judicial Circuit's State Attorney, (R 2411), and same is fatal to his ineffective assistance claim. *Strickland*. Indeed, his appellate claim does not couch the issue in terms of ineffective assistance of counsel, (IB 80), possibly because the attempt to do so is so obviously an attempt to circumvent the well-established rule against using 3.850 to obtain a second appeal. *See Medina v. State*, 573 So. 2d at 295. Summary denial was clearly appropriate.

Motion Claim XXXI:

In his brief, Huff says that his "jury was pre-qualified in a racially discriminatory manner," and "Huff was not present." (IB 81). As the trial judge correctly noted, the portion of this claim alleging absence is procedurally barred because it was raised on direct appeal (Claim XVI). (R 2409). Moreover, this Court found this claim to be "without merit." *Huff*, 495 So. 2d at 153. *See*

also, Argument II, Motion Claim XXVIII, *supra*, at 76.

Regarding the allegation of racially discriminatory pre-qualification of the jury, that issue could and should have been raised at trial. *See San Martin v. State*, 705 So. 2d 1337, 1343 (Fla. 1997), *cert. denied*, 119 S.Ct. 105 (1998). The failure to so raise it constitutes a procedural bar in this proceeding. *Rutherford*, 727 So. 2d at 219 n.2; *Johnson*, 593 So. 2d at 208; *Smith*, 445 So. 2d at 325. It was an issue for direct appeal and is not appropriate in a 3.850 proceeding. *See Webber v. State*, 662 So. 2d 1287 (Fla. 5th DCA 1995). Further, where not raised at trial or on appeal, the *Neil v. State*, 457 So. 2d 481 (Fla. 1984) holding regarding racially biased jury selection is not applicable. 457 So. 2d at 488.

Motion Claim XXXII:

In his brief, Huff reiterates his 3.850 motion claim that the heinous, atrocious and cruel aggravator is unconstitutional. (IB 81). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such

pleading is frivolous and should not be tolerated.

The lower court correctly ruled that this claim is procedurally barred because it was raised on direct appeal (Claim XVIII). (R 2412). This Court found this claim to be "without merit." *Huff*, 495 So. 2d at 153.

Moreover, to the extent that the motion claim varies from the direct appeal claim regarding this aggravator, it is procedurally barred because different arguments may not be used to relitigate issues raised on direct appeal. *Medina*, 573 So. 2d at 295. In any event, the facts of the instant case well support a finding of heinous, atrocious and cruel under any definition, or construction, of that aggravator. *See Johnson v. State*, 660 So. 2d 637, 648 (Fla. 1995), *cert. denied*, 116 S.Ct. 115 (1996); *Fennie v. State*, 648 So. 2d 95, 98 (Fla. 1994), *cert. denied*, 115 S.Ct. 1120 (1995).

Motion Claim XXXIII:

In his brief, Huff says that the trial court improperly considered "non-statutory aggravating circumstances." (IB 85). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in

the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

Moreover, the lower court correctly ruled this claim procedurally barred because it was "partially" raised on direct appeal (Claim XVIII). (R 2412). The order identifies this component of the issue as the "lack of remorse" claim raised on direct appeal. (R 2412). This Court found some error in connection with that issue, but determined that it was harmless since "it was used in support of findings which were already amply supported by the record . . .." *Huff*, 495 So. 2d at 153.

In his motion, Huff lists four other factors he claims were "relied upon" by the court and amount to "non-statutory aggravating circumstances:"

1. Evidence of guilt was stronger in second trial;
2. Huff testified;
3. Court found Huff's testimony incredible;
4. guilt was 'well beyond <u>any</u> reasonable doubt.'

(R 1600). A review of the <u>Supplement to Finding of Fact Supporting Death Sentence</u> makes it clear that these "factors" were considered in deciding whether the statutory aggravators had been proved. For example, where there was testimony both in support and in opposition to the finding of a given aggravator, the trial judge

had to determine which was the most credible in order to determine whether the statutory aggravator applied. The State submits that there was no impropriety in so considering the "factors" about which Huff complains. Thus, even had it not been procedurally barred, the claim was still properly denied summarily because it is legally insufficient.

In his motion, Huff also complained that "[t]o the extent counsel failed to object or raise this issue at trial, Mr. Huff was denied effective assistance of counsel." (R 1601). Since that issue is **not** raised in the appellate brief, it is procedurally barred in this Court. Further, it is a conclusory, "barebones," claim which is utterly insufficient on which to base 3.850 relief. *Roberts*, 568 So. 2d at 1259; *Kennedy*, 547 So. 2d at 913. Finally, even assuming that the failure to object to the complained-of factors constitutes deficient conduct (and the State contends that does not), Huff has failed to allege the requisite prejudice. Indeed, considering the ample evidence supporting the statutory aggravators found by the trial court and the minuscule mitigation, there is no reasonable possibility, much less probability, that absent the complained-of factors, the sentence would have been less than death. Thus, the *Strickland* standard has not been met, and the claim is legally insufficient.

<u>Motion Claim XXXIV</u>:

In his brief, Huff says that the pecuniary gain aggravator was inapplicable to his case. (IB 85). The lower court correctly ruled that this claim is procedurally barred because it was raised on direct appeal (Claim XVIII). (R 2413). This Court found this claim had merit and struck the pecuniary gain aggravator. *Huff*, 495 So. 2d at 152. Thus, summary denial of the issue in the 3.850 motion was proper.

<u>Motion Claim XXXV</u>:

In his brief, Huff says that "he was incompetent to waive his right to a penalty phase." (IB 87). The trial judge found, "[t]his claim is completely refuted by the record . . .." (R 2413). He is correct. *See* Argument II, Motion Claim VI, *supra*, at 46-50.

In his motion, Huff also complained that "trial counsel was ineffective in relying on his client to make legal decisions regarding what evidence should be presented in mitigation." (R 1607). Since that issue is **not** raised in the appellate brief, it is procedurally barred in this Court. Further, it is a conclusory, "barebones," claim which is utterly insufficient on which to base 3.850 relief. *Roberts*, 568 So. 2d at 1259; *Kennedy*, 547 So. 2d at 913.

Moreover, it is clear that Huff had a strategic reason for waiving the penalty phase and asking the court for the death penalty. He wanted an immediate direct appeal to this Honorable Court. *See* Argument II, Motion Claim VI, *supra*, at 46-50. Clearly the alternative option had been considered. Huff, who had already tried the penalty phase option in his first trial, had repeatedly talked to his attorneys about the course he ultimately chose in the retrial. Id. That his attorneys could not dissuade him from his "stubborn" insistence to proceed with that strategy does not constitute deficient performance. *See Rutherford*, 727 So. 2d at 216 [As long as alternative courses are considered, strategic decisions do not constitute deficient performance].

Finally, even assuming that the failure to present mitigation in the face of his client's adamant contention that he did not want to proceed to a penalty phase proceeding constitutes deficient performance, Huff has failed to show the requisite prejudice. He has not demonstrated that there was mitigation available at the time of the 1984 proceeding which was even arguably sufficient to overcome the statutory aggravators. Thus, there is no reasonable possibility, much less probability, that had counsel put on whatever mitigation was then available, the sentence would have been less than death. Thus, the *Strickland* standard has not been

met, and the claim is legally insufficient as the trial judge correctly ruled. (R 2415).

Motion Claim XXXVI:

In his brief, Huff says that he "inventoried all the evidence that could have been presented had he not elected to waive the presentation of mitigating evidence . ..." (IB 88). Of course, he does not bother to tell this Court what that was, or even to provide a record citation indicating where that alleged inventory could be found. The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

Moreover, consideration of any mitigation presented in the 3.850 motion is not appropriate where, as here, the defendant voluntarily waived the presentation of same. Indeed, the record facts show that Huff did much more than waive the penalty phase, he consistently insisted that it not be conducted from the time he initially met his defense counsel to prepare for the retrial until the day he rejected his counsel's advice and personally addressed the trial court on the matter. *See* Argument II, Motion Claim VI, *supra*, 46-50.

Finally, even if all the alleged mitigation is accepted and considered, it is woefully short of approaching the level necessary to permit a reasonable sentencer to find that it outweighs the substantial aggravation in this case. Thus, Huff has not met his burden to show prejudice under *Strickland*.

Motion Claim XXXVII:

Huff does not raise this claim in his appellate brief. Therefore, it is abandoned, or waived, on appeal and is procedurally barred from any type of consideration. (See IB 88-89). Moreover, the issue is largely a restatement of Motion Claim I regarding public records sought from the Sumter County Sheriff's Department. Huff is entitled to no relief thereon. *See* Argument II, Motion Claim I, *supra*, at 30-32.

Motion Claim XXXVIII:

In his appellate brief, Huff conclusorily alleges that "the trial judge erred by failing to properly and timely impose a written sentence and relied on facts not in evidence at the sentencing." (IB 89). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the

arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

Moreover, the instant claim could and should have been raised on direct appeal. The failure to so raise it constitutes a procedural bar. *Rutherford*, 727 So. 2d at 219 n.2; *Johnson*, 593 So. 2d at 208; *Smith*, 445 So. 2d at 325. 3.850 proceedings do not serve as a second appeal. *Medina*, 573 So. 2d at 295.

Finally, a written sentencing order present at the time of sentencing was not required until 1988. *Stewart v. State*, 549 So. 2d 171, 176 (1989), *cert. denied*, 497 U.S. 1031 (1989). As the trial judge correctly ruled, "Huff's complaint that the trial court violated a rule that did not exist [when he was sentenced] is legally insufficient." (R 2417). Regarding the claim that the court relied "on evidence and testimony not presented at the 1984 proceeding," Huff fails to specify the evidence and testimony to which he refers, muchless allege how its consideration changed the sentence he would have received into a death sentence. (R 1635-1641). His claim is legally insufficient.

Motion Claim XXXIX:

In his brief, Huff says that "the security measures undertaken in the presence of the jury violated several of Huff's rights." (IB 89). The "barebones" appellate brief again fails to state any

facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

In his motion, Huff identifies the "security measures" as being shackled to a deputy when leaving the courthouse at the conclusion of the day's proceedings. (R 1643). Defense counsel repeatedly objected and moved for mistrials. (R 1645). This issue was raised on direct appeal (Point XVII). The lower court correctly ruled that this claim is procedurally barred because it was raised on direct appeal. (R 2412). This Court found this claim to be "without merit." *Huff*, 495 So. 2d at 153. Had it not been so raised, it would still be barred because it could have been raised on direct appeal. *See Buenoano v. Dugger*, 559 So. 2d 1116 (Fla. 1990); *Medina*, 573 So. 2d at 295.

Motion Claim XXXX:

In his brief, Huff says that "the trial judge was mistaken about the law." (IB 89). In his motion, Huff identifies the mistake of law as "a misapprehension of Mr. Huff's eligibility for parole . . .." (R 1649). He claims that "[t]he court mistakenly

understood the meaning of a 'life' sentence under Florida law as the equivalent of a twenty-five year prison sentence." (R 1649). He concludes this gave the judge "a false choice between sentencing Mr. Huff to death and sentencing him to a limited period of incarceration." (R 1651).

The trial judge, in summarily denying this 3.850 claim, found that the record "shows that the judge was under no misapprehension about what the potential sentences for First Degree Murder were. [R.43]." (R 2417). The lower court properly concluded that the claim is "conclusively refuted by the record" and subject summary denial. (R 2418).

In his motion, Huff also complained that "counsel's failure to object at trial and to raise this issue on direct appeal is ineffective assistance of counsel." (R 1651). Since that issue is **not** raised in the appellate brief, it is procedurally barred in this Court. Further, it is a conclusory, "barebones," claim which merely hints at both trial and appellate counsel ineffective assistance of counsel claims and is utterly insufficient on which to base 3.850 relief. *Roberts*, 568 So. 2d at 1259; *Kennedy*, 547 So. 2d at 913.

Motion Claim XXXXI:

In his brief, Huff says that "the attorney client relationship

was breached, or a Brady violation occurred, based upon an investigative subpoena requesting long-distance records of his prior attorney." (IB 90). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

In his motion, Huff claimed that the State Attorney's Office was investigating one of the officers involved in the investigation of the instant murders, Terry Overly. (R 1653). The investigation involved the relationship between Overly and Huff's counsel at the original trial, Stan Cushman. (R 1653). The State had served a subpoena on the telephone company requesting long distance phone calls placed at two of Mr. Cushman's phone numbers, including his law office. (R 1652). The subpoena covered calls from May 23, 1983 through May 23, 1984. (R 1653). As Huff admits in his motion, "Cushman withdrew from Mr. Huff's case in November of 1980. (R 1653).

Huff claims that Cushman was a "key defense witness," but does not bother to tell the court how or why. (R 1653). Neither does

he explain how telephone contact between Cushman and Overly some three after Cushman ceased representing Huff could have impacted him. Finally, although he reports that Overly was a witness at the retrial, he makes it clear that Overly testified **for** Huff. (R 1654). Although he charges that "the State fought mightily to impeach his credibility," he never states that the State was successful in so doing, or that it used the phone information in its efforts, or even that it received any information sought by the subpoena.

He also claims that "[h]ad successor counsel known of the State's evidence against Stan Cushman, defense counsel could have presented such information at trial. This evidence would have resulted in a verdict of not guilty . . .." (R 1655). He also charges that "the State suspected that Stan Cushman was involved in the homicides of [the victims], yet failed to provide this material and exculpatory (sic) to successor defense counsel." (R 1655). However, he never advises what evidence the State had against Cushman, nor does he reveal on what the State's alleged suspicion of Cushman's involvement in the murders was based. Neither does he identify a single person who he believes has information bearing on either claim. Nor does he reveal how proving that another person, Cushman, helped Huff murder his parents would result "in a verdict

of not guilty" for Huff.

As Huff points out in his motion, material or exculpatory evidence is evidence that is favorable to the defendant and creates a reasonable probability that the conviction or sentence would have been different had it been presented at trial. (R 1656). Huff's instant claim falls woefully short of that standard and does not state a 3.850 claim on which an evidentiary hearing should be granted. The trial judge correctly denied this claim as legally insufficient. (R 2418).

Motion Claim XXXXII:

In his brief, Huff says that "he was denied the effective representation of postconviction counsel because of 'under-funding' and postconviction counsel's 'excessive caseload.'" (IB 90). The "barebones" appellate brief again fails to state any facts or other support for the position. Thus, the issue as presented to this Court is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest*, 555 So. 2d at 852. Such pleading is frivolous and should not be tolerated.

The trial court found:

> Mr. Huff's convictions and sentences were affirmed by the Florida Supreme Court more than eleven years ago and . .

> . for the next decade Mr. Huff has been represented by various attorneys who specialize in capital postconviction litigation. Through these attorneys, Mr. Huff has conducted a thorough and comprehensive search for public records, including depositions of various public records custodians and several evidentiary hearings regarding disclosure of such records. Mr. Huff's representatives filed an original 3.850 motion in 1989 and a 238-page Amended Motion in 1996. That amended motion, too, has been corrected and supplemented by additional pleadings. **Throughout the proceedings, the attorneys** who have appeared before this Court on Mr. Huff's behalf **have been prepared and have zealously advocated his position**. This Court has at **no** time observed any **indication that the funding of CCR has adversely affected the substantive rights of this Defendant**.
>
> Moreover, the Court finds that this Claim does not in any way challenge the viability of the Defendant's convictions or sentences and thus is not a cognizable claim.

(citations omitted) (R 2419) (emphasis added).

Moreover, there is no entitlement to effective assistance of collateral counsel. *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996), *cert. denied*, 118 S.Ct. 1064 (1998). *See Pennyslvania v. Finley*, 481 U.S. 551 (1997); *Butterworth v. Kenny*, 714 So. 2d at 407-408.

ARGUMENT III

Huff complains that the trial judge should have permitted him to further amend his previously filed **and ruled on** Rule 3.850 motion. (IB 90). He claims that

> [t]he purpose of [his] request . . . was to provide the very details . . . which the Circuit court said were lacking in the 3.850 motion as filed by CCR and served a bases for the denial of an evidentiary hearing on those issues.

(IB 93). The State disagrees.

First, Huff's request was untimely in that it was made not only after his Rule 3.850 motion had been filed and repeatedly amended, but well after it had been ruled on at the *Huff* hearing.[19] *See* R 2174-2220. Further, it came after previous continuances granted by the trial court to Huff's current counsel, including a 45 day continuance which was "most recent" to the date of the filing of the motion to again amend the 3.850 motion. (R 2302). The motion to amend was not filed with a proposed amended Rule 3.850 motion, but rather, asked for more time in which to read the record, evaluate the case, and write the amended motion. (R 2302). Indeed, defense counsel had not even finished reviewing the trial transcript, muchless the materials provided him by CCR. (R 2302).

---

[19]The trial court denied "each and everyone," and adopted "the State's analysis" and "reasons stated in the State's answer." (R 2220).

Under these circumstances, it was far too late to amend the motion as to the issues already disposed of.

Second, the motion to amend makes it clear that the issue of the sufficiency of the allegations was litigated by Huff's attorney at the *Huff* hearing. The State's response to the pending Rule 3.850 motion emphasized the legal insufficiency of the allegations. (R 1746; 1749; 1750-1753; 1754-1766; 1767-1776; 1778-1781; 1782-1783; 1785; 1788-1789; 1790-1798; 1801-1804). Rather than seek amendment, Huff took the position that he "did not have to provide specificity as to allegations of ineffectiveness." (R 2302). Thus, he specifically waived any amendment for the purpose now asserted as the reason the trial judge should have permitted further amendment of the pending 3.850 motion.

CONCLUSION

Based upon the foregoing arguments and authorities, Huff's convictions and sentence of death should be affirmed in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

____
JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #0438847
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, Florida 32118
(904) 238-4990

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to Appellant’s Attorney, Frederick W. Vollrath, P. O. Box 18942, Tampa, Florida, 33679 on this ____ day of June, 1999.

____

Of Counsel