IN THE SUPREME COURT OF FLORIDA

DUANE EUGENE OWEN,

Appellant,

vs. Case No. 92,144

STATE OF FLORIDA,

Appellee.
_______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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IN THE SUPREME COURT OF FLORIDA

DUANE EUGENE OWEN,

Appellant,

vs. Case No. 92,144

STATE OF FLORIDA,

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_________________________________/

PRELIMINARY STATEMENT

Appellant, DUANE EUGENE OWEN, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "PCR," reference to the transcripts will be by the symbol "PCT," and reference to the record from the direct appeal will be by the symbols "ROA. All references will be followed with "[vol.]" and the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The state accepts appellant's statement of the facts and case with the following additions which are relevant for resolution of the issues on appeal. During the pendency of Owen's direct appeal in this case, trial counsel, Don Kohl filed a motion for postconviction relief. Initially this Court allowed that litigation to proceed irrespective of the fact that this case was pending on appeal. Ultimately however this Court held the collateral proceedings in abeyance until resolution of the direct appeal. The direct appeal became final in 1992. (PCR VOL. XXIII 4-238).

Owen was represented by Craig Boudreau and Don Kohl at his trial for the murder of Georgianna Worden. Owen was represented by another member of the firm, Barry Krischer, at his trial for the murder of Karen Slattery. His conviction for that murder was overturned by this Court in 1990. At that time of the evidentiary hearing in this case, Owen was facing retrial for the Slattery murder. Owen was represented by Carey Hauwought in that retrial.

Owen's former counsel, Barry Krischer was elected State Attorney for the Fifteenth Circuit in 1992. Consequently in 1994 the State Attorney's Office from the Fifteenth Circuit was removed

from any further prosecution of Owen. The Hillsborough State Attorney's Occice was then designated as counsel for the state. (PCR VOL. V 888-908, 1053).

Thereafter Owen filed an amended motion for postconviction relief in October of 1994. The issues raised in that initial motion, filed earlier by Don Kohl were incorporated into the Owen's amended motion for postconviction relief. (PCR VOL. V 919-1039). The state conceded that Owen was entitled to amend his motion yet again after resolution of outstanding public records requests. (PCR VOL. VI 1147-1153). From October of 1994 until July of 1997 numerous hearings and status conferences were held regarding those additional public records requests.(PCT VOL. XXVI-XXVII 373-670). During litigation of the public records requests, Owen filed a motion to disqualify original trial judge, Judge Burke on July 12, 1996. (PCR VOL. VI 1217-1260). The motion was denied and Owen filed a Writ of Prohibition. The writ was denied in December of 1996. Owen v. Richard Burke, Case no. 88,534. (PCR VOL. VII 1272, PCT VOL. XXVI 450-452, 480).

From January 1997 until September of 1997, several hearings were held in order to resolve any outstanding public records requests. (PCT VOL. XXVI-XXVII 479-625). Owen filed a final amended motion for postconviction relief on September 23, 1997, (PCR VOL. VIII 1379-1546). The state's response was filed on October 31, 1997 (PCR VOL. VIII 1560-1581). A Huff hearing was

set for November 5, 1997 with an evidentiary scheduled for the week of December 8, 1997. (PCT VOL. XXVII 627-634).

On September 8, 1997 an emergency hearing was held regarding Owen's request for access to the original video tape of his confession. (PCT VOL. XXVII 639-648). The state objected arguing that the tape had already been tested by Owen's expert retained by Carey Hauwought at a cost of $5,000.00. (PCT VOL. XXVII 646). The court denied the request but advised Owen to speak with his counsel, Hauwought about the testing she had pursued. (PCT VOL. XXVII 648). A second hearing was held on September 11, 1997. Owen stated that Hauwought was not sure what test had been conducted by the expert and therefore release of the tape was still necessary. The state again objected arguing that Owen should be required to investigate further by talking to the expert. Owen then altered his request, asking instead for a copy of the video rather than for release of the original. (PCT VOL. XXVII 651-657). The court again denied the request, telling Owen to depose the expert. If he was unable to get the proper information from the expert, Owen should advise the Court. (PCT VOL. XXVI 657).

On October 20, 1997 capital collateral counsel advised the court that the state offered to make available for review, the trial file in the Slattery case. The offer was made strictly as a professional courtesy and not pursuant to chapter 119. The state would allow collateral counsel access to the same information

already in possession of Owen's trial counsel Carey Hauwought. The state consistently maintained that the files were not subject to disclosure under chapter 119. (PCT VOL. XXVI 424-426, 670-671).

A Huff hearing was held on November 5, 1997. (PCT VOL. XXVII 674-749) Owen filed two pro se motions on the day of the Huff hearing, including a pro se motion for postconviction relief. (PCR VOL. VIII 1595-1622). Since Owen was represented by counsel that motion was denied. The court advised Owen to confer with counsel regarding counsel's decision whether to adopt the motion. (PCT VOL. XXVII 679-699). Owen also filed a motion questioning the qualifications of his attorneys under chapter 27. (PCT VOL. XXVII 679). The court found that counsel meet the statutory criteria and denied the motion. (PCT VOL. XXVII 679).

At the Huff hearing, the state conceded that the following issues would require an evidentiary hearing for resolution: (1) trial counsel, Craig Boudreau and Don Kohl rendered constitutionally deficient performance in the use of mental health experts at critical stages of the trial (PCR VOL. VIII 1399-1407), (2) Craig Boudreau rendered deficient performance at the guilt phase for failing to investigate a viable defense to the state's case (PCR VOL. VIII 1407-1422), (3) Attorneys Donald Kohl and Barry Krischer failed to disclose to Owen various conflicts of interest they both possessed (PCR VOL. VIII 1422-1431),(4) Craig Boudreau failed to investigate and present statutory and nonstatutory

mitigating evidence, (PCR VOL. VIII 1432-1456), (5) trial counsel Donald Kohl failed to raise the following issues before the trial court: the police incorrectly testified at the motion to suppress hearing that Owen was arrested on May 30, 1984 when in fact he had been arrested on May 29, 1984; a photo used by the victims to identify Owen was taken after he was arrested rather than before; not all of Owen's confessions were videotaped and he was questioned without the presence of counsel; counsel failed to learn that Owen suffered a head injury in 1982; the police misrepresented that Owen had been dishonorably discharged from the United States Army when he in fact had been honorably discharged. (PCR VOL. VIII 1456-1463, 1580 PCT VOL. XXVII 706-707, 747-749).

The trial judge also left open the opportunity for Owen to present evidence regarding five additional claims after collateral counsel reviewed the state attorney file in the Slattery case. Those additional claims are as follows: (6) Owen's inability to locate former defense attorney, Barry Krischer's file (PCR VOL. VIII 1390-1393, (7) "potential" Brady claim (PCR VOL. VIII 1397-1399), (8) "potential" newly discovered evidence (PCR VOL. VIII 1464), (9) "potential" juror misconduct, (10) alleged "Johnson v. Mississippi claim (PCR VOL. VIII 1515-1516, PCT VOL. VII 710, 712-714, 717-719, 734, 742). On November 25, 1997 a hearing was held regarding motions for continuance, one filed by each side.Relying on case law regarding public records, Owen argued that

he was entitled to a sixty-day continuance based on the fact that he had not yet received the state's trial file from the Slattery case. The state objected arguing that the records were to be turned over only as a courtesy and not pursuant any public records request. More importantly the files were already in the Owen's possession since 1994, therefore he was not deserving of the continuance. (PCT VOL. XXVIII 753-764).

The state's continuance was based on the possibility that state witness, Craig Boudreau, would not be unavailable for the evidentiary hearing. (PCT VOL. XXVIII 754-759). Both motions were denied. (PCR VOL. IX 1628-1629). Owen sought a writ of prohibition based on the trial court's denial. Owen v. Burke, Case No. 91,920. This Court denied the writ on December 5, 1997.

On December 5, 1997, three days before the scheduled evidentiary hearing, Carey Haughwout, filed "Motion to Stay Postconviction Proceedings Or In The Alternative, To Prohibit Disclosure Of Privileged Information." (PCR VOL. IX 1637-1642). The motion was heard on the morning of the evidentiary hearing. (PCT VOL. XXVIII 766-813).

In support of his request for a stay of the evidentiary hearing, Owen argued that litigation of the postconviction motion would result in a compelled waiver of the attorney-client privilege in the Slattery case in violation of Simmons v. United States, 390 U.S. 377, 394 (1968) and Johnson v. State, 537 So. 2d 1116 (4th DCA

1989). (PCR VOL. XXVIII 1637-1638). Owen requested that the court <u>either</u> enter a stay of the pending collateral litigation <u>or</u> prohibit the disclosures of privileged information regarding the Slattery case. (PCR VOL. IX 1637-1638 ,PCT XXVIII 771-774). The state objected to the stay and requested that the court restrict the amount of disclosure in order to protect the attorney-client privilege in the Slattery case. (PCT VOL. XXVIII 776, 799-800). The state assured the court that questioning of the witnesses would not involve matters in the Slattery case. (PCT VOL. XXVIII 778, 793, 799-800). The Court granted Owen's request to prohibit disclosures of privileged information. The court extended the prohibition of disclosure to all of Owen's other criminal convictions and repeatedly assured Owen that confidential information would be protected. The court further advised that any questions regarding confidential matters would be addressed as they developed. Owens' trial counsel, Carey Haughwout was permitted to sit with collateral counsel during the evidentiary hearing in order to advise on any specific potential disclosures. (PCT VOL. XXVIII 817-818, 865-868, 909-910). Owen was then ordered to proceed on his pending motion. (PCT. VOL. XXVIII 812-813, 818, 858).

The only witness called by Owen was Barry Krischer, former trial counsel in the Slattery case. On direct examination, Krischer testified that his law firm represented Owen on all of his pending criminal charges however all the cases were

decompartmentalized. (PCT VOL. XXVIII 832-835). For purposes of this hearing Krischer stated that he would answer any questions as long as they were not related to his discussions with Owen regarding the Slattery case. (PCT. VOL. XXVIII 837). Collateral counsel did not ask any other questions of Mr. Krischer. (PCT. VOL. XXVIII 837).

On cross-examination Krischer was asked about his knowledge of the Worden case. He repeatedly and consistently stated he knew nothing about the Worden case. He and Owen never discussed the facts of the Worden murder. (PCT VOL. XXVIII 837, 840, 842-843, 845, 850).

Mr. Krischer was then asked questions regarding his prior employment with the Palm Beach County State Attorney's Office. Krischer was employed as an Assistant State Attorney in the Fifteenth Circuit in 1982. As evidence of this employment Owen referred to a court document signed by Barry Krischer wherein the state decided to nolle prosse an outstanding burglary charge of Owen in 1982. Over Owen's objection Krischer stated that Owen was told about Krischer's prior employment. Krischer also stated that at the time he filed the nol prosse, he had no personal knowledge of Owen. (PCT VOL. XXVIII 859-870, 875). Those discussions included reference to the nolle prosse. (PCT VOL. XXVIII 870).

The only other area of inquiry centered around Mr. Krischer's association, if any, with Dr. Blackman. This inquiry was relevant

since Owen alleged that trial counsel, Craig Boudreau, was ineffective for failing to competently pursue mental health defenses at either phase of the trial. (PCR VOL. VII 1399-1456). The state was trying to ascertain whether he spoke to Dr. Blackman and if so did he ever relay any information to trial counsel Craig Boudreau. (PCT VOL. XXVIII 890, 893-895). Towards that end, Mr. Krischer was shown a copy of a report that was done by psychiatrist, Dr. Blackman. Owen objected stating," Your Honor, I believe I need to object to this. I don't even see the Worden--the Worden case number on this. I am not--the Worden case number is not on this case." (PCT VOL. XXVIII 898). The trial court overruled the objection. After reviewing the report, Krischer stated that it did not refresh his recollection. Although Mr. Krischer remembers Dr. Blackman, he could not say how he became familiar with him. (PCT VOL. XXVIII 900-901). The report was never placed into evidence, and its contents were never revealed. (PCT VOL. XXVIII 898-899, 913). The trial court made it clear that the report would not have been admitted as substantive evidence as it was merely used to refresh the witness's recollection. Mr. Krischer was never asked to reveal the contents of any conversation that he had with Owen regarding Dr. Blackman. (PCT VOL. XXVIII 894, 896, 906).

On redirect, Krischer was again asked about which attorneys were appointed to represent Owen in his various cases. He stated

that the entire law firm was appointed on all of Owen’s cases. (PCT VOL. XXVIII 908-909). The witness was then excused.

Owen then decided not to go forward with the evidentiary hearing claiming that his rights were being violated. He refused to put on any other witnesses because “they would probably say the same thing.” (PCT VOL. XXVIII 909-910). The court asked if Owen had been advised of the consequences of not going forward. Owen and his counsel told the court that he was well aware of the ramifications of his decision to conclude the hearing. The court repeated that he would deny the motion on the merits if Owen did not go forward. He further warned that if the ruling is upheld by the Florida Supreme Court, Owen would be precluded from presenting any another motion in the instant case. Owen said he understood and he was acting under the advice of counsel. The court entered an order denying the motion as Owen did not prove his case. (T 910-913).

SUMMARY OF ARGUMENT

Issue I - The trial court properly denied Owen's motion for postconviction relief when Owen refused to present any evidence in support of the claims for which he was granted an evidentiary hearing.

Issue II - The record establishes that Owen was fully aware of the consequences of his strategic decision not to pursue his motion for postconviction motion.

Issue III - Owen is not entitled to relief on any of his claims of ineffective assistance of counsel since he failed to present any evidence in support of his factual and legal allegations.

Issue IV - Owen's constitutional challenge to the jury instruction applicable to the "HAC" factor is procedurally barred for failing to preserve on direct appeal.

Issue V - Owen's constitutional challenge to the jury instruction applicable to the "felony murder" aggravator is procedurally barred for failure to raise it on direct appeal.

Issue VI - Owen's constitutional challenge to the jury instruction applicable to the "avoid arrest" aggravator is procedurally barred for failure to raise it on direct appeal.

Issue VII - Owen's constitutional challenge to the jury instruction on "prior violent felony" aggravator is procedurally barred for failure to raise it on direct appeal.

Issue VIII - Owen’s constitutional challenge to the jury instructing on the “CCP” aggravator is procedurally barred for failure to raise it on direct appeal.

Issue IX - Owen’s challenge to the admissibility of the details surrounding Owen’s prior violent felonies is procedurally barred as it should have been raised on direct appeal.

Issue X - Owens’ challenge to the admissibility of his confession is procedurally barred as it has already been raised and rejected on direct appeal

Issue XI - Owen’s challenge to the penalty phase jury instructions is procedurally barred as it is an issue which should have been raised on direct appeal.

Issue XII - Owen’s claim that the penalty phase jury instructions are a violation of Caldwell v. Mississippi is procedurally barred for failure to raise it on direct appeal.

Issue XIII - Owen’s challenge to the prosecutor’s remarks is procedurally barred as it is an issue which should have been raised on direct appeal.

Issue XIV - Owen’s claim that he should be allowed to interview jurors was properly denied on the merits since he failed to present any evidence in support of this claim at the evidentiary hearing.

Issue XV - Owen's claim that he was improperly denied an evidentiary hearing is procedurally barred as it an issue which should have been raised on direct appeal.

Issue XVI - Owen's constitutional challenge to Florida's death penalty statute is proceedurally barred as it was raised and rejected on direct appeal.

Issue XVII - Owen's challenge to the admissility of the crime scene video is procedurally barred for failure to raise it on direct appeal.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN FAILING TO HOLD OWEN'S EVIDENTIARY HEARING IN ABEYANCE PENDING "RESOLUTION" OF HIS RETRIAL FOR ANOTHER CAPITAL OFFENSE

Duane Owen has been convicted in two separate trials of two separate capital murders. This court upheld the conviction and sentence of death for the murder of Georgianna Worden. Owen v. State, 596 So. 2d 985 (Fla. 1992). This appeal is from the trial court's denial of his motion for postconviction relief in the Worden homicide. Earlier this year, Owen was also convicted and sentenced to death for the murder of Karen Slattery. Owen v. State, Case No. 95,526.

In the instant case, Owen filed a third amended motion for postconviction relief in September of 1997. Following the state's response, a Huff hearing was held wherein the trial court granted an evidentiary hearing on five claims. The substance of four of those claims involve allegations that trial counsel Craig Boudreau and Don Kohl were ineffective at both phases of the trial. The other claim alleges that a conflict of interest prevented Barry Krischer from adequately representing Owen at the motion to suppress his confession.[1] On the morning of the evidentiary

[1] As already noted, Owen was tried separately for the two murders. However, a joint motion to suppress Owen's confessions was conducted. Barry Krischer, Owen's original trial counsel in the

hearing, Owen's new trial counsel in the Slattery case, Carey Haughwout, moved to stay the Worden evidentiary hearing for fear that privileged information relating to the Slattery case would be disclosed and subsequently used at the trial.[2] Ms. Haughwout requested either a stay of the Worden proceedings or in the alternative a protective order prohibiting disclosure of attorney/client information from the Slattery case. (PCR VOL. IX 1637-1542, PCT VOL. XXVIII 766-813). The state argued that Ms. Haughwout had no standing in these proceedings. It was at that point, that Owen's attorney in the postconviction proceedings, Pamela Izakowitz, adopted the motion. (PCT VOL XXVIII 774-775). The trial court granted Owen's request for a protective order. (PCT VOL. XXVIII 812-813). In granting the protective order, the trial court made it clear that no privileged information would be disclosed regarding any of Owen's other criminal cases except for

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Slattery case represented Owen in that combined suppression hearing. Krisher's representation of Owen in the Worden case was limited solely to the motion to suppress.

[2] In 1990, this Court overturned Owen's conviction and sentence of death for the capital murder of Karen Slattery. Owen v. State, 560 So. 2d 207 (Fla. 1990). Prior to the commencement of that retrial the state sought certiorari review regarding the admissibility of Owen's confession. State v. Owen, 654 So. 2d 200 (4th DCA 1995). The state prevailed in this Court in May of 1997. State v. Owen, 696 So. 2d 715 (Fla. 1997). The retrial for the murder of Karen Slattery commenced in January of 1999 and concluded on March 23, 1999. Owen was again convicted of first degree murder and sentenced to death. Owen v. State, Case no. 95,526

the conviction and sentence under attack in the proceedings, i.e., the murder of Georgianna Worden. (PCT VOL. XXVIII 812-813, 818).

The trial court then ordered Owen to proceed with his pending postconviction motion. (PCT VOL. XXVIII 812-813). Irrespective of the trial court's order prohibiting disclosure of attorney/client information in the Slattery case, collateral counsel indicated that Owen still would not go forward. (PCT VOL XXVIII 774, 807, 813-814, 817-818, 820-822, 865-868 909-910). After further discussions, counsel stated that Owen would only go forward for the limited purpose of showing that the attorney/client privilege in the Slattery case had not been waived. Owen called as his only witness, former counsel in the <u>Slattery</u> case, Barry Krischer. This despite Krischer's repeated statements that he knew nothing about the Worden case. Although Krischer's law firm has been appointed to represent Owen on all his criminal cases, Krischer stated that he had no responsibilities in the Worden case. (T. 836). The firm never discussed or formulated a master plan on how to proceed on all of Owen's cases. (PCT. VOL XXVIII 837). The attorneys did not share information or strategy regarding the two cases as the cases were decompartmentalized. (PCT VOL. XXVIII 804, 835-843, 845-850). Nor did Krischer ever discuss the Worden case with Owen. (PCT VOL. XXVIII 840-843).

On cross-examination, Krischer was asked about his prior employment with the State Attorney's Office. This was relevant

because Owen alleged that Mr. Krischer never informed the defendant about his prior employment as a prosecutor with the State Attorney’s Office. (PCR VOL. VIII 1428-143). Owen further alleged that former counsel failed to disclose to Owen that he had nolle prossed a pending charge against Owen for burglary in 1982.

Krischer testified that Owen knew about his prior employment. (PCT VOL. XXVIII 855, 858-860, 869, 874-875). This information was not privileged as the record on appeal reveals that Krischer’s prior employment as a prosecutor as well as his representation of the Boca Raton Police department had been fully litigated prior to trial. In February of 1985, Krischer’s law firm brought this information before the trial court in an attempt to withdraw from all of his cases. (PCT VOL. XXVIII 875-876)(ROA VOL. III 376, 440-446, VOL. XXXI 4670-4672). Consequently, Owen’s knowledge of this information was obviously not privileged. Johnston v. State, 497 So. 2d 863, 867 (Fla. 1986)(finding no attorney/client privilege where defendant communicated information to third persons).

Over Owen’s objection, the trial court grant a limited waiver of the attorney/client privilege and ordered Krischer to reveal whether he had ever told Owen about the nolle prosse. The trial court found that the limited disclosure would not be prejudicial to Owen in his pending retrial. (PCT VOL.XXVIII 866)[3] Krischer

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The limited waiver of the attorney/client privilege in the Slattery case does not establish any prejudice to Owen. It is

testified that Owen was well aware of this information. Krischer further testified that at the time he filed the nolle prosse, he had no personal knowledge of Duane Owen. (PCT VOL. 859-870, 875).

Also on cross-examination, the state sought to ascertain if Krischer ever shared or discussed with Craig Boudreau any information concerning Owen's mental health. (PCT VOL. 890, 893-895). In an attempt to refresh his recollection, Krischer was shown a copy of a psychiatric report done by Dr. Blackman. Collateral counsel objected alleging that the contents of the report were privileged and not subject to disclosure under the trial court's protective order.[4] Ultimately Krischer stated that the report did not refresh his recollection. The report was never introduced into evidence, and it's contents were never disclosed. (PCT VOL. XXVIII 894, 896, 898-901, 913, 906). Morton v. State, 689 So. 2d 259, 264 n. 5 (Fla. 1997)(reaffirming evidentiary rule

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mere speculation that the disclosure regarding Krischer's prior employment would be relevant let alone admissible at his pending retrial. State v. Speigel, 710 So. 2d 13, 16 (3rd DCA 1998)(affirming rule that waiver of privilege in one preceding does not affect right to assert privilege in another independent proceeding).

[4] Counsel's specific objection was that Dr. Blackman had not been appointed in this case, therefore there could be no waiver of the attorney/client privilege. (PCT VOL. XXVIII 898-899). Counsel's assertions are incorrect. Dr. Blackman was specifically appointed as a confidential expert in this case. (ROA VOL. I 61, 68, VOL. XXXI 4216-4217). See also (PCR VOL VIII 1401).

that refreshing witness's recollection does not transform information into admissible substantive evidence).

Following Krishcer's testimony, collateral counsel made a strategic decision not to call any other witnesses. (PCT VOL. XXVIII 909-910). The trial court specifically asked Owen if he understood the ramifications of his chosen strategy. Owen unequivocally stated that he did. The trial court then denied Owen's amended motion for postconviction relief. (PCT VOL. XXVIII 910-913).

In this appeal appellant alleges that the hearing granted to him by the circuit court was not full and fair. Specifically Owen contends that he was unable to proceed with the scheduled evidentiary hearing because of his pending retrial for the first degree murder and attempted sexual battery of Karen Slattery. Owen claims that if he pursued the claims in his pending postconviction motion for the murder of Georgianna Worden, he would be required to waive the attorney client-privilege pertaining to the Slattery retrial. Therefore Owen contends that an unconstitutional condition was created in that he was forced to choose between his right to proceed in his postconviction litigation in an timely manner at the expense of waiving his attorney-client privilege in the Slattery case. This choice resulted in a violation of Owen's due process rights under Simmons v. United States, 390 U.S. 377,

394 (1968). Owen's allegations are speculative at best given that no harm has ever materialized.

Owen made a fully informed decision not to present evidence in support of his motion for postconviction relief. He cannot now argue that the trial court failed to provide a full and fair hearing. See Scott v. State, 717 So. 2d 908 (Fla. 1998)(upholding denial of postconviction motion based on counsel's strategic decision to offer only minimal participation); Cf. Espinosa v. State, 589 So. 2d 887, 893 (Fla. 1991)(upholding denial of request for continuance where counsel's unpreparedness for penalty phase was result of his own actions); Landry v. State, 562 So. 2d 843 (Fla. 4th DCA 1990)(finding that trial court has discretion to refuse request for continuance from a defendant whose bad faith and dilatory behavior has been established); United States v. Gates, 557 F.2d 1086 (5th Cir. 1977)(same). This record demonstrates that counsel deliberately chose not to participate in the evidentiary hearing in an attempt to circumvent the trial court's denial of his motion to stay the proceedings. Owen's deliberate failure to take advantage of the opportunity afforded to him is no one's fault but his own. He must bear the consequences of his own decisions. Scott, 717 So. 2d at 911-912.

Owen's argument before this Court is nothing more than a premature Simmons claim. In Simmons, the defendant, charged with robbery, pursued a motion to suppress prior to trial. At that

suppression hearing, Simmons admitted to ownership of certain incriminating evidence. Simmons, 390 U.S. at 390-391. At the guilt phase of the trial, the state admitted into evidence Simmons's prior testimony as substantive evidence of his guilt. Id. The United States Supreme Court reversed the conviction finding, "We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." Id. at 394.(emphasis added). Consequently, the record in Simmons contains a factually developed claim, i.e., evidence was revealed at one proceeding and then to the defendant's detriment admitted as substantive evidence at a subsequent proceeding.

Likewise in Johnson v. State, 537 So. 2d 1116 (4th DCA 1989), the District Court reversed defendant's conviction for possession of cocaine based on a violation of Simmons. Again, the Simmons error was ripe for review. Therein Johnson presented evidence in support of a pre-trial motion to dismiss the charges. The trial court then allowed the state to introduce that same evidence at trial in support of the defendant's guilt.

In the instant case, Owen cannot make such a showing. He cannot point to any privileged information that was revealed at the evidentiary hearing that was then later used at his retrial for the murder of Karen Slattery. A potential for prejudice at some future

date simply does not state a claim for relief. See Duncan v. Calderon, 78 F.3d 592 (9th Cir. 1996)(upholding order requiring release of privileged information since alleged Simmons problem not yet ripe as potential harm would only arise at retrial); Cottrell v. Amerkas, 35 So. 2d 383, 385 (Fla. 1948)(affirming proposition that in order to appeal, there must be concrete injury to appellant rather than simply an abstract question to resolve); Hallandale Professional Fire Fighters v. City of Hallandale, 922 F. 2d 756 (11th Cir. 1991)(requiring appellant to present definite and concrete prejudice with well developed factual record in order to prefect proper appeal); United States v. Blue, 384 U.S. 251 (1966)(requiring admission of evidence against defendant in order to review alleged Fifth Amendment violation); Cobbledick v. United State, 309 U.S. 323 (1940)(requiring defendant to either obey subpoena or be held in contempt for disobeying in order to perfect issue for appeal). Owen's refusal to present witnesses "for fear" of what might be revealed at the hearing is not a valid basis for granting Owen a second hearing. cf. Jones v. State, 678 So. 2d 309, 313 (Fla. 1996)(refusing to speculate about content of testimony of witness who was never called at the evidentiary hearing).

Owen's alleged Simmons claim is nothing more than a veiled attempt to delay these proceedings. This is best illustrated by examining what effect a stay would have had on the future of these

proceedings. Even though the trial court had already granted Owen's request for a protective order, he still refused to go forward with the hearing. At that point the court inquired of counsel as to what point in time would there be a waiver of the attorney/client privilege. In response collateral counsel stated, "When his conviction is final, when his petition has been denied and he no longer has any relationship with his trial attorneys." (PCT VOL. XXVIII 861). However that explanation is vague and speculative. Conclusion of the Slattery retrial does not end the attorney/client privilege between Owen and his former counsel. Depending on the outcome of that trial, the attorney client/privilege may never be waived. Consequently to grant Owen's motion for a stay, pending "resolution" of the Slattery retrial could have resulted in a stay that may never be lifted.

At the time of the evidentiary hearing, the Slattery retrial was at least a year away from commencement. Under Owen's logic the trial court was required to grant a stay of an evidentiary hearing[5] and wait in anticipation of the following events to occur: Owen is convicted and sentenced to death for the murder of Karen Slattery; Owen's conviction and sentence are upheld on direct appeal; Owen is unsuccessful in obtaining relief in the United States Supreme Court via certiorari review; Owen seeks collateral review of his

[5] At the time of the evidentiary, Owen's postconviction motion had already been pending for three years. (PCR VOL. V 919-1032).

conviction and sentence by filing a motion for postconviction relief; in that motion Owen includes a claim of ineffective assistance of trial counsel, Carey Haughwout, and that claim somehow encompasses a waiver of the attorney/client privilege between Owen and former counsel Barry Krischer. See Turner v. State, 530 So. 2d 45 (Fla. 1987) (affirming rule that attorney/client waived to the extent former counsel is able to defend against pending claim of ineffective assistance of counsel). There is no guarantee that these events would ever occur. And, even if they ultimately were to occur, these proceedings could be delayed anywhere for another four to six years.

In support of the his request for a stay, Owen relies on Wehling v. CBS, 608 F.2d 1084 (5th Cir. 1979). However, a review of the facts in Wheling underscore the shortcomings inherent in Owen's demand for a stay of the proceedings. In Wheling the plaintiff was suing the defendant, CBS for libel. During the discovery process, the plaintiff was required to answer certain questions which would possibly subject him to criminal prosecution. Therefore the plaintiff sought a protective order from the discovery process which in essence would have stayed the discovery process. The defendant, CBS, argued that the plaintiff should be required to comply with discovery. Without the discovery CBS could not properly defend against the lawsuit. The district court denied both requests and dismissed the plaintiff's lawsuit. The plaintiff

appealed and the Fifth Circuit reversed. The Court ordered that the protective order be issued, and the proceedings stayed until the statute of limitations had run on the applicable crime for which the plaintiff may have been prosecuted. Wheling, 608 F.2d at 1088-1089.

In the instant case, there was no guarantee that the anticipated waiver of the attorney/client privilege would ever materialize. Consequently, there was no date certain upon which to rely as to when the stay could be lifted. Given the protracted and highly speculative nature of these events, the trial court did not abuse its discretion in denying Owen's motion for an indefinite stay. Wyatt v. State, 641 So. 2d 1336, 1341 (Fla. 1994)(upholding trial court's denial of defendant's request for indefinite stay since defendant waived alternative remedy). Clinton v. Jones, 520 U.S. __, 137 L.Ed.2d 945, 969 (1997)(ruling it an abuse of discretion to grant lengthy stay since it ignores the interests of party's right to bring case to trial; proponent of stay had not demonstrated what prejudice would result from not going forward with the lawsuit). Owen made a knowing and tactical choice not to present evidence in support of any of the claims for which he had been granted an evidentiary hearing.(PCT VOL. XXVIII 807, 813-814, 820-822, 857-858, 909-910). The trial court's refusal to stay the proceedings and enter an order denying the motion for postconviction relief was proper. Scott,717 So. 2d at 911-912.

Owen's also claims that the trial court erred in failing to allow Mr. Krischer as well as other former counsel from appealing the court's decision to allow a disclosure of privileged information. **See initial brief at 36.** As already noted, the court granted Owen's protective order regarding the attorney/client privilege in Slattery. Owen's claim that he should have been allowed to appeal borders on the frivolous.

Owen next claims that he was unfairly denied access to three separate types of information or evidence which hampered his ability to file a complete motion for postconviction relief. Owen alleges that the trial court erroneously denied his request for access to the original videotape of Owen's confession; the Office of the State Attorney was relying on an exemption to public records which unfairly deprived Owen of the Slattery file; and Owen was unfairly deprived access to the trial file of former defense counsel Barry Krischer. A review of the record below clearly belies these claims.

On September 8, 1997 collateral counsel asked the trial court for an order authorizing the release of the original video taped confession for analysis by Owen's expert. (PCT VOL. XXVII 639-643). The state objected to the release of the original tape since Carey Hauwought already had the tape tested by an expert. (PCT VOL. XXVII 643-645). The trial court denied the request without prejudice in order to give counsel an opportunity to obtain that

information from Carey Haughwout. (PCT VOL. XXVII 648). At a second hearing, collateral counsel altered the request, instead asking that the original be copied and the copy be provided to Owen. Collateral counsel also said that after speaking with Ms. Haughwout she was still unsure of what tests were actually done on the tape. The court again denied the request and instructed counsel to depose the expert who conducted the tests. The court indicated that the matter could be re-addressed if necessary. (PCT VOL. XXVII 653-657). Several days later Owen filed a motion for costs to depose the expert. (PCR VOL. VII 1375-1377). However Owen never pursued this matter any further. Consequently his due process claim before this Court is waived. Armstrong v. State, 641 So. 2d 730 (Fla. 1994)(finding that failure to obtain ruling on motion precludes appellate review); Richardson v. State, 437 So. 2d 1091 (Fla. 1983).

In any event Owen cannot establish that he was denied due process as he already had in his possession a copy of the video tapped confession from the Boca Police Department. The tape had been made available to Owen pursuant to a public records requests. (PCT VOL. XXVI 416-417). Therefore his assertion that he has been denied such tapes is incorrect.

Next Owen claims that he was unfairly precluded from access to the state's file in the active criminal case involving Karen Slattery. When asked to turn over the files pursuant to a public

records request the State Attorney's Office relied upon the exemption under section 119.07(3)(d)(2) and, Kokal v. State, 562 So. 2d 324 (Fla. 1990). Owen argues that it was unfair for the State Attorney's office to rely on the exemption. He claims that disclosure of those files was critical to his postconviction motion in the instant case, because the Slattery and worden cases are inextricably intertwined. Therefore the state's reliance on an exemption amounts to a denial of due process. Owen's argument is without merit.

There can be no question that the Hillsborough County State Attorney's Office properly refused to disclose the contents of their trial file in the active prosecution of Owen for the murder of Karen Slattery. Tal-Mason v. Satz, 614 So. 2d 1134 (4th DCA 1993)(upholding state attorney's refusal to disclose trial file of prisoner since case was still active). Owen has never argued that the exemption is unconstitutional; nor could he successfully do so. Florida Freedom News Papers v. McCrary, 520 So. 2d 32 (Fla. 1988)(upholding constitutionality of chapter 119).

In an effort to circumvent the valid exemption, Owen alleges that due process entitles him to the information. The facts reveal otherwise. Owen's conclusory allegation that the cases are inextricably intertwined is not supported by the facts. The state relied upon the Slattery conviction at the penalty phase in support of the aggravating factor of "prior violent felony." Owen v.

State, 596 So. 2d 985, 989 (Fla. 1992). However while this case was pending on direct appeal, Owen's conviction for that murder was overturned. Owen v. State, 560 So. 2d 207 (Fla. 1990). Supplemental briefs were submitted regarding the effect of that reversal on the pending appeal. This Court held:

> During the penalty proceeding before the jury, the State introduced evidence of Owen's convictions in the Delray Beach murder, sexual battery, and armed burglary. See Owen. The trial court used these
>
> convictions as a basis for finding as an aggravating factor that Owen had previously been convicted of another capital or violent felony. Owen now claims that he is entitled to a new sentencing proceeding because the Delray Beach convictions were subsequently reversed by this Court. Id. Based on our examination of the record, however, we conclude that use of this evidence was harmless error. Given the nature and extent of other evidence in aggravation presented to the jury we conclude that its recommendation would have been unchanged. We similarly conclude that the trial court's sentence would have been the same because the aggravating circumstance concerning prior conviction of a violent felony was adequately supported by Owen's conviction for attempted first-degree murder in a third case.

Owen v. State, 596 So. 2d at 989-990. Given the disposition of this issue on appeal, Owen's conclusory allegation that the Slattery case is still critical to his motion for postconviction relief is totally void of merit. Owen fails to explain what nexus exists beyond that which has already been addressed in the opinion.

Finally the record clearly establishes that Owen was only attempting to delay these proceedings by alleging that he could not go forward without access to the Slattery file. On October 20, 1997 the state offered to make available the current trial file in the Slattery case irrespective of the state's exemption. (PCT VOL. XXVII 424-426, 670-671). The state made it clear, however, that disclosure would be limited solely to that portion of the file that had already been disclosed to Carey Hauwought pursuant to the rules of discovery. Subsequent to that offer, Owen did absolutely nothing within the next month to obtain that information. Yet on November 25, 1997, Owen asked the trial court for a continuance of the evidentiary hearing because he still had not received the file from the state attorney's office. (PCT VOL. XXVIII 753-764). The motion for continuance was made even though Owen already possessed the identical information. The motion for continuance was properly denied (PCT VOL. XXVIII 759-763). cf. Williams v. State, 438 So. 2d 781, 785 (Fla. 1983)(upholding denial of continuance where defendant had eleven weeks to prepare); Landry v. State, 562 So. 2d 843 (4th DCA 1990)(upholding denial of continuance where defendant's bad faith and dilatory behavior have been established).

Owen has failed to establish that he has been denied due process. He cannot demonstrate that the trial court abused its discretion nor can he establish that he was entitled to a

suspension of the state's valid exemption under Florida oublic records law.

Next Owen argues that he was unfairly deprived of the trial files of former defense counsel Barry Krischer. Again the record demonstrates that Owen already had in his possession the trial files of all his former counsel. His repeated assertions otherwise are not supported by the record.

Early on in the proceedings, Owen asked the trial court to issue a motion to compel former counsel to turn over his file pursuant to chapter 119. (PCT VOL. XXVI 388-389). Owen pursued this argument even though Mr. Krischer was not subject to the public records demand. (PCT VOL. XXVI 394, 407). The motion to compel was denied, however, the trial court provided Owen an opportunity to develop the issue at the evidentiary hearing. (PCT VOL. XXVIII 713-714). The record is very clear that the trial file of Barry Krischer was turned over to Owen after the Slattery trial had concluded. (PCT VOL. XXVI 390-394, 407, 409, 410, 412-413, VOL. XXVIII 787-789, 798-799, 806-807, 844, 846). Simply because collateral counsel thinks that the file maybe incomplete or not "maintained in any discreet fashion" does not present any basis for relief. Cf. Downs v. State, 24 Fla. Law Weekly S231, 232 (Fla. May 20, 1999)(ruling that defendant's suspicions that a file may not be complete is insufficient to establish a violation of public records

request). Owen’s claim is not supported by the record and must be denied.

ISSUE II

WHETHER THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE INQUIRY INTO OWEN'S "WAIVER" OF HIS RIGHT TO PURSUE POSTCONVICTION RELIEF.

Relying on Faretta v. California, 422 U.S. 806 (1975), Owen claims that the trial court failed to conduct an adequate inquiry of Owen regarding the ramifications of his decision not to go forward with the evidentiary hearing. Owens' claim is without merit.

Owen always maintained that he did not want to represent himself. (PCT VOL. XXVI 680, 702-703, VOL. XXVIII 825). Consequently Owen's reliance on Farretta is wholly misplaced. See Valdes v. State, 626 So.d 2 1316, 1320 (Fla. 1993)(rejecting argument that trial court erred in failing to conduct Faretta hearing given that defendant made it clear that he did not want to represent himself).

The record demonstrates that Owen actively participated with his counsel in the postconviction proceedings. (PCT VOL. XXVII 678-680, 687-699, VOL. XXVIII 824-825, PCR VOL. VIII 1595-1622). Owen, extremely knowledgeable in the law, clearly stated that he understood the consequences of his refusal to go forward. The ramifications of not going forward were explained by the judge on two separate occasions. Both Owen and counsel advised the judge that Owen had been advised about the consequences of his decision

not to present any evidence. Owen unequivocally stated that he was relying on the advice of counsel. (PCT VOL. XXVIII 910-913). Owen's claim that his waiver was not voluntary is without merit. Cf. Henry v. State, 613 SO. 2d 429, 433 (Fla. 1992)(upholding voluntary waiver of mitigation where defense attorney and defendant state on the record that defendant was advised of possible mitigation and he chose to waive its presentation);cf. United States v. Rodriguez, 982 F.2d 474 (11th Cir.), cert. denied, 510 U.S. 901, 114 S.Ct. 275, 126 L.Ed.2d 226 (1993)(affirming rule when viewing record as a whole it is clear that defendant was made of aware of potential conflict and he insisted on waiving the issue, such waiver is voluntary and binding on defendant); Duncan v. Alabama, 881 F.2d 1013 (11th Cir. 1989)(same).

ISSUE III

OWEN WAS PROPERLY DENIED RELIEF ON HIS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AS HE FAILED TO PRESENT ANY EVIDENCE IN SUPPORT OF HIS CLAIMS.

Owen alleges that he is entitled to relief on five separate claims of ineffective assistance of counsel. Owen is in error. The state conceded that all five of these claims required an evidentiary hearing for resolution. (PCR VOL. VIII 1561-1580). Owen was granted an evidentiary hearing on these claims. (PCT VOL. XXVII 706-706, 742). The trial judge also left open the opportunity for Owen to present evidence regarding five additional claims after collateral counsel reviewed the state attorney file in the Slattery case. Those additional claims are as follows: (6) Owen's inability to locate former defense attorney, Barry Krischer's file (PCR VOL. VIII 1390-1393, (7) "potential" Brady claim (PCR VOL. VIII 1397-1399), (8) "potential" newly discovered evidence (PCR VOL. VIII 1464), (9) "potential" juror misconduct, (10) alleged "Johnson v. Mississippi claim (PCR VOL. VIII 1515-1516, PCT VOL. XXVII 710, 714, 717-719, 734, 742). As more fully developed in Issue I, Owen chose not to present any evidence in support of any of his claims. The trial court properly denied relief since there was no factual support presented. (PCT VOL. XXVIII 910-913). See Phillips v. State, 608 So. 2d 778, 781 (Fla. 1992)(rejecting claim that state used jailhouse informant to elicit

information from defendant where defendant failed to establish claim at evidentiary hearing); Scott v. State, 717 So. 2d (Fla. 1998)(affirming denial of motion since defendant decided to offer only minimal participation in hearing).

ISSUE IV

THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED APPELLANT'S CONSTITUTIONAL CHALLENGE TO THE JURY INSTRUCTION ON "HAC"

Owen alleges that the jury was improperly instructed regarding the aggravating factor of "heinous, atrocious, and cruel."[6] The trial court properly found that this claim was procedurally barred as any challenge to the jury instruction was something that could have been raised on direct appeal. (PCT VOL. XXVII 719-720, VOL. XXVIII 915-916).

On direct appeal Owen argued that the trial court erred in finding that there was sufficient evidence to establish the existence of this factor. This Court upheld those findings. Owen v. State, 596 So. 2d at 990. At no time on appeal did Owen attack the constitutionality of the jury instruction applicable to the "HAC" factor. Owen claims that the challenge to the jury instruction was properly presented on direct appeal since he made reference to all pre-trial motions in the "Judicial Acts To Be Reviewed." (ROA VOL. XXXII 4958). Owen is in error. Merely citing to pleadings presented in the trial court does not preserve an issue for appeal. Duest v. State, 555 So. 2d 849, 851 (Fla. 1990)(precluding review of issues that merely make reference to arguments in postconviction motion since the purpose of brief is to

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[6] 921.141 (5)(h).

present specific legal points for review); Roberts v. State, 568 So. 2d 1255, 1260 (Fla. 1990)(same).

Therefore this claim is procedurally barred as it could have been raised on direct appeal. See Koon v. State, 619 So. 2d 246, 248 (Fla. 1993)(finding that failure to challenge the language of the instruction as improper or vague precludes collateral review); Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1994)(same). Owen's reliance on Espinosa v. Florida, 112 S. Ct. 2926 (1992) in an attempt to overcome the procedural deficiency is also without merit. Sims v. Singletary, 622 So. 2d 980,981 (Fla. 1993)(rejecting claim that Espinosa warrants a determination on an otherwise procedurally barred claim).

In any event Owen cannot establish harmful error. The following facts were found in support of this factor:

> Sufficient evidence also supports the court's finding that the murder was especially heinous, atrocious, or cruel. The sleeping victim was struck on the head and face with five hammer blows. She awoke screaming and struggling after the first blow and lived for a period of from several minutes to an hour. Her neck was constricted with sufficient force to break the bones therein. She was sexually assaulted and the walls of her vagina were torn by a foreign object, such as the hammer handle.

Owen v. State, 596 So. 2d 985, 990 (Fla. 1992). The facts of this case overwhelming support a finding that the murder of Georgianna Worden was "heinous, atrocious, and cruel" under any definition of

those terms. See Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1994)(finding that overwhelming evidence to establish aggravating factor rendered harmless any deficiency in the instruction).

ISSUE V

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED APPELLANT'S CHALLENGE TO THE JURY INSTRUCTION REGARDING THE FELONY MURDER AGGRAVATOR

Owen alleges that his sentence was tainted by an improper instruction regarding the "felony murder"[7] aggravating factor. The trial court properly found this claim to be procedurally barred for failure to raise it on direct appeal. (PCT VOL. XXVII 720, VOL. XXVIII 915-196).

On direct appeal Owen challenged only the constitutionality of the aggravating factor. Owen, 596 So. 2d at 990 n. 9. Consequently any challenge to the jury instruction is procedurally barred. Cf. Koon v. State, 619 So. 2d 246, 248 (Fla. 1993)(finding that failure to challenge the language of the instruction as improper or vague precludes collateral review); Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1994)(same).

To the extent this issue is reargument concerning the constitutionality of the "felony murder" aggravator, review is also precluded. See Van Poyck v. State, 694 So. 2d 698 (Fla. 1997)(precluding relitigation of challenge to the felony murder aggravator since it was raised and rejected on direct appeal). See Bryan v. State, 641 So. 2d 61, 63 (Fla. 1994)(finding that issues

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[7] 921.141 (5)(d).

addressed on direct appeal are procedurally barred on collateral review); Quince v. State, 477 So. 2d 535, 536 (Fla. 1985)(same).

Irrespective of the irrevocable procedural default, this claim is also without merit. The Florida Supreme Court has repeatedly upheld the constitutionality of this factor. Sims v. State, 681 So. 2d 1112 (Fla. 1996); Kearse v. State, 662 So. 2d 677, 685 (Fla. 1995); Stewart v. State, 588 So. 2d 972, 973 (Fla. 1991).

ISSUE VI

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED APPELLANT'S CHALLENGE TO THE CONSTITUTIONALITY OF THE AVOID ARREST JURY INSTRUCTION AND ITS IMPROPER CONSIDERATION BY THE JURY

Owen presents various challenges to the aggravating factor of "avoid arrest."[8] He complains that the jury instruction applicable to this factor does not sufficiently instruct the jury regarding the elements of same. Owen further alleges that this infirmity resulted in an improper consideration of this factor by the jury irrespective of the fact that the trial court did not find the existence of this factor. (ROA VOL. XXXI 4561). The trial court properly found this claim to be procedurally barred as it could have been raised on direct appeal. (PCT VOL. XXVII 721, VOL. XXVIII 915-916). See Atkins v. State, 541 So. 2d 1165, 1166 n. 1 (Fla 1989)(finding as procedurally barred issues involving trial errors that should have been raised on direct appeal); Kelly v. State, 569 So. 2d 754, 756 (Fla 1990)(same).

As for the merits Owen cannot establish any error simply because the trial court did not find sufficient evidence to establish this aggravator. The trial court is required to instruct the jury on those factors for which there has been evidence presented. Stewart v. State, 549 So. 2d 171, 174 (Fla. 1989).

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[8] 921.141(5)(e).

Simply because the jury is instructed regarding a factor that the trial court ultimately rejected for lack of sufficient evidence does not in any way taint the jury's recommendation. Stewart, 549 So. 2d at 174; Bowden v. State, 588 So. 2d 225, 231 (Fla. 1981).

Furthermore the Florida Supreme Court has determined that the "avoid arrest" aggravator does not contain terms that are so vague that the jury is left without sufficient guidance. Whitton v. State, 649 So. 2d 861, 867 n. 10 (Fla. 1994). It is improper to assume that a jury will ignore the law and find the existence of a factor absent sufficient evidence once they have been properly instructed. Sochor v. Florida, 504 U.S. 527 (1992). Finally the jury also heard argument from defense counsel that this aggravator should only apply in cases when the killing is contemplated after identification of the murderer. (ROA VOL. XXX 4319). The jury was also told by the prosecutor that in order to find the existence of this factor the dominant motive for the murder must have been to avoid arrest. (ROA VOL. XXX 4291). Owen's argument is without merit.

ISSUE VII

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED APPELLANT'S CHALLENGE TO THE JURY INSTRUCTION REGARDING THE "PRIOR VIOLENT FELONY" AGGRAVATOR

Owen challenges the jury instruction regarding the aggravating factor of "prior violent felony."[9] Specifically he claims that the instruction is overboard and vague and it does not define the elements of the factor. This claim is procedurally barred as it could have been raised on direct appeal. (PCT VOL. XXVII 722, XXVIII 915-916). See Koon v. State, 619 So. 2d 246, 248 (Fla. 1993)(precluding review of any challenge to a penalty phase jury instruction since it was never raised at trial or on appeal).

Furthermore this Court upheld this court's findings with respect to the sufficiency of the evidence regarding this factor. Owen 596 So. 2d at 990. The overwhelming evidence clearly established same, therefore under any definition of this factor, there was sufficient evidence to sustain its finding. See Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1994)(finding that overwhelming evidence to establish aggravating factor rendered harmless any deficiency in the instruction).

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[9] 921.141 (5)(b).

ISSUE VIII

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED APPELLANT'S CONSTITUTIONAL CHALLENGE TO THE JURY INSTRUCTION REGARDING THE "COLD CALCULATED AND PREMEDITATED" AGGRAVATING FACTOR

Owen challenges the constitutionality of the jury instruction regarding the aggravating factor of "cold, calculated, and premeditated"[10]. This issue is procedurally barred for the following reasons. The sufficiency of the evidence required to establish this factor was raised and rejected on direct appeal. Owen 596 So. 2d at 990. However no challenge was made to the instruction. Review was properly denied by the trial court. (PCT VOL. XXVII 723, VOL. XXVIII 915-916). See Koon v. State, 619 So. 2d 246, 248 (Fla. 1993)(finding that failure to challenge the language of the instruction as improper or vague precludes collateral review); Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1994)(same).

Owen's reliance on Espinosa v. Florida, 112 S. Ct. 2926 (1992) and Jackson v. State, 648 So. 2d 85 (Fla. 1994) in an attempt to overcome the procedural bar is without merit. Sims v. Singletary, 622 So. 2d 980,981 (Fla. 1993)(rejecting claim that Espinosa warrants a determination on an otherwise procedurally barred claim); Jones v. State, 690 So. 2d 568, 571 (Fla. 1996)(affirming

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[10] 921.141(5)(I).

that claims brought pursuant to Jackson are procedurally barred unless a specific objection is made at trial and then raised on appeal); Crump v. State, 654 So. 2d 545, 548 (Fla. 1995)(same).

In any event Owen cannot establish harmful error. This Court found the following facts in support of the "CCP" factor:

> The court's finding that the murder was committed in a cold, calculated, and premeditated manner was also adequately established. Owen selected the victim, removed his own outer garments to prevent them from being soiled by blood, placed socks on his hands, broke into the home, closed and blocked the door to the children's room, selected a hammer and knife from the kitchen, and bludgeoned the sleeping victim before strangling and sexually assaulting her.

Owen v. State, 596 So. 2d 985, 990 (Fla. 1992). Given the overwhelming evidence in support of this factor, any error in the instruction must be considered harmless. See Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1994)(finding that overwhelming evidence to establish aggravating factor rendered harmless any deficiency in the instruction).

ISSUE IX

THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED APPELLANT'S CHALLENGE TO THE STATE'S USE OF IRRELEVANT AND PREJUDICIAL EVIDENCE AT THE PENALTY PHASE

Owen argues that the jury was improperly allowed to hear details regarding the two prior violent felonies used in support the aggravating factor of "prior violent felony." The trial court properly found this claim to be procedurally barred as it could have been raised on direct appeal. (PCT VOL. XXVII 724-727). Kelly v. State, 569 So. 2d 754 (Fla. 1990).

Irrespective of the irrevocable procedural bar attached to this claim, it is without merit. The state is allowed to present the jury with details of prior violent felonies. Stewart v. State, 558 So. 2d 416, 419 (Fla. 1990); Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989); Finney v. State, 660 So. 2d 674, 681 n.2 (Fla. 1995).

ISSUE X

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED APPELLANT'S CHALLENGE TO THE ADMISSION OF HIS CONFESSION

Owen alleges that his confession was erroneously admitted at trial in violation of the Fifth and Sixth Amendments to the United States Constitution. This claim was raised and rejected on direct appeal. Owen, 596 So. 2d at 990. The trial court properly found this claim to be procedurally barred as it is simply an attempt to relitigate it on collateral review. (PCT VOL. 727-733). See Bryan v. State, 641 So. 2d 61, 63 (Fla. 1994)(finding that issues addressed on direct appeal are procedurally barred on collateral review); Quince v. State, 477 So. 2d 535, 536 (Fla. 1985)(same). Owen fails to offer any valid reason which would overcome this procedural deficiency. To the extent Owen is raising new arguments or facts in support of this claim is also procedurally barred. Quince v. State, 477 So.2d 535 (Fla. 1985).

ISSUE XI

THE TRIAL COURT PROPERLY FOUND THAT OWEN'S CHALLENGE TO THE PENALTY PHASE JURY INSTRUCTION WAS PROCEDURALLY BARRED

Owen alleges that the penalty phase jury instructions impermissibly shifted the burden of proof to the defense requiring Owen to prove that death was not the appropriate sentence. The jury and judge relied upon this improper standard during the penalty phase deliberations. Owen further alleges that trial counsel was ineffective in failing to object to this improper instruction and procedure. The trial court properly found that the substance of this claim is procedurally barred as it is one that could have and should have been raised on direct appeal but was not. (PCT VOL. XXVII 733). See Atkins v. State, 541 So. 2d 1165, 1166 n. 1 (Fla 1989)(finding as procedurally barred issues involving trial errors that should have been raised on direct appeal); Kelly v. State, 569 So. 2d 754, 756 (Fla 1990)(same).

As for the additional claim that counsel was ineffective for failing to object to the instruction, Owen's claim is without merit. This Court has repeatedly held that the penalty phase jury instructions do not impermissibly shift the burden to the defense to prove that death is not the appropriate penalty. Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995).

ISSUE XII

THE TRIAL COURT PROPERLY FOUND THAT OWEN'S CHALLENGE TO THE PENALTY PHASE JURY INSTRUCTIONS WAS PROCEDURALLY BARRED

Owen alleges that the penalty phase jury instructions as well as the prosecutor's comments to the jury impermissibly diminished the jury's role in Florida's sentencing scheme in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). The trial court properly found this claim to be procedurally barred. (PCT VOL. XXVII 734). The Florida Supreme Court has repeatedly found Caldwell issues to be procedurally barred on collateral review. See Atkins v. State, 541 So. 2d 1165, 1166 (Fla. 1989); Daughtery v. State, 533 So. 2d 287, 288 (Fla. 1988); Combs v. State, 525 So. 2d 853 (Fla. 1988); Van Poyck v. State, 694 So. 2d 686, 698 (Fla. 1997). In any event the prosecutor's comments and the jury instructions given adequately advise the jury of its responsibility in Florida's sentencing scheme. Turner v. Dugger, 614 So. 2d 1075, 1079 (Fla. 1992); Burns v. State, 699 So. 2d 646 (Fla. 1997).

ISSUE XIII

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED OWEN'S CHALLENGE TO THE PROSECUTOR'S REMARKS

Owen claims that the prosecutor made improper and inflammatory comments and arguments to the jury. The trial court properly found this claim to be procedurally barred as alleged trial errors are not cognizable in a motion for postconviction relief. (PCT VOL. XXVII 734). Kelly v. State, 569 So. 2d 754 (Fla. 1990).

In any event, Owen's claim has no merit. The prosecutor was permitted to comment on the evidence offered by both sides during the penalty phase. Mann v. State, 603 So. 2d 1141, 1143 (Fla. 1992)(finding that argument on conclusions that could be drawn from the evidence is permissible); Jones v. State, 612 So. 2d 1370, 1374 (Fla. 1992)(same); Craig v. State, 510 So. 2d 857, 865 (Fla. 1987)(same). Furthermore the jury was properly instructed regarding the law as it pertained to the imposition of the death penalty. (ROA VOL. XXX 4345-4354). See Moore v. State, 701 SO. 2d 545 (Fla. 1997)(finding no impermissible prosecutorial comment especially in light of the fact that the jury was properly instructed on the aggravating and mitigating circumstances).

ISSUE XIV

THE TRIAL COURT PROPERLY DENIED OWEN'S CLAIM REGARDING HIS "RIGHT" TO INTERVIEW JURORS SINCE NO EVIDENCE WAS PRESENTED IN SUPPORT OF THIS CLAIM

The trial court granted Owen an evidentiary hearing on the claim that Owen should be allowed to interview jurors. (PCT VOL. XXVII 719, 742). As more fully developed in Issue I, Owen chose not to present any evidence in support of this claim. The trial court's summary denial was correct.See Phillips v. State, 608 So. 2d 778, 781 (Fla. 1992)(rejecting claim that state used jailhouse informant to elicit information from defendant where defendant failed to establish claim at evidentiary hearing); Scott v. State, 717 So. 2d (Fla. 1998)(affirming denial of motion since defendant decided to offer only minimal participation in hearing).

ISSUE XV

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED OWEN'S CLAIM THAT HE WAS ERRONEOUSLY DENIED A MOTION FOR CHANGE OF VENUE

Owen alleges that the trial court should have granted the defense's motion for a change of venue. The trial court properly found this claim to be procedurally barred as issues involving trial errors are not cognizable in a motion for postconviction relief. (PCT VOL. XXVII 737). See Atkins v. State, 541 So. 2d 1165, 1166 n.1 (Fla. 1989); Kelly v. State, 569 So. 2d 754, 756 (Fla. 1990).

Even if not procedurally barred, Owen's claim is facially insufficient. There are no record cites, no factual explanations regarding what transpired at trial regarding the alleged error. Owen does not specify which jurors or potential jurors or what specific information they possessed which demonstrated that a change of venue was warranted.[11] Engle v. State, 576 So. 2d 698, 700 (Fla. 1992) (ruling that motion is legally insufficient absent factual support for allegations). See also Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to

[11] The validity of this claim must be further questioned given that the defense was not forced to exercise all of his peremptory challenges.

receive an evidentiary hearing."); Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990) ("The second and third claims are devoid of adequate factual allegations and therefore are insufficient on their face.”). Summary denial was proper.

ISSUE XVI

THE TRIAL COURT'S SUMMARY DENIAL OF OWEN'S CONSTITUTIONAL CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE WAS PROPER

Owen alleges that Florida's death penalty statute is unconstitutional. This issue was raised and rejected on direct appeal. Owen, 596 So. 2d at 989. Summary denial was warranted. (PCT VOL. XXVII 738). Bryan,641 So. 2d 61, 63 (Fla. 1994). Owen has failed to demonstrate why this issue should be revisited given that this Court has repeatedly rejected this claim. Walls v. State, 641 So. 2d 381, 389 (Fla. 1994); Johnson v. State, 612 So. 2d 575 (Fla. 1993).

ISSUE XVII

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED OWEN'S CHALLENGE TO THE ADMISSIBILITY OF A CRIME SCENE VIDEO

Owen alleges that the trial court erred in allowing the jury to view a video of the crime scene. Owen concedes that defense counsel objected to the admission of the tape, however he claims that to the extent that counsel was unsuccessful in convincing the judge to preclude its admission, he rendered ineffective assistance of counsel. The trial court correctly found this claim to be procedurally barred as issues involving trial errors are not cognizable in a motion for postconviction relief. See Atkins v. State, 541 So. 2d 1165, 1166 n.1 (Fla. 1989); Kelly v. State, 569 So. 2d 754, 756 (Fla. 1990). (PCT VOL. XXVII 739).

To the extent Owen attempts to overcome the procedural bar by claiming ineffective assistance of counsel, that claim is legally insufficient. See also Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing."); Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990) ("The second and third claims are devoid of adequate factual allegations and therefore are insufficient on their face."). Furthermore simply because trial strategy or argument is

unsuccessful does not render counsel’s performance constitutionally deficient. Bush v. Waiwright, 505 So. 2d. 409, 411 (Fla. 1987).

ISSUE XVIII

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED OWEN'S CLAIM THAT CUMULATIVE ERROR AMOUNTED TO FUNDAMENTAL ERROR

Owen alleges that the combined effect of all the errors in his trial cannot be deemed harmless. Again Owen makes no attempt to overcome that the procedural defect except to say that the combined effect of all the errors was to deprive him of a fair trial. The trial court properly found this issue to be procedurally barred. (PCT VOL. XXVII 741-742). See Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984) ("In spite of Zeigler's novel, though not convincing, argument that all nineteen points should be viewed as a pattern which could not have been seen until after the trial, we hold that all but two of the points raised either were, or could have been, presented at trial or on direct appeal. Therefore, they are not cognizable under rule 3.850."), sentence vacated on other grounds, 524 So. 2d 419 (Fla. 1988).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm the trial court's denial of Owen's motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Jack W. Crooks, 3801 Corporex Park Drive, Suite 210, Tampa, Florida, 33619, this 4th day of June, 1999.

CELIA A. TERENZIO
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