IN THE SUPREME COURT OF FLORIDA

MICHAEL GEORGE BRUNO, SR.,

Appellant,

vs. Case No. 92,223

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, MICHAEL GEORGE BRUNO, SR., 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 various pleadings and transcripts will be as follows:

Original trial record - "TR [vol.] [pages]"

Supplemental trial record - "STR [vol.] [pages]"

Postconviction record - "PCR [vol.] [pages]"

Supplemental postconviction record - "SPCR [vol.] [pages]"

STATEMENT OF THE CASE AND FACTS

A grand jury indicted Michael Bruno on September 11, 1986, for the first-degree murder and armed robbery of Lionel Merlano, allegedly committed in the late evening of August 8 or early morning of August 9, 1986. (TR VI 960). A petit jury convicted Bruno on both counts as charged on August 11, 1987. (TR VI 1076-77). At the penalty phase, which followed the next day, the State and defense stipulated before the jury that Bruno had been convicted of possession of cocaine and marijuana. (TR IV 785). The State presented no other evidence. In his own defense, Bruno presented the testimony of his mother and father, and Dr. Arthur Stillman. (TR IV 786-93, 794-98; V 799-830). Bruno also testified on his own behalf. (TR V 835-80). The jury recommended death by a vote of eight to four. (TR V 913). The trial court followed the jury's recommendation and sentenced Bruno to death, finding in aggravation that Bruno had a prior violent felony conviction (the contemporaneous armed robbery), that he committed the murder during the course of a robbery, that he committed the murder to avoid arrest, that he committed the murder for pecuniary gain, that he committed the murder in an especially heinous, atrocious, or cruel manner, and that he committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. However, it merged the first three aggravators.

Despite Dr. Stillman's testimony, it found nothing in mitigation. (TR VI 1104-08).

On appeal, this Court struck the "prior violent felony" and "avoid arrest" aggravators, merged the "felony murder" and "pecuniary gain" aggravators, and upheld the HAC and CCP aggravators. Bruno v. State, 574 So.2d 76, 81-82 (Fla. 1991). It upheld the trial court's rejection of mitigation. Id. at 82-83. Given the presence of three aggravating factors and no mitigation, this Court affirmed Bruno's sentence of death. Id. at 83. The United States Supreme Court denied Bruno's petition for writ of certiorari on October 7, 1991. Bruno v. Florida, 112 S.Ct. 112, 116 L.Ed.2d 81 (1991).

On July 26, 1993, Assistant Public Defender Steven Malone filed Bruno's first 3.850 motion, seeking leave to amend upon the production of outstanding public records. The motion was 199 pages long and raised twelve claims for relief. (SPCR IV 610-807). Following months of public records acquisition and an opportunity for Mr. Malone to amend the motion, which he declined, the State filed its response to Bruno's 3.850 motion on November 15, 1994. (SPCR I 67-165).

Eight months later, the trial court agreed to allow Mr. Malone to depose Craig Stella, Bruno's trial counsel, in anticipation of an evidentiary hearing. (PCR IV 6-20). Although the trial court

ordered the deposition to occur within 30 days, Mr. Malone did not conduct the deposition for four months. (SPCR II 198-368). During the course of that deposition, Mr. Stella refused to answer certain questions relating to his alleged drug use preceding and during Bruno's trial. As a result, Mr. Malone obtained an order a week later authorizing the transcription of the deposition. The trial court then directed Mr. Malone to set a hearing for the trial court to rule on the questions certified at the deposition. (PCR V 22-28).

Mr. Malone did not pursue his deposition and ultimately withdrew from the case in August 1996. (SPCR III 369-70). Six months later, Bruno's new counsel concluded taking Mr. Stella's deposition. (SPCR III 398-448). He also filed a witness list, naming 51 potential witnesses. (SPCR III 385-88).

The evidentiary hearing began the week of March 10, 1997. Of the 51 people on Bruno's witness list, he called only six: Craig Stella, Bruno's trial counsel; Professor Michael Radelet, a sociology professor at the University of Florida; Dr. Henry Dee, a neuropsychologist; Arthur Maheu, the husband of Sharon Spalding; Dr. Jonathan Lipman, a neuropharmacologist from Chicago; and Elizabeth Bruno, the defendant's mother. In rebuttal, the State called Sydney Patrick, the defense investigator Mr. Stella hired at the time of trial.

Following the evidentiary hearing, the parties submitted post-hearing memoranda of law. (PCR I 75-113, 114-173). Three weeks later, the trial court denied Bruno's 3.850 motion, specifically analyzing Bruno's 12 claims in a 30-page order. (PCR I 174-203). In this appeal, Bruno abandons some of his claims or subclaims and challenges the denial of only Claims III, IV(B), IV(C), IV(F), IV(H), IV(I), IV(J), IV(K), IV(L), VIII, IX, XI, and XII.[1]

[1] Although Bruno subdivided claims IV and VIII into lettered subclaims, i.e., A-K, these letters did not necessarily correspond to separate and distinct instances of allegedly deficient behavior. Moreover, he mislettered the subclaims after the initial "H." As a result, in its response to Bruno's 3.850 motion, the State subdivided the claims according to specific allegations of deficient conduct. The State maintained its subdivision lettering in its post-hearing memorandum, and the trial court used the same lettering in its order denying relief.

SUMMARY OF ARGUMENT

Issue I - The trial court properly denied Claims III, IV, and VIII of Bruno's 3.850 motion, which alleged that Bruno's trial attorney was ineffective during the guilt and penalty phases of his trial, as the claims were either procedurally barred or without merit.

Issue II - The trial court properly denied Claim IX of Bruno's 3.850 motion, which alleged that Bruno's mental health expert at trial rendered a professionally incompetent evaluation. Bruno failed to prove at the evidentiary hearing that Mr. Stella failed to provide additional evidence and materials to Dr. Stillman, or that Dr. Stillman conducted an incompetent evaluation.

Issue III - The trial court properly denied Claim XI of Bruno's 3.850 motion, which alleged that certain jury instructions were defective, as these allegations were procedurally barred.

Issue IV - The trial court properly denied Claim XII of Bruno's 3.850 motion, which alleged that cumulative errors deprived Bruno of a fair trial. Bruno's allegations of error were either procedurally barred or without merit; thus, they had no cumulative effect.

ARGUMENT

ISSUE I

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S DENIAL OF CLAIMS III, IV, AND VIII, WHEREIN BRUNO ALLEGED THAT TRIAL COUNSEL WAS INEFFECTIVE IN THE GUILT AND PENALTY PHASES OF BRUNO'S TRIAL (Restated).

In Claims III, IV, and VIII of his 3.850 motion, Bruno alleged that his trial attorney, Craig Stella, was ineffective in the guilt and penalty phases of his trial. (SPCR IV 654-63, 664-720, 742-91). After considering the State's response, the trial court granted an evidentiary hearing on all of these claims. Following the five-day hearing, and post-hearing memoranda, the trial court ultimately denied all of these claims and set forth its findings and conclusions in a 30-page order. (PCR I 174-203). Bruno does not challenge the denial of every allegation raised and rejected by the trial court. Thus, the State will respond only to those allegations raised and rejected below, then challenged here on appeal.

Claim IV(B): Ineffective assistance of counsel--Stella's alleged use of drugs/alcohol and hospitalization therefor

In his 3.850 motion, Bruno alleged that Craig Stella, the attorney whom he retained to represent him at trial, was "addicted to cocaine and alcohol" prior to and during his trial, which made him "grossly impaired." (SPCR IV 668). To support this

allegation, Bruno appended an affidavit from Ginger Bottner, one of Mr. Stella's former girlfriends, who averred that Mr. Stella was "an alcoholic and heavy drug user" at the time of Bruno's trial. (SPCR IV 668-70; PCR I 18-20). To support her averments, Bruno pointed to (1) a motion for continuance filed ten days before trial by Russell Adler, an associate of Mr. Stella, which sought to continue the trial because Mr. Stella was "presently hospitalized for diagnostic testing and evaluation," and (2) an affidavit from Michael Castoro, who originally declined to represent Bruno because of time and money constraints, and who had "heard accounts of Mr. Stella's substance abuse problems and his term in a rehabilitation facility." (SPCR IV 670-71; PCR I 21-22) (emphasis added). According to Bruno, other "independent indicators" of Mr. Stella's alleged drug abuse and addiction included (1) his tardiness to court and (2) inconsistent accounts of the burglary of Mr. Stella's home on the first day of trial. (SPCR IV 671-73).

At the evidentiary hearing, Bruno presented no evidence to support this claim. He called neither Ginger Bottner, nor Michael Castoro, nor anyone else as witnesses. In fact, the only evidence regarding this claim came from Mr. Stella, who completely refuted Bruno's allegations. At the evidentiary hearing, Mr. Stella testified that he began representing Bruno in August 1986. In October 1986, Mr. Stella's friends and family approached him with

concerns that he had developed a drinking problem. He began going to Alcoholics Anonymous meetings on October 15, 1986, and remained alcohol- and drug-free until the middle of March 1987, when he began drinking again. On March 15, 1987, he admitted himself to the Coral Springs Care Unit and remained there for 28 days. He has remained alcohol- and drug-free since his release. (PCR XI 200-209). As for cocaine, Mr. Stella testified that he ingested cocaine once every few weeks prior to October 1986, only if he were drinking, and only on the weekends. His relapse in March 1987 did not involve cocaine. (EH 3/10/97 at 102-03). According to Mr. Stella, upon his release from the hospital, he discussed his hospitalization with Bruno and told Bruno he would refund part of his retainer if Bruno wanted different counsel. Bruno declined. (PCR XI 211; XIV 663). Despite his use of cocaine, and abuse of alcohol, prior to October 15, 1986, and his relapse with alcohol in March 1987, Mr. Stella did not believe that same affected his ability to represent Bruno or anyone else during that period. (PCR XI 203; XIV 663). He testified that he was never under the influence of drugs or alcohol while working on Bruno's case, and he was not using drugs or alcohol during Bruno's trial. (PCR XIV 662).

Bruno presented <u>nothing</u> to refute his testimony or to otherwise show that Mr. Stella was, in fact, intoxicated during

Bruno's pretrial preparation or trial. Nor did Bruno present any expert testimony based on Mr. Stella's own admission of alcoholism and drug use that same affected Mr. Stella's ability to competently represent Bruno. Finally, Bruno failed to prove that he was unaware of Mr. Stella's hospitalization or the basis for same. Without such proof, Bruno failed to prove this claim.

In its written order denying relief, the trial court agreed:

> Mr. Stella testified at the evidentiary hearing, that he was not using drugs and/or alcohol during the Defendant's trial. A motion for continuance was granted by Judge Coker in March of 1985, which described that Mr. Stella's [sic] had been hospitalized for 21 days as a result of alcohol addiction. In August of 1986, when Mr. Stella undertook representation of the Defendant, his alcohol problem was getting worse, and he was using cocaine every few weeks. His use of cocaine went on intermittently from August of 1986, to October of 1986. Mr. Stella testified, that from October 1986, to February or March of 1987, that he was not using alcohol or cocaine. On March 15, 1987, Mr. Stella went to Coral Springs Care unit, where he remained for 28 days, because of a relapse due to alcohol addiction. An associate, Mr. Adler, filed a motion for continuance on March 20, 1987, because the Bruno trial was set for March 30, 1987. Mr. Stella gave the Defendant the opinion of having him withdraw as attorney of record after he came out of the Coral Springs Care Unit, and he also advised Judge Coker of his condition. The Defendant elected to keep the Defendant [sic] as his trial counsel.
>
> The fact that Mr. Stella was hospitalized in the summer of 1987, because of alleged

> alcohol and drug usage, does not in and of itself, provide evidence of ineffective assistance of legal counsel. There was no evidence presented at the evidentiary hearing, that Mr. Stella was under the influence of an alcoholic beverage or a controlled substance during the Defendant's trial. The Defendant failed to meet his burden of demonstrating how Mr. Stella's drug and alcohol usage prior to the trial, rendered ineffective his legal representation to the Defendant, and how such conduct prejudiced the Defendant. The Defendant fails to illustrate a nexus between Mr. Stella's drug and/or alcohol usage, and any sub-standard performance which occurred in this case. See White v. State, 559 So. 2d 1097 (Fla. 1990).

(PCR I 179-80).

The trial court's ruling was proper. Bruno failed to prove that Mr. Stella was intoxicated or under the influence of drugs during the time of Bruno's trial. More importantly, he failed to show that, even if he were under the influence of drugs or alcohol, he was *per se* constitutionally ineffective. Ultimately, even if counsel were intoxicated, it would be Bruno's burden to show that counsel's conduct was deficient and that such deficient behavior prejudiced Bruno's case. Bruno failed to meet his burden. Therefore, this Court should affirm the trial court's denial of this claim. See White v. State, 559 So. 2d 1097 (Fla. 1990) (affirming denial of claim that trial counsel was under the influence of drugs/alcohol during the defendant's trial); White v.

Singletary, 972 F.2d 1218, 1221-22 (11th Cir. 1992) (affirming denial of identical claim in habeas petition).

Claim III: Ineffective assistance of counsel--Stella's alleged revelation of confidential information

In his 3.850 motion, Bruno alleged that his trial counsel, Craig Stella, revealed confidential information to the court and the state on three separate occasions: (1) in his "Motion for Leave to File Belated Notice of Insanity at Time of Offense and Competency to Stand Trial," (2) at the close of the State's case when counsel sought the court to explain to Bruno the ramifications of calling witnesses on his behalf, and (3) during the penalty phase after Dr. Stillman gave surprise testimony. According to Bruno, counsel's actions created a conflict of interest and prejudiced Bruno's ability to obtain a fair trial. (SR IV 654-63).

In its initial response, and again after the evidentiary hearing, the State argued that this claim was procedurally barred. Bruno challenged the latter instance of alleged misconduct on direct appeal, claiming that the trial court erred in failing to conduct an evidentiary hearing, declare a mistrial, or continue the hearing when the dispute between trial counsel and Dr. Stillman was brought to the court's attention. This Court rejected that contention. Bruno v. State, 574 So. 2d 76, 83 (Fla. 1991). In an attempt to escape this procedural bar, Bruno recast the claim as

one of ineffective assistance of counsel, which was improper. See Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). As for the other two instances of alleged misconduct, the State maintained that Bruno could have, and should have, raised the substance of the underlying claim on direct appeal. Thus, they too were procedurally barred. Harvey, 656 So. 2d at 1256; Medina, 573 So. 2d at 295. (SPCR I 98-99; PCR I 118).

The trial court agreed, finding the claim procedurally barred:

> The Defendant in his direct appeal to the Florida Supreme Court raised, and the Court rejected the following issues: that the trial court erred in failing to conduct an evidentiary hearing, declare a mistrial, or continue the penalty phase, when the dispute between trial counsel and his mental health expert were brought to the court's attention. Bruno v. State, 574 So.2d 76, 83 (Fla. 1991). The Defendant is now attempting to relitigate the same issue by using a different argument of ineffective assistance of trial counsel. See Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995); Medina v. State, 573 So.2d 293, 295 (Fla. 1990). These instances of alleged misconduct were raised, or should have been raised on direct appeal, and are now procedurally barred.

(PCR I 177).

Alternatively, the State argued, prior to and after the evidentiary hearing, that counsel's actions did not create a conflict of interest or deny Bruno a fair trial. On June 12, 1987,

over nine months after Bruno had been indicted, defense counsel filed a motion pursuant to Rule 3.216(f), seeking leave to file a belated notice of intent to rely on an insanity defense. As Mr. Stella testified at the evidentiary hearing, he was required to show "good cause" for filing the belated notice. (PCR XIII 640; XIV 729-30). Without such, counsel's motion could have, and probably would have, been denied summarily. Thus, counsel could not be faulted for following the rules of procedure. After all, where there is sufficient evidence to question a defendant's sanity, counsel's performance is deficient if he fails to seek and follow through with a mental evaluation of his client. See Bertolotti v. State, 534 So. 2d 386, 389 (Fla. 1988). Had counsel not moved for leave to file a belated notice when he questioned Bruno's competency/insanity, nor followed the pleading requirements of the rule, Bruno surely would have attacked counsel's representation. Ultimately, Bruno failed to show that counsel performed deficiently in this respect.

The next instance of counsel's alleged breach of confidentiality occurred at the end of the State's case when counsel informed the trial court that Bruno wanted to testify and present witnesses against counsel's advice. (TR IV 655-61). As the trial record reveals, Mr. Stella told the court that he had spoken with Bruno and had indicated to him that he believed the

witnesses would be detrimental to his case. Counsel also indicated that he had tried to discourage Bruno from testifying, but that the decision was ultimately Bruno's. The trial court told Bruno that he had the right to testify, but that if he chose not to, that the court would instruct the jury not to infer anything from it. At that point, the trial court took a recess. Upon its return, the court informed Bruno that, by presenting witnesses, he would lose first and last closing arguments. Defense counsel then volunteered that he had contacted the potential witnesses and had determined from a strategic standpoint that "they would not contribute to the defense's case to the extent that would justify losing the strategic opening and closing argument." Counsel also volunteered that he had advised Bruno to "take a plea in this case," but that Bruno had declined. Thereafter, defense counsel indicated that he would be resting his case. (TR IV 660-61).

As Mr. Stella explained at the evidentiary hearing, he was having difficulty convincing Bruno not to present witnesses and not to testify on his own behalf. Not only did he believe that having first and last closing argument was strategically important, but he also feared that Bruno would alienate the jury if he put on witnesses who lacked credibility. (PCR XIV 678-81, 683-84). In frustration, he turned to the trial court for assistance in explaining the ramifications of his testifying and presenting

witnesses. In doing so, however, he did not disclose any information of a confidential or prejudicial nature.

Although counsel mentioned that he had advised Bruno to plead guilty, it was the jury's function to resolve his guilt or innocence. Having sat through the trial and heard the overwhelming evidence of guilt, the trial court would not reasonably have been affected by counsel's comment in determining his sentence. See Harris v. Rivera, 454 U.S. 339, 346 (1981) ("[J]udges routinely hear inadmissible evidence that they are presumed to ignore when making decisions."); Grossman v. State, 525 So. 2d 833, 846 n.9 (Fla. 1988) (same), cert. denied, 489 U.S. 1071 (1989). Thus, a new sentencing proceeding was not warranted because of this off-hand remark.

The final instance of counsel's alleged breach of confidentiality occurred during the penalty phase of the trial. During the State's cross-examination of Dr. Stillman, the doctor testified that he suspected Bruno was insane at the time of the murder, that he told defense counsel of his suspicions, and that he confirmed his suspicions when he spoke to Bruno's family just prior to his testimony. (TR V 820-23). During a recess in Bruno's testimony, defense counsel requested a side-bar conference and indicated to the court his surprise in Dr. Stillman's testimony. According to Mr. Stella, Dr. Stillman wrote him a letter on

December 8, 1986, in which he opined that Bruno was sane at the time of the offense and competent to stand trial. Mr. Stella had doubts, so he asked Dr. Stillman to evaluate Bruno again, which he did, and confirmed his prior findings in a letter dated June 19, 1987. Two days prior to the start of the penalty phase, Mr. Stella contacted Dr. Stillman and put the doctor in contact with Bruno's family for potential testimony regarding mitigation. According to Mr. Stella, Dr. Stillman never indicated that Bruno was insane or that he had suspicions and needed corroboration. (TR V 863-66).

At the evidentiary hearing, Mr. Stella explained that he registered his surprise with the trial court in order to justify his subsequent motion for an additional psychological examination. He testified that he knew Judge Coker fairly well and that if Judge Coker thought he had known about Stillman's conclusion Judge Coker would not have entertained his motion. Mr. Stella believed that it was very important that Judge Coker understand the extent of his surprise in order to obtain his continuance and additional examination. (PCR XII 449-50; XIII 610-15).

Bruno complained in his motion that "[c]ounsel's disclosures of confidential, damaging information to the trial court denied Mike Bruno the effective assistance of counsel." (SPCR IV 661).[2]

[2] Again, Bruno raised the substance of this issue on direct appeal and should not be allowed to circumvent the procedural bar by recasting this claim as one of ineffective assistance of

He failed to show, however, that counsel's comments prejudiced him. As the ultimate sentencer, the trial court has the discretion to accept or reject the testimony of an expert witness just as he may accept or reject the testimony of any other witness. Roberts v. State, 510 So. 2d 885 (Fla. 1987), cert. denied, 485 U.S. 943 (1988); Reaves v. State, 639 So. 2d 1 (Fla. 1994). After reviewing Dr. Stillman's entire testimony, this Court found that "the trial judge had the discretion to discount much of [Dr. Stillman's] opinion," and thereby affirmed the rejection of Bruno's mental mitigation. Bruno, 574 so. 2d at 82-83.[3] Since there was no indication that the trial court relied upon Mr. Stella's comments in determining Bruno's sentence, relief was not warranted, See Rose v. State, 617 So. 2d 291, 195-96 (Fla. 1993), cert. denied, 114 S.Ct. 279, 126 L.Ed.2d 230 (1994). (SPCR I 99-103; PCR I 118-23).

Ultimately, the trial court agreed, finding no evidence of a conflict of interest between Bruna and Mr. Stella or any prejudice by Stella's statements to the trial court:

> This Court does not find that there is any evidence of a 'conflict of interest"

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counsel. Harvev, 656 So. 2d at 1256; Medina, 573 So. 2d at 295.

[3] This Court also rejected Bruno's claim that the trial court should have conducted an evidentiary hearing, declared a mistrial, or continued the penalty phase when Mr. Stella registered his surprise with Dr. Stillman's testimony. Id. at 83.

between Mr. Stella and the Defendant, or that the Defendant was prejudiced by Mr. Stella's statements to the Trial Judge. Mr. Stella's statements to the Trial Judge, were made as a justification for his seeking leave of court to file a belated notice of intent to rely on an insanity defense, pursuant to Rule 3.216(f) R.Crim.P. The evidentiary hearing revealed that Mr. Stella was having difficulty with the Defendant as to whether the Defendant should or should not testify, and whether certain alibi witnesses who lacked credibility should be called to testify by the defense. The testimony of Mr. Stella does not reflect a lack of preparation, but reflect his conflicts with the Defendant as to the conduct of the trial. Mr. Stella stated that he advised the Defendant that "strategy wise", he would be better off not testifying. Mr. Stella felt that the witnesses which the Defendant wanted to call were not credible, and would result in the loss of first and last closing argument by the defense. Mr. Stella testified that he had strongly recommended to the Defendant that he take a plea in the case, which advice the Defendant elected to reject. Mr. Stella's statements to the Trial Judge did not amount to a "conflict of interest", but was an effort to seek the Trial Court's help with a client who consistently refused to co-operate with his defense counsel's trial preparations.

The Defendant has failed to show that he was prejudiced by Mr. Stella's statements to the Trial Judge. The State's evidence presented at the guilt and penalty phases of the trial were [sic] overwhelming, and the statement by Mr. Stella to Judge Coker did not deny the Defendant effective assistance of counsel. The Trial Judge exercised his discretion to reject the testimony and opinions of Dr. Stillman, and his decision was affirmed by the Florida Supreme Court. See: Roberts v. State, 510 So.2d 885 (Fla. 1987). The Defendant cannot re-litigate this issue

> under the guise of an argument on effective assistance of counsel, See: Medina v. State, supra.

(PCR I 177-78).

The trial court's ruling was correct, The substance of these claims either were or could have been raised on direct appeal. This claim presents a classic example of a defendant trying to use an ineffectiveness claim to sidestep a procedural bar. See Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995) (affirming summary denial of procedurally barred claims where Court believed defendant was improperly recasting barred claims as ones of ineffectiveness) . Thus, this Court should affirm the trial court's ruling in this regard.

Bruno claims that the State is making inconsistent arguments between its answer brief on direct appeal and its response to Bruno's 3.850 motion. To clarify, the State argued on direct appeal that the pith of Bruno's claim was that trial counsel was ineffective and that such an argument was not cognizable on direct appeal. However, this Court rejected Bruno's claim on its merits. Obviously, it did not find that Bruno was making an ineffectiveness claim, but rather a substantive claim that "[t]he trial court erred in failing to conduct an evidentiary hearing, declare a mistrial or continuance of the penalty phase when the dispute between trial counsel and his mental health expert was brought to the court's

attention." Bruno v. State, **574** So.2d 76, 83 (Fla. 1991). The bottom line is that, despite what the State argued on direct appeal, this Court considered the issue on its merits, and thus **Bruno** is procedurally barred from recasting the claim as one of ineffective assistance of counsel.

Ultimately, Mr. Stella explained his reasons for including the information in his motion for leave to file **a** belated notice of insanity. Likewise, he explained why he said what he did at the close of the State's case when Bruno was insisting on testifying and calling witnesses. Finally, he explained why he said what he did when he was surprised by Dr. Stillman's testimony. Bruno has failed to show that those were not reasonable statements to make under the circumstances. Nor has Bruno shown that they prejudiced his case. Therefore, this Court should affirm the trial court's denial of this claim.

Claim IV(F): Ineffective assistance of counsel--Stella's failure to present a defense of voluntary intoxication

In his 3.850 motion, Bruno complained that trial counsel failed to present a defense of voluntary intoxication even though there was 'ample, credible evidence that Mr. Bruno was intoxicated to such a degree that he could not possibly have formed the specific intent to commit premeditated murder or robbery." (SPCR IV 683-87).

Following the evidentiary hearing, the trial court disagreed. In its written order denying this claim, the trial court made the following findings:

> The Defendant claims that he was denied effective assistance of counsel, when Mr. Stella failed to investigate and present evidence of his drug and alcohol intoxication on the day of the offense. In Kisht v. Dugger, 574 So.2d 1066 (Fla. 1990), the Florida Supreme Court held that in order to prevail on this claim, the Defendant must allege specific facts which demonstrate deficiency in performance that prejudiced the Defendant, and which are not conclusively rebutted by the record. Mr. Stella testified that based on the instructions of the Defendant, that he made a strategic decision not to present a voluntary intoxication defense. Mr. Bruno consistently maintained his innocence, and an affirmative defense of Voluntary intoxication" would have been wholly inconsistent with an alibi defense, or a defense that the murder was committed by Jody Spalding. Mr. Stella also testified that he made a strategic decision not to have the Defendant present additional testimony, because he did not want to lose the benefit of first and last closing arguments. See Johnston v. Dugger, 583 So.2d 657, 661-662 (Fla. 1991). The decision not to present the affirmative defense of "voluntary intoxication", was based on a strategy decision which was motivated by the Defendant's conscious decision, rather than the result of Mr. Stella's legal incompetency. The evidence presented at the evidentiary hearing does not demonstrate that the Defendant was intoxicated to the point where he could not form a specific intent to murder Mr. Merlano. Prior to the murder, the Defendant had the mental capacity to secrete the gun and a crow bar, which he later used in

> the murder. The Defendant was sufficiently aware of what was going on, that he used a pillow to muffle the report of his gun. The Defendant possessed sufficient normal facilities so as to move the victims [sic] electrical equipment and discard the murder weapons. In its opinion in Bruno v. State, 574 So.2d 76, 83 (Fla. 1991), the Florida Supreme Court affirmed the order of the Trial Judge, finding that the Defendant was not substantially impairment [sic] by drugs or alcohol.

(PCR I 183-84).

The trial court's ruling was proper, Mr. Stella testified at the evidentiary hearing that Bruno's confession and Mike Jr.'s eyewitness account of the murder were "significant pieces of evidence" against Bruno. (PCR XI 170). If he lost the motion to suppress, he thought that voluntary intoxication would be "the most legally meritorious defense." (PCR XI 186, 232-33). He had spoken to Bruno, who told him that he and Mike Jr. were "high" on the night of the murder. He had also spoken to Mike Jr. shortly after their arrest about their drug use, and Mike Jr. told him "what had happened and that they were loaded. They were high." (PCR XI 233-35; XIV 667). Mr. Stella knew that voluntary intoxication was a difficult defense because it admitted culpability, and he believed it to be a "defense of last resort" because "jurors like people to take responsibility for their actions." (PCR XI 236).

Nevertheless, he thought it was their best defense because of Bruno's confession and Mike Jr.'s statement. (PCR XI 232-33).

On cross-examination, Mr. Stella further testified that he discussed a voluntary intoxication defense with Bruno "many times" prior to trial, but Bruno refused to present that defense: "The Defendant did not want to proceed or entertain thoughts of that defense. . . . Mr. Bruno did not believe in that defense, Mr. Bruno did not think that was a defense that a jury was going to have any sympathy for, or believe, that it was a defense of last resort, and it was not one that he would cooperate with and he didn't." (PCR XIV 667, 670). Mr. Stella further explained that Bruno 'never thought that his son would testify against him, never thought that would happen." (PCR XIV 668). On the day of trial, Mr, Stella saw Mike Jr. in the courthouse and knew that he would, in fact, testify against Bruno, "so [they] discussed the voluntary intoxication defense with renewed vigor." (PCR XIV 668) . Mr. Stella told Bruno that he would seek a continuance, that he would "try to get an expert to examine him and maybe even a neuropsychologist or neuro pharmacologist," but Bruno "didn't want to do it." (PCR XIV 668-69) .

Given this testimony, Bruno failed to prove his claim. Once Bruno rejected Mr. Stella's plea to present an intoxication defense, Bruno foreclosed his ability to later attack Mr. Stella's

effectiveness. See Rose v. State, 617 So. 2d 291, 294 (Fla. 1993) ("When a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made."' (quoting Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985)). Therefore, the trial court's denial of this claim was proper.

Bruno claims on appeal that Mr. Stella failed to adequately investigate the defense, and thus Bruno could not "make a decision to forego or waive a viable area of inquiry without first being fully advised of all the options after counsel has fully investigated." Initial brief at 51. Mr. Stella's testimony is clear, however, that he believed this to be the best defense in this case and "implored" Bruno to present it. But Bruno refused because he did not believe in the defense; he did not think it was a defense that the jury would have sympathy for. Thus, regardless of whether Mr. Stella had hired a neuropharmacologist, or any other mental health expert, to support this defense, Bruno did not think it was a credible defense and was not going to cooperate with Mr. Stella to present it.

Bruno also claims that Mr. Stella's reliance on Bruno's rejection of this defense was questionable because of Mr. Stella's concerns about Bruno's competency. Initial brief at 52. Mr. Stella testified, however, that Dr. Stillman had written him a

letter on December 8, 1986, in which he opined that Bruno was sane at the time of the offense and competent to stand trial. Mr. Stella had doubts, so he asked Dr. Stillman to evaluate Bruno again, which he did, and confirmed his prior findings in a letter dated June 19, 1987. (TR V 863-66). Thus, Mr. Stella's concerns about Bruno's competency were dispelled by Dr. Stillman. In the face of Dr. Stillman's expert opinion, and a client unwilling to cooperate with a voluntary intoxication defense, Mr. Stella's decision to present an alternative defense was reasonable.

Bruno also challenges the reasonableness of Mr. Stella's decision in light of Mr. Stella's decision to file a belated notice of an insanity defense and requests for instructions on self-defense/defense of others, both of which admit culpability. Initial **brief at 53-54.** Mr. Stella testified at the evidentiary hearing, however, that he filed a belated insanity notice to "keep the door open." (PCR XIII 639). After all, he **was** awaiting Dr. Stillman's findings on the follow-up evaluation, and, unlike with other defenses, he was required to notify the State of his intent to rely on such a defense. As for the self-defense instruction, no one questioned Mr. Stella at the evidentiary hearing about his request for this instruction, but the record **reveals** his intent. Mr. Stella explained to the jury his alternative theories: "[W]e have gone over it at length as to why my client was not the

perpetrator, but even if you are to believe this, that's not first degree murder. The individual, my client indicated that it was done in self-defense or during a fight, and as the judge will instruct you, that's not first degree murder." (TR IV 729-30).

Mr. Stella maintained that Bruno did not commit the murder, but he was stuck with Bruno's statement to the police, In that statement, Bruno indicated that the victim invited him and Mike Jr. into his apartment for a beer. Bruno was carrying a two-foot-long crow bar from working on his car. While inside, the victim started "getting loud" with Mike Jr. Bruno stepped in and he and the victim started fighting. In the midst of the fight, "the crowbar came out, and [Bruno] hit him with it" between one and five times. The victim kneed him in the groin, and Bruno fell back against the couch. The victim then went to his room and brought out a gun. Bruno told Mike Jr. to leave and he did. Bruno and the victim continued to fight, but Bruno knocked him down and thought he was unconscious. When Bruno started to walk away, the victim grabbed for the gun again, so Bruno "grabbed the gun from him and [he] shot him" in the head once or twice. (STR I 8-10).

Based on this statement that Mr. Stella unsuccessfully sought to suppress, he was faced with Bruno's admission that he was in the victim's apartment and shot the victim, though in self-defense. Obviously, Bruno did not preclude Mr. Stella from presenting this

alternative defense. The fact that he did present it, however, does not render his decision not to present a voluntary intoxication unreasonable and ineffective.

Finally, Bruno claims that Mr. Stella's failure to present a voluntary intoxication defense prejudiced his **case. Initial brief** at 53-55. As the trial court found, however, Bruno's actions before, during, and after the murder clearly refute such a defense, Bruno borrowed the murder weapon (a .22 caliber revolver) from Christopher Tague several days before the murder (TR II 346-47) and was seen with it on the day of the murder (TR III 450). Later that night, Bruno borrowed **a** car from Steve Mazzella (TR III 469-71). Bruno's son, who was with Bruno in the victim's apartment, testified that, when the victim went to adjust his stereo, Bruno hit the victim several times with a crowbar. Bruno then told Mike Jr. to get **a** gun from the cabinet in the bathroom where Bruno had previously secreted it. With the gun in hand, Bruno put a pillow over the victim's face and shot the victim twice in the head. (TR III 423-32).

When Bruno returned home during the early morning hours, he had blood stains on his shoes (TR III 486). Mike Jr, was scared and told Jody Spalding, "You don't ever want to see what I saw tonight." (TR III 391). About ten minutes later, Bruno told Jody Spalding that he got into a fight and the guy was dead (TR III

391). Later that morning, electronic equipment belonging to the victim showed up at the Spalding's house. Archie Maheu found Bruno asleep on the couch with the gun under his pillow. When he asked Bruno where the equipment came from, Bruno told him that he killed someone and ransacked their place. Bruno stated that he sent Mike Jr. in as an entre into the victim's apartment. When the victim emptied an ashtray, Bruno hit him with a crowbar, then shot him through a pillow with a gun. (TR III 566-68). Bruno also told Jody that he got the equipment from the "dead guy's" apartment (TR II 392-93), and he told Sharon Spalding that the owner of the equipment was dead. (TR III 452). Later that morning, Bruno asked Jody to drive him to several canals where Bruno threw parts of the gun and the crowbar into the canals. (TR II 393-96). Two days later, Bruno tried unsuccessfully to get back into the victim's apartment to remove fingerprints. (TR II 354-60, 397-99). Several days after that, Bruno called Jody Spalding and told him to throw a pair of sneakers away because they had blood on them. (TR III 402-04). Finally, while awaiting trial, Bruno asked Steve Mazzella to lie for him, and Bruno admitted that he "did do it." (TR III 472-73). Bruno also told Mike Jr. to blame the murder on Jody. He asked Mike Jr. to say that he (Bruno) was bowling or at the movies with a girl at the time of the murder. In a roundabout way, Bruno

wanted Mike Jr. to say that he (Mike Jr.) and Jody committed the murder. (TR III 433-34).

Based on Bruno's actions prior to, during, and following the murder, there is no reasonable probability that the verdict would have been different had Mr. Stella presented a voluntary intoxication defense, Kokal v. Dugger, 718 So.2d 138, 141 n.12 (Fla. 1998); Rivera v. State, 717 So.2d 477, 485 (Fla. 1998); Hardwick v. Dugger, 648 So.2d 100, 104 (Fla. 1994); Remeta v. Dugger, 622 So.2d 452, 455 (Fla. 1993); Koon v. Dugger, 619 So.2d 246, 249 (Fla. 1993). Therefore, this Court should affirm the trial court's order denying this claim.

Claim IV(H): Ineffective Assistance of Counsel--Stella failed to move to suppress Bruno's initial statement to the police

In his 3.850 motion, Bruno claimed that trial counsel failed to move to suppress his initial statements to the police, which were made without Miranda warnings. Although Bruno conceded that they were exculsatorv in nature, he complained that the State used them to show inconsistencies in Bruno's later statements, and to show guilty knowledge. (SPCR IV 692-95). In response, the State argued that Mr. Stella made a reasonable tactical decision not to challenge Bruno's initial statements to the police. At the evidentiary hearing, Mr. Stella testified that he remembered reading Bruno's statements in Detective Edgerton's report,

researching the issue, and deciding that those statements were not subject to Miranda because they were not made in a custodial setting, (PCR XI 275-78). Alternatively, the State argued that, even assuming counsel should have moved to suppress these statements, and that they would have been suppressed, Bruno failed to show that he was prejudiced by counsel's omission, As it had detailed earlier in its response, the evidence against Bruno, which included Bruno's later inculpatory statements, was overwhelming. Thus, there was no reasonable probability that the verdict would have been different had Mr. Stella successfully challenged the admission of Bruno's initial exculpatory statements to the police. (PCR I 134-35).

In its written order denying relief, the trial court found the claim procedurally barred and, alternatively, without merit:

> Mr. Bruno was interrogated by the police on August 12, 1996 [sic], and his statement was introduced at trial through the testimony of Detectives Hanstein and Edgerton. In his initial statement the Defendant denied any knowledge as to the whereabouts of the Victim, and denied killing him. This matter is procedurally barred, because it was raised, or could have been raised on appeal. The Defendant is now seeking to raise this issue under the guise of ineffectiveness of counsel. Even if this issue was [sic] not procedurally barred, the evidence against Mr. Bruno was overwhelming. Thus there is no reasonable probability that the verdict would have been different, had Bruno's initial exculpatory statements [not] been received in evidence.

see: Pericola v. State, 499 So.2d 864 (Fla. First D.C.A. 19861

(PCR I 184-85).

The trial court's ruling was proper, In Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995), the defendant had challenged the admission of his confession in the trial court, and the denial of same on direct appeal. In his postconviction motion (claim l(a)) , Harvey claimed that his trial counsel was ineffective for failing to challenge the admission of his statements on other grounds. Id. at 1254 n.1. The trial court found, and this Court agreed, that these allegations were procedurally barred, except for an allegation based on newly discovered evidence. Id. at 1256.

Like Harvey, Bruno challenged the admission of his inculpatory statements in the trial court, and the denial of same on appeal. Bruno v. State, 574 So.2d 76, 79 (Fla. 1991). Bruno's postconviction allegations, like most of Harvey's, were based on facts in the record, not on newly discovered evidence. Bruno simply used an ineffectiveness claim to relitigate his motion to suppress and to get a second bite at the apple. See Harvey, 656 So.2d at 1256 ("It is also not appropriate to use a different argument to relitigate the same issue. Hence, claim l(a) is procedurally barred, . . ." (citation omitted)) . Thus, the trial court properly found Bruno's claim procedurally barred.

Alternatively, the trial court also properly found the claim to be without merit. Bruno failed to show that Mr. Stella's tactical decision not to challenge them was unreasonable. Mr. Stella specifically testified that he investigated the circumstances surrounding, and the propriety of, Bruno's initial statements to the police and determined that they were not obtained in violation of Miranda because they were not made in a custodial setting. (PCR XI 275-78). According to Detective Edgerton's report, which Bruno used to refresh Mr. Stella's recollection on this matter, Detectives Edgerton and Hanstein went to Bruno's parents" home to talk to Bruno or Mike Jr. According to the report,

> Mr. Michael Bruno answered the door and agreed to voluntarily respond to the North Lauderdale Public Safety Dept. and answer our questions pertaining to this homicide investigation. Mr. Bruno was given a ride by myself and Det. Hanstein to the North Lauderdale Public Safety Dept. Mr. Bruno was advised that we were investigating a homicide which occurred at the Candlewood Square apartment complex, and that we were particularly concerned with his activity from Friday, the 8th of August, 1986 through Monday, the 11th of August, 1986, Mr. Michael George Bruno. Sr.. . . . stated that he had no problem answerins our questions as he was not guilty of anv crime.

(Court exhibit 2 at 1-2) (emphasis added). The report then detailed the substance of Bruno's statement. Id. at 2-3. Thereafter, the detective wrote,

> Mr. Bruno then was taken by this investigator and Det. Hanstein back to his parent's [sic] home, and was told that as this micide investigation had not determined a prime subject at this time, that he was suspected of being involved, and therefore was told not to leave town until either myself or Det. Hanstein had notified him that the homicide had been solved.

Id. at 3.

Not only did Bruno voluntarily go to the police station, he agreed to talk to them. He was also not under arrest and was returned to his home after the interview. Finally, while the detectives indicated that he was **a** suspect, they also indicated that they did not have a "prime subject" at that time. The police did not, as Bruno contended, have a precalculated plan to manipulate Bruno into confessing to this crime. Thus, Mr. Stella had no legal basis to challenge Bruno's initial exculpatory statements. Cf. Roman v. State, 475 So.2d 1228, 1231-32 (Fla. 1985) ("Appellant's situation was that he was being questioned in an investigation room at the sheriff's department, having voluntarily complied with a deputy's request to go there.") .[4]

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[4] Bruno's reliance on Mosley v. State, 503 So.2d 1356, 1359 (Fla. 1st DCA 1987), and Drake v. State, 441 So.2d 1079, 1081 (Fla. 1984), is misplaced. In Moslev although the defendant appeared at the police station voluntarily: was told he was not under arrest, and was not given Miranda warnings, the police induced his inculpatorv statements with promises of leniency if he would become a confidential informant. No inducements were made in Bruno's case. Similarly, in Drake, "[t]he defendant . . . was aware that

Even if counsel had a legal basis to challenge Bruno's initial exculpatory statements and failed to assert it, Bruno failed to prove that counsel's failure to do so prejudiced his case. As the trial court found, the evidence against Bruno was overwhelming, As this Court stated in its direct appeal opinion, "[d]irect evidence of how the crime occurred was furnished by Bruno's fifteen-year-old son, Michael, Jr., and by Bruno himself in the form of a taped confession." Bruno, 574 So.2d at 78. Bruno also made inculpatory statements to several lay witnesses, was seen with the murder weapon shortly after the murder, and was in possession of the victim's stereo equipment. Id. at 78-79. In assessing the harm of the improper admission of two witnesses' statements, this Court found their admission harmless "in view of the overwhelming evidence of guilt." Id. at 80. Thus, even if Mr. Stella could have successfully excluded Bruno's initial exculpatory statements, there is no reasonable probability that the outcome of his guilt phase would have been different. Cf. Henyard v. State, 689 So.2d 239, 248 (Fla. 1996) (finding admission of defendant's statements harmless in light of overwhelming evidence of guilt); LeCroy v.

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he had furnished the police with probable cause for his arrest. This knowledge, coupled with the fact that his request to discontinue further interrogation without counsel went unheeded, afforded a reasonable basis for Drake to believe he was not free to leave." 475 So.2d at 1231. Not only was Bruno free to leave, the police gave him a ride back to his parents' home; he was not arrested for several more days.

Dugger, 24 Fla. L. Weekly S13, 14 (Fla. 1998) (affirming summary denial of similar ineffectiveness claim where evidence of guilt was overwhelming); Pericola v. State, 499 So.2d 864 (Fla. 1st DCA 1986) ("While it is true that, when the error affects the constitutional rights of the appellant, the reviewing court may not find it harmless if there is a reasonable possibility that the error may have contributed to the accused's conviction or if the error may not be found harmless beyond a reasonable doubt, even such constitutional error may be treated as harmless where the evidence of guilt is overwhelming."). As a result, the trial court properly denied this allegation.

Claim IV(G): Ineffective Assistance of Counsel--Stella failed to challenge Bruno's inability to waive his rights before talking to the police because of Bruno's intoxication

In his 3.850 motion, Bruno admitted that trial counsel was aware that he (Bruno) "had a severe substance abuse problem," yet claimed that trial counsel failed to discover that Bruno was under the influence of LSD at the time of the crime and was similarly "out of touch with reality" when he made statements to the police. As a result, according to Bruno, defense counsel unreasonably

failed to challenge his competency to waive his Miranda rights.[5] (SPCR IV 687-92).

Following the evidentiary hearing, the trial court found this claim procedurally barred, believing that Bruno was using an ineffectiveness claim to relitigate the propriety of his confession on other grounds:

> The Defendant alleges that he was manipulated by the police into confessing his guilt, by their discussing the danger of his son being raped in jail. This matter was raised on appeal, or could have been raised on appeal, and it cannot be re-litigated at the present time under the guise of ineffective assistance of counsel. Thus the issue **was** procedurally barred.

(PCR I **184)** .

This ruling was proper. Again, in Harvey v. Dugger, 656 So.2d **1253, 1258** n.1 (Fla. 1995), the defendant challenged on direct appeal the admission of his confession. In his postconviction motion (claim 1(a)), however, Harvey claimed that trial counsel was ineffective for failing to make several arguments in support of his motion to suppress Harvey's confession. One of the allegations was "that trial counsel failed to obtain the services of a psychiatrist

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[5] Bruno **also** claimed that trial counsel similarly failed to challenge his competency to testify at the trial (SPCR IV 691-92), but Bruno does not challenge in this appeal the denial of that allegation, **initial brief** at 59-62. Therefore, he has waived it for review.

who would have testified that Harvey suffered from organic brain damage and was subject to becoming quickly and easily confused in stressful situations." Id. Ultimately, this Court affirmed the denial of this claim on the ground that it was procedurally barred: "It is also not appropriate to use a different argument to relitigate the same issue. Hence, claim 1(a) is procedurally barred, . . . because the issue of the suppression of Harvey's confession was raised on direct appeal and rejected by this Court." Id. at 1256 (citation omitted)). Thus, the trial court properly found Bruno's claim procedurally barred.

Even were it not procedurally barred, Bruno failed to establish that Mr. Stella's conduct was deficient and that such conduct prejudiced his case. The original trial record reveals that Mr. Stella had two separate doctors, Stillman and Ceros-Livingston, evaluate Bruno prior to trial to determine whether he was sane and competent. Dr. Stillman testified to Bruno's history of drug use during the penalty phase, including the drugs Bruno allegedly ingested prior to the murder and while awaiting trial. (TR V 806-07, 823). He made no mention of Bruno using drugs or alcohol on the day of Bruno's arrest, presumedly because Bruno did not relate same. Nor did Mike Jr. relate such information during his testimony.

At the evidentiary hearing, Mr. Stella could not recall if he discussed with Bruno or Mike Jr, whether they were under the influence of drugs/alcohol at the time of their arrest. Nor could he remember whether he discussed with Dr. Stillman Bruno's ability to waive Miranda. (PCR XI 269-71). Thereafter, Bruno presented no direct evidence that he was under the influence of drugs or alcohol at the time of his arrest, or that he related same to Mr. Stella at the time of trial. Dr. Lipman testified on Bruno's behalf that, from his interview with Bruno, he believed that Bruno was "actively hallucinating" at the time he gave his statement to the police. Bruno told him that he had "taken additional cocaine several times since the time of the offense, and prior to his arrest, and he had taken additional L.S.D." (PCR XV 848). But, Dr. Lipman did not specify the amount of cocaine and/or L.S.D. Bruno had ingested or when in relation to giving his statement he had ingested them.

The trial record reveals that Bruno and Mike Jr. were arrested and driven to the police station on August 13, 1986, four days after the murder. Detective Edgerton read Bruno his rights at approximately 7:30 p.m., and Bruno signed a written waiver of his rights at 8:00 p.m. (TR IV 616-21). Bruno told the detectives, however, that he had previously related everything he knew and had nothing more to add, so they ceased the interview and put Bruno in a holding cell. (TR IV 621-22). Later, Bruno asked to speak to

the detectives and returned to the interview room, where he gave a taped statement at 8:59 p.m. (TR IV 622-23; STR I 2). Thus, approximately an hour and a half elapsed from the time of his arrest to the time he gave a taped statement.

During that taped statement, Detective Edgerton read each statement of rights off of the written waiver form Bruno had previously signed. Bruno confirmed that he understood each right read to him and confirmed that he wanted to waive his rights and speak to them. (STR I 4-6). Bruno recounted his version of events in substantial detail. (STR I 7-15). At the end of the statement, Bruno stated that he was not then under the influence of drugs or alcohol and that he had given his statement of his own free will. (STR I 15). The statement ended at 9:10 p.m. (STR I 16; TR IV 623). Thus, another hour and eleven minutes had elapsed.

Dr. Lipman gave no testimony on the half-life of cocaine and/or L.S.D. In other words, there was no testimony as to how long the effects of such drugs last. More importantly, Dr. Lipman testified that his opinions depended on the veracity of the information given. (PCR XV 875-76). He also admitted that drug abusers often lie and confabulate, and thus corroboration of the self-report is "vital." (PCR XV 854, 857). Yet, Dr. Lipman did not corroborate Bruno's self-report that he was hallucinating on cocaine and L.S.D. at the time he gave his statement. Finally, Dr.

Lipman did not opine that Bruno was legally incompetent to waive his Miranda rights. Rather, Dr. Lipman opined that Bruno's ability to understand his rights was "reduced": "It would have reduced his ability to understand because he would perceive it from the context of his deranged perceptions and delusions." (PCR XV 848-49).

Also significant to the analysis of this claim are Bruno's actions before, during, and after the murder, including the day he was arrested. According to the record, Bruno was seen with the gun the morning of the murder. The evening of the murder, he invited Diane Liu to "a murder party" and told her, "It's going to be a great killing."' Later that night, he borrowed a car to go to the victim's apartment. Bruno's son, who witnessed the murder, testified that, when the victim began adjusting his stereo, Bruno pulled out a crowbar he had hidden in his pants and struck the victim several times. Bruno then told Mike Jr. to retrieve a gun Bruno had earlier secreted in the victim's bathroom. Bruno took the gun, put a pillow over the victim's face to muffle the gunshots, and then shot the victim twice in the head while the victim pled for his life. Bruno returned to the Spaldings' shortly thereafter with bloodstained shoes and told Jody Spalding that he got into a fight and the guy was dead. The following day, Bruno was in possession of the victim's electronic equipment and was again seen with the gun. He told Archie Maheu that he killed the

victim and ransacked his house. He dismantled the gun and, with Jody Spalding's assistance, disposed of it and the crowbar in separate canals later that day. Two days later, he took several people to the victim's apartment to get rid of his fingerprints, but he could not get back in. When initially confronted by the police, he admitting knowing the victim and admitting have been in the victim's apartment before, but denied any involvement in the murder.

Nothing about these actions indicate that Bruno was "out of touch with reality" when he ultimately confessed to bludgeoning and shooting the victim. To the contrary, his actions were very deliberate and culminated in a voluntary and knowing statement to the police. This Court determined as much on direct appeal. Bruno v. State, 574 So.2d 76, 79-80 (Fla. 1991).

Finally, even if Mr. Stella should have challenged Bruno's competency to waive his rights, and that Bruno's statements would have been suppressed, Bruno failed to show prejudice. Even without his statements, the evidence against him **was** overwhelming. As just recounted, Bruno took elaborate steps to conceal the crime, including dismantling the gun and throwing the pieces into different canals, calling Jody Spalding to dispose of the bloodstained sneakers Bruno had worn the night of the murder, and going back to the victim's apartment to eliminate fingerprints from

the apartment. He also made numerous inculpatory statements to lay witnesses. Finally, his own son witnessed the murder and testified against him. Based on this evidence, there is no reasonable probability that the verdict would have been different had Bruno's statements to the police been suppressed. See Johnston v. Dugger, 583 So.2d 657, 661 (Fla. 1991); Kight v. State, 512 So.2d 922, 926 (Fla. 1987). Therefore, this Court should affirm the denial of this claim.

Claim IV(I): Ineffective Assistance of Counsel--Stella failed to effectively challenge the State's case

In Claim IV(I) of his 3.850 motion, Bruno claimed that trial counsel failed to properly impeach the following state witnesses: (1) Mike Jr.--with evidence of his mental illness, medication, and drug use; (2) Diane Liu--with Detective Edgerton's opinion that she was "spacey," "not all with it," and not credible; and with evidence of her mental illness; (3) Bob Bryant--with his statements to the police that, although the walls between the apartments were paper thin, he did not hear a gunshot, and that he was awakened by kids screaming in the apartment across the hall; (4) the victim--with Detective Edgerton's testimony that the victim was an alcoholic and had been arrested for possession of marijuana and/or dangerous drugs; (5) Sharon Spalding--with evidence that her memory was impaired by her use of Tranxene; with the fact that she failed

to tell the police in her first statement that she saw Bruno with a gun the morning of the murder; with the fact that she detailed to the police Bruno's whereabouts on the day preceding and two days following the murder even though she told them that she did not believe he was involved; and with evidence that she was with Bruno the Sunday after the murder and was seen running from Building E and leaving the area in a hurry, even though she testified that she was at the apartment complex to get a receipt for a refrigerator: (6) Archie Maheu--with his deposition testimony that he went to the police station because he was tired of this case interfering with his home life; and with evidence of a petit theft conviction; and (7) Jody Spalding--with evidence that he initially denied having any knowledge about this case; and with evidence that in his second sworn statement he denied being present when Bruno disposed of the gun and crowbar. (SPCR IV 695-709).

In denying this claim, the trial court made the following findings:

> Decisions on these matters were tactical choices, and are within the standard of competency of defense counsel. see: Card v. State 497/1169, 1176 (Fla. 1986). Even had defense counsel impeached the witnesses in the manner sought by the Defendant, there is no reasonable probability that the verdict would have been different, See: Routly v. State, 590 so. 2d 397, 403 (Fla. 1991). Mr. Stella testified that the Defendant had told him to go easy on the cross-examination of his

> son Mike Jr. Mr. Stella also testified that he did not want to go into the fact that the Defendant's son was suffering from traumatic stress syndrome, because this fact would corroborate the fact that Mike Jr. was [sic] indeed been traumatized by witnessing his father kill Lionel Merlano.

(PCR I 185-86).

The trial court properly denied this claim.

1. Mike Jr.

At the evidentiary hearing, Mr. Stella testified that he had spoken to Mike Jr. about both his and Bruno's history of drug use, (PCR XII 300-01). He also knew that Mike Jr. was seeing a psychiatrist, had been diagnosed with posttraumatic stress disorder, and was on medication. (PCR XII 298; XIV 691). He made a strategic decision, however, not to cross-examine Mike Jr. about his mental health because he thought that Mike Jr.'s mental problems and diagnosis of PTSD would validate Mike Jr.'s testimony that he saw Bruno kill Lionel Merlano. (PCR XII 298-99; XIV 686). Moreover, Mr. Stella testified that he wanted to get Mike Jr. off of the witness stand as soon as possible because he was 'a very damaging witness," (PCR XIV 681). Finally, Mr. Stella testified that Bruno 'was crazy about his son. He didn't want his son cross examined." So Bruno told Mr. Stella to leave Mike Jr. alone. (PCR XIV 681, 687). They had 'many harsh discussions about that," but

Mr. Stella decided to accede to his client's wishes. (PCR XIV 682).

Mr. Stella's strategic decision not to impeach Mike Jr. about his mental condition and use of medication was not unreasonable. Not only did Bruno order him to leave Mike Jr. alone, but impeachment on this basis would have had a negative result, i.e., it would have validated Mike Jr.'s story that he witnessed his father murder Lionel Merlano. Thus, Mr. Stella cannot be deemed ineffective for failing to impeach Mike Jr. on this subject. Cf. Robinson v. State, 707 So.2d 688, 699-700 (Fla. 1998) (affirming denial of claim that trial counsel failed to adequately impeach testimony of codefendant); Van Povck v. State, 694 So.2d 686, 696 (Fla. 1997) (affirming denial of claim that trial counsel failed to adequately impeach testimony of surviving victim); Torres-Arboleda v. Duaaer, 636 So.2d 1321, 1324 (Fla. 1994) (affirming denial of claim that defense counsel was deficient in either impeaching State witnesses or arguing witness bias); Kight v. State, 574 So.2d 1066, 1073 (Fla. 1990) (same); Ssaziano v. Sinsletarv, 36 F.3d 1028, 1039 (11th Cir. 1994) ("We agree with the state courts and the district court that counsel's strategic decision to keep from the jury the evidence of hypnosis was not one of those relatively rare strategic decisions that is outside the wide range of reasonable professional assistance.").

2. Diane Liu

Regarding Diane Liu, Bruno alleged that Mr. Stella was ineffective for failing to depose Diane Liu, or otherwise discover, that Bruno had invited her to **a** 'murder party" the evening of the murder. He also faulted counsel for failing to claim a discovery violation regarding Bruno's statement to this witness. Finally, he faulted counsel for failing to impeach Diane Liu with Detective Edgerton's opinion that she was "spacey," 'not all with it," and not credible, and with evidence of her mental illness. (SPCR IV 696-99) .

At the evidentiary hearing, Mr. Stella testified that Ms. Liu was one of the first people to report Bruno as a suspect. (PCR XII **327).** Mr. Stella had no independent recollection of whether he was aware of Bruno's statement to Ms. Liu or whether he deposed Ms. Liu, but indicated that it **was** his practice then to depose everyone in a first-degree murder case, Thus, it would have been "very unusual" for him not to have taken her deposition. (PCR XII 330-**31;** XIV 694) . He speculated that, if he had not, it might have been because he was not aware of Bruno's statement to her. (PCR XII 331). It was also possible that he took her deposition, but did not order it transcribed. (PCR XIV 694-95).

Terminally, the record reveals that Mr. Stella questioned Diane Liu about whether she told either Detective Hanstein or

Detective Edgerton of Bruno's statement to her. (TR II 382-83). Although Ms. Liu testified that she had, Mr. Stella established during the cross-examination of Detective Hanstein that, in fact, she had not told them about Bruno's statement to her. (TR III 507). Thus, Mr. Stella effectively impeached her with this omission. Cf. Kight v. State, 574 So.2d 1066, 1073 (Fla. 1990) (finding it 'clear from the record that counsel either adequately did [what the defendant alleged he failed to do] or that it was a tactical decision not to do so").

More importantly, Bruno did not prove at the hearing either that Mr. Stella was unaware of Ms. Liu's statement at the time of trial or that the State withheld this statement from him in discovery. Nor did he prove that Mr. Stella did not depose Ms. Liu, only that he (Bruno) did not have her deposition. Likewise, Bruno did not prove at the hearing that Detective Edgerton thought Ms. Liu was "spacey" and "not all with it." He did not call the detective as a witness or question Mr. Stella about his strategy regarding his impeachment of this witness. Finally, Bruno did not prove, as he alleged in his motion, that Ms. Liu 'is [being treated] and has been treated for a debilitating mental illness from before the time of the killing to this day." (SPCR IV 698). Thus, the trial court properly denied these allegations. Cf. Scott v. State, 717 So.2d 908, 912 (Fla. 1998) (affirming denial of Brady

claim where defendant failed to prove allegations at evidentiary hearing); Robinson v. State, 707 So.2d 688, 691-92 (Fla. 1998) (affirming denial of newly discovered evidence claim where defendant failed to prove allegations at evidentiary hearing); Jones v. State, 709 So.2d 512 (Fla. 1996) (same).

3. **Bob Bryant**

Regarding Mr. Bryant, Bruno claimed that Mr. Stella was ineffective for failing to impeach Bob Bryant with the fact that he did not hear a gunshot, and with his statement to the police that what really woke him up were the kids across the hall screaming. (SPCR IV 699). Bruno failed to prove this allegation at the evidentiary hearing. He did not call Bob Bryant as a witness to establish the underlying fact, nor did he show Mr. Bryant's statement to Mr. Stella and question him about his strategy regarding this witness. Thus, he has no basis upon which to conclude, as he does in his initial brief, that Mr. Stella's strategy was unreasonable. Cf. Scott v. State, 717 So.2d 908, 912 (Fla. 1998); Robinson v. State, 707 So.2d 688, 691-92 (Fla. 1998); Jones v. State, 709 So.2d 512 (Fla. 1996).

Regardless, the original trial record reveals that Mr. Bryant never testified that he heard gunshots,[6] only that he heard coming

[6] This is probably true because Bruno used a pillow to silence the report from the handgun.

from the victim's apartment next door 'a guy scuffling around and him saying hey, hey, hey." (TR II 327). As for what woke up Mr. Bryant, the record reveals that Mr. Stella did, in fact, impeach Mr. Bryant with his statement to the police that the kids across the hall woke him up. (TR II 327-28). Thus, trial counsel can hardly be ineffective for doing what Bruno alleges he failed to do, Cf. Kight v. State, 574 So.2d 1066, IO73 (Fla. 1990).

4. The victim

In his 3.850 motion, Bruno alleged that Mr. Stella was ineffective for failing to elicit through Detective Edgerton that the victim was an alcoholic and had been arrested for possession of marijuana and/or dangerous drugs. (SPCR IV 699). Bruno does not challenge the denial of this claim in his initial brief. Therefore, he has waived this allegation.

5. Sharon Spalding

Regarding Sharon Spalding, Bruno alleged that Mr. Stella was ineffective for failing to impeach Sharon with evidence that her memory **was** impaired by her use of Tranxene 'in the months preceding, and during, trial"; with the fact that she failed to tell the police in her first statement that she saw Bruno with a gun the morning of the murder; with the fact that she detailed to the police Bruno's whereabouts on the day preceding and two days following the murder even though she told them that she did not

believe he was involved; and with evidence that she was with Bruno the Sunday after the murder and was seen running from Building E and leaving the area in a hurry, even though she testified that she was at the apartment complex to get a receipt for a refrigerator. (SPCR IV 700-03).

Regarding Sharon Spalding's alleged use of Tranxene, and Mr. Stella's alleged failure to impeach her with this fact, Bruno failed to prove this allegation. Bruno showed Sharon Spalding's January 7, 1987, deposition to Mr. Stella, wherein Mrs. Spalding stated that she had 'been on nerve pills for the last three months." (PCR XII 336-37). He also showed Arthur Maheu's May 19, 1987, deposition to Mr. Stella, wherein Mr. Maheu stated that Sharon Spalding was taking Tranxene for her symptoms of menopause. (PCR XII 343-46). However, Bruno did not prove that Sharon Spalding was on any medication at the time of trial or when she perceived the events about which she testified. Nor did he prove by relevant evidence that her use of Tranxene at the time of her deposition affected her ability to observe, remember, and recount at the time of trial.[7] See Green v. State, 688 So.2d 301, 305 (Fla. 1996) ("[E]vidence of drug use for impeachment purposes is inadmissible unless it is shown that: the witness was using the

[7] Curiously, Mr. Maheu testified at the evidentiary hearing, but Bruno elicited no testimony on this subject. (PCR XV 760-98).

intoxicant at or about the time of the incident about which the witness is testifying; the witness is using the intoxicant at or about the time of testimony; or it is expressly shown by other relevant evidence that the prior use of the intoxicant affects the witness's ability to observe, remember, and recount."') . Three months prior to her deposition would have been several months after Bruno's arrest, Similarly, her deposition was eight months prior to trial, and Arthur Maheu's deposition **was** three months prior to trial. Since the relevant time period for purposes of impeachment is at the time of the event about which the witness was testifying or at the time of her testimony, her use of Tranxene around the time of her deposition would have been irrelevant to any impeachment at the time of trial. Thus, Mr. Stella cannot be deemed ineffective for failing to question her about her use of Tranxene at the time of her deposition.

As for Sharon Spalding's testimony at trial that she saw Bruno with a gun the morning after the murder, Mr. Stella acknowledged that he did not see any reference to this fact in Detective Edgerton's synopsis of Sharon's first statement in his report. But Mr. Stella did not believe that the detective's report constituted a "statement" that he could use to impeach her. (PCR XII 340-41). While he acknowledged that he could use her statement, or lack thereof, to the detective directly, he could not recall whether he

had cross-examined her on this subject. (PCR XII 342). Bruno did not provide Mr. Stella with the transcripts of Mrs. Spalding's testimony (PCR XII 343), or otherwise confirm with the witness that he did not question her in this regard. Nor did he discuss with Mr. Stella his reason, if any, for failing to do so. Bruno simply concludes that Mr. Stella's strategy was unreasonable.

Terminally, Bruno cannot prove prejudice. The original trial record reveals that, while Mr. Stella did not cross-examine Sharon Spalding with this omission, he cross-examined Detective Edgerton about it. Detective Edgerton testified that Sharon Spalding did not tell him during her interview on August 11, 1986, that she had seen a gun around her apartment. (TR IV 631). It was not until later that she revealed this information, (TR IV 633). Thus, Mr. Stella cannot be deemed ineffective for failing to impeach Sharon Spalding directly when he impeached her through Detective Edgerton. Cf. Kight v. State, 574 So.2d 1066, 1073 (Fla. 1990).

As for the other two areas of inquiry that Bruno alleged Mr. Stella should have cross-examined Sharon Spalding about--that Sharon Spalding detailed to the police Bruno's whereabouts even though she did not think he was involved and that she was seen running from the apartment complex the day after the murder--Bruno does not pursue in his initial brief the denial of these allegations. Thus, he has waived them for review.

He does contend, however, that Mr. Stella was ineffective for failing to "question Sharon Spalding, as well as her son Jody, about their illicit drug dealings in the Candlewood Apartment complex." **Initial brief at 67-68.** These allegations, however, were not made in Claim IV(I). Rather, Bruno raised them in Claim VI, wherein he alleged as **a Brady claim only** that the State withheld evidence that Jody Spalding **was** selling cocaine and using it heavily at the time of trial, and that Sharon Spalding was "a drug dealer, a pathological liar, a prostitute, and 'a sick individual, not right at all in the head."'" (SPCR IV 733-36). Bruno cannot now challenge the denial of these allegations as an ineffectiveness claim when he raised them only as a Brady claim before the trial court. Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). Since he did not raise these allegations **as a** claim of ineffective assistance of counsel, he has failed to preserve this argument for review. Moreover, since he does not challenge the denial of these allegations as a Brady/Giglio claim, he has waived any challenge to their denial as raised.

6. **Arthur Maheu**

In his 3.850 motion, Bruno claimed that Mr. Stella was ineffective for failing to impeach Arthur Maheu with his deposition testimony, wherein he stated that he went to the police station

because he was tired of this case interfering with his home life, and with evidence of a petit theft conviction. (SPCR IV 703-06). At the evidentiary hearing, Mr. Stella testified that he had no specific recollection of the substance of Mr. Maheu's testimony, Bruno showed Mr. Maheu's deposition testimony to Mr. Stella, but failed to provide Mr. Maheu's trial testimony. Thus, the most Mr. Stella could say was that Mr. Maheu's deposition might be relevant to show bias or a motive for testifying, but Bruno provided him no frame of reference to explain his strategy. (PCR XII 403-04). Nevertheless, Bruno claims that his failure to impeach Mr. Maheu with this information was an unreasonable strategic decision.

Regardless, Bruno cannot show prejudice. The original trial record reveals that Mr. Stella spent five pages of the transcript impeaching Mr. Maheu with the fact that he did not come forward with his information for six months. (TR III 570-74). There is no reasonable probability that the outcome of this trial would have been different if Mr. Stella had elicited from Mr. Maheu that he came forward with information he thought would 'hang" Bruno because he was tired of the police investigating as suspects his wife and stepson, Sharon and Jody Spalding.

As for Mr. Stella's alleged failure to impeach Mr. Maheu with a petit theft conviction, Bruno presented no evidence that Mr.

Maheu had **a** petit theft conviction. Thus, he failed to prove this allegation.

7. **Jody Spalding**

In his 3.850 motion, Bruno alleged that Mr. Stella was ineffective for failing to impeach Jody Spalding with evidence that Jody denied in his first statement to the police having any knowledge about this case and then denied in his second sworn statement being present when Bruno disposed of the gun and **crowbar.** (SPCR IV 706-09). At the evidentiary hearing, Mr. Stella once again denied any specific recollection of the substance of Jody Spalding's testimony at the trial, and Bruno provided him with no transcripts. He did provide him, however, with a copy of Detective Lavarello's report, wherein the detective synopsized his interviews with Jody Spalding. When Mr. Stella confirmed Bruno's interpretation of the detective's synopsis, i.e., that Jody denied in his first statement knowing the victim and denied in his second statement being present when Bruno disposed of the weapons, Bruno ended his questioning about this matter. Thus, there **was** no testimony about Mr. Stella's strategy in cross-examining Jody Spalding. There is now only Bruno's conclusory allegations that Mr. Stella's strategy was unreasonable,

Again, Bruno cannot show prejudice. The original trial record reveals that Jody Spalding did not go to the police upon learning

of Bruno's involvement in this murder because "[he] was worried about what [Bruno] might do to [him] and [his] family." (TR III 404). He also testified that he did not tell the police the truth during his first statement because Mike Jr. was with him, and he was worried about what Bruno would do to him and his family if Mike Jr. told Bruno what he said to the police. (TR III 404). When he went to the police station on the Monday or Tuesday after the murder, he '"told them [he] knew nothing about it," so he agreed that he "didn't tell the truth." (TR III 408). He also admitted that he could have told the police during that interview that Bruno and Mike Jr. were with him the whole weekend. (TR III 408-10). Regarding Jody's presence when Bruno disposed of the weapons, Detective Hanstein testified at trial that Jody was "instrumental" in locating the weapons because "Jody drove Mr. Bruno to the areas." (TR III 515-16). In fact, Jody more accurately led them to the weapons than did Bruno himself. (TR III 516). Thus, at some point prior to his testimony, Jody confessed that he was present when Bruno disposed of the weapons, and actually led the police to the disposal sites. Mr. Stella obviously knew of this change in Jody's story, because he questioned Detective Hanstein about it. That he did not specifically impeach Jody with this change could not have, within a reasonable probability, affected the outcome of this case.

Conclusion

At the evidentiary hearing, Bruno failed to prove some of the underlying facts that he claimed Mr. Stella should have used to impeach a witness, At other times, he failed to provide Mr. Stella with a witness' trial testimony to provide a frame of reference for any discussion about his strategy, Still other times, he failed to question Mr. Stella at all about his strategy with regard to impeaching certain witnesses. Yet he claims that Mr. Stella's strategy was unreasonable. With some witnesses, Mr. Stella did, in fact, impeach them with the information Bruno now suggests. Finally, with other witnesses, Mr. Stella explained why he did not question certain witnesses as Bruno no desires. As the trial court found, decisions on these matters are tactical choices and are within the standard of competency expected. See Card v. State, 497 So. 2d 1169, 1176 (Fla. 1986); Sireci v. State, 469 So.2d 119, 120 (Fla. 1985) (affirming denial of ineffectiveness claim where trial counsel's strategy in cross-examining witness was reasonable),

Ultimately, Bruno failed to prove that Mr. Stella's failure to impeach certain witnesses prejudiced Bruno's case. In other words, he failed to show how the outcome of his trial would have been different had Mr. Stella impeached these witnesses as Bruno now wishes. See Routly v. State, 590 So. 2d 397, 403 (Fla. 1991). Thus, the trial court properly denied this claim.

Claim IV(J): Ineffective assistance of counsel--Stella failed to object to testimony that witnesses feared Bruno

In Claim IV(J) of his 3.850 motion, Bruno claimed that trial counsel failed to object to testimony by Sharon and Jody Spalding that they did not immediately go to the police because they were afraid of Bruno. (SPCR IV 710-12). In response, the State argued that this allegation was procedurally barred because Bruno raised the substance of this claim on direct appeal, and because it was inappropriate to recast it as an ineffectiveness claim. Alternatively the State argued that counsel's conduct did not prejudice Bruno's case. (PCR I 137-38). In its written order denying relief, the trial court agreed, finding the claim procedurally barred. (PCR I 186).

The trial court's ruling was proper. This allegation is a classic example of a defendant improperly recasting a barred claim as one of ineffectiveness in order to escape the bar. This Court has repeatedly condemned such practices. E.g., Medina v. State, 573 so. 2d 293, 295 (Fla. 1990) ("Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal."); Robinson v. State, 707 So.2d 688, 698-99 (Fla. 1998).

Regardless, on direct appeal this Court found that, "in view of the overwhelming evidence of guilt," the admission of the

Spaldings' testimony constituted "no more than harmless error." Bruno, 574 So.2d at 80. Such a finding precludes a later finding of prejudice under Strickland. See White v. State, 559 So.2d 1097, 1099-1100 (Fla. 1990) (affirming denial of ineffectiveness claim where Court addressed harmfulness of error on direct appeal). Therefore, this Court should affirm the trial court's denial of this claim.

Claim IV(L): Ineffective assistance of counsel--Stella failed to object when the trial court made an inquiry of the jury during deliberations

Finally, in Claim IV(L) of his 3.850 motion, Bruno complained that trial counsel failed to object when the trial court called the jury into the courtroom after 26 hours of deliberation and asked if it had a problem with which the court might be of assistance. (SPCR IV 714-18). In response, the State argued that the substance of this claim **was** raised and rejected on direct appeal. Bruno v. State, 574 So. 2d 76, 81 (Fla. 1991). Thus, Bruno was procedurally barred from raising this claim again under the guise of ineffective assistance of counsel. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). (PCR I 138). Again, the trial court agreed, finding this claim procedurally barred:

> After the jury had deliberated for 26 hours, the Trial Judge inquired if there **was** some problem that the court might provide some assistance. The foreperson stated: "Not at this time. We're coming pretty close". The

> Florida Supreme Court rejected this argument on direct appeal, Bruno, 574 So.2d at 81. The Defendant may not now re-litigate these claims under the guise of ineffective assistance of counsel. Medina v. State, 573 So.2d 293 (Fla. 1990).

(PCR 186-87).

The trial court's ruling **was** proper. As with Claim IV(J), Bruno attempted to circumvent the procedural bar by recasting this substantive claim as one of ineffective assistance of counsel. Based on Medina, this was improper.

Regardless, Bruno failed to show that counsel's failure to object to the trial court's inquiry of the jury was unreasonable under the circumstances, At the evidentiary hearing, Mr. Stella testified that, while he might object to such an inquiry today, he did not object to the trial court's inquiry at the time because he believed that the trial court was merely curious about the jury's progress in deliberations and its tone was not such **as** to constitute a de facto Allen charge. (PCR XII 419-22; XIV 711-13). Given his reasonable strategic decision, this Court should affirm the trial court's denial of this claim.

Claim IV(N): Ineffective Assistance of Counsel--Stella failed to object to guilt phase jury **instructions**

In his 3.850 motion, Bruno claimed that trial counsel failed to object to the inaccuracy of the "short-form" excusable homicide instruction that was given, failed to object to the lack of the

"long-form" instruction, and failed to object to the inaccuracy of the justifiable homicide instruction. (SPCR IV 718-20). In response, the State argued that this claim was procedurally barred. On direct appeal, this Court found that the "short-form" excusable homicide instruction, as worded, was not fundamental error. Bruno v. State, 574 So. 2d 76, 80 (Fla. 1991). Thus, counsel's failure to object is of no consequence. See White v. State, 559 So.2d 1097, 1099-1100 (Fla. 1990). Similarly, although this Court faulted trial counsel for failing to request the "long-form" excusable homicide instruction, it nevertheless found no evidence in the record to justify giving the instruction. Id. Finally, contrary to Bruno's assertion (SPCR IV 720), this Court rejected without discussion his claim that the justifiable homicide instruction failed to explain clearly the defense of another as self-defense. Id. at 81. Thus, the State argued that Bruno could not relitigate these issues under the guise of ineffective assistance of counsel. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Terminally, it argued that, "[w]hen jury instructions are proper, the failure to object does not constitute a serious and substantial deficiency that is measurably below the standard of competent counsel." Mendyk v. State, 592 So. 2d 1076, 1080 (Fla. 1992), receded from on other grounds sub nom. Hoffman v. State, 613 so. 2d 405 (Fla. 1992). (PCR I 139-40).

In denying relief, the trial court **agreed** with the State's analysis and found the claim procedurally barred. Once again, Bruno was merely recasting a barred claim under the guise of an ineffectiveness claim in order to escape the bar. This was improper but, more importantly, unavailing. Therefore, this Court should affirm the trial court's denial of this claim.

Claim IV(C): Ineffective Assistance of Counsel--Stella failed to ensure that the jury challenges were recorded

In his 3.850 motion, Bruno **claimed** that defense counsel "negligently failed to take steps to ensure the entire proceedings were being reported." (SPCR IV 674) . Specifically, Bruno complained that there were several unreported bench conferences during jury selection, most notably one during which the parties exercised challenges to the jury venire. According to Bruno, two jurors--Ms. Hrytzay and Ms. Henry--were excusable for cause. Because of the lack of a transcript, he speculated that counsel may have challenged them, that his challenges may have been denied, that counsel may have requested additional peremptories, and that his request may have been denied. In addition, Bruno speculated that the trial court may have granted state cause challenges in error, may have limited voir dire in time or scope, or may have committed other errors. (SPCR IV 674-78).

In response, the State initially argued that this claim was procedurally barred. Bruno raised the substance of this issue on direct appeal, claiming that the trial court erred in failing to ensure that the bench conferences were reported, which this Court rejected without discussion. Bruno v. State, 574 So. 2d at 76, 81 (Fla. 1991). Thus, it was inappropriate for Bruno to relitigate this claim under the guise of ineffective assistance of counsel. Torres-Arboleda v. Duaaer, 636 So. 2d 1321, 1323-24 (Fla. 1994); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990).

Alternatively, the State argued that Bruno failed to prove this claim. Mr. Stella testified at the evidentiary hearing that he had no recollection of the substance of any bench conference, but he would have requested a court reporter at any bench conference that was more than ministerial in nature. (PCR XI 254, 258-60). Regarding alleged indications in the record of unrecorded bench conferences during jury selection, Mr. Stella testified that in I986 the parties wrote juror challenges on slips of paper and gave them to the judge; they did not go sidebar and discuss them. (PCR XIV 706-07). Thus, where the record seems to suggest that a bench conference occurred during jury selection, it was counsel approaching the bench with their written challenges, Mr. Stella did not remember making any specific challenges for cause, requesting additional peremptories, or being limited by the court

in voir dire. He also did not remember whether the trial court denied any of his challenges for cause or granted any of the State's cause challenges. (PCR XI 263-68; XIV 707-09).

As in Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993), Bruno "point[ed] to no specific error which occurred during these [unreported portions of the trial]." See also Hardwick v. Dugger, 648 So. 2d 100, 101 (Fla. 1994); Turner v. Dugger, 614 So. ad 1075, 1079-80 (Fla. 1992). Bruno speculated what might have happened during these unreported bench conferences, but failed to prove that anything prejudicial did occur. Therefore, Bruno was not entitled to relief. (PCR I 127-29).

In denying relief, the trial court found the claim procedurally barred:

> Trial Counsel failed to ensure reporting of voir dire and to preserve the record. This matter was raised, or could have been raised on appeal. It is inappropriate for the Defendant to re-litigate this claim under the guise of ineffective assistance of counsel. Medina v. State, 573 So.2d 293 (Fla. 1990). The Defendant point [sic] to no specific errors which were alleged to have occurred during these unreported portions of the voir dire. See: Ferguson v. Singletary, 632 So.2d 53, 58 (Fla. 1993).

(PCR I 180-81).

This ruling was proper. Once again, Bruno attempted to circumvent the procedural bar by recasting this substantive claim

as one of ineffective assistance of counsel. Based on Medina, this was improper. Alternatively, it could have been found to be without merit, since Mr. Stella testified that juror challenges were submitted on slips of paper, rather than orally at a sidebar conference. Despite the opportunity to do so, Bruno failed to prove that anything prejudicial occurred at these unreported bench conferences. Therefore, this Court should affirm the **trial court's** denial of this claim,

Claim VIII: Ineffective Assistance of Counsel at the Penalty Phase--Stella failed to provide background material to Dr. Stillman, failed to investigate and present available mitigation, failed to prepare Bruno's parents to testify, and failed to object to improper evidence and prosecutorial arguments

A. Failure to investigate Bruno's medical, family, and drug use history and failure to provide same to Dr. Stillman

In the introduction to Claim VIII in his 3.850 motion, Bruno alleged that Mr. Stella failed to investigate, discover, and present the following nonstatutory mitigating evidence, which he claimed was readily discoverable: (1) Bruno's father was an invalid who spent most of his life in a VA hospital after World War II suffering from Guillain-Barre Syndrome and Tic Douloureux; (2) Bruno's mother was sexually abused as **a** child by her stepfather, **was** withheld from school, was forced to spend her childhood in a factory with her mother, **was** raped and impregnated as a teenager, had her first child taken away by her mother, drank alcohol while

pregnant with Bruno (her second child), and gave birth to a third child (Gina) three years after Bruno; (3) the Bruno's grew up in the projects in Queens and then moved to Long Island; (4) the family was poor; (5) Bruno's mother worked at a candy factory to support the family; (6) Bruno's mother was mentally ill; as a result, she was "unpredictable and violent," claimed to be a witch, berated the Bruno children, acted inappropriately around men, required the children to perform **all** of the household chores, and physically abused her children; (7) Bruno's uncle physically abused him; (8) a neighbor cared for the Bruno children when they were sick or "in need"; (9) Bruno suffered two head injuries, one as an infant and one as a toddler; (10) Mary Ann receives psychiatric care; (11) Gina has attempted suicide twice; (12) Bruno began abusing drugs in his teens, inhaling airplane glue, paint thinner, and toluene, and later ingesting LSD, mescaline, cocaine, and Quaaludes; (13) Bruno was raped by two young men when he was twelve years old; (14) Despite his abused background, Bruno **was** "a kind and gentle person who was eager to please and help others"; (15) Bruno was artistic and musically inclined; (16) Bruno was unable to provide for his own family because of his drug addiction; (17) Bruno attempted suicide by drug overdose and was hospitalized briefly after his wife divorced him; and (18) after Bruno and his two children (Mike Jr. and Alisha) moved to Florida, he and Mike

Jr. became even more addicted to drugs and lived a chaotic life in search of drugs. (SPCR IV 742-53).

Following this narration, Bruno claimed in a single paragraph that Mr. Stella failed to provide to Dr. Stillman all of this information and the records to support it. As a result, he alleged, that Dr. Stillman failed to perform a constitutionally competent mental health evaluation. (SPCR IV 753-54). Bruno raised the substance of this claim in greater detail, however, in Claim IX. (SPCR IV 779-91). To avoid duplication of responses, the State will respond to this allegation in Issue II, infra, as it relates to Claim IX of Bruno's 3.850 motion,

Following this single paragraph, Bruno alleged in Claim VIII that Mr. Stella was ineffective for failing to investigate, discover, and present the nonstatutory mitigation listed above. (SPCR IV 754-56). Although the trial court granted Bruno an evidentiary hearing on this claim, Bruno failed to prove (1) the truth of these allegations and (2) that witnesses were available at the time of trial to relate them. Bruno's motion recounted nine pages of family history that Mr. Stella allegedly failed to discover and present. (SPCR IV 742-53). Yet, the onlv witness with personal knowledge of Bruno's family background to testify at the hearing was Bruno's mother, who testified at Bruno's trial. Despite her apparent ability to substantiate the majority of

Bruno's allegations, her testimony revealed only the following about Bruno's family history: She has three children--Mary Ann, Bruno, and Gina. (PCR XV 883-84) . She was molested as a child and impregnated. That child, Jessie Alverez, was put up for adoption. (PCR XV 885). Her husband died in June 1997. He was a paraplegic from the war, but he did not like to talk about his military career. (PCR XV 884, 890) . Bruno was very talented. He had a band in 1970. He told her he was on drugs. Gina told her that Bruno tried to kill himself prior to his admission to the hospital, (PCR XV 893-99).

The original trial record, however, reveals that Mr. Stella presented most of this information at Bruno's trial. For example, Bruno's mother testified at the trial that she was very strict with her "three children." (TR IV 791). She also testified that Bruno's father was in two wars and, as a result, spent most of his time in the hospital because of his wounds. (TR IV 787). Similarly, Bruno's father testified that he spent most of Bruno's life in the hospital because of paralysis,[8] head surgery, and Tic Douloureux. (TR IV 795). Bruno's mother also testified that Bruno was musically inclined and played in a band. (TR **lv** 791-92).

[8] Dr. Dee testified at the evidentiary hearing that Guillain-Barre Syndrome causes 'progressive paralysis." (PCR XIII 552). Thus, although the father did not name the disease, he testified to its effect.

Before his arrest, Bruno told her that he had a serious drug problem. (TR IV 790). His mother and father also testified that Bruno married young and was devastated by his divorce, after which he tried to commit suicide and was briefly hospitalized until his sister had him released. (TR IV 787-90, 796).

The only information that Mrs. Bruno did not reveal at the trial was that she was molested and impregnated as a child, and that her husband died in 1997, Obviously, Bruno's father was alive at the time of trial. As for any sexual abuse upon her, such information would not have been relevant to Bruno's character, record, or the circumstances of the offense. See Hill v. State, 515 So. 2d 176, 177-78 (Fla. 1987) (evidence that defendant's mother also cared for defendant's cousins, and evidence of father's ill health and past job responsibilities properly excluded because not relevant to defendant's character, record, or offense), cert. denied, 485 U.S. 993 (1988). Thus, counsel cannot be deemed ineffective for failing to introduce inadmissible evidence. Jones v. State, 709 So.2d 512, 519 (Fla. 1998) ("If the evidence could not have been properly admitted at trial or would not be admissible on retrial, there is no reasonable probability that the outcome of Jones" trial would have been different if the evidence had been provided to the defense.").

Bruno attempted to introduce evidence of his social and drug use history at the evidentiary hearing through his two mental health experts, but the trial court found such testimony inadmissible.[9] At the beginning of Dr. Dee's substantive testimony, Bruno attempted to admit dozens of exhibits that the doctor allegedly used to formulate his opinions. The trial court refused to admit the large majority of them as substantive evidence because they were either irrelevant to the issues or were hearsay that the State would have no fair opportunity to rebut. (PCR XIII 486-52).

Later during Dr. Dee's testimony, the doctor stated that, besides reviewing the background materials, he had interviewed Bruno, as well as Bruno's two sisters and Mike Jr. (PCR XIII 531-32). He then began to recount their impressions of Bruno's drug abuse history. (PCR XIII 532). Following his opinion that Bruno met the criteria for both statutory mental mitigators, Bruno began questioning Dr. Dee about nonstatutory mitigation. As the doctor recited information about Bruno's social history that he learned from Bruno's family and friends, the trial court interrupted:

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[9] Despite this ruling, Bruno relies extensively in his initial brief on such testimony as substantive evidence. **Initial brief** at 84-89. Such reliance is highly improper, and this Court should ignore Bruno's references to evidence not properly admitted, especially since Bruno does not challenge the trial court's rulings in this regard.

> THE COURT: Just so the record is clear, you're not asking opinions, you're asking him to basically repeat those exhibits that the court has ruled inadmissible. . . . I want the record to be clear, I'm not going to consider this portion of the testimony because it's based on inadmissible evidence. He's just acting as a conduit, rather than exercising opinions.

(PCR XIII 549-51).

Ultimately, on cross-examination, Dr. Dee admitted that he had not interviewed Bruno's sisters or Mike Jr. until the night before his testimony. By that point, he had already formulated his opinions, Most importantly, he admitted that the information they provided about Bruno's social history did not relate to any of his expert opinions, i.e., that Bruno had organic brain damage or that both of the statutory mental mitigators applied. He merely "got a much better feeling for . . . how dysfunctional the family was." (PCR XIII 563-68).

Similarly, the trial court refused to consider an historical account of Bruno's drug use history as reported by Dr. Lipman, a neuropharmacologist:

> THE COURT: The purpose of an expert is not to be a conduit for hearsay. So, we have this gentleman who has been qualified as an expert pharmacologist, relating the defendant's life. This is not the purpose of this witness. The purpose of this witness is to render expert opinions. So why are we going through the defendant's life through

this witness, when he has no personal knowledge?

[COLLATERAL COUNSEL] : Because, Your Honor, this witness is going to be rendering expert opinions and part of his opinion is based on Mr. Bruno's history of substance abuse, chronic substance abuse, of various different substances. All of that information gleaned from him **as** well as review of records and interview of other witnesses is something that this expert and other witnesses routinely rely on.

THE COURT: He may consider it, but he can't testify to it. . . . In other words, he can state what he is relying upon to render an opinion. . . . But he cannot act as a conduit for the defendant's past life. . . . I'm not considering it for that purpose.

[COLLATERAL COUNSEL] : Okay. I understand.

(PCR XV 830-31).

What is most telling about these witnesses' testimony, especially that of Dr. Dee, is that Bruno's two sister's and son were not only available to testify at the evidentiary hearing, but they were more than willing to provide information to the doctors about Bruno's social history. Yet, not one of them testified at the evidentiary hearing. Instead of putting on direct testimony of Bruno's social history through the testimony of these witnesses, Bruno attempted to relate such information through the hearsay testimony of these doctors. Yet, Dr. Dee specifically acknowledged that he did not rely on such information to formulate his expert

opinions. Quite properly, the trial court refused to consider any of the social history testimony offered by Drs. Dee or Lipman. As a result, the only person to relate admissible evidence about Bruno's social history was his mother. And since Mr. Stella presented the vast majority of her testimony at trial, Bruno has failed to prove, as he had alleged in his motion, that there was a wealth of nonstatutory mitigation that Mr. Stella failed to discover and present. In other words, since Bruno failed to prove that witnesses were available at the time of trial to relate additional evidence in mitigation, Bruno failed to establish that Mr. Stella was ineffective for failing to present such unsubstantiated evidence. Cf. Scott v. State, 717 So.2d 908, 912 (Fla. 1998) (affirming denial of Brady claim where defendant failed to prove allegations at evidentiary hearing); Robinson v. State, 707 So.2d 688, 691-92 (Fla. 1998) (affirming denial of newly discovered evidence claim where defendant failed to prove allegations at evidentiary hearing); Jones v. State, 709 So.2d 512 (Fla. 1996) (same).

B. Failure to prepare Bruno's mother and father for their testimony

In Claim VIII of his 3,850 motion, Bruno also alleged that Mr. Stella was ineffective for failing to prepare Bruno's mother and father for their testimony. According to Bruno, Mr. Stella failed

to ensure that his parents would plead for a life sentence. (SPCR IV 756-60). At the evidentiary hearing, Mr. Stella testified that he was surprised by Mr. and Mrs. Bruno's testimony. He had spoken to them often, because they were actively involved in the case. And he had spoken to them on a number of occasions regarding their penalty phase testimony. (PCR XIII 601) . Ultimately, however, he could not prevent them from speaking their mind. Mr. Stella can hardly be deemed deficient for failing to anticipate their testimony after he had counseled them on a number of occasions.

C. **Failure to object to improper evidence, argument, and instructions during the penalty phase**

Also in Claim VIII, Bruno alleged that Mr. Stella failed to object to (1) comments and instructions that misled the jury as to its role in sentencing, (2) evidence and argument of Bruno's prior nonviolent felonies as nonstatutory aggravating factors, (3) questions and comments relating to Bruno's tattoos, (4) argument relating to aggravating factors which were not supported by the record.[10] (SPCR IV 763-72).

In response, the State argued that each one of these allegations **was** procedurally barred since each was raised and

[10] To the extent Bruno raised other allegations of ineffectiveness (SPCR IV 772-77), but has not challenged their denial in this appeal, he has waived them for review.

rejected on direct appeal. Bruno, 574 So. 2d at 83.[11] It was improper for Bruno to relitigate them under the guise of ineffective assistance of counsel. Medina v. State, 573 So, 2d 293, 295 (Fla. 1990). (PCR I 164-65). The trial court agreed, finding the claim procedurally barred. (PCR I 198).

This ruling was proper. These allegations are classic attempts to recast barred claims as ineffectiveness claims in an attempt to escape the bar. Regardless, these claims were raised as fundamental error on direct appeal, and rejected. Consequently, Bruno cannot show that any failure by trial counsel to raise them in the trial court prejudiced his case. See White v. State, 559 So.2d 1097, 1099-1100 (Fla. 1990) (affirming denial of ineffectiveness claim where Court addressed harmfulness of error on direct appeal). Therefore, this Court should affirm the trial court's denial of these allegations,

[11] Bruno's arguments in his postconviction motion were taken verbatim from his initial brief on direct appeal.

ISSUE II

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S DENIAL OF CLAIMS VIII AND IX, WHEREIN BRUNO ALLEGED THAT DR. STILLMAN DID NOT PERFORM A COMPETENT EVALUATION (Restated) .

In Claims VIII and IX of his 3.850 motion, Bruno claimed that he was deprived of his constitutional right to competent mental health assistance **because** defense counsel failed to investigate mitigating evidence relating to Bruno's family history, background, **and** drug history, and failed to present evidence of same to Dr. Stillman. Thus, according to Bruno, because of counsel's ineffectiveness, Dr. Stillman was unable to perform a competent mental health evaluation.[12] (SPCR IV 753-54, 779-91) .

In denying this claim, the trial court made the following findings:

> Since Dr. Stillman is dead, there is no **way** for the court to ascertain what factors he considered, or did not consider, in the way of background material on the Defendant. The record of the trial reflects that Dr. Stillman interviewed the Defendant twice of [sic] a total of two and **a** half hours. He read letters written to Jean Gruninger and he spoke with the defendant's sister and parents, (tr

[12] To the extent Bruno alleges in Claim IX that Dr. Stillman performed an incompetent evaluation because he failed to conclude that Bruno **was** unable to form specific intent to commit first-degree murder or robbery and that he was unable to voluntarily waive his Miranda rights, the State will rely on its response to these allegations in Issue I, supra, regarding Mr. Stella's failure to present a voluntary intoxication defense, and his failure to challenge Bruno's confession on this ground.

> 799-801). The record reflects that Dr. Stillman was aware of the Defendant's extensive drug usage, and his stay at Pilgrim State hospital. The experts presented by the Defendant at the evidentiary hearing, did not testify that they believed that the Defendant was incompetent to stand trial. The Defendant's trial strategy during the guilt phase, precluded the use of either the affirmative defenses of voluntary intoxication or insanity. At the penalty phase, the jury and trial judge were presented with testimony relating to his drug usage, family background, and mental health. The fact that the defendant and his family withheld information from Mr. Stella, or that a more detailed presentation of this evidence could have been made in hind sight, does not render Mr. Stellar's] performance deficient, Maxwell v. Wainwrisht, 490 So.2d 927, 932 (Fla. 1986), sentenced [sic] vacated on other grounds, 603 So.2d 490 (Fla. 1992). The Defendant has failed to establish that the presentation of any additional testimony as to mitigating circumstances would have changed the outcome of the proceedings, and this claim is denied. Turner v. Dugger, 614 So.2d 1075, 1079 (Fla. 1992).

(PCR I 196-97).

The trial court's ruling was proper. First, as the State argued in Issue I, supra, regarding Bruno's alleged nonstatutory mitigation, Bruno failed to prove that such evidence existed. Since he failed to prove that such information was available for Mr. Stella to have discovered at the time of trial, Mr. Stella cannot be deficient for failing either to discover it or to present it to Dr. Stillman for his consideration.

second, Bruno failed to establish the underlying factual basis for this claim, namely, that Dr. Stillman did not have sufficient background material' with which to render a competent evaluation. Dr. Stillman was deceased when Bruno made these allegations. Bruno failed to prove at the evidentiary hearing what information Dr. Stillman had or did not have when assessing Bruno's competency, sanity, and mitigation. He merely presented the testimony of two new doctors who relied on background information that Bruno could not prove existed at the time of Dr. Stillman's evaluations. Thus, Bruno failed to prove his conclusory allegation that Dr. Stillman did not have sufficient background information to perform a constitutionally competent mental health evaluation.

Third, Bruno's two new doctors did not testify that Dr. Stillman's conclusions were erroneous. In fact, Dr. Dee admitted that Dr. Stillman accurately diagnosed Bruno with organic brain disorder. (PCR XIII 543-44). Moreover, their ultimate conclusions were strikingly similar to that of Dr. Stillman. At the penalty phase of Bruno's trial, Dr. Stillman detailed Bruno's extensive drug history, drug use at the time of the murder, and drug use since his arrest, which he obtained from Bruno's sister and girlfriend. (TR V 803-08). Despite this drug use, he believed that Bruno was above average in intelligence. (TR V 804). Dr. Stillman opined that Bruno was an anxiety-ridden person with

depression, who had a psychotic or pre-psychotic personality, When he was under the influence of drugs, his was almost schizophrenic. When he was not under the influence of drugs, he was passive-aggressive. He also testified that there was some evidence of brain damage from the drug use. He explained that when the cortex of the brain is damaged, the person becomes violent and has a low frustration tolerance. (TR v 807-09). On cross-examination, Dr. Stillman further opined that Bruno was insane at the time of the crime. He had confirmed this diagnosis within the previous two days after speaking to Bruno's parents, sister, and girlfriend. Given the amount of drugs Bruno claimed to have ingested, Dr. Stillman did not believe that Bruno "could have been in his right mind" when he committed the murder. (TR V 820-23). Finally, Dr. Stillman testified that, while Bruno used a pillow to muffle the shots because he may have been afraid he was going to get caught, Bruno did not understand the consequences of his actions. (TR v 824).

Dr. Dee's testimony at the evidentiary hearing was strikingly similar. For example, Dr. Dee testified that Bruno had a full-scale I.Q. of 114, which is in the bright normal range. (PCR XIII 525). But a discrepancy between his verbal and performance I.Q. scores was consistent with long-term substance abuse. (PCR XIII 526). Testing also revealed that Bruno had poor impulse control.

(PCR XIII 529-30). As did Dr. Stillman, Dr. Dee detailed Bruno's drug use history, which the doctor obtained from Bruno's family and friends, (PCR XIII 531-33). As did Dr. Stillman, Dr. Dee diagnosed Bruno with organic brain damage, resulting from the long-term drug use. (PCR XIII 534). He also diagnosed him as a poly-substance abuser, with a dependency on cocaine. (PCR XIII 540). From these diagnoses, Dr. Dee opined that Bruno was under the influence of an extreme mental or emotional disturbance at the time of the murder. (PCR XIII 545-46). However, because he had insufficient information, he could do no more than conclude that Bruno's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired. He thought that this was an area better left to Dr. Lipman. (PCR XIII 547).

Dr. Lipman, a neuropharmacologist from Chicago, detailed Bruno's drug use history, suicide attempt, and resultant hospitalization, which the trial court refused to consider as substantive evidence because it was inadmissible hearsay. (PCR XV 806-30). Regarding his drug use at the time of the murder, Bruno and Mike Jr. reported that Bruno was using up to an ounce of cocaine per day at the time of the murder, was "abusing Quaalude[s]," and had ingested four or five hits of L.S.D. in the hours leading up to the murder. (PCR XV 834). According to Dr.

Lipman, such drug use made Bruno actively psychotic, hallucinatory and delusional, Bruno told him that he saw bright lights trailing moving objects and could not drive that day. (PCR XV 835-36, 859-60). Ultimately, Dr. Lipman opined that Bruno was under the influence of an extreme mental or emotional disturbance when he committed the murder. (PCR XV 838) . However, when he opined that Bruno's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired because of his psycho-toxic state, the trial court questioned the doctor's expertise to render such an opinion, given that he was a neuropharmacologist, not a neuropsychologist. (PCR XV 840-47). On cross-examination, Dr. Lipman also admitted that his opinions were dependent on the information given, and thus his opinions would change if the information changed. (PCR XV 876).

Ultimately, neither of these two doctors presented testimony that was meaningfully different from that of Dr. Stillman. Their collective opinions were that Bruno was above average in intelligence, but had a severe drug abuse problem. When under the influence of drugs, he was actively psychotic and, perhaps, even schizophrenic. He had poor impulse control and was prone to violence. They all agreed that Bruno committed this murder while under the influence of drugs and that his behavior during the murder was psychotic as a result. Thus, Dr. Dee's and Dr. Lipman's

testimony was cumulative to that of Dr. Stillman. Cf. Provenzano v. Dusser, 561 So.2d 541, 546 (Fla. 1990) (finding original evaluations competent where new doctor related same diagnosis); Jackson v. Dugger, 547 So.2d 1197, 1200-01 (Fla. 1989) (rejecting claim that trial counsel was ineffective and trial expert was incompetent where defendant's new evidence 'is essentially cumulative of the prior evidence") .

As for their testimony regarding the statutory mental mitigators, both Drs. Dee and Lipman testified that Bruno was under the influence of an extreme mental or emotional disturbance at the time of trial. However, Dr. Dee did not have enough information to explain how Bruno met the criteria for the "capacity to appreciate" mitigator, and Dr. Lipman's area of expertise did not qualify him to render such an opinion. To the extent Dr. Stillman did not parrot the statutory language, Mr. Stella argued for, and obtained, instructions on both of these mental mitigators. (TR v 909-10). More importantly, Mr. Stella argued the existence of these two mitigators to the jury: "And I think we have shown through Doctor Stillman and the defendant's own testimony as well as the peripheral testimony of both the mother and father that he was under the influence of drugs, he was under extreme emotional and mental disturbance at the time this particular crime occurred. I

don't think he fully appreciated the criminality of his actions," (TR V 899).

As for Dr. Stillman's surprise testimony on cross-examination that Bruno was insane at the time of the crime, Mr. Stella registered his surprise with the trial court and moved for the appointment of another mental health expert, which the trial court denied. (TR V 863-66; VI 1093-95). Bruno challenged on appeal the trial court's failure to conduct an evidentiary hearing, declare a mistrial, or grant a continuance of the penalty phase when Mr. Stella brought this matter to the court's attention. Bruno v. State, 574 So.2d 76, 83 (Fla. 1991). Mr. Stella could have done no more.

Finally, as for Mr. Stella's investigation and preparation for the penalty phase, Mr. Stella testified that he intended to use in the penalty phase Bruno's psychiatric history, drug usage, family problems, childhood problems, and anything else he could find in mitigation. (PCR XII 425). His goal was to present both statutory and nonstatutory mitigation. (PCR XII 426). To achieve this goal, he spoke to Bruno's parents and siblings, and to Dr. Stillman. (PCR XII 428). He also tried to obtain records on Bruno. (PCR XII 428). Back then it was customary to get the doctor together with the family and to provide the doctor with records. (PCR XII 432). Although Dr. Stillman was appointed initially to assess Bruno's

competency and sanity, he became part of the 'team" for the penalty phase. (PCR XII 434). Mr. Stella testified that he provided all of his discovery to Dr. Stillman. (PCR XI 192; XIV 726). And he had more than one or two thorough discussions with Dr. Stillman regarding the purpose of his evaluation and its scope, including penalty phase mitigation. (PCR XI 191; XIII 641).

As the trial court found, the trial record also reveals that Dr. Stillman interviewed Bruno twice for a total of two and a half hours. He read police reports and letters that Bruno wrote to Jean Gruninger, and he spoke to Bruno's sister for 45 minutes and to Bruno's mother and father. (TR IV 799-801). Thus, Dr. Stillman had as much information as these people would provide.

Mr. Stella also explained that Bruno sabotaged his own penalty phase defense by withholding information that could have led to mitigation. (PCR XIV 717-19). According to Stella, his client was the starting point for investigating mitigation. (PCR IV 728). Even Dr, Dee testified at the evidentiary hearing that Bruno provided "virtually nothing that would act as nonstatutory mitigation." (PCR XIII 549). He further testified that Bruno was "reluctant to say anything critical about his parents." (PCR XIII 561). Bruno "didn't think he had a remarkable childhood. He didn't think he was deprived or abused or anything like that." (PCR XIII 570). As for his drug usage, Dr. Dee testified that

Bruno "tended to minimize it" because he "didn't seem to think that it was all that remarkable." (PCR XIII 571).

Mr. Stella further testified that he questioned Bruno about his psychiatric history "on more than one occasion," but neither Bruno nor his parents revealed any mental health problems, and they all minimized Bruno's drug use. (PCR XII 437; XIV 717-18). He did not believe that Bruno's parents really knew the extent of Bruno's drug use. (PCR XIII 602). According to Mr. Stella, the rest of Bruno's family was simply uncooperative.[13] (PCR XII 437). They were 'crazy about mom and dad" and tried to shield them as much as possible. (PCR XIII 602). Thus, without some frame of reference, Mr. Stella could not discover information which he did not know existed. Cf. Mills v. State, 603 So, 2d 482 (Fla. 1992) (counsel not ineffective for failing to investigate and present evidence of mental mitigation where counsel had no reason to suspect that any mental health evidence could be developed); Henderson v. Dugger, 522 So. 2d 835, 837-38 (Fla. 1988) (counsel prohibited from talking to family by defendant, not by failure to investigate).

Despite the lack of information, Stella testified that he or his investigator called many family members, friends, old teachers, and the like, but the phone calls were not returned. (PCR XIV

[13] Enigmatically, Bruno's sisters were very cooperative with Dr. Dee the night before his testimony at the evidentiary hearing (PCR XIII 564-65), but did not testify personally at the hearing.

727). He was fairly sure he obtained Bruno's school records, but suspected he did not use them because they were not helpful. (PCR XIV 717-18). As for the sister that Mr. Stella allegedly failed to learn about until the penalty phase, Mr. Stella testified that she hated Bruno and told him that he would be sorry if he forced her to testify. If subpoenaed, she would reveal that Bruno sexually abused her throughout their childhood. Thus, Mr. Stella made a strategic decision not to call her as a witness, but he tried to corroborate the information that she gave him about Bruno's suicide attempt and hospitalization, (PCR XII 454-55).

According to Mr. Stella, Bruno did not cooperate with him because Bruno did not want him to present a penalty phase defense. Bruno told Stella that if he were convicted he did not want to spend the rest of his life in prison. (PCR XIV 719). Bruno did not even want his parents to testify in the penalty phase. (PCR XIV 734). Under these circumstances, Mr. Stella could not be found deficient where Bruno and his family prevented him from discovering the mitigation alleged by Bruno in his motion. Cf. Rutherford v. State, 24 Fla. L. Weekly S3 (Fla. 1998) ("Rutherford's uncooperativeness at trial belies his present claim that his trial counsel was deficient for not investigating and presenting mitigation regarding his harsh childhood and military history.").

The trial court found as much. In its written order denying relief, the trial court made the following findings regarding this claim:

> The testimony and exhibits presented at the evidentiary hearing, reflects [sic] that the Defendant's mis-information to, and his failure to fully co-operate with Mr. Stella in the preparation of his defense, prevented Mr. Stella from initially obtaining information relating to the Defendant's previous hospitalization at Pilgrim State Hospital. An examination of Dr. Stillman's trial testimony, reveals that he acquainted the jury with the Defendant's extensive emotional and drug history, and drug use at the time of the murder. See: Defense exhibit 45(tr 803-808) [.] Dr. Stillman testified that the Defendant had organic brain damage as a result of his extensive drug use. (tr808-809). The Defendant's Parents testified that Mr. Bruno had tried to commit suicide, and was briefly hospitalized until his sister had him released. (tr787-90, 796). The fact that there could have been a more detailed presentation of these circumstances, does not establish that defense counsel's performance was deficient. see: Maxwell v. Wainwrisht, 490 So.2d 927, 932 (Fla. 1986), sentenced [sic] vacated on other grounds, 603 So.2d 490 (Fla. 1992). Defense counsel cannot be faulted for failing to investigate background information, which he had no reason to suspect existed. citing Mills v. State, 603 So.2d 482 (Fla. 1992); Henderson v. Dugger, 522 So. 835, 837-38 (Fla. 1988); Puiatti v. Dugger, 589 So.2d 231[,] 233-34 (Fla. 1991)[.] Even though the Defendant presented expert testimony at the evidentiary hearing, which was more detailed than that presented at the trial, the Defendant has failed to show with a reasonable degree of probability, that his sentence would have been different had this

> evidence have [sic] been presented to the jury and Trial Judge. Given that there were strong aggravating factors[:] heinous[,] atrocious and cruel, cold[,] calculating and premeditated, and felony murder/pecuniary gain, there is no reasonable probability that his sentence would have been different had defense counsel presented evidence of Bruno's mother's abuse [sic] behavior, his physical and sexual abuse, and additional testimony about his drug addiction.

(PCR I 191-92).

The trial court's denial of Claim IX was proper. Dr. Stillman had a significant amount of information regarding Bruno's drug history, family background, and mental health, Other information was affirmatively withheld by Bruno and his family. As the trial court found, "[t]he fact that a more thorough and detailed presentation [of mitigation] could have been made does not establish counsel's performance as deficient." Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986), sentence vacated on other grounds, 603 So. 2d 490 (Fla. 1992).

Terminally, even if Mr. Stella's conduct were constitutionally deficient, Bruno failed to prove that such conduct prejudiced his case. Bruno's two new doctors did not present testimony meaningfully different from that of Dr. Stillman.[14] Notwithstanding the fact that counsel was affirmatively misled by Bruno regarding

[14] Nor did Bruno establish that these two doctors were available at the time of his trial, that the trial court would have appointed them, and that they would have testified.

his family background and mental health history, counsel nevertheless presented evidence of Bruno's extensive drug history and drug use at the time of the murder, his attempted suicide following his divorce, his hospitalization following the suicide, his physical decline thereafter, his passive/aggressive personality while not under the influence of drugs, his schizophrene-form personality while under the influence of drugs, his organic brain damage from his extensive drug use, his low frustration tolerance, and his violent tendencies due to the damage to the cortex of his brain. Given that three strong aggravating factors exist in this case--HAC, CCP, and felony murder/pecuniary gain--and that Bruno's original mitigating evidence was rejected in toto, there is no reasonable probability that his sentence would have been different had counsel presented the testimony of Drs. Dee and Lipman, or any other doctors. Puiatti v. Dugger, 589 So. 2d 231, 234 (Fla. 1991) (affirming denial of claim that counsel failed to properly investigate and present evidence of defendant's deprived childhood, dependent personality, drug and alcohol use, and learning deficiency); Mendvk v. State, 592 So. 2d 1076, 1079-80 (Fla. 1992) (affirming denial of claim that counsel failed to investigate and present evidence of defendant's mental deficiencies, intoxication at the time of the offense, history of substance abuse, deprived childhood, and lack of significant prior criminal activity),

receded from on other grounds sub nom, Hoffman v. State, 613 So. 2d 405 (Fla. 1992); Glock v. Dugger, 537 So. 2d 99, 101-02 (Fla. 1989) (affirming denial of claim that counsel failed to obtain additional information from family members to establish mitigation); Kennedv v. State, 547 So. 2d 912, 913-14 (Fla. 1989) (affirming denial of claim that counsel failed to investigate and present evidence in mitigation); Maxwell v. Wainwriaht, 490 So. 2d 927, 932 (Fla. 1986) (same), Sentence vacated on other grounds, 603 So. 2d 490 (Fla. 1992). See also Johnson v. State, 593 So. 2d 206, 209 (Fla. 1992); Routly v. State, 590 So. 2d 397, 401-02 (Fla. 1991); Mills v. State, 603 So. 2d 482 (Fla. 1992).

ISSUE III

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S DENIAL OF CLAIM XI, WHEREIN BRUNO ALLEGED THAT CERTAIN JURY INSTRUCTIONS WERE UNCONSTITUTIONALLY VAGUE (Restated).

In Claim XI of his 3.850 motion, Bruno claimed that several of the penalty-phase jury instructions were unconstitutionally vague and confusing, created a presumption in favor of death, and failed to sufficiently guide the jury's discretion. Based on a survey conducted by Professor Radelet at the University of Florida, Bruno alleged that the instructions confused his jury as to (1) whether a sentence of death is required if it finds a single aggravating factor and nothing in mitigation, (2) whether a recommendation of death is required if the evidence in aggravation and mitigation are equally balanced, (3) whether nonstatutory mitigating circumstances which are similar to statutory mitigators but which do not rise to the level of statutory mitigators may be considered, (4) whether the state had to prove that the aggravators outweighed the mitigators or whether Bruno had to prove that the mitigators outweighed the aggravators, and (5) whether it is required to weigh rather than count the aggravating and mitigating circumstances. (SPCR IV 796-802; PCR I 34-68).

In response, the State argued that this claim was procedurally barred. None of the allegations Bruno raised in his motion were

raised at the time of trial. In fact, after the jury rendered its verdicts, the trial court asked counsel whether the penalty-phase instructions had been prepared. Upon an affirmative response by the State, the trial court asked the parties to confer on the instructions overnight and raise questions the following morning. (TR IV 781-82). The next day, the trial court asked defense counsel if he had read the instructions and was ready to proceed. Counsel responded affirmatively without raising any objection to the instructions as prepared. (TR IV 782-83). No objections were raised following the charge to the jury either, (TR V 912). In addition, none of these claims were raised on direct appeal. Byrd v. State, 597 So. 2d 252, 255-56 (Fla. 1992) (claim that jury was misled and incorrectly informed about its recommendation when vote is six to six should have been raised on direct appeal and was thus procedurally barred).

To the extent Bruno attempted to excuse his failure to do so on the fact that the empirical data on which Professor Radelet's study was based was not in existence prior to the study, the State argued that such claims had been previously raised and rejected in other cases prior to the study. Dufour v. State, 495 So. 2d 154, 163 (Fla. 1986) ("[T]he court had no duty to instruct the jury that a life sentence could be imposed even in the absence of any mitigating circumstances."), cert. denied, 479 U.S. 1101 (1987);

Stewart v. State, 558 So. 2d 416, 420-21 (Fla. 1990) (trial court properly denied requested instructions which deleted the modifiers "extreme" and "substantial" from statutory mental mitigators), cert. denied, 114 S.Ct. 478, 126 L.Ed.2d 429 (1993); Foster v. State, 614 So. 2d 455, 461-62 (Fla. 1992) (standard instructions do not limit consideration of mental mitigation that does not rise to level of statutory mental mitigation), cert. denied, 114 S.Ct. 398, 126 L.Ed.2d 346 (1993); Jones, 612 So. 2d 1370, 1375 (Fla. 1992) (no need to give separate instructions on individual nonstatutory mitigating evidence because standard instruction is sufficient), cert. denied, 114 S.Ct. 112, 126 L.Ed.2d 78 (1993); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990) ("[T]he standard instructions [do not] impermissibly put any particular burden of proof on capital defendants."), cert. denied, 498 U.S. 992 (1991). Bruno failed to establish how the study impugned these considered opinions and under what authority the trial court could ignore such case Law, (PCR I 169-71).

The trial court properly found the claim procedurally barred. (PCR I 202). Bruno was attempting to challenge on postconviction review the constitutionality of jury instructions he had not challenged at trial or on appeal. See Ragsdale v. State, 720 So.2d 203, 204-05 n.2 (Fla. 1998). To the extent he had a new "study," wherein a sociology professor surveyed 249 college students on

their understanding of certain jury instructions, Bruno was required, but failed, to show that his jurors had a fundamental misunderstanding of the jury instructions in his case. Cf. McCleskey v. Kemp, 481 U.S. 279, 292-93 (1987) (rejecting claim based on Baldus study that death penalty was applied in discriminatory manner where defendant failed to show that "that the decisionmakers in his case acted with discriminatory purpose" (emphasis in original)). Professor Radelet specifically testified that he did not interview the jurors in Bruno's case and did not even read the trial record. (PCR XII 394, 400). Therefore, this claim was properly denied.

ISSUE IV

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S DENIAL OF CLAIM XII, WHEREIN BRUNO ALLEGED THAT THE CUMULATIVE IMPACT OF ERRORS COMMITTED AT HIS TRIAL RENDERED HIS TRIAL FUNDAMENTALLY UNFAIR (Restated).

In Claim XII of his 3,850 motion, Bruno alleged that "numerous and varied violations occurred at both stages of his capital trial," which, when viewed in the aggregate, deprived him of a fundamentally fair trial. (SPCR IV 803-04). In response, the State argued that, since Bruno's individual claims are either procedurally barred or without merit, a *fortiori* Bruno has suffered no cumulative effect which rendered his sentence invalid. (PCR I 171-72). The trial court agreed. (PCR I 202).

This ruling was proper. To the extent this claim is based on alleged errors that appear in the original trial record, it is procedurally barred. Rivera v. State, 717 So.2d 477, 488 n.1,2 (Fla. 1998) (finding identical claim procedurally barred); 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 be 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). To the

extent it is based on alleged errors of trial counsel, the State submits that the cumulative effect of any deficient conduct did not prejudice Bruno's case. Therefore, this Court should affirm the denial of Bruno's motion for postconviction relief.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State requests that this Honorable Court AFFIRM the trial court's order denying Bruno's motion for postconviction relief.

Respectfully submitted,

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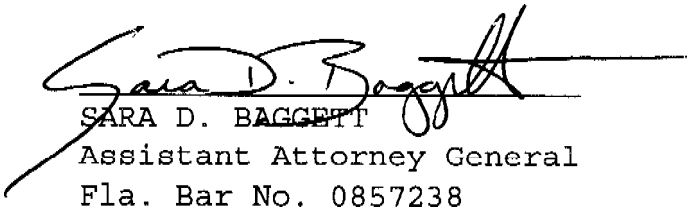

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is Courier New, 12 point, a font that is not proportionately spaced,

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I HEREBY CERTIFY that the foregoing document was sent by United States mail, postage prepaid, to Todd G. Scher, Assistant CCRC, Office **of** the Capital Collateral Regional Counsel, 1444 Biscayne Boulevard, Suite 202, Miami, Florida 33132-1422, this 21st day of May, 1999.

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