IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC93675 AND SC01-285

RICHARD BARRY RANDOLPH,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

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RICHARD BARRY RANDOLPH,
Petitioner,
vs.
JAMES V. CROSBY, JR., etc.,
Respondent.

ANSWER BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
Florida Bar #438847
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
904) 238-4990

CERTIFICATE OF FONT

This brief is typed in Courier New 12 point.

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STATEMENT OF THE CASE AND FACTS

Appellee, the State of Florida, disagrees with and/or supplements the Statement of the Case and Facts contained in the initial brief, as follows:

1998 Evidentiary Hearing:

The Honorable Robert K. Mathis, Circuit Court Judge for the Seventh Judicial Circuit, Putnam County, Florida, held an evidentiary hearing on April 24, 1998 upon Claim XX of the Florida Rules of Criminal Procedure 3.850 motion for postconviction relief filed by Appellant, Richard Barry Randolph. (R 5182). Claim XX alleged:

> Circuit Judge Robert R. Perry, failed to independently weigh aggravating and mitigating circumstances by either expressly relying upon findings prepared by the state attorney or engaging in improper *ex parte* communications with the state attorney as to the findings to be included in the Judgment and Sentence . . ..

Id. The judgment and sentence at issue was entered on April 5, 1989 and was attached to Judge Mathis' order marked as Exhibit #1. *Id.* At some point subsequent to the entry of the judgment and sentence, Randolph came into possession of "a copy of a draft Judgment and Sentence obtained from the state's files under a public records disclosure . . .." *Id.* at R 5183. No evidence was produced which established "how or when" the draft (admitted at the hearing as Defendant's Exhibit #1) "found its way into the state's files."[1] *Id.* Another document, "a yellow-pad page with handwriting" was also "produced from the state's file." *Id.* It contained "an attorney's notes concerning the preparation of the information or

[1] However, the judge noted that Judge Perry's law clerk had subsequently become employed by the State and had taken "her copies of final judgments that she prepared" with her. *Id.*

indictment in this case . . . ." *Id.* This document was admitted as Defendant's Exhibit #2. *Id.*

On April 24, 1998, Judge Mathis held a hearing to "determine if in fact the documents should have been identified by due diligence, if not whether or not they raise grounds for a 3.850." (R 5227). CCRC Investigator Jeffrey Walsh was the first witness. *Id.* at 5228. In January, 1992, Mr. Walsh signed a public records request for Randolph's attorney. *Id.* at 5230. In response thereto, the State Attorney's Office made Randolph's files and records available for examination and copying. *Id.* at 5231. Mr. Walsh said that he copied everything that was produced. *Id.*

Mr. Walsh identified a "judgment and sentence, State v. Richard Barry Randolph. And it is dated April 5, 1989." *Id.* at 5232. On Page 1, "a caret indicating that something needs to be edited" appears with "a blue ink circle around it," and on page 2 "there is some handwriting in pencil on the top." *Id.* The second page also contained "initials R.R.P." at the place where the judge would sign it. *Id.* Mr. Walsh said that he did not receive that document when he made the examination in 1992. *Id.* However, it was "in the materials turned over in '97 . . .." *Id.* at 5233.

CCR Attorney Martin McClain said he did not recall seeing the draft judgment and sentence in the disclosures received from the State Attorney's Office in 1992. *Id.* at 5268, 5271. Mr. McClain relied on Mr. Walsh "to get all of the paper that was available." *Id.* at

5287. Likewise, CCR Attorney Gail Anderson did not remember seeing the draft judgment and sentence while representing Randolph. *Id.* at 5296, 5300, 5303. CCRC employee, Peter Starr, said he compared the documents from two sets given to him, and the draft judgment and sentence was not in the documents represented to him as those from the 1992 disclosure. *Id.* at 5314, 5319-21.

Assistant State Attorney, Pamela Koller,[2] testified that she was Judge Perry's law clerk at the time of the Randolph trial and sentencing. *Id.* at 5322. She served in that capacity from January, 1989 through April, 1992. *Id.*

Ms. Koller identified the draft judgment and sentence as having been typed on her computer in Judge Perry's office. *Id.* at 5339. However, she could not recall the copy of the document containing the insert mark having been given to her. *Id.* at 5332, 5335. She also identified the final judgment and sentence signed by Judge Perry and filed in this case as having been typed on that same computer. *Id.* at 5337.

Ms. Koller said that Judge Perry determined that he was going to sentence Randolph to death prior to her preparation of the first draft of the proposed judgment and sentence. *Id.* at 5340-41. He

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[2] Ms. Koller is presently an Assistant Attorney General at the Daytona Beach office, doing non Capital Criminal Appeals. Collateral Defense Counsel described Ms. Koller, after her testimony at the evidentiary hearing, as "obviously an extremely honest person, very credible . . .." *Id.* at 5417.

indicated that he was concerned over a recent Florida Supreme Court case in which this Court had remanded for a resentencing because this Court could not tell from the order whether the trial court would have sentenced the defendant to death had there been only one aggravating factor found. *Id.* at 5323-24. To insure that this Court understood his intention was to sentence Randolph to death even if only one aggravator were found, the judge wanted specific language to that effect added to the draft judgment and sentence which Ms. Koller had already prepared. *Id.* at 5351, 5355. Ms. Koller's job was to draft a proposed order in accord with Judge Perry's verbal instructions, give it to the judge, and he would determine which facts and other language to leave in and which to take out. *Id.* at 5340-41, 5356.

When Ms. Koller received the language from Mr. Alexander, Judge Perry was not present. *Id.* at 5325. Ms. Koller had already fully typed the draft judgment and sentence, and Mr. Alexander stood behind her and recited the verbiage which she added to the draft pursuant to Judge Perry's instruction. *Id.* at 5324, 5345. That was Mr. Alexander's only contribution - he simply provided the specific language the Judge wanted Ms. Koller to add to the existing draft. *Id.* at 5355. Ms. Koller had no knowledge of any contact between the judge and the prosecutor at which the defense attorney was not also present. *Id.* at 5326.

Ms. Koller and Judge Perry prepared the final order, and "it didn't

come from the State Attorney's Office." *Id.* at 5344. She "put it on the computer," and the judge directed its content. *Id.* at 5349. In fact, after the subject verbiage had been inserted, Judge Perry again reviewed the proposed judgment and sentence and inserted additional language about the circumstances of the brutal assault upon the victim. *Id.* at 5345, 5349.

Finally, contrary to Randolph's contention in his initial brief, Ms. Koller did **not** testify that Judge Perry "had a fully formed and fixed intention of sentencing Randolph to death before the penalty phase, before the jury deliberated its recommendation, and before the final sentencing hearing." (IB at 62-63). Rather, she said that she did not remember how soon after Randolph was convicted that she learned that Judge Perry intended to sentence Randolph to death. *Id.* at 5353. She did know that "he never intended to do anything else." *Id*. Ms. Koller opined that the judge felt that way "once he heard the evidence at the trial," but she added that she did not know specifically when he made the decision. *Id.* at 5353-54.

Randolph's next witness was Defense Counsel Howard Pearl, who had served as a Public Defender in the Seventh Circuit for "[t]wenty-six years." *Id.* at 5359. Mr. Pearl knew of no *ex parte* communication having occurred in regard to Randolph's case. *Id.* at 5360. He had not seen the draft judgment and sentence marked Exhibit 1 prior to entry of the "actual judgment and sentence."

Id. at 5361. Mr. Pearl had no doubts in his mind that Judge Perry fully intended to give Randolph death once the jury recommended it. *Id.* at 5363.

Randolph produced Thomas Vastrick who was accepted by the judge as an expert in handwriting analysis. *Id.* at 5373, 5386. Mr. Vastrick compared the initials on the draft judgment and sentence with known handwriting samples of Judge Perry, and did not believe that Judge Perry wrote the initials on the draft.[3] *Id.* at 5387-5393, 5404. Judge Mathis concluded that he had no doubt "that Judge Perry didn't sign it," referring to the initials on the draft. *Id.* at 5396. Due to the very significant possibility of contamination, the expert could not say with any definitive finding who wrote the initials and date on the draft judgment and sentence. *Id.* at 5398-5400, 5405. He also agreed that physical ailments or characteristics, of which Judge Perry had several, can impact one's writing. *Id.* at 5410-11

The State's only witness at the hearing was Robin Strickler. *Id.* at 5370. He was in charge of disclosing the public records in Randolph's case pursuant to a request therefor. *Id.* at 5370-71. He recalled providing everything in the possession of the State Attorney's Office except the "actual attorneys' notes, handwritten notes" to CCR. *Id.* at 5371.

[3] However, he declined to say "absolutely, one hundred percent" that Judge Perry did not make those initials. *Id.* at 5404.

On May 14, 1998, Judge Mathis issued his order denying Claim XX of the Rule 3.850 motion. (order at R 5184). In so doing, the judge concluded:

> Even though the contact between Ms. Kohler (sic) and assistant state attorney Alexander may have been improper, it did not deal in any way with the judge's independent weighing of the aggravating and mitigating circumstances and his determination to impose a sentence of death. This contact was purely ministerial in nature concerning wording of the Judgment and Sentence on one narrow issue to express the judge's wishes. There was no evidence presented that Judge Perry failed to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty should be imposed or that he failed to do so before directing his law clerk to prepare the Judgment and Sentence.
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> . . . that Judge Perry intended to impose the death penalty was in fact just that - her opinion. . . . There is no evidence that the trial judge made any decision prior to the end of the penalty phase and prior to weighing the aggravating and mitigating circumstances to impose a sentence of death.

(order at 5183-5184).

1997 Evidentiary Hearing:

Defense Counsel Pearl also testified at the 1997 evidentiary hearing. (R 3173). He handled Randolph's case in 1988 and 1989,[4]

[4] Randolph's Judgment and Sentence are dated April 5, 1989.

and tried "conservatively 175" capital cases during his career.[5] *Id.* at 3174, 3223. He was a Special Deputy of Marion County, resigning as such on May 1, 1989. *Id.*

As a Special Deputy, Mr. Pearl had no position of authority. *Id.* at 3175. In fact, the Sheriff "made it crystal clear" that "[h]e didn't want me playing law enforcement officer." *Id.* at 3228. The title merely enabled him to lawfully carry a concealed weapon statewide. *Id.* at 3177. He was not paid, did not complete a W-2 or W-4 form, did not wear a deputy uniform, was not given a patrol car or any other equipment, never made an arrest or stop, and was never asked to perform any deputy services. *Id.* at 3229-30.

Mr. Pearl's status as a Special Deputy did not impede or infringe upon his ability to defend his clients. *Id.* at 3232. It had no effect on the defendants. *Id.*

He rarely carried the weapon in a courtroom, and he did not carry one during Randolph's trial. *Id.* at 3178. Mr. Pearl said that he would not have accepted a Special Deputy appointment in the Seventh Judicial Circuit (where Randolph's case was tried) because he would have regarded it as "an appearance of a conflict of interest,"

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[5] He tried some 70 to 75 jury cases involving the death penalty prior to handling Randolph's case. *Id.* at 3223. Throughout that time, he was "sole counsel." *Id.* at 3224. He was often successful "[a]ll of the way from not-guilty jury verdict in a number of cases, on up to negotiating . . . a life sentence instead of death . . . and I tried to a jury and the jury came back with a sentence of life." *Id.* at 3226.

although it would not have been such a conflict. *Id.* at 3178. Mr. Pearl was not contacted prior to the filing of the Rule 3.850 to ask whether an action was a strategic decision. *Id.* at 3233. He was not given even "a piece of paper to look at," despite it being some "eight years since the trial." *Id.* Mr. Pearl had little "independent memory" of his actions in this case. *Id.* at 3234. However, the prosecutor gave him a copy of his closing argument "[a]nd that awakened some memories in my mind . . . that was some assistance to me." *Id.* at 3260.

Mr. Pearl testified that it was his "practice in . . . every capital case, to employ . . . Dr. Harry Krop, who was . . . a well-known foremost expert in this state on the death penalty in criminal cases." *Id.* at 3181. He "left it to him to inquire of . . . and interview Mr. Randolph to find out whatever he wanted to know as an expert in the area of mental health." *Id.* at 3181-82. He left it to Dr. Krop to "interview the persons that Mr. Randolph might indicate as having knowledge of his prior life." *Id.* at 3182. After Dr. Krop completed his evaluation, he gave Mr. Pearl a report of his findings. *Id.*

Mr. Pearl he did not have the name of Ronzial Williams, but would have given the information to Dr. Krop had he had it. *Id.* at 3188. He was "frustrated by what his girlfriend, Janene, said" about Randolph's usage of crack cocaine. *Id.* Neither did he get the

names of any Timothy Calhoun, Michael Hart, or James Hunter.[6] *Id.* at 3183, 3188. Mr. Pearl commented: "The thing that mystifies me is why Mr. Randolph, when he was examined by Dr. Krop, didn't reveal the names of these persons . . .."[7] *Id.* at 3189. He left it up to Dr. Krop to make records requests from schools or the Army. *Id.* at 3190-91. He said that "Dr. Krop . . . would be the judge, really, of what was relevant . . . that might help us to present to the jury mitigating circumstances." *Id.* at 3191-92. Mr. Pearl testified that "[i]t would not have been my practice to" call Mr. Randolph's relatives to testify at the penalty phase. *Id.* at 3194. He preferred to present mitigation through Dr. Krop because "his testimony is a history of a patient, is an exception to the hearsay rule. So, I get it in through him and I don't have to worry about loose cannons on the deck." *Id.* at 3194-95. In fact, he did not feel that Randolph's parents were "being particularly candid in the affidavits I saw. And counsel like John Tanner would have handed them their heads. But I was able to avoid that by using Dr. Krop instead." *Id.* at 3250. Mr. Pearl testified

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[6] He said that he "didn't call them because I didn't know they existed. I would not have called them probably anyway." *Id.* at 3260.

[7] In deciding whether to present a witness, one would need to consider "[h]is reputation in the community, whether he himself is a drug dealer." *Id.* at 3246. One also needed to consider the witness's demeanor and "the very real possibility of a negative backlash" in deciding upon "a trial strategy.' *Id.* at 3247.

that Randolph was a cooperative client, and he "would have expected" him to "have disclosed the names of these people to Dr. Krop so he could get in touch with them."[8] *Id.* at 3180, 3197. This approach was definitely a tactical decision Mr. Pearl made. *Id.* at 3250.

Mr. Pearl himself talked to Janene. *Id.* at 3198. She "testified that she was able to recognize when [Randolph] was under the influence of crack cocaine. And on that morning he was normal and his faculties were not impaired." *Id.* at 3199. Janene "saw him immediately before he departed for the Handy-Way," and she "was of the opinion that he was not under the influence." *Id.* at 3201, 3247. Mr. Pearl felt "that crack cocaine addiction . . ., if his faculties had not been impaired on that morning, would have been irrelevant." *Id.* He added that in any event, "crack cocaine addiction is not a terribly good mitigator in Putnam County."[9] *Id.* at 3200. He nonetheless argued Randolph's addiction as mitigation, including that he discovered drugs while in the Army. *Id.* at 3248. He established that Randolph had a history of using crack cocaine

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[8]Mr. Pearl "wouldn't have wanted those people [Timothy and Pearl] up on the witness stand being cross examined by John Tanner. John Tanner is a very, very good prosecutor and a good lawyer. He would have torn them apart." *Id.* at 3251.

[9] Mr. Pearl drew upon his vast experience with Putnam County juries in deciding what "avenues to take in the defense" of Randolph. *Id.* at 3226.

through Dr. Krop. *Id.* at 3239. At the hearing, Mr. Pearl admitted that "certainly [Randolph's] entry into the store for the purpose of getting money was purposeful and voluntary." *Id.* at 3240. Randolph also purposefully took out a video camera at the scene in an attempt to avoid being identified and/or caught. *Id.* at 3241. Likewise, Randolph had to make an adjustment to his robbery plan when the clerk "got in the way." *Id.* at 3241-42. Mr. Pearl testified that a story "that he was in some cloud, drug-induced stupor and was just acting without mind or without understanding" "wouldn't play in Putnam." *Id.* at 3242.

Regarding the commission of a sexual battery, Mr. Pearl testified:

> . . . Mr. Randolph said that one of the things he did was to commit a sexual battery upon the lady because he said it would mislead people into thinking that the person who committed that crime was somebody who was insane, crazy, out of control.

Id. at 3202. Randolph "confessed to it. He left me in a very poor position." *Id.* Thus, Mr. Pearl was "not in a position to deny it or to try to change the facts . . .." *Id.* at 3203.

Later, Randolph told the police that "he had not actually done that" (penetrated her). *Id.* Mr. Pearl said that he

> didn't want the jury to get the idea that this man was talking out of both sides of his mouth and telling different stories. I would rather that they believed that at least he was telling the truth about what he did, because that might get the sympathy or understanding of a jury such as we get in Putnam County.

> . . .
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> . . . I didn't intend for him to testify. But at least the jury could see that he was being remorseful by being truthful in making a confession to the police when he got caught. And that was one of the few things he left me to try to work with.
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> . . . [I]n his confession he said that [he] garroted the lady at least twice, beat her and he cut her. And whether or not he raped her was not really all that important.

Id. at 3203-05. Randolph also detailed his guilt of the murder. *Id.* at 3236. Moreover, "cleaning ladies or something like that" saw Randolph exiting the Handy Way and "recognized him," identifying him by name. *Id.* at 3235. These persons found the murder victim, naked below the waist and brutally beaten. *Id.* at 3236. Mr. Pearl was left with "[n]ot much of a defense at all." *Id.* at 3236. Regarding aggravators, Mr. Pearl said that "[i]f it had been proved . . . [he] saw no reason to deny it." *Id.* at 3215-16. He testified: "Based on my experience with Putnam County juries . . . they don't accept voluntary intoxication with drugs as a defense to a capital crime." *Id.* at 3237. However, he said that it might be considered as a non-statutory mitigating circumstance. *Id.* at 3243. He opined that no Putnam County jury would be receptive to a defense that this murder was less than first degree homicide. *Id.* at 3245. He added: "[T]rial counsel on both sides have to maintain with the jury some semblance of believability, credibility. If you ever lose that, your whole case is out the

door." *Id.*

Mr. Pearl adamantly denied that he conceded the aggravating circumstance regarding flight or murder to avoid arrest. *Id.* at 3252-53. He asked the jury for mercy, and "certainly did not concede the death penalty." *Id.* at 3254, 3255.

Regarding his failure to object when the prosecutor mentioned putting an old dog to sleep, Mr. Pearl said "[t]hat is lawyer's hyperbole." *Id.* at 3256. The context was that people sometimes have to make difficult decisions. *Id.* Mr. Pearl explained that if he "objected to that the jurors would have thought that what he said had hurt me very badly. I just let it pass."[10] *Id.* He felt that it was "a great difficulty in their minds about voting for life" after what Randolph had done to his victim. *Id.* at 3257.

Timothy Randolph testified that he provided food, shelter, and love to Randolph throughout his entire life. *Id.* at 3641, 3643. He, and his wife, Shirley, loved Randolph just as much as their other son. *Id.* at 3641. With the exception of a single occasion when he saw Randolph asleep in a car, he never saw him looking like he was on drugs; rather, he looked like he was "fine." *Id.* at 3641-42. Randolph "[w]ouldn't follow the rules," and eventually his father

[10]He explained: "We all tend to wander off course now and then. And certainly the dog analogy didn't come through as anything really clear. But I didn't want to object to it because I thought that the jury would feel that he really said something very important." *Id.* at 3256.

beat him because he "got tired of talking and saying things over and over and . . . he just didn't do it." *Id.* at 3642. He punished him in an attempt to straighten out his life. *Id.* at 3643. Randolph was "[d]isruptive" in school, but never skipped because he knew "[t]hat definitely wouldn't be tolerated." *Id.* at 3644. Randolph hid from his parents that he was "mustered out of the Army." *Id.* at 3641. However, after his return from the Army, Timothy and Shirley continued to provide him with clothes, food, and necessities. *Id.* at 3643. Randolph's father pleaded with his son to get a job, but Randolph would not keep a job and lived off of his parents. *Id.* at 3642-43.

Timothy recalled being contacted by "someone" who "called me to ask me about him." *Id.* at 3645. He attended Randolph's sentencing proceeding. *Id.* He said that if asked, he would have said that Randolph was not like the other murderers because he had loving parents who provided for him and tried to put him on the right course in life. *Id.* at 3645.

Randolph's step-mother, Shirley Randolph, testified on his behalf. *Id.* at 3647-48. She married Randolph's father, Tim, when Randolph was 10 years old. *Id.* at 3648. She and Tim had a son, Jermaine, whom Randolph got along with "[v]ery well." *Id.* at 3649. She and Randolph "had a good" relationship. *Id*.

Mrs. Randolph and Timothy did everything they could to provide well for Randolph as he grew up. *Id.* at 3655. She said that Randolph

"never got angry or anything," or did not express those feelings, although he would sometimes "cry." *Id.* at 3649.

Mrs. Randolph said that Randolph went to live with his adoptive mother, Pearl, "during his senior year of high school." *Id.* at 3650. She did not remember any other contact between the two of them. *Id.* at 3650-51.

As a student, Randolph "was okay." *Id.* at 3650. Mrs. Randolph signed for him to join the Army. *Id.* at 3656. Randolph "never held down a job." *Id.*

Mrs. Randolph did not think that Janene, who was "[v]ery young," was able to take care of the baby she and Randolph had. *Id.* at 3653. However, she only saw Janene, Randolph, and the baby two or three times after Randolph moved to Florida. *Id.*

Mrs. Randolph never really had any suspicion that Randolph was using drugs. *Id.* at 3653-54. She was not contacted by anyone on Randolph's behalf during trial. *Id.* at 3654. She lived in Lakeland, and had she been contacted, she would have been willing to talk to them. *Id.*

Randolph's adoptive mother, Pearl, testified at the hearing. *Id.* at 3658. Pearl "stayed home with the baby for about two years and then I went to work." *Id.* at 3662. She worked "9:00 to 5:00," and Timothy worked at night. *Id.*

Pearl said she did not think that Randolph acted normally because "[h]e cried a lot" and was "fussy." *Id.* 3662-63. She claimed that

"[h]e used to have tantrums and gritting his teeth and do unusual things." *Id.* at 3663. She further complained that "his hands didn't develop right, nor his feet." *Id.* She felt that the adoption agency had not been truthful in telling them that Randolph was a normal, healthy baby. *Id.* at 3664. Pearl said that Randolph refused to accept that he was adopted, and he "cried and screamed." *Id.* at 3664-65.

Pearl said that she loved Randolph and provided him "love and affection." *Id.* at 3676, 3678. She cared for him the best she could when he was growing up. *Id.* at 3677. Throughout all times he was with her, Randolph had enough food to eat, a roof over his head, and clothes on his back. *Id.* at 3678. She tried to teach him right from wrong. *Id.* at 3677. She said that Randolph had no problems in school at least not until after she moved to North Carolina. *Id.* at 3677. Randolph was happy when he was with her. *Id.* at 3678.

According to Pearl, Randolph first learned that Timothy was talking to "other women" on the phone when Pearl was not home. *Id.* at 3665. He "crawled upstairs one day . . . [and] picked up the phone and he would listen in on the conversation . . .." Id. at 3666. "That affected him a lot. Knowing that his father ***was*** doing that to me." *Id.* One day, Randolph asked her not to spank him and after she promised not to, he told her about the other women. *Id.* at 3665-3667. At some point thereafter, Timothy left her. *Id.* at

3667, 3668. Randolph was "about 7." *Id.* at 3669.

Pearl recounted a time when Timothy beat Randolph "bad with that belt." *Id.* at 3668. She also claimed that Timothy "fought me one time and he beat me with a broom." *Id.* She "called the cops." *Id.* at 3668.

Pearl said that she became so upset and "hurt" when she learned that Timothy was going to remarry that she went to live with her father in North Carolina. *Id.* at 3671. She drank "some beer" to help her deal with the hurt. *Id.*

Pearl claimed that Randolph stayed with Timothy during the school year, but during the "summertime he would come with me in North Carolina . . .." *Id.* at 3670. "[T]he last year of his school he came and lived with me for that year, and graduated from Merril Skeet School . . .." *Id.* at 3672. She said that Randolph continued to have "tantrums" and "[g]rit his teeth" during his senior high school year. *Id.* at 3675.

She was living in North Carolina and was contacted when Randolph was arrested for the instant sexual battery and murder. *Id.* She was not contacted by Randolph's defense team. *Id.* at 3675-76. Had she been, she would have been willing to testify as she did at the hearing. *Id.* at 3676.

Randolph's next witness was Michael Hart, a resident of the "[d]rug area" of Palatka, Florida. *Id.* at 3682. He met Randolph on the "[b]asketball court." *Id.* at 3683. He saw Randolph do "[a]bout

two or 300" dollars worth of crack cocaine. *Id.* at 3689. When Randolph was high on crack, his "[e]yes get big. And he just be walking. He didn't know nobody." *Id.* at 3690.

Mr. Hart said that he first met Randolph "[a]bout '86 . . . [o]r '87," and the last day he saw Randolph smoking crack was "'90, '91." *Id.* at 3692. He said that he saw Randolph smoking "[m]ostly every day." *Id.* at 3090. He admitted that he had "never seen him smoke it in jail." *Id.* at 3692.

On cross, Mr. Hart admitted that he had only seen Randolph smoke crack "[a]bout two or three times" total.[11] *Id.* at 3694. Still later, he said that it "[m]ight have been in the eighties when he [Randolph] was smoking." *Id.* at 3695. He then claimed to have known Randolph for "[a]bout a year." *Id.* at 3695.

Mr. Hart said he would have testified back in 1986 had he been asked to. *Id.* at 3691. He had been convicted of a felony, or a crime involving dishonesty, two times. *Id.* at 3695. The trial judge declared him incredible, unworthy of belief, and struck the entirety of his testimony. *Id.* at 3698-99.

CCR next presented Ronzial Williams, a resident of the County Jail, recently incarcerated for violating the probation he was on for

[11] On redirect, he tried to explain his earlier "mostly every day" testimony with: "Every time I go up there I see him. Every time I go up there." *Id.* at 3696. Thus, he testified that he went "up there" two or three times total.

manslaughter. *Id.* at 3704. Mr. Williams called Randolph "Shorty" and recalled that he "moved in the neighborhood in '87."[12] *Id.* at 3704. Randolph would pick him up and they would ride around while Williams smoked "weed," and Randolph smoked "crack." *Id.* at 3705. He said Randolph would "have mood swings" and "talked to his-self." *Id.* at 3706. When Randolph wanted "some more," he would "get anxious." *Id.* at 3706.

Williams claimed he and Randolph "was together, the night before it all happened." *Id.* at 3709. He said that Randolph took him to Welaka to see his "finance" or "friend." *Id.* at 3719. They left about 5:00 PM and returned to Palatka. *Id.* Randolph "went home for a couple of hours," and then picked up Williams again and "we went out in the country and stayed out there . . . until about 9:00." *Id.* They rode around with some "other friends of mine," until "about 11:00," and then separated. *Id.* Randolph smoked crack throughout this time. *Id.* Williams estimated it at "[a]bout $100 worth."[13] *Id.* at 3723.

Randolph's attorneys did not contact him until 1993. *Id.* at 3711. He had been convicted of a felony "[a]bout three" times.

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[12] "The neighborhood" was the "North side of Palatka." *Id.* at 3705.

[13] Later, he said Randolph smoked about $300 worth, and still later said that he did not know that he finished the $300 worth he had taken possession of that day. *Id.* at 3726.

Randolph presented Dr. Hyman Eisenstein. *Id.* at 3365. The doctor testified that although it would have been beneficial to him in reaching an opinion about Randolph, he did not review the interview and testing information contained in Dr. Krop's file.[14] *Id.* at 3438. He did not limit himself to evaluating the materials that were available to Dr. Krop at the time of the trial. *Id.* at 3439-40. Neither did he talk to either Dr. Krop, or Dr. Wilder. *Id.* at 3445. Dr. Eisenstein acknowledged that Dr. Wilder, an MD, reached an opinion contrary to his in regard to the "organicity damage" Randolph claims. *Id.* at 3446. Indeed, he acknowledged that psychologists "could all very properly . . . reach different conclusions" than he did about Randolph. *Id.* at 3460. Moreover, Dr. Eisenstein conceded that he did not read the trial transcripts and was not aware of the evidence given by the witnesses. *Id.* at 3465. The only facts of the crime which he had were those "read in the background materials provided by CCR." *Id.* The doctor admitted that Randolph understood that what he was doing (robbery/murder, etc.) was wrong and that he fully planned the robbery. *Id.* at 3460, 3467. According to the doctor, Randolph's "lack of planning was the inability to change, the inability to do something other than, would have been more appropriate, given the circumstances that arose," i.e., the victim arriving at work during

[14] He said he asked CCRC for a copy of same, but it was not provided. *Id.* at 3438-39.

the robbery. *Id.* at 3467-68. Randolph's IQ is "in the low average range." *Id.* at 3467. Dr. Eisenstein was unwilling to admit that "when the original plan went bad, he developed a new plan to escape . . .." *Id.* at 3468. Reluctantly, he admitted that Randolph's taking the car keys so he could leave was a plan. *Id.* at 3468. Likewise, he put on a Handy-Way uniform to avoid arousing suspicion and removed the video camera because he did not want to be identified. *Id.* at 3469-70. The only basis for his opinion that Randolph had difficulty planning was that he was unable to open the safe: "Even if he knew the numbers he couldn't remember the numbers. He couldn't get the sequences straight. And he couldn't get the safe open." *Id.* at 3507. He dismissed the many other planning activities as "very much rote, behavior of saving oneself." *Id.* The doctor explained his belief that the fact that Randolph was adopted was nonstatutory mitigation. *Id.* at 3488. He said that "attachment theories would apply to the case of any adoptive individual that does not know their biological parents." *Id.* at 3489.

Randolph also presented Dr. Milton Burglass, who "was asked to deal with the intoxication issue only." *Id.* at 3517, 3576. Neither was he asked to "render an opinion about the effects of . . . intoxication on the elements of the offense or on the question of sanity." *Id.* at 3576. Moreover, this doctor said that he had not rendered an opinion that Randolph qualifies for the statutory

mitigator of extreme mental or emotional disturbance. *Id.* at 3569. He specifically declined to opine what the appropriate opinion based on intoxication would have been at the time Dr. Krop testified, stating "[i]t is just too far back." *Id.* at 3570. After all, he did not know the criminal history or personal history Dr. Krop had obtained from Randolph, had not talked with Dr. Krop, and had not seen police reports or Randolph's statements to police. *Id.* at 3572-73, 3580. Neither was he provided with the testimony from the guilt or penalty phase.[15] *Id.* at 3574-75. He asked CCRC for nothing; rather, "CCR decided what to send me." *Id.* at 3575.

Dr. Burglass opined that the "classic voluntary intoxication" instruction "is based on [the] alcohol model" and "is inappropriate for cocaine." *Id.* at 3578. However, he admitted that Randolph's "purposeful conduct in committing the crime, fleeing the crime and attempting to avoid capture for the crime" was relevant to his analysis. *Id.*

Randolph told Dr. Burglass that he had done either "$1,200 or $900" worth of cocaine himself the night before the crime.[16] *Id.* at 3580.

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[15] With one exception - he had read Dr. Krop's penalty phase testimony. *Id.* at 3571.

[16] He had told Dr. Eisenstein that he had done $400 worth of cocaine that night. *Id.* at 3496. Also, sometimes, Randolph told Dr. Burglass he had not used all of the cocaine he had that night, but other times, he said that he had. *Id.* at 3581. Moreover, there was no indication as to the "purity" of the cocaine, or the amount that any dollar amount would buy. *Id.* at 3586.

The doctor said that individuals build up a tolerance to cocaine over time. *Id.* at 3582. These people can walk, talk, and act normally while on the drug as long as the dose is not too high. *Id.* at 3583. Randolph's ability to formulate a plan would have been detrimentally affected were he under a high dose of cocaine at the time of the crime. *Id.* at 3594.

Dr. Burglass was not aware of Janene's testimony regarding Randolph's demeanor shortly before the murder. *Id.* The only way he knew that Randolph was on cocaine at the time was through Randolph's self report and the affidavit of Ronzial Williams. *Id.* at 3585.

Dr. Burglass said that although he listed several items as potential mitigation under the "neurospychiatric history" portion of his report, he was not rendering an opinion that any of them apply to Randolph. *Id.* at 3588. He also agreed that "thinking to put on a Handy-Way uniform and grab the victim's keys, lock the store behind you and then tell the people that you run into as you are leaving the store that Ms. Ruth's car broke down, I am going to go and get her" indicated abstract reasoning. *Id.* at 3595. Likewise, tearing down the video camera indicated such reasoning. *Id.* These matters "are important factors to be considered" in determining whether Randolph was under a high dosage of cocaine at the time of the crime. *Id.* He indicated that he was not aware of those factors when formulating, and expressing, his opinion in this case. *Id.*

Trial:

At the penalty phase of the trial, Randolph presented his mental state expert, Dr. Harry Krop. (DAR 1706, 1713). Dr. Krop saw Randolph in October, 1988 and February, 1989 and "conducted psychological and clinical interviews on both occasions." *Id.* at 1716, 1717. His testing was extensive and included intellectual screening. *Id.* at 1717-19. He determined that Randolph is of "average intellectual ability." *Id.* at 1719-20.

In addition to his evaluation of Randolph himself, Dr. Krop reviewed "a packet of information" that Defense Counsel had provided. The packet "included various witness statements and investigative material describing the investigation by the detectives, and various interviews . . .." *Id.* at 1720. He also "had an opportunity to speak to Mr. Randolph, the father of the Defendant . . . by phone on February 20th, '89." *Id.* He also "contacted Janene Betts" who was Randolph's girlfriend, and spoke with "Miss Betts' mother . . . during that interview by phone." *Id.* He also received "some corroboration and independent reports" by Ms. Betts' father. *Id.* at 1722. Subsequently, he "also reviewed two depositions by Detective Hord and Detective Brown in this case." *Id.* He also took a history from Randolph. *Id.* at 1721.

After all of this testing, interviewing, and evaluating, Dr. Krop concluded that "none of the statutory mitigating factors ... existed

from a psychological point of view." *Id.* at 1725. He said that "[a]n individual can certainly be intoxicated by alcohol or drugs and still not suffer extreme emotional disturbance." *Id.* at 1725-26. He concluded that "[b]ased on my interview with his father, . . ." Randolph has "atypical personality disorder."[17] *Id.* at 1726. Dr. Krop admitted that psychologists' opinions often vary considerably because "there's some subjectivity that goes into" the evaluation and diagnosis process. *Id.* at 1729-30.

Dr. Krop testified that Randolph "had psychotherapy for about a year when he was in the third grade." *Id.* at 1728. "He was referred by his teachers because he had difficulty getting along with other people in school. Randolph's father . . . took him for therapy." *Id* at 1828..

Dr. Krop described mitigating circumstances as "any conditions which can help explain the particular person's behavior at the time of the offense, or perhaps explain future behavior . . .." *Id.* at 1730. He proceeded to relate "portions of his history and background" that he "found to be significant." *Id.* at 1732. Dr. Krop related that Randolph was adopted at "about five-months old."

As related by the mental health expert Randolph's adoptive mother

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[17] Atypical personality disorder "means the person has several traits, but we cannot classify it as any one kind of personality disturbance." *Id.* at 1728. It is a "disorder which we cannot document . . .." *Id.* at 1747.

was "emotionally unstable."[18] *Id.* at 1733. Randolph "was physically abused by his father on occasions . . .." *Id.* Randolph's father, however, did not regard the incidents as abuse, but described them as "discipline." *Id.*

Dr. Krop opined that Randolph's short stature "has always been a problem" for him. *Id.* at 1734. He "was always trying to prove" himself, "by participating in sports and by doing the best he could in school." *Id.* Randolph "passed" and "graduated from high school." *Id.* He joined "the Army and received an honorable discharge." *Id.* "[D]espite some of these emotional deficiencies on his part he did relatively well." *Id.*

Randolph "began using drugs in the Army," He started with marijuana and "progressed to the use of cocaine." *Id.* at 1734. "In 1984 he began using crack cocaine." *Id.* at 1734. "[H]is girlfriend and his girlfriend's mother said they noticed changes, particularly in early '88 when apparently his crack habit increased." *Id.* at 1735. "[H]e was more irritable, his mood changed on a more regular basis, his temper became more easily to . . . fly off the handle." *Id.*

Randolph completed cooking and dietary school and "got a certificate from Queensborough Community College in New York as a dietitian." *Id.* at 1750. Dr. Krop described Randolph's "vocational history" as

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[18] Randolph's adoptive parents were told that his biological parents "were two college young adults who had a baby and put it up for adoption. *Id.* at 1753.

"very unstable." *Id.* He kept jobs for very short terms. *Id.* "[T]he position that he had at the store in which the murder occurred . . . he only held for a few weeks, and had difficulty on that job." *Id.* at 1736.

Dr. Krop diagnosed him as "a crack cocaine addict, or in psychological terms a drug abuser." *Id*. at 1736. He explained that "the person's personality is affected not necessarily by an immediate ingestion of the drug, but an overall drug use time." *Id*. at 1736. This, in turn, affects behavior. *Id*. at 1736-37. Dr. Krop said that in his opinion, Randolph's "thought processes and personality was certainly being influenced by his drug addiction . . . at the time of the offense." *Id*. at 1737. Dr. Krop explained that with crack cocaine, "the behavior is not directly correlated to the use." *Id*. at 1739. However, he made it clear that he was basing his opinion in regard to drug use "only on self-report and the reports of others that he was generally using the drug." *Id.* at 1754. He admitted that in regard to the instant attack and murder, Randolph was not intoxicated on drugs at the time, at least "[n]ot to the extent where it had a significant impairment on his functioning." *Id.* at 1754. He added that Randolph is responsible for his acts. *Id.*

Based on his discussions with Randolph, Dr. Krop learned that Randolph's primary motive for robbing the convenience store was "in order to get money to support his habit." *Id.* at 1740. He also

opined that Randolph" appeared not only depressed and upset about the fact that he was [in] serious legal trouble, but also not only that he regretted what had happened, but he also felt very ashamed and very embarrassed about what had happened, that he lost control like that." *Id.* at 1741. Dr. Krop added: "[T]his is a subjective opinion . . ., but it appeared that he was remorseful for what happened. He indicated that he didn't feel like he had anything against that particular woman, and his desire was to go in there and get money, and then things happened and he panicked." *Id.* at 1741. Dr. Krop said that Randolph may well have been given love by his parents, but Randolph did not perceive "that kind of love." *Id.* at 1745, 1751. Randolph "indicated the only person that he's ever really felt close to was his girlfriend. And even that relationship certainly was strained as a result of various problems that they had." *Id.* at 1744-45. Randolph's girlfriend, Janene, perceived Randolph's father as "a loving, warm, interacting person." *Id.* at 1752.

SUMMARY OF THE ARGUMENTS

POINT I: Appellant failed to prove that the trial judge engaged in improper *ex parte* communication with the State. Neither did he establish that the judge delegated his duty to the State or unlawfully predetermined his death sentence.

POINT II: Appellant failed to prove that he received ineffective assistance of counsel at the penalty phase of his trial. Defense Counsel's investigation was adequate, and his reliance on the expertise of the experienced mental health provider was not deficient. In any event, Appellant was not prejudiced in any way. Neither did he establish deficient performance or prejudice in connection with trial counsel's closing argument, alleged prosecutorial misconduct, alleged faulty jury instructions, or alleged invalid aggravators. He is entitled to no relief.

POINT III: Appellant received a full and fair Rule 3.850 evidentiary hearing. He has not established any abuse of discretion in the denial of his discovery motion. Neither has he demonstrated that a hearsay affidavit should have been admitted. Moreover, he failed to show that his motion for a continuance was improperly denied. He has shown no basis for relief.

POINT IV: Appellant's trial counsel did not render ineffective assistance of counsel at the guilt phase. Any concessions of guilt were compelled by Appellant's own confession, and were done for a tactical reason. Likewise, defense counsel articulated a reasonable

strategic reason for his approach regarding the "intoxication defense." Neither did he show that counsel failed to procure a complete record when he failed to have "housekeeping type" sidebars reported. Finally, he failed to show that counsel was ineffective for not having him present at an informal discussion outlining the anticipated matters to come before the court on a given day. He is entitled to no relief.

POINT V: Appellant did not establish that trial counsel harbored an undisclosed conflict of interest. Indeed, he did not present this claim to the appellate Court in such a manner as to permit it to be considered. It should be denied as legally and facially insufficient. In any event, the facts developed at the evidentiary hearing proved that this claim is without merit.

POINT VI: Appellant failed to establish that the trial judge harbored an undisclosed conflict of interest. Indeed, in his postconviction motion, he failed to even allege any facts in support of the claim. There are no record facts relevant to this claim. This claim, too, should be denied as legally and facially insufficient.

POINT VII: Appellant failed to establish that there was any defect in the heinous, atrocious, or cruel aggravating factor instruction given by the trial court. Indeed, it was constitutionally adequate. Moreover, any error was harmless due to the overwhelming evidence of guilt and the fact that this crime was heinous, atrocious, or cruel under any definition, or construction, of that term.

ARGUMENT

POINT I

RANDOLPH FAILED TO PROVE HIS CLAIMS THAT THE TRIAL COURT ENGAGED IN IMPROPER *EX PARTE* COMMUNICATION WITH THE STATE, DELEGATED HIS DUTY TO THE STATE, OR UNLAWFULLY PREDETERMINED RANDOLPH'S DEATH SENTENCE.

Randolph claims that the Honorable Robert R. Perry, then a judge of the Seventh Judicial Circuit in and for Putnam County, Florida, engaged in improper *ex parte* communication with the prosecutor assigned to try his instant case. (IB 45-50). He quarrels with the lower court's determination that any *ex parte* contact was "purely ministerial" in nature, (IB 50-56), and he charges that Judge Perry delegated his duty to weigh the aggravators and mitigators to the State. (IB 56-61). Finally, he complains that the judge "harbored bias against" him and unlawfully predetermined to sentence Randolph to death. (IB 61-63). He wants a new trial and/or sentencing, but is entitled to no relief.

Randolph failed to present any evidence that Judge Perry told or directed his law clerk to obtain the subject language from Mr. Alexander. Thus, the evidence presented shows that the judge told his law clerk that he wanted certain language added to the initial draft she had prepared, and she took it upon herself to obtain it from Mr. Alexander. She could have obtained it directly from the cases the judge referenced, and there is no indication that the judge intended for her to obtain it from any other source. Even if

Ms. Koller, who was new to the job, acted improperly in obtaining the desired language from Mr. Alexander (as found by the lower court), there is no indication that Judge Perry knew she had done so, much less that he directed, or sanctioned, it. Moreover, Randolph was not, in any manner, prejudiced by Mr. Alexander having provided the language as it says nothing more, or less, than what Judge Perry intended.[19]

Randolph relies principally on *Rose v. State*, 601 so. 2d 1181 (Fla. 1992). (IB 46-47). In *Rose*, the State's response to a Rule 3.850 motion "agreed that an evidentiary hearing was required." 601 So. 2d at 1182. Thereafter, "the State submitted a proposed order . . . denying all relief." *Id.* This order was "adopted in its entirety by the trial court."[20] *Id.* From this, it was apparent that "the trial court, in an *ex parte* communication, had requested the State to prepare the proposed order." *Id.* at 1182-83. This Court held: [A] judge should not engage in <u>any</u> conversation about a pending case with only one of the parties participating in that

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[19] It should be noted that Judge Perry told Ms. Koller very specifically what he wanted the insert to say, and he reviewed the document (and made further changes) thereafter. (R 5345, 5349). Moreover, he read the document at sentencing. (DAR 1893-1905). Thus, the record is clear that the final Judgment and Sentence said precisely what Judge Perry, and he alone, intended for it to say.

[20] All of this had occurred without a hearing and without input from the defense attorney. *Id.* at 1182.

conversation. . . . [T]his would not include strictly administrative matters not dealing in any way with the merits of the case." *Id.* at 1183.

Randolph's case is readily distinguishable from *Rose.* In the instant case, there is no evidence of any communication between the judge and the State.[21] The evidence Randolph presented shows that Judge Perry told his law clerk exactly what he wanted the order to include and informed her that recent Florida Supreme Court precedent included the language necessary to accomplish his purpose. Ms. Koller apparently took it upon herself to obtain help from Mr. Alexander. The assistance he gave was limited to very brief language expressing the judge's previously expressed intent to impose the death sentence even if only one valid aggravator was found, as any one of the aggravators outweighed all of the mitigation.

Rose is also distinguishable on the basis of *Swafford v. State*, 636 So. 2d 1309 (Fla. 1994). In *Swafford,* "[n]o discussions on the merits of the case were held *ex parte*." 636 So. 2d at 1311. This Court found "no improper *ex parte* communications" even though the judge "requested the state to prepare an order" where the hearing had already occured and the *ex parte* communication did not include

[21] It is significiant that the communication was between the law clerk, Ms. Koller, and the prosecutor. There is no evidence that the judge ordered the communication or even knew that it occurred. *See Diaz v. Dugger*, 719 So. 2d 865, 867 (Fla. 1998).

a merits discussion. 636 So. 2d at 1311.

Randolph's order was not entered until after he had a penalty phase hearing, a Spencer hearing, and the sentencing hearing. The judge did not communicate with any person about what he would do on the merits of the case. Clearly, as Randolph's own extremely honest and credible witness, Ms. Koller, (R 5417), established, the judge had concretely made up his mind not only to sentence Randolph to death, but that even were only a single aggravator present, it outweighed all mitigation, and he wanted this Court to know that if only one aggravator survived the direct appeal, he would still impose the death penalty well prior to her communication with Mr. Alexander. Thus, Ms. Koller's obtaining the language the judge had instructed her to get was, as the postconviction court held, a strictly ministerial, or administrative, matter, and did not deal with the merits of the case. *See* R 5184. Thus, Randolph's case falls within the exception in *Rose*. *Rose* does not entitle Randolph to relief. Moreover, in *Rushen v. Spain*, 464 U.S. 114, 119 (1983), the Supreme Court held that *ex parte* communications do not automatically entitle a defendant to relief. Rather, when there has been such a communication relating to an aspect of the trial, a hearing should be held to determine the prejudicial effect, if any, of the communication. *Rushen*, 464 U.S. at 119. Where *ex parte* communications are "innocuous," there is no harmful, or reversible, error. *Id.* at 121. *Rushen* dealt specifically with a postconviction

relief motion.

In *Pinardi v. State*, 718 So. 2d 242 (Fla. 5th DCA 1998, *rev. denied*, 729 So. 2d 393 (1999), the Fifth District Court of Appeal considered two separate *ex parte* communications between the judge and employees of the Probation and Parole Services. 718 So. 2d at 243. The *Pinardi* court concluded that "'structual defects in the trial mechanism,' . . . are not subject to harmless error analysis . . .," although others are subject to such analysis. *Id.* at 244. Pointing out that "[t]he issue of whether an *ex parte* communication on the part of aa trial judge constitutes a structural defect was considered and rejected . . . in *Rushen* . . .," *Id.* at 345, the court applied the rationale of that decision. *Id.* Based on *Rushen*, the court concluded that "if the *ex parte* communication is innocuous and not a comment on the facts in controversy or the applicable law, the reviewing judge may deny postconviction relief allowing the conviction to stand . . .." *Id.* at 246. The court held that the trial judge's comments "did not involve the facts in controversy or any law applicable to defendant's case, nor did they reflect an interest or bias," *id.,* and upheld the order denying the 3.850 claim. *Id.* at 247.

In the instant case, the *ex parte* communication was not between the judge and the prosecutor, but rather, it was between the law clerk and the prosecutor. Indeed, there was no evidence that the judge directed the clerk to speak with the prosecutor. Moreover, the

communication did not concern facts in controversy, reflect an improper interest or bias, or discuss any law applicable to the case. The judge had previously told the law clerk what facts he had found and what law he had applied, and merely asked her to phrase the draft judgment and sentence to contain those. That the clerk obtained some of the phrasing from the prosecutor does not constitute a structural defect. Thus, harmless error analysis is applicable. *Pinardi*.

In the instant case, any improper *ex parte* communication is clearly harmless. Judge Perry clearly and unequivocably expressed his settled determination to sentence Randolph to death and to make it clear to this Court that he would impose the death penalty if only one of the aggravators he found were upheld on appeal. After receiving the draft judgment from the language the clerk had obtained from Mr. Alexander, the judge reviewed the document in detail and made further refinements to it. Only thereafter did he execute the document. Thus, it is clear that the communication Ms. Koller had with Mr. Alexander did not in any manner effect the merits of Randolph's case, much less prejudice him. On this record, any error was harmless beyond a reasonable doubt, and Randolph is entitled to no relief. *Rushen*; *Pinardi*.

Moreover, the fact that the judge clearly and decisively stated to Ms. Koller what he wanted the order to provide defeats the claim that the judge delegated the decision making function to the State.

Randolph's extremely honest and credible witness (R 5417) clearly and unequivocably stated that the judge told her what he wanted the order to say prior to her brief conversation with Mr. Alexander. Thus, he not only failed to carry his burden to establish error, he affirmatively disproved his claim through the testimony of his own witness, Ms. Koller. He is entitled to no relief on this claim.

Randolph's final claim in this Point is that Judge Perry was biased against him as evidenced by his having pre-determined to sentence him to death. (IB 61). To support this claim, he points to the testimony of the law clerk, Ms. Koller, which he claims shows that the judge "had a fully formed and fixed intention of sentencing Randolph to death before the penalty phase, before the jury deliberated its recommendation, and before the final sentencing hearing." (IB 62). He concludes that this entitles him to some unspecified "relief." (IB 63).

Contrary to Randolph's contention, Ms. Koller did **not** testify that the judge had prejudged Randolph. (IB at 62-63). Rather, she did not remember how soon after Randolph was convicted that she learned that Judge Perry intended to sentence Randolph to death. *Id.* at 5353. She said that she did know that "he never intended to do anything else." *Id*. She opined that the judge felt that way "once he heard the evidence at the trial," but she added that she did not know specifically when he made the decision. *Id.* at 5353-54. The postconviction court was entitled to, and did, reject Ms. Koller's

subject “opinion.” (R 5184). Thus, Randolph failed to establish entitlement to any relief.

POINT II

RANDOLPH RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

Randolph claims that Trial Counsel Howard Pearl rendered him ineffective assistance at the penalty phase of his trial. (IB at 63). He identifies several areas of deficiency which he claims prejudiced him, entitling him to relief.

To show ineffective assistance of trial counsel, the defendant must demonstrate that his attorney's performance, including both acts and omissions, fell outside the wide range of reasonable professional assistance. *See Robinson v. State*, 707 So. 2d 688, 695 (Fla. 1998); *Kennedy v. State*, 546 So. 2d 912 (Fla. 1989). There is a strong presumption that counsel rendered effective assistance, and the defendant carries the burden to prove otherwise. *Id.* The distorting effects of hindsight must be eliminated, and the action, or inaction, must be evaluated from counsel's perspective at the time. *Id.* *See Strickland v. Washington*, 466 U.S. 668, 690 (1984). Even if the defendant shows deficient performance, he must also prove that the deficiency so adversely prejudiced him that there is a reasonable probability that except for the deficient performance, the result would have been different. *Id.*; *Gorham v. State*, 521 So. 2d 1067, 1069 (Fla. 1988)(*citing Strickland*, 466 U.S. at 687).

Reasonable strategic decisions of trial counsel will not be second-guessed. *Haliburton v. Singletary*, 691 So. 2d 466 (Fla.

1997). "'Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected.'" *Rutherford v. State*, 727 So. 2d 216 (Fla. 1998), *quoting, State v. Bolender*, 503 So. 2d 1247, 1250 (Fla. 1987), *cert. denied*, 484 U.S. 873 (1987). "To hold that counsel was not ineffective[,] we need not find that he made the best possible choice, but that he made a reasonable one." *Byrd v. Armontrout*, 880 F.2d 1, 6 (8th Cir. 1989). Trial counsel "cannot be faulted simply because he did not succeed." *Alford v. Wainwright*, 725 F.2d 1282, 1289 (11th Cir.), *modified*, 731 F.2d 1486, *cert. denied*, 469 U.S. 956 (1984). A defendant is "not entitled to perfect or error-free counsel, only to reasonably effective counsel." *Waterhouse v. State*, 522 So. 2d 341, 343 (Fla. 1988) *cert. denied*, 488 U.S. 846 (1988).

Findings of fact made after an evidentiary hearing are presumed correct. *See Jones v. State*, 446 So. 2d 1059 (Fla. 1984). The evidence adduced below well supports the trial judge's conclusions based on his factual findings.

Investigation/Mental Health Examination:

Court-appointed expert, Dr. Harry Krop, was "a well-known foremost expert in this State on the death penalty in criminal cases." (R 3181). In accordance with Mr. Pearl's long-standing practice in capital cases, he "left it to [Dr. Krop] to inquire of . . . and interview Mr. Randolph to find out whatever he wanted to know as an

expert in the area of mental health." *Id.* at 3181-82. Had Mr. Pearl learned of any persons who had information which might be relevant to the penalty phase proceeding, he would have given the information to Dr. Krop to follow up on. *Id.* at 3182.

However, Mr. Pearl made an exception in the case of Mr. Randolph's girlfriend, Janene Bettes, interviewing this important witness himself. *Id.* at 3198. From Janene, he learned that she could recognize when Randolph was under the influence of crack cocaine, and she had observed him at length immediately before (and after) the murder. *Id.* at 3198. At that time, Randolph was "normal and his faculties were not impaired." *Id.* at 3199.

Moreover, Randolph was a cooperative client, and Mr. Pearl "would have expected" him to "have disclosed the names of these people to Dr. Krop so he could get in touch with them." *Id.* at 3180, 3197. Counsel was mystified over Randolph's failure to reveal those names to the doctor. *Id.* at 3189.

Dr. Krop conducted clinical and psychological interviews on both October, 1988 and February, 1989, during which he took a history from Randolph. (DAR 1716, 1717, 1721). Dr. Krop's testing was extensive and included intellectual screening. *Id.* at 1717-19. He determined that Randolph is of "average intellectual ability." *Id.* at 1719-20.

In addition to his interviewing and evaluating Randolph, Dr. Krop reviewed "a packet of information" that Mr. Pearl had provided. It

"included various witness statements and investigative material describing the investigation by the detectives, and various interviews . . .." *Id.* at 1720. He also spoke to Randolph's father, Timothy Randolph, Randolph's girlfriend, Janene Bettes, Ms. Bettes' mother, and obtained "some corroboration and independent reports" regarding Randolph from Ms. Bettes' father. *Id.* at 1720-22. Moreover, the doctor "reviewed two depositions by Detective Hord and Detective Brown in this case." *Id.*

Dr. Krop testified at length at trial. He related that Randolph was adopted at "about five-months old," and had "difficulty getting along with other people in school," resulting in his being "referred for counseling in the third grade . . . for about a year." *Id.* at 1733. Randolph's father . . . took him for therapy." *Id.*

This "foremost" mental health expert opined that Randolph's adoptive mother was "emotionally unstable." *Id.* He said that Randolph "was physically abused by his father on occasions . . .."[22] *Id.* Dr. Krop said that Randolph's short stature "has always been a problem" for him. *Id.* at 1734. He "was always trying to prove" himself, "by participating in sports and by doing the best he could

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in school." *Id.* Randolph "passed" and "graduated from high school." *Id.* He joined "the Army and received an honorable discharge." *Id.* "[D]espite some of these emotional deficiencies on his part he did relatively well." *Id.*

Randolph "began using drugs in the Army," beginning with marijuana and progressing to cocaine. *Id.* at 1734. "In 1984 he began using crack cocaine." *Id.* at 1734. Janene and her mother reported "changes, particularly in early '88 when apparently his crack habit increased." *Id.* at 1735. "[H]e was more irritable, his mood changed on a more regular basis, his temper became more easily to . . . fly off the handle." *Id.*

Randolph completed cooking and dietary school and "got a certificate from Queensborough Community College in New York as a dietitian." *Id.* at 1750. Randolph's "vocational history" was "very unstable;" he kept jobs for very short terms. *Id.* "[T]he position that he had at the store in which the murder occurred . . . he only held for a few weeks, and had difficulty on that job." *Id.* at 1736.

Dr. Krop diagnosed Randolph as "a crack cocaine addict, or in psychological terms a drug abuser." *Id.* at 1736. He explained that an addict's "personality is affected not necessarily by an immediate ingestion of the drug," but by "overall drug use" over time. *Id.* at 1736. This personality change affects behavior. *Id.* at 1736-37. Dr. Krop opined that Randolph's "thought processes and

personality was certainly being influenced by his drug addiction . . . at the time of the offense."[23] *Id.* at 1737. Reluctantly, he admitted that in regard to the instant attack and murder, Randolph was not intoxicated on drugs at the time, at least "[n]ot to the extent where it had a significant impairment on his functioning," adding that Randolph is responsible for his acts. *Id.* at 1754. Dr. Krop opined that Randolph's primary motive for robbing the convenience store was "to get money to support his habit." *Id.* at 1740. He testified that Randolph "appeared not only depressed and upset about the fact that he was [in] serious legal trouble, but also not only that he regretted what had happened, but he also felt very ashamed and very embarrassed about what had happened, that he lost control like that." *Id.* at 1741. Dr. Krop indicated that he believed that Randolph was remorseful for what happened. Randolph had indicated that he didn't have anything against that particular woman; his desire was to go in there and get money, and then things happened and he panicked." *Id.* at 1741.

Dr. Krop said that Randolph did not perceive the "kind of love" he was given by his parents. *Id.* at 1745, 1751. However, Randolph indicated that he felt really close to his girlfriend, despite "various problems that they had." *Id.* at 1744-45.

Upon completion of the extensive testing, interviewing, and

[23] He said that with crack cocaine, "the behavior is not directly correlated to the use." *Id.* at 1739.

evaluating, Dr. Krop concluded that "none of the statutory mitigating factors existed from a psychological point of view."[24] *Id.* at 1725. However, he explained that "[a]n individual can certainly be intoxicated by alcohol or drugs and still not suffer extreme emotional disturbance." *Id.* at 1725-26. Dr.Krop further concluded that Randolph has "atypical personality disorder."[25] *Id.* at 1726. Although this testimony did not rise to the level of a statutory mitigator, it was considered as non-statutory mitigation. (*See* DAR 644-45).

It was the customary practice of long-time, successful defender Pearl to leave it to Dr. Krop "to inquire of . . . and interview . . . to find out whatever he wanted to know as an expert in the area of mental health." (R 3181-82). He would not have called Mr. Randolph's relatives to testify at the penalty phase. *Id.* at 3194. He preferred to present mitigation through Dr. Krop because "his testimony is a history of a patient, is an exception to the hearsay rule. So, I get it in through him and I don't have to worry about loose cannons on the deck." *Id.* at 3194-95. Moreover, he did not

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[24] He defined mitigating circumstances as "any conditions which can help explain the particular person's behavior at the time of the offense, or perhaps explain future behavior . . .." *Id.* at 1730.

[25] Atypical personality disorder "means the person has several traits, but we cannot classify it as any one kind of personality disturbance." *Id.* at 1728. It is a "disorder which we cannot document . . .." *Id.* at 1747.

feel that Randolph's parents were "being particularly candid in the affidavits I saw. And counsel like John Tanner would have handed them their heads. But I was able to avoid that by using Dr. Krop instead." *Id.* at 3250. Since Randolph was a cooperative client, Mr. Pearl reasonably expected him to disclose the names of the people who testified at the evidentiary hearing to Dr. Krop." *Id.* at 3180, 3197. Clearly, this was a tactical decision which Mr. Pearl was entitled to, and did, make. *Id.* at 3250.

Regarding the cocaine intoxication issue raised in the motion as an example of deficient performance, the evidentiary hearing evidence well supports the lower court's instant order. Mr. Pearl was "frustrated by what his girlfriend, Janene, said" about Randolph's crack cocaine usage. *Id.* at 3188, 3198. Janene was able to recognize when he was under the influence of cocaine, and he was not under the influence immediately before the murder. *Id.* at 3198. Moreover, long-time capital murder defender Pearl was well aware that "crack cocaine addiction is not a terribly good mitigator in Putnam County." *Id.* at 3200. He specifically drew upon his vast experience with Putnam County juries in deciding what "avenues to take in the defense" of Randolph. *Id.* at 3226. Thus, although he argued Randolph's addiction as mitigation, including that he discovered drugs while in the Army, he did not dwell on it before the Putnam County jury. *Id.* at 3248.

Mr. Pearl testified: "Based on my experience with Putnam County

juries . . . they don't accept voluntary intoxication with drugs as a defense to a capital crime." *Id.* at 3237. He opined that no Putnam County jury would be receptive to a defense that this murder was less than first degree homicide. *Id.* at 3245. He added: "[T]rial counsel on both sides have to maintain with the jury some semblance of believability, credibility. If you ever lose that, your whole case is out the door." *Id.* Thus, Mr. Pearl resorted to a trial strategy aimed at getting the intoxication information considered as a non-statutory mitigating circumstance by soft-pedaling the information to the jury. *Id.* at 3243.

Another factor in Mr. Pearl's decision not to vigorously pursue an intoxication defense was that clearly Randolph's "entry into the store for the purpose of getting money was purposeful and voluntary." *Id.* at 3240. Once inside, he purposefully took out a video camera at the scene in an attempt to avoid being identified and/or caught. *Id.* at 3241. Moreover, he adjusted his robbery plan when the clerk "got in the way," and Randolph said that he committed a sexual battery upon the lady because he thought it would mislead people into thinking that the person who committed that crime was somebody who was insane, crazy, and out of control. *Id.* at 3202, 3241-42. Mr. Pearl opined that a defense "that he was in some cloud, drug-induced stupor and was just acting without mind or without understanding" "wouldn't play in Putnam." *Id.* at 3242. Randolph has presented nothing to show that this unquestionably

strategic decision should be second-guessed by this Honorable Court, and the law is clear that it should not be. *Haliburton v. Singletary*, 691 So. 2d 466 (Fla. 1997)[Reasonable strategic decisions of trial counsel will not be second-guessed.]. Thus, Randolph has failed to carry his burden to demonstrate deficient performance on the part of his penalty phase trial counsel, and his instant Rule 3.850 claim was properly denied by the lower court. Neither has Randolph carried his burden to demonstrate that he was prejudiced by Mr. Pearl's allegedly deficient performance in failing to personally interview and present at trial the witnesses Randolph called at the 3.850 evidentiary hearing. At the hearing, Randolph presented the testimony of his father, Timothy Randolph, his step-mother, Shirley Randolph, and his adopted mother, Pearl Randolph. These persons testified to family background and potential mental health issues. In addition, Randolph presented Michael Hart (whose testimony was stricken as incredible) and Ronzial Williams to testify to his crack cocaine usage.

Timothy and Shirley Randolph provided food, shelter, and love to Randolph throughout his life. (R 3641, 3643, 3655). Despite their love and care, Randolph "[w]ouldn't follow the rules." *Id.* at 3642. Although physical discipline was eventually tried, it did not bring about the desired change: "[H]e just didn't do it." *Id.* at 3642, 3643. Timothy pleaded with Randolph to get a job, but Randolph would not keep a job and lived off of his parents. *Id.* at

3642-43, 3656.

Timothy's testimony would also have established that in keeping with his refusal to follow the rules of the household, Randolph was "[d]isruptive" in school and was "mustered out of the Army." *Id.* at 3641, 3644. With a single exception when he was found asleep in a car, neither Timothy nor Shirley ever saw Randolph looking like he was on drugs. *Id.* at 3641-42, 3653-54. Moreover, if asked, Timothy would have said that Randolph was not like the other murderers because he had loving parents who provided for him and tried to put him on the right course in life. *Id.* at 3645.

It seems obvious why Mr. Pearl would not have wanted to have this information brought to the attention of the jury. By presenting family and background information through Dr. Krop, he was able to keep most of this type of damaging evidence from the jury. Certainly, neither Timothy nor Shirley testified to anything at the hearing which would have significantly favorably added to what Dr. Krop testified to, and most likely, they would have been, as Mr. Pearl put it, "handed their heads." Randolph has not carried his burden to prove that Mr. Pearl's strategic decision to put the family and background information before the jury through Dr. Krop rather than through Timothy and/or Shirley Randolph constituted deficient performance.

Moreover, Randolph has not shown that he was prejudiced by the failure to put Timothy and/or Shirley Randolph on the penalty phase

stand. The additional background information which they could have provided was largely cumulative, and therefore, no prejudice can be shown. Thus, Randolph has failed to establish either *Strickland* prong in regard to the testimony of Timothy and/or Shirley Randolph.

Neither has he met either *Strickland* requisite in regard to the testimony of his adoptive mother, Pearl. As Dr. Krop and this Honorable Court put it, Pearl "was emotionally unstable." See *Randolph*, 562 So. 2d at 334 and DAR 1733. Thus, her testimony would certainly have been of little value and might well have been precluded altogether. Moreover, had she testified, her testimony would have included that she loved Randolph and provided him with "love and affection." *Id.* at 3676, 3678. She cared for him as he grew up, and at all times, he had enough food to eat, a roof over his head, and clothes on his back. *Id.* He was taught right from wrong. *Id.* at 3677. He was a happy child. *Id.* at 3678.

Thus, Randolph has not carried his burden to establish that Mr. Pearl's strategic decision to put the family and background information before the jury through Dr. Krop, rather than through Pearl Randolph, constituted deficient performance. Neither has he shown that he was prejudiced by the failure to present Pearl to the jury during the penalty phase. In fact, by presenting the foremost mental health expert Dr. Krop to testify that Pearl Randolph was emotionally unstable, Counsel presented significant, unrebutted

mitigation. Had he put Pearl on to testify, he would have exposed Randolph to the unnecessary risk that the jury would have reached a contrary opinion. Moreover, the additional background information which Pearl could have provided was largely cumulative and/or of marginal value as mitigation. Thus, no prejudice can be shown. Randolph has failed to establish either *Strickland* prong in regard to Pearl Randolph's testimony.

Thus, the allegedly new background information does not add anything of substance; it merely gives more detail to the background information presented at trial through Dr. Krop. Such does not establish ineffective assistance of counsel or entitle Randolph to relief. *See Clisby v. State*, 26 F.3d 1054 (11th Cir. 1994).

The record is clear that Mr. Pearl chose to present the family background and mental health evidence through the mental health expert rather than through family members. He testified that this was a conscious, deliberate choice based on his long-term, experience-based belief that the professional would make the most credible witness and would be much less likely to hurt his client's case by emotionalism or by following a personal agenda when testifying. He was also reasonably concerned that the lay witnesses would be more susceptible to cross-examination by the very capable prosecutor. *See Breedlove v. State*, 692 So. 2d 874, 877-78 (Fla. 1997). Indeed, he held this view even more strongly

after viewing the affidavits of Randolph's parents which he regarded as not credible. Thus, none of the family background evidence presented at the evidentiary hearing rises to the level necessary to find deficient performance in the presentation of the evidence solely through Dr. Krop.

Neither has Randolph met either prong of the *Strickland* standard in regard to the testimony of Michael Hart or Ronzial Williams. Mr. Hart's testimony was stricken by the trial judge who found it totally incredible and unworthy of belief. (R 4610). However, even had it been accepted, it is of dubious value to Randolph. Mr. Hart testified that he saw Randolph when he was high on crack and his "[e]yes get big. And he just be walking. He didn't know nobody." (R 3690). Both Janene's testimony describing Randolph's appearance and demeanor immediately before and after the crime and the purposeful acts Randolph committed before, at, and after leaving, the crime scene establish that he was not "just walking" and "didn't know nobody." Thus, Mr. Hart's testimony is evidence that Randolph was **not** high on cocaine at the time of the murder.

Ronzial Williams' testimony is of little more value. This three-time felon, then incarcerated for manslaughter, testified that when Randolph was smoking crack, he would "have mood swings" and "talked to his-self," when he wanted more, he would "get anxious." *Id.* at 3706. Janene's report of Randolph's demeanor immediately before and after the murder does not include any of

these alleges signs of Randolph's cocaine use. Mr. Williams last saw Randolph "about 11:00" the night before the murder; Janene observed him at length shortly before, and immediately after, he committed the crime. Thus, Mr. Williams' testimony is of little value to Randolph, as it would have served only to emphasize mitigation which would not have been well received by the Putnam County jury and would have reduced the credibility of the defense in the eyes of that jury.

Finally, neither did the evidentiary hearing testimony of Dr. Eisenstein or Dr. Burgess establish either prong of the *Strickland* ineffective assistance standard. Dr. Eisenstein acknowledged that other professionals in his field could "very properly . . . reach different conclusions" than he did about Randolph. (R 3460). Dr. Burgess specifically declined to opine that the appropriate opinion of Randolph based on intoxication would have been at the time Dr. Krop testified. *Id.* at 3570. Dr. Eisenstein did not explain "in detail how the statutory mitigating factors apply despite the fact that Randolph attempted to open the safe, tore the video camera from the wall, etc." (IB 25). It is true that he attempted to do so, but the record shows that he was far from successful. He ultimately backed off the claim that the purposeful acts Randolph engaged in after the robbery began were not the result of planning by Randolph and said that the "lack of planning was the inability to change, the inability to do something other than, would have

been more appropriate, given the circumstances that arose," i.e., the victim arrival at work during the robbery. (R 3467-68). Dr. Burgess admitted that "thinking to put on a Handy-Way uniform and grab the victim's keys, lock the store behind you and then tell the people that you run into as you are leaving the store that Ms. Ruth's car broke down, I am going to go and get her" indicated abstract reasoning, as did tearing down the video camera. *Id.* at 3595. These factors indicated that Randolph was able to formulate a plan which in turn indicated that he was not under a high dose of cocaine at the time of the crime. *See id*. at 3594, 3595. Thus, the defense doctors' testimony also undercut his cocaine intoxication claim. Moreover, it indicated that Dr. Krop's evaluation and findings regarding Randolph were not incorrect or deficient. Thus, Randolph did not establish that Attorney Pearl was ineffective because he "failed . . . to ensure that Randolph was provided an adequate assessment" by a mental health professional. (*See* IB at 77).

Finally Randolph claims that Attorney Pearl was ineffective because he did not provide enough background information to Dr. Krop to permit him to do an effective evaluation. He also claims that the evaluation done by Dr. Krop was inadequate. (IB 77). This issue, even though couched in ineffective assistance of counsel phraseology, is procedurally barred because the adequacy of Dr. Krops' evaluation (and in-court testimony based thereon) could, and

should, have been raised on direct appeal. See *Muhammad v. State,* 603 So. 2d 488, 489 (Fla. 1992); *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988).

Assuming *arguendo* that this issue is not procedurally barred, it is without merit. *Hill v. Dugger,* 556 So. 2d 1385, 1387 (Fla. 1990). The defendant claimed that his attorney was ineffective because he "unreasonably failed to present critical mitigating evidence and failed to adquately develop and employ expert mental health assistance, and because the experts retained at the time of trial failed to conduct professionally adequate mental health evaluations." Hill's claims involved intoxication and mental condition. *Id.* at 1388. "Hill proffered affidavits from additional family members and acquaintances, giving information concerning his family backgroung and drug use." *Id*. He also proffered reports from two new mental health professionals who stated that ... Hill's conduct ... was the result of cocaine inqestion, his below average intelligence, and Jackson's domination." *Id.* Finally, he asserted that

> his expert witness at his sentencing proceeding would now testify that he did not have sufficient information concerning Hill's history of substance abuse and intoxication at the time of the offense and that, given Hill's borderline intelligence and those two factors, he would now testify that Hill suffered from extreme mental disturbance at the time of the offense and that his poor mental ability impaired his judgment sufficiently to impair his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.

Id. Further, trial counsel submitted an affidavit admitting his ineffectiveness. *Id.*

This Court upheld the trial court's conclusion that counsel's performance was not deficient. *Id.* Indeed, it did not even warrant an evidentiary hearing! *Id.*

In *Hill*, this Court said that although the "asserted information ... might have been helpful to the mental health professional," it did not rise to level which would establish ineffectiveness. *Id.* Certainly, that is the case here. Indeed, the defense doctors admitted, they could not say that Dr. Krop's evaluation, muchless his diagnosis and/or opinions were incorrect. Thus, the omission of the asserted information did not rise to the level of ineffectiveness.

Moreover, the consumption of cocaine does not necessarily equal intoxication. *Cf. Reed v. State*, 560 So. 2d 203, 206 (Fla. 1990), cert. denied, 498 U.S. 881 (1990). This is especially true where, as here, there is a long history of cocaine use. Indeed, the defense doctors testified to this at the evidentiary hearing. The evidence available at trial was that Randolph was not under the influence of cocaine at the time of the crime. Further, even if there is intoxication, a reasonable, effective defense attorney may decide not to present it. *See Clisby v. Alabama*, 26 F.3d 1054, 1056 (11th Cir. 1994).

In any event, even if the trial court had found mitigation in the

additional family and background and intoxication information presented at the evidentiary hearing, the three strong aggravators in this case, which have previously been affirmed by this Court, overwhelm that mitigation. Thus, Randolph is entitled to no relief. *See Robinson*, 707 So. 2d at 696; *Breedlove*.

Closing Argument:

Randolph claims that Mr. Pearl was ineffective because he conceded three aggravators during closing argument. (IB 77). At the evidentiary hearing, Counsel adamantly denied that he conceded the avoiding arrest factor. (R 3252-53). Regarding the others, he testified that "[i]f it had been proved . . . [he] saw no reason to deny it." *Id.* at 3215-16. He felt that as a matter of credibility with the jury, it was better to concede clearly established factors. *Id.* at 3245. It is clear from Mr. Pearl's closing argument that he was, in fact, then concerned with this credibility issue. For example, at one point, he admits that the bodily fluids evidence placed Randolph at the scene, stating: "So once again, no dancing around on the head of a pin." (DAR 1533). Regarding the committed for pecuniary gain, Mr. Pearl told the jury:

> [I]t goes beyond a reasonable doubt and all the way to a moral certainty that Barry Randolph committed robbery in that store. . .. [I]t would be an exercise in futility, and probably an insult to your intelligence to start arguing and getting picky about, well, was the car taken in the course of the robbery . . ..
>
> I'm not going to argue that kind of thing. He went in there primarily to steal. . . . I

> can't argue it and still hold your attention.

Id. at 1532. This type of tactical choice falls well within the broad range of professionally competent strategic trial decisions. Randolph has utterly failed to carry his burden to establish either prong of the *Strickland* standard in regard to this claim. He is entitled to no relief.

Regarding the committed during the course of a felony, Mr. Pearl told the jury that he had "doubts I want to share with you about whether this is the kind of sexual battery as such that you envision as being sexual battery." *Id.* at 1534. Thus, the record does not support the claim that Mr. Pearl conceded in the course of a felony at page 1534 of the record. However, even if he had, it would have been a reasonable tactical decision given Randolph's statement explaining the sexual battery in which he said:

> I decided to do something that would persuade people that only a maniac would have done, so that people would know I didn't, because in essence -- I'm not implying -- I'm no maniac, everybody knows that. And therefore they would never think it was me.

Id.

Regarding this claim, Mr. Pearl testified: Randolph "confessed to it. He left me in a very poor position." *Id.* Thus, Mr. Pearl was "not in a position to deny it or to try to change the facts . . .." *Id.* at 3203. Later, Randolph told the police that "he had not actually done that" (penetrated her). *Id.* Mr. Pearl said that he

> didn’t want the jury to get the idea that this man was talking out of both sides of his mouth and telling different stories. I would rather that they believed that at least he was telling the truth about what he did, because that might get the sympathy or understanding of a jury such as we get in Putnam County.
>
> . . .
>
> . . . I didn’t intend for him to testify. But at least the jury could see that he was being remorseful by being truthful in making a confession to the police when he got caught. And that was one of the few things he left me to try to work with.
>
> . . . [I]n his confession he said that [he] garroted the lady at least twice, beat her and he cut her. And whether or not he raped her was not really all that important.

Id. at 3203-05. Randolph also detailed his guilt of the murder. *Id.* at 3236. Moreover, “cleaning ladies or something like that” saw Randolph exiting the Handy Way and “recognized him,” identifying him by name. *Id.* at 3235. These persons found the murder victim naked below the waist and brutally beaten. *Id.* at 3236. Mr. Pearl was left with “[n]ot much of a defense at all.” *Id.* at 3236. Regarding the claim that at record page “1897” Mr. Pearl conceded the “avoiding arrest” aggravator, there is no closing argument at DAR 1897. The jury charge begins at DAR 1583. In any event, given Randolph’s above-referenced written statement, Randolph can hardly show any prejudice from any concession of the avoid arrest aggravator. Clearly, his own statement unequivocally established it!

Finally, to the extent that Randolph claims that statements made in closing argument prejudiced him by referencing a "racial difference" and "vengeance." (IB 78). It does not appear that this claim was raised in the postconviction motion, and therefore, it is procedurally barred in this proceeding. Moreover, any error in that regard was harmless beyond a reasonable doubt due to the overwhelming evidence of guilt, the three strong aggravators, and the comparatively minuscule mitigation.

Prosecutorial Misconduct:

Prosecutor's Comment - Randolph complains that Mr. Pearl was ineffective for failing to object to a comment made by the prosecutor during closing argument. At the evidentiary hearing, Mr. Pearl explained his failure to object when the prosecutor mentioned putting an old dog to sleep, Mr. Pearl said "[t]hat is lawyer's hyperbole." (R 3256). The context was that people sometimes have to make difficult decisions. *Id.* The postconviction judge agreed. *See* R 4613.

Mr. Pearl explained that if he "objected to that the jurors would have thought that what he said had hurt me very badly. I just let it pass."[26] *Id.* He felt that there was "a great difficulty in their

[26]He explained: "We all tend to wander off course now and then. And certainly the dog analogy didn't come through as anything really clear. But I didn't want to object to it because I thought that the jury would feel that he really said something very important." *Id.* at 3256.

minds about voting for life" after what Randolph had done to his victim. *Id.* at 3257. Again, this is a reasonable, tactical decision. Whether to object under such circumstances cannot be ineffective assistance of counsel. *See Rutherford*, 727 So. 2d at 2230. Further, to the extent that the issue should have been raised on direct appeal, but was not, it is procedurally barred in this proceeding. It is well settled that issues that could have been, but were not, raised on direct appeal are procedurally barred in a Rule 3.850 proceeding. *Id.* at 218-19; *Johnson v. State*, 593 So. 2d 206, 208 (Fla. 1992), *cert. denied*, 113 S.Ct. 119 (1992); *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983), *cert. denied*, 467 U.S. 1220 (1984). Randolph cannot avoid the procedural bar by attempting to couch an otherwise barred claim as ineffective assistance of counsel. *Rutherford*, 727 So. 2d at 218-19 n.2; *Lopez v. Singletary*, 634 So. 2d 1054, 1057 (Fla. 1993); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990).

Finally, the attempt to raise a prosecutorial misconduct issue "based on ineffective assistance of counsel for failure to raise an appropriate objection . . . must fail under this Court's decision in *Gaskin v. State*, 737 So. 2d 509, 520 n.6, 7 (Fla. 1999). Therein, this Court found prosecutorial misconduct allegations "legally and facially insufficient to warrant relief under the requirements of *Strickland* . . ." because Gaskin failed to allege "how the outcome of his trial would have been different had counsel

properly objected" to the comments. *Id.* Randolph's instant claim likewise fails to allege how the outcome of his trial would have been different had Mr. Pearl objected to the prosecutor's pet dog comment. Thus, he is entitled to no relief. *Gaskin*.

Moreover, it is pointed out that a prosecutorial comment/misconduct issue was raised as Point IV on direct appeal. That the substance of that claim differs from the instant one does not avoid the procedural bar. Different arguments may not be used to relitigate an issue raised on direct appeal. *Medina*, 573 So. 2d at 295.

Jury Instructions:

Burden-Shifting - Randolph complains that Mr. Pearl rendered ineffective assistance of counsel for failing to object to a jury instruction which he characterizes as a "burden shifting" instruction. (IB 79-80). This claim is without merit. *Shellito v. State*, 701 So. 2d 837, 842-43 (Fla. 1997). Trial counsel is not ineffective for failing to object to the standard instruction specifically approved in *Shellito*. *See Downs v. State*, 740 So. 2d 506, 518 (Fla. 1999).

Moreover, ineffective assistance claims cannot be used to obtain a second appeal. *Rutherford*; *Lopez*; *Medina*. To the extent that Randolph attempts to raise a claim which is procedurally barred for lack of an objection at trial and for the failure to raise it on direct appeal under the guise of a postconviction ineffective assistance claim, he is entitled to no relief. *Id.* Jury

instruction issues are barred on postconviction motion where they were not raised on direct appeal. *See Shere v. State*, 742 So. 2d 215, 224 (Fla. 1999). The postconviction court properly held this claim procedurally barred. *See* R 4602.

Sympathy - Randolph likewise complains that Mr. Pearl was ineffective when he failed to object to the trial judge's allegedly "erroneous admonition regarding sympathy . . .." (IB 81). To the extent that this claim should have been raised on direct appeal, but was not, it is procedurally barred in this proceeding. Randolph cannot avoid the procedural bar by attempting to couch an otherwise barred claim as ineffective assistance of counsel. *Rutherford*; *Lopez*; *Medina*.

Moreover, as pointed out by the postconviction judge: "The quote contained in the motion which the defendant attributes to the trial court was in fact part of State Attorney John Tanner's closing argument." (R 4611). "The trial court gave no instruction regarding sympathy at the penalty phase." *Id.* Indeed, even had he done so, "it would not constitute error. *California v. Brown*, 479 U.S. 538 (1987)." *Id.* Randolph is entitled to no relief.

Majority Vote - Randolph next complains that the trial court gave an erroneous instruction regarding whether a majority vote is required for a death penalty recommendation. (IB 81-82). He alleges that "[t]he correct statement of the law contained in the passage read from the standard jury instructions was inadequate to

correct the previous instruction misinforming the jury." (IB 82). He says Mr. Pearl was ineffective for failing to object "to this erroneous instruction." *Id.*

Randolph can show no prejudice in light of the fact, conceded by Randolph in his initial brief, that the trial judge himself corrected any erroneous instruction by reading the correct one to the jury. Thus, this claim is wholly frivolous. Moreover, jury instruction claims can be raised on direct appeal, and therefore, are procedurally barred in postconviction proceedings. *Shere v. State*, 742 So. 2d 215, 224 (Fla. 1999). Randolph cannot avoid the procedural bar by attempting to couch an otherwise barred claim as ineffective assistance of counsel. *Rutherford*; *Lopez*; *Medina*.

Vague Aggravating Circumstances, Automatic Aggravator, Vague Jury Instructions, and Limiting Constructions:

Automatic Aggravator - Randolph claims that the in the course of a felony aggravator is an automatic aggravator. (IB at 83). He complains: "Rather than object to this automatic aggravation, counsel conceded the State was entitled to have it considered." (IB 84). This claim "has been repeatedly rejected by state and federal courts." *Johnson v. State*, 660 So. 2d 637, 647 (Fla. 1995), *cert. denied*, 116 S.Ct. 1550 (1996). Counsel can hardly be ineffective for failing to raise nonmeritorious objections. Moreover, ineffective assistance claims cannot be used to obtain a second appeal. *Rutherford*; *Lopez*; *Medina*. To the extent that

Randolph attempts to raise a claim which is procedurally barred for lack of an objection at trial and for the failure to raise it on direct appeal under the guise of a postconviction ineffective assistance claim, he is entitled to no relief. *Id.* The "automatic aggravator" claim has been held procedurally barred in a 3.850 proceeding where it was not raised on direct appeal. *See Lopez v. Singletary*, 634 So. 2d at 1056.

Finally, although the automatic aggravator claim is placed under the ineffective assistance of counsel general heading, "there are no specific allegations of ineffective assistance of counsel contained in this claim." (R 4603). It was, therefore, facially and legally insufficient and properly denied.

Vague Aggravator/Limiting Construction - Randolph claims that the pecuniary gain aggravator is facially vague and overbroad unless a limiting instruction is given making it clear that it applies "only where pecuniary gain is shown [as] the primary motive for the murder." (IB 84-85). However, in his brief, he argues that "[t]rial counsel was ineffective for failing to object to this argument" made by the prosecutor in closing argument. (IB 85). The prosecutor's comment, which Randolph quotes in his brief, contains no objectional language and does not misstate the law or evidence. Trial counsel cannot be ineffective for failing to make a meritless objection.

Randolph also complains that "[c]ounsel was ineffective for failing

to object to this factor and this instruction" on pecuniary gain. (IB 85). This is a barebones presentation of a claim and should be dismissed for legal and facial insufficiency. The defendant bears the burden to establish the legal sufficiency of his claims. *Smith v. State*, 445 So. 2d at 325. A mere conclusory allegation that objection should have been made to "this factor and this instruction" is wholly insufficient on which to base an evidentiary hearing on a Rule 3.850 motion, much less, grant relief. *See id.*; *Roberts v. State*, 568 So. 2d 1255, 1259 (Fla. 1990); *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989).

Moreover, there is no merit to this claim.

> As to the pecuniary gain aggravator and instruction, this Court stated in *Chaky v. State*, 651 So. 2d 1169 (Fla. 1995), that the pecuniary gain aggravator applies where 'the murder is an integral step in obtaining some sought-after specific gain.' *Id.* at 1172. We further explained the applicability of this aggravator in *Finney v. State*, 660 So. 2d 674 (Fla. 1995), stating that '[i]n order to establish this aggravating factor, the State must prove beyond a reasonable doubt that the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain.' *Id.* at 680.

Walker v. State, 707 So. 2d 300, 316 (Fla. 1997). The evidence was clear that Randolph entered the store for the express purpose of stealing money, and he battered and murdered his victim, at least in part, so he could steal her car, as well as get away with the money he had just taken. The evidence well supports the finding of

pecuniary gain under this Court's precedent. *See id*. Moreover, harmless error analysis is appropriate and would apply to this claim. *See Fennie v. State*, 648 So. 2d 95 (Fla. 1994) *cert. denied,* 115 S. Ct. 1120 (1995)[applied harmless error to vague CCP instruction].

Finally, Randolph has not alleged how the outcome of his penalty phase proceeding would have been different had counsel properly objected to the prosecutor's argument or the factor and instruction thereon. Thus, his claim is "legally and facially insufficient to warrant relief under the requirements of *Strickland* . . . ." *Gaskin*, 737 So. 2d 520 n.7.

Vague Aggravator - Randolph claims that the avoid arrest aggravator, both the factor and the instruction, is "vague and counsel was ineffective for failing to object." (IB 85). This claim is without merit as this Court has specifically rejected it. *Wike v. State*, 698 So. 2d 817, 822 (Fla. 1997), *cert. denied,* 522 U.S. 1058 (1998) ; *Whitton v. State*, 649 So. 2d 861, 867 (Fla. 1994). Trial counsel cannot be ineffective for failing to make a meritless objection.

Randolph also complains that "[t]he record does not demonstrate that the dominant or only motivating reason for the homicide was the elimination of witnesses" and without such, the aggravator does not apply. (IB 85). This is an incorrect statement of the law. In *Davis v. State*, 698 So. 2d 1182, 1192 (Fla. 1997), this Court

specifically rejected such a claim, approving a finding that avoid arrest had been established where the defendant said he put the victim's body in a dumpster to give him time to get away before its discovery.

In the instant case, the evidence showed that Randolph killed his victim, who well knew him, only after she walked-in on his robbery of the store. In his statement, Randolph specifically recounted how he thought about it and decided to sexually batter her in connection with her murder for the specific purpose of causing the police to think someone other than he had committed the crime. Thus, the evidence well supports the finding of avoid arrest under this Court's precedent. *Davis*.

Moreover, harmless error analysis is appropriate and would apply to this claim. *See Fennie v. State*, 648 So. 2d 95 (Fla. 1994)[applied harmless error to vague CCP instruction]. With only the other two aggravators present in this case, the minimal nonstatutory mitigator is dwarfed. Thus, there is no reasonable likelihood that the result would have been different without the avoid arrest aggravator,[27] and so, any error is harmless.

Finally, Randolph has not even **alleged** that the outcome of his penalty phase proceeding would have been different had counsel

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[27] Of course, we **know** that Judge Perry would have sentenced Randolph to death even had he not found this aggravator because he specifically tells us so in his order. *See* DAR 646.

properly objected to the prosecutor's argument or the factor and instruction thereon. Thus, his claim is "legally and facially insufficient to warrant relief under the requirements of *Strickland* . . . ." *Gaskin*, 737 So. 2d 520 n.7.

POINT III

RANDOLPH HAD A FULL AND FAIR POSTCONVICTION EVIDENTIARY HEARING.

Discovery Motion:

Randolph complains that his Motion to Permit Discovery to depose State Attorney John Tanner, Assistant State Attorney Sean Daly, and Circuit Court Judge John Alexander "about matters related to his Claim XX regarding the draft judgment and sentence . . ." was error. (IB 86).

In *State v. Lewis*, 656 So. 2d 1248, 1249 (Fla. 1994), this Court declared that a trial judge has "inherent authority . . . to allow limited discovery" in postconviction proceedings. "[T]his inherent authority should be used only upon a showing of good cause." *Id.* at 1250. In deciding whether to permit the requested discovery, the trial judge "shall consider the issues presented, the elapsed time between the conviction and the post-conviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts." *Id.* If a motion "sets forth good reason, . . . the court may allow limited discovery into matters which are relevant and material, and . . . may place limitations on the sources and scope." *Id.* It is the "[moving party's] burden to show that the discretion has been abused. *Id.*

At the time the motion to depose was made, there was no reason for the postconviction judge to believe that any of the three

prosecutors, Tanner, Daly, or Alexander had any relevant and material information. As Randolph admits in his brief, he did not know "about the participation of prosecutor Alexander" until well after the motion had been denied. (IB 87 n.27). He makes no claim that after learning of that alleged participation from Ms. Koller, he renewed his discovery motion. Thus, at the time the motion was pending, it lacked the required good cause showing, and was, therefore, properly denied. *Lewis.*

As to Tanner and Daly, there is no indication that either has any information relevant or material to the draft judgment and sentence issue. Thus, Randolph cannot meet the good cause prerequisite to a court's consideration of a motion.

Moreover, even if good cause had been properly alleged, and established, the motion was still properly denied because there was an "alternative means of securing the evidence." As has already been discussed in detail hereinabove, Ms. Koller testified to this issue, and Randolph has not alleged, much less shown, that Tanner, Daly, or Alexander have information on this issue which Ms. Koller did not give, or could not have given, him. Thus, Randolph cannot establish that the postconviction judge abused his discretion in denying the discovery motion.

Finally, in his order denying the discovery motion, the postconviction judge pointed out that Tanner, Daly, and Alexander "are available to testify at the evidentiary hearing or can be upon

proper notice." (R 4648). Apparently, postconviction counsel decided not to subpoena them. Thus, he waived this issue.

The discovery motion was filed in the court just eight days before the evidentiary hearing was to begin, and did "not contain a showing of good cause for the taking of depositions."[28] *Id.* The judge proceeded to identify other alternative means of obtaining the evidence, specifically naming the person most likely to have information on the issue, Judge Perry's Judicial Assistant, Jill Brown. *Id.* Indeed, as Randolph admits in his brief, this alternative means of information, Ms. Brown, led Randolph to Ms. Koller, who testified in detail about the matter at issue. At no point, did Randolph complain that Ms. Koller did not provide him with all of the information he sought in regard to this claim. Randolph has utterly failed to carry his burden to show that the postconviction judge abused his discretion in denying the discovery motion, and therefore, he is entitled to no relief.

Indeed, even if it was error to deny the motion to depose the three prosecutors, the error was harmless. Not even in his appellate brief does Randolph identify any difficency in Ms. Koller's testimony on the subject matter, or claim that he cannot prove his claim without more information.

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[28]Indeed, the sole basis for taking the depositions is "[b]ecause Mr. Tanner, Mr. Daly and Judge Alexander prosecuted Mr. Randolph . . .." (R 4646).

Moreover, the final public records disclosure - which contained the draft judgment and sentence - were produced to Randolph's attorneys on November 26, 1997.[29] (R 4587). Randolph was granted the right to take the deposition of John Alexander and John Tanner, and both testified at a hearing on December 4, 1997. (R 4587). Thus, at the time of the Alexander and Tanner testimony, postconviction counsel had the draft judgment and sentence. There is no allegation that the witnesses failed to answer whatever they were asked, and the record shows that they answered everything asked. (R 4173-83, 4197-4204). Postconviction counsel should have asked any questions about the draft judgment and sentence at that time, and the postconviction court's denial of a subsequent motion to take another deposition of these same persons was not an abuse of discretion. Thus, he cannot establish prejudice; neither has he alleged it. Randolph is entitled to no relief as any error is harmless.

Calhoun Affidavit:

Randolph also complains that the Rule 3.850 court should have accepted the affidavit of Timothy Calhoun into evidence. (IB 88). In that affidavit, Mr. Calhoun alleges that at some unspecified time before the murder, Randolph "drank a lot of beer and smoked

[29] Randolph was given until January 26, 1998 to file the amended 3.850 motion. *Id.*

marijuana" and "became an addict" to crack cocaine.[30] (R 232-33). It does nothing to tie any alleged alcohol and/or illegal drug use to the instant crime.

The affidavit is rank hearsay, and there is absolutely no indicia of trustworthiness inherent in it. Neither did Randolph attempt to establish its trustworthiness at the hearing. Further, to the extent that Mr. Calhoun states what "I had heard from people around the neighborhood," that is hearsay within hearsay for which no exception exists.

Moreover, the information in the affidavit is merely cumulative to that admitted into evidence in the testimony of Ronzial Williams. Since the Calhoun affidavit was rank hearsay, the State could not cross examine the witness, and the information was merely cumulative to admitted evidence, there was no error in the refusal to receive it into evidence. Even if there was error, it was harmless due to the cumulative nature of the evidence.

Finally, this is yet another barebones claim. Randolph conclusorily alleges that "a valid [hearsay] exception applied," but never deigns to divulge what it was. (IB 88-89). Nor is even a single case, statute, or rule cited for the conclusorily claims that "evidence admissible at a penalty phase, must be considered"

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[30] These observations by Mr. Calhoun began "[a]bout seven or eight months" after Randolph "moved to Palatka in 1987," however, there is no indication of when Mr. Calhoun last saw Randolph with either beer or illegal drugs. (R 231-34). Mrs. McCollum was murdered on August 15, 198**8**.

at a postconviction evidentiary hearing, or anything else alleged in the short, single paragraph statement of claim. The defendant bears the burden to establish the legal sufficiency of his claims. *Smith v. State*, 445 So. 2d at 325. A mere conclusory allegation is wholly insufficient on which to base a claim for relief. *See id.*; *Roberts v. State*, 568 So. 2d 1255, 1259 (Fla. 1990); *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989).

Motion for Continuance:

Randolph complains about a hodge-podge of matters in this subsection of Point III, including an alleged failure to hold public records hearings or a *Huff* hearing, but focuses primarily on the claim that he "was forced to go forward without his lead counsel and without qualified counsel and conduct lengthy public records proceedings at the same time he was expected to present evidence . . .." (IB 89).

The first part of this claim - the complaint about public records and a *Huff* hearing - is legally insufficient because it is no more than a barebones presentation of unsubstantiated allegations. He does not even allege that postconviction counsel made a timely, proper request for either a public records or a *Huff* hearing.[31] The

[31] Toward the end of this claim, Randolph claims that he "repeatedly requested . . . a Huff hearing and a Motion to Compel hearing before any evidentiary hearing." (IB 92). However, he offers no citation to the record to support that unsubstantiated, barebones claim, and therefore, it is improperly pled. Moreover, the evidentiary hearing held in 1998 was held on an issue which was raised subsequent to the 1997 hearing as a result of later received

defendant bears the burden to establish the legal sufficiency of his claims. *Smith v. State*, 445 So. 2d at 325. A mere conclusory allegation such as the instant one is wholly insufficient on which to base a claim for relief. *See id.*; *Roberts*, 568 So. 2d at 1259; *Kennedy*, 547 So. 2d at, 913.

Neither does the claim that he was forced to proceed to the evidentiary hearing without his lead attorney and to examine public records at the same time merit relief. The record shows that at the 1997 evidentiary hearing, Randolph was represented by long-time, capable CCR attorneys, Todd Scher and Heidi Brewer. These two veteran capital appellate defense attorneys had the assistance of attorney Silvia Smith. Thus, Randolph had three attorneys representing him at the three day hearing. Surely, two of them could have conducted the hearing while one attended to public records, or vice-versa. Indeed, he has not alleged any real prejudice in not having his "lead" attorney present for the 1997 hearing. Neither can he show such prejudice; the court granted the defense "sixty days from July 24, 1997, within which to depose 2 individuals and the records custodian . . . and to file an amendment to the 3.850 motion . . . based on the public records

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public records information. Thus, any possible error in not holding a hearing on public records before the 1997 evidentiary hearing was cured when Randolph was permitted to amend his Rule 3.850 motion and proceed to an evidentiary hearing on a new claim resulting from the public records information received.

produced at the July 22, 23, and 24, 1997, hearing." (R 4587). Thus, the claim that he was forced to review and evaluate the public records provided at the hearing at the same time as he put on his evidence is clearly false. This claim fails to state any basis upon which relief could be granted.

Moreover, as admitted in his brief, when Randolph's "lead" attorney learned that she would not be able to attend the evidentiary hearing because of a conflict with the Leo Jones case, this matter was brought to the attention of this Court. This Court decided that the best disposition was to extend the time in the Jones case so the "lead" attorney could attend the Randolph hearing. That counsel failed to use the time extension in Jones to attend the Randolph hearing implies that she had full confidence in the ability of Mr. Scher, Ms. Brewer, and Ms. Smith to handle the three day hearing. Certainly no evidence has been offered, or even alleged, herein to indicate that such an assessment was incorrect. Neither is there any indication that "lead" counsel reapplied to this Court for an additional extension of time or made any further complaint that she would not be at the Randolph hearing.[32] Thus, this matter is procedurally barred because the failure to

[32] Nonetheless, the trial judge extended the defense a period of "thirty days from July 24, 1997, within which to file written memorandums." (R 4587). Moreover, the court gave Randolph a sixty day extension from July 24, 1997 for taking the depositions of 2 individuals and the records custodian and in which to amend his 3.850 motion "based on the public records produced at the July 22, 23, and 24, 1997, hearing." *Id.*

make further complaint after resolution by this Court waived any claim.

Finally, although there is no indication that Randolph received anything other than effective assistance of postconviction counsel, the State disagrees with his claim that he is "entitled to effective assistance in his post-conviction proceedings." (IB 92). There is no right to effective collateral counsel. *State v. Lambrix*, 698 So. 2d 247, 248 (Fla. 1996), *cert. denied*, 118 S.Ct. 1064 (1998). Randolph has utterly failed to demonstrate any basis for relief on this claim.

POINT IV

RANDOLPH RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE.

Randolph claims that Trial Counsel Howard Pearl rendered him ineffective assistance at the guilt phase of his trial. (IB 93). He identifies several areas of deficiency which he claims prejudiced him, entitling him to relief.

To show ineffective assistance of trial counsel, the defendant must demonstrate that his attorney's performance, including both acts and omissions, fell outside the wide range of reasonable professional assistance. See Robinson v. State, 707 So. 2d 688, 695 (Fla. 1998); *Kennedy v. State*, 546 So. 2d 912 (Fla. 1989). There is a strong presumption that counsel rendered effective assistance, and the defendant carries the burden to prove otherwise. *Id.* The distorting effects of hindsight must be eliminated and the action, or inaction, must be evaluated from counsel's perspective at the time. *Id.* *See Strickland v. Washington*, 466 U.S. 668, 690 (1984). Even if the defendant shows deficient performance, he must also prove that the deficiency so adversely prejudiced him that there is a reasonable probability that except for the deficient performance, the result would have been different. *Id.*; *Gorham v. State*, 521 So. 2d 1067, 1069 (Fla. 1988)(*citing Strickland*, 466 U.S. at 687).

Reasonable strategic decisions of trial counsel will not be

second-guessed. *Haliburton v. Singletary*, 691 So. 2d 466 (Fla. 1997). "'Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected.'" *Rutherford v. State*, 727 So. 2d 216 (Fla. 1998), *quoting, State v. Bolender*, 503 So. 2d 1247, 1250 (Fla. 1987), *cert. denied*, 484 U.S. 873 (1987). "To hold that counsel was not ineffective[,] we need not find that he made the best possible choice, but that he made a reasonable one." *Byrd v. Armontrout*, 880 F.2d 1, 6 (8th Cir. 1989). Trial counsel "cannot be faulted simply because he did not succeed." *Alford v. Wainwright*, 725 F.2d 1282, 1289 (11th Cir.), *modified*, 731 F.2d 1486, *cert. denied*, 469 U.S. 956 (1984). A defendant is "not entitled to perfect or error-free counsel, only to reasonably effective counsel." *Waterhouse v. State*, 522 So. 2d 341, 343 (Fla. 1988) *cert. denied,* 488 U.S. 846 (1988).

Findings of fact made after an evidentiary hearing are presumed correct. *See Jones v. State*, 446 So. 2d 1059 (Fla. 1984). The evidence adduced below well supports the trial judge's conclusions based on his factual findings.

Concessions of Guilt:

Randolph claims that Mr. Pearl conceded "the rape charge . . . the robbery and grand theft charges . . . [and] that the victim's death occurred in the course of a felony . . .." (IB 93). According to the initial brief, these concessions were all made without his

consent. *Id.* This statement is followed with: "Counsel rendered ineffective assistance." *Id.*

Again, Randolph presents a barebones claim. The defendant bears the burden to establish the legal sufficiency of his claims. *Smith v. State*, 445 So. 2d at 325. A mere conclusory allegation is wholly insufficient on which to base a claim for relief. *See id.*; *Roberts*, 568 So. 2d at, 1259; *Kennedy*, 547 So. 2d at, 913. This 9 line claim for relief is a barebones, conclusory claim which provides no basis for relief.

Moreover, as Mr. Pearl testified at the evidentiary hearing, "[i]f it had been proved . . . [he] saw no reason to deny it." (R 3215-16). He felt that as a matter of credibility with the jury, it was better to concede clearly established factors. *Id.* at 3245. It is clear from Mr. Pearl's closing argument that he was, in fact, then concerned with this credibility issue. For example, at one point, he admits that the bodily fluids evidence was left at the scene by Randolph, stating: "So once again, no dancing around on the head of a pin." (DAR 1533). Regarding the robbery and theft of the car, Mr. Pearl told the jury:

> [I]t goes beyond a reasonable doubt and all the way to a moral certainty that Barry Randolph committed robbery in that store. . .. [I]t would be an exercise in futility, and probably an insult to your intelligence to start arguing and getting picky about, well, was the car taken in the course of the robbery . . ..
>
> I'm not going to argue that kind of thing. He went in there primarily to steal. . . . I

can't argue it and still hold your attention.

Id. at 1532. Moreover, in his statement, Randolph stated: "I took about one-half of the book of lottery tickets; . . . I took the keys to the store, and I took off with Miss Ruth's car . . .." (DAR 1260, 1261); (R 4589). This type of tactical choice falls well within the broad range of professionally competent strategic trial decisions. Randolph has utterly failed to carry his burden to establish either prong of the *Strickland* standard in regard to this claim. He is entitled to no relief.

Regarding the rape concession, Mr. Pearl told the jury that he had "doubts I want to share with you about whether this is the kind of sexual battery as such that you envision as being sexual battery." *Id.* at 1534. Thus, the record does not support Randolph's claim that Mr. Pearl conceded the rape charge at page 1534 of the record. However, even if he did, such a concession would have been a reasonable tactical move given Randolph's statement, which was admitted into evidence, explaining the sexual battery, in which he said:

> I decided to do something that would persuade people that only a maniac would have done, so that people would know I didn't, because in essence -- I'm not implying -- I'm no maniac, everybody knows that. And therefore they would never think it was me.

Id.; (R 4589). Randolph's confession also included the statement: "I put my penis on her vagina and then ejected in her." (DAR 1260); (R 4589). Moreover, Randolph's claim that he did not

consent to the concession of the rape charge is frivolous considering that his own statement conceded his guilt.

As Mr. Pearl testified: Randolph "confessed to it. He left me in a very poor position." *Id.* Thus, he was "not in a position to deny it or to try to change the facts . . .." *Id.* at 3203. Later, Randolph told the police that "he had not actually done that" (penetrated her). *Id.* Mr. Pearl said that he

> didn't want the jury to get the idea that this man was talking out of both sides of his mouth and telling different stories. I would rather that they believed that at least he was telling the truth about what he did, because that might get the sympathy or understanding of a jury such as we get in Putnam County.
>
> . . .
>
> . . . I didn't intend for him to testify. But at least the jury could see that he was being remorseful by being truthful in making a confession to the police when he got caught. And that was one of the few things he left me to try to work with.
>
> . . . [I]n his confession he said that [he] garroted the lady at least twice, beat her and he cut her. And whether or not he raped her was not really all that important.

Id. at 3203-05. Randolph also detailed his guilt of the murder. *Id.* at 3236. Moreover, "cleaning ladies or something like that" saw Randolph exiting the Handy Way and "recognized him," identifying him by name. *Id.* at 3235. These persons found the murder victim naked below the waist and brutally beaten. *Id.* at 3236. Mr. Pearl was left with "[n]ot much of a defense at all." *Id.* at 3236.

Finally, given Randolph's confession and the evidence at trial, any error in conceding these matters is harmless beyond a reasonable doubt since the evidence overwhelmingly supports each of them. Indeed, the postconviction judge found in his order denying the motion: "The overwhelming physical evidence and witness testimony presented at trial corroborated and exactly matched the defendant's statement." (R 4589). Thus, even were Randolph able to establish deficient performance in regard to one, or more, of the alleged concessions, he cannot meet the second *Strickland* prong, i.e., prejudice. Indeed, he has not even alleged it, and therefore, his claim is "legally and facially insufficient." *Gaskin v. State*, 737 So. 2d 509, 520 n.7 (Fla. 1999). He is entitled to no relief. Moreover, as the postconviction judge found and explicated in his order: "The motion fails to set forth sufficient facts showing how defense counsel is alleged to have conceded the victim's death occurred during the course of a felony . . .. There is no support in the record for these allegations." (R 4590). Neither has appellate collateral counsel done so, and the conclusory allegation is wholly insufficient on which to base a claim for relief. Moreover, Mr. Pearl argued that the medical treatment given the victim was partially responsible for her death; *see id.*; thus, he clearly did not concede that the death occurred during commission of the felony. Randolph's claim is frivolous.

Voluntary Intoxication:

Randolph presents yet again another appalling example of barebones, conclusory pleading which is utterly insufficient on which to base relief. He provides no record cites for any of his conclusory allegations. Neither does the 8 line claim contain even a single case, statute, or rule citation. He has failed to carry his burden to properly plead a facially and/or legally sufficient claim. Thus, he is entitled to no relief. *See Roberts v. State*, 568 So. 2d at 1259; *Kennedy v. State*, 547 So. 2d at 913.

Moreover, Mr. Pearl did present expert testimony regarding the affects of Randolph's crack cocaine addition and use. *See* Dr. Krop's trial testimony outlined, *supra,* at 25 - 30. Given the conclusions of Randolph's postconviction defense experts that Dr. Krop could properly have reached the conclusions he did based on the information on Randolph's cocaine use, Randolph's complaints about Dr. Krop and/or Mr. Pearl's use and presentation of him must fail. It is also important to note that Randolph could have given Ronzial Williams' name to Dr. Krop and/or Mr. Pearl (as he could have likewise supplied Mr. Hart's name), but he did not. He is not entitled to withhold such information from his counsel and experts and then cry foul on postconviction motion.

Moreover, even if Mr. Pearl had had Mr. Williams' name,

> it is highly unlikely that any competent defense attorney would have had [him] testify and even assuming he had testified it is highly unlikely that his testimony would have been credible. He is incarcerated on a violation charge stemming from a conviction for

> manslaughter, has three prior felony convictions and admits he was using drugs throughout the time he made the observations to which he testified.

(R 4593). The court found "Williams' testimony to be highly suspect. Even if his testimony was assumed to be true, he last saw the defendant some seven to eight hours before the murder took place." *Id.* at 4592. On the other hand, Janene Bettes saw Randolph "immediately after he committed the murder," she was very familiar with how Randolph looked and acted under the influence of cocaine, and he did not appear to be under the influence of same at that time. *Id.* The factfinder reasonably chose to believe this evidence over the "highly suspect" testimony of Mr. Williams. Randolph has demonstrated no error.

Finally, as Mr. Pearl made clear at the evidentiary hearing, there were sound tactical reasons why he chose to soft-pedal the cocaine use and abuse evidence to the Putnam County jury. Randolph has not shown either deficient performance or prejudice, and therefore, he is entitled to no relief on this claim. *Strickland; Rutherford*.

Consultation and Advise:

Randolph claims that "[t]he failure to investigate, consult and advise his client, reflected in these comments, constituted ineffective assistance." (IB 95). The problem is, there is no such failure reflected therein. This claim is simply another barebones presentation of a claim and should be dismissed for legal and facial insufficiency. The defendant bears the burden to

establish the legal sufficiency of his claims. *Smith v. State*, 445 So. 2d at 325. A mere conclusory allegation that that some nebulous "failure to investigate, consult and advise" is "reflected" is a few quoted lines is wholly insufficient on which to grant relief. *See id.*; *Roberts*, 568 So. 2d at 1259; *Kennedy*, 547 So. 2d at 913.

The postconviction court explained that the complained-of "statements were made while the attorneys and the trial judge were reviewing the jury charges." (R 4593). He pointed out that indicating to the court that he expected his client would testify consistently with his statement is hardly deficient performance. *Id.* He added: "Obviously the statement that otherwise the defendant would 'come in on a stretcher' was not meant to be taken literally." *Id.* Indeed, "[t]his statement clearly shows that Mr. Pearl intended to counsel his client not to give testimony at trial different from his written statement." *Id.* Thus, the very statement alleged to show a failure to consult and advise actually shows the opposite and defeats this claim.

Finally, Randolph has not alleged how the outcome of the trial would have been different had Mr. Pearl not failed to investigate, consult and advise him. Thus, his claim is legally and facially insufficient under *Strickland* and should be denied. *Gaskin*, 737 So. 2d at 520 n.7.

Reporting of Bench Conferences:

Randolph next complains that Mr. Pearl "rendered ineffective assistance in failing to assure that a proper record was made." (IB 95). He says that "[m]any bench conferences were unreported" and gives some record citations, but utterly fails to explain how, or why, the failure to report these conferences prejudiced him. There is no apparent prejudice, and his failure to allege "how the outcome of his trial would have been different" had the brief sidebar/bench conferences been reported is fatal to his claim. *Gaskin*, 737 So. 2d at 520 n.7.

The lower court examined each sidebar/bench conference referenced by Randolph and determined from the context what the subject of the unreported exchange was. (R 4594-95). It is apparent that the matters discussed were of the "housekeeping" variety, or were, in the case of three of them, brief conversations between counsel for the prosecution and the defense which are not required to be reported. *Id.*

"[T]he failure to record any portion of the statements made by the court and attorneys at the charge conference is harmless" where "the proposed instructions and the instructions as read to the jury" were in writing and filed in the record. *Turner v. Dugger,* 614 So. 2d 1075, 1079 (Fla. 1992). This Court added: "The absence of transcribed bench conferences did not violate the mandate of section 921.141 . . ., and the fact that bench conferences were not reported did not prejudice the appeal." *Id.* at 1080. Thus, no

relief was warranted. *Id.*

In Randolph's case, trial counsel filed proposed jury instructions, and the formal charge conference was held on the record and reported. (DAR 195-96, 543-45, 1763-64). The lower court correctly rejected the claim that Mr. Pearl's performance was deficient because he did not make sure that these matters were reported on the record. Moreover, as set out above, Randolph has not even alleged, much less demonstrated, the prejudice prong of the *Strickland* standard. He is entitled to no relief.

Presence:

Randolph claims that he "was involuntarily absent from the February 24, 1989 proceeding which occurred immediately before the penalty phase." (IB 95). He says he did not waive his presence and alleges a reasonable possibility that his rights were prejudiced by his absence. (IB 96). Thus, he says, "Counsel was ineffective." *Id.*

Randolph complains about four matters discussed at this proceeding:

1. Mr. Pearl "conceded the state could rely on felony murder;"

2. The judge "heard argument on whether Dr. McConaghie could discuss cause of death;"

3. The court heard argument on "whether the State could use photographs to show heinous, atrocious, and cruel;" and,

4. The court heard argument on "whether or not there would be evidenced introduced regarding the O negative blood issue." (IB 96). The postconviction court reviewed these incidents in detail and concluded that "the state attorney and defense counsel discussed the testimony and evidence they expected to be presented," but the trial judge clearly did not rule on any of the matters discussed and his only comments were to the effect that he did not know how he would rule until the evidence was actually presented. (R 4602-03). The record also shows that all involved understood that this was "not . . . the formal charge conference," but was only a broad overview or outline which to provide "some idea of what's going to go on this morning." *Id.* at 4602. Moreover, at the appropriate time, a formal charge conference was held, and Randolph was present for it. *Id.* at 4603. Thus, as the postconviction judge found, "there is no reasonable possibility of prejudice from the defendant's absence at this stage of the proceedings," i.e., no *Proffitt*[33] error.

[33] *Proffitt v. Wainwright*, 685 F. 2d 1227, 1260 (11th Cir. 1982).

POINT V

RANDOLPH HAS FAILED TO ESTABLISH THAT TRIAL COUNSEL HAD AN UNDISCLOSED CONFLICT OF INTEREST.

Randolph complains that Mr. Pearl was a special deputy sheriff and that constituted an unconstitutional conflict of interest. (IB 96). He then attempts to "rely on the arguments presented at page 48-57 of his Initial Brief in Consolidated Case No. 81,950." *Id.* This is a blatant attempt to undermine this Court's order requiring Randolph to comply with the 100 page limitation for his instant initial brief. This issue should be stricken and other appropriate sanctions should be imposed.

As it appears in the instant case, this issue is a barebones presentation which is legally insufficient on its face and need not be further considered. It is well-settled that claims cannot be raised on appeal by merely referencing the arguments contained in the 3.850 motion. *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). The State contends that neither can a reference to arguments contained in another appellate proceeding be so utilized. Moreover, the issue raised in the allegedly consolidated case, No. 81,950, has been resolved by opinion dated March 7, 1996. *Teffeteller v. State*, 676 So. 2d 369 (Fla. 1996). Therein, this Court remanded the claims to be heard in the individual cases by the postconviction court. *Id.* The mandate in that case issued on August 9, 1996. Appendix A-1. The evidentiary hearing on this

issue was held by the lower court in this case "on July 22, 23, and 24, and December 4, 1997." (R 4600). Thus, the referenced brief was written **before** the evidentiary hearing and is not entitled to consideration in reviewing the propriety of the postconviction court's ruling subsequent to the evidentiary hearing.

In any event, the postconviction judge, after the hearing, found as fact that:

> Pearl had no actual or apparent authority to act as a law enforcement officer for the Marion County Sheriff's Department and at no time indicated to anyone that he possessed anything other than a permit for 'pistol toting.' Sheriff Mooreland testified in giving special deputy status he in no way contemplated Pearl acting as a deputy sheriff in any manner.
>
> The Court finds from the testimony presented that Pearl's status was only that of an honorary deputy sheriff and that his sole purpose in obtaining such status was to be permitted to carry a concealed weapon. The Court finds Pearl's status as a special deputy sheriff did not conflict with his duties as a defense attorney and that there was no *per se* conflict of interest between Pearl and the Defendant. *See Harich v. State*, 573 So.2d 303, 305 (Fla. 1990) . . ..

(R 4601). Thus, assuming *arguendo* that the issue is properly presented in this proceeding, Randolph is entitled to no relief because the conflict of interest claim is without merit.

POINT VI

RANDOLPH HAS FAILED TO ESTABLISH THAT THE TRIAL JUDGE HAD AN UNDISCLOSED CONFLICT OF INTEREST.

Randolph complains that Judge Perry held the same special deputy status as Mr. Pearl. *See* Point V, *supra* at 94. He alleges that same was "a basis for disqualification." (IB 96). He claims that if he had known about this, he would have "filed a motion to recuse." *Id.* He says that he only learned of it when Judge Perry testified to it in "the 1992 hearing." *Id.* He then claims that he will later supply a citation for this claim "in the reply brief." *Id.*

The State strongly objects to any attempt to first supply the referenced testimony, or citation to it, in the reply brief. Obviously, the State will already have filed its one and only answer at that time. It is grossly unfair and unjust to permit the defendant, who has the burden of proof, to first place information before this Court at a point when the State has no adequate opportunity to refute it. Moreover, there is no claim that this information was presented to the postconviction lower court judge. It is inappropriate to consider same for the first time on appeal. Moreover, due to the vague and conclusory nature of the presentation of the issue, it should be denied as legally and facially insufficient to support relief. It is Randolph's burden to establish the legal sufficiency of his claims. *Smith v. State*,

445 So. 2d at 325, and an unsupported conclusory claim is wholly insufficient to carry that burden.

However, even if the appellate presentation was sufficient to raise the issue before this Court, it would still not warrant relief. As the postconviction judge found: "The defendant presented no evidence in support of this bare allegation." (R 4613-14). Thus, the motion itself was legally and facially insufficient and was properly denied. Moreover, the failure to allege in the motion "how the outcome of his trial would have been different" had Judge Perry not presided over it bars relief. *Gaskin*, 737 So. 2d at 520 n.7. As mentioned previously herein, Randolph's own statement, and the extensive corroborating evidence introduced at trial, overwhelmingly establish his guilt. Thus, he cannot show that an acquittal would have resulted had any other judge presided over his case. He is entitled to no relief.

POINT VII

RANDOLPH HAS FAILED TO ESTABLISH THAT THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING FACTOR VIOLATES THE EIGHTH AMENDMENT.

Randolph admits that his trial counsel objected to the HAC factor on vagueness grounds and that he presented the issue to this Court on appeal. (IB 97). He also admits that this Court rejected his claim. *Id.* However, he contends that *Espinosa v. Florida*, 505 U.S. 1079 (1992) compels reconsideration. *Id.* at 97-98.

The lower court reviewed the instruction complained-of in *Espinosa* and that given in this case. (R 4612). He concluded that they were not the same, and that the instruction given in this case substantially "conformed to the jury instruction upheld by the Florida Supreme Court in *Hall v. State*, 614 So. 2d 473 (Fla. 1993)." *Id.* Thus, there is no merit to this claim.

Moreover, any error in the phrasing of the jury instruction at issue was harmless beyond a reasonable doubt. There is no harmful error where, as here, there is scant mitigation to weigh against three strong aggravators. The trial judge made it clear in his order that he would have imposed the death penalty even if only one of the aggravators existed. He stated: "[A]ny of the aggravating factors found to exist would outweigh all mitigating factors . . .." (DAR 646). Thus, even ignoring the HAC factor, there are two strong aggravators to be weighed against mitigation which is of such little weight that a single aggravator would outweight it.

Any error in the HAC instruction is clearly harmless. can be no doubt that the death sentence would still have been imposed. Moreover, any error is harmless due to the overwhelming evidence of HAC. Clearly, this is a case where the facts would constitute HAC under any definition of that term. Thus, Randolph is entitled to no relief. *See Fennie v. State*, 648 So. 2d 95, 98 (Fla. 1994).

CONCLUSION

For the reasons set out above, Randolph's conviction and sentence of death should be affirmed in all respects.

Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
Florida Bar #438847
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: Sylvia Smith, P.O. Box 5303, Tallahassee, FL 32314-5303, on this 1st day of May, 2000.

Of Counsel