IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,134

DAVID COOK,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

ANSWER BRIEF OF APPELLEE

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CERTIFICATE OF TYPE STYLE AND FONT

It is hereby certified that the text of this brief is printed in 14 point Times New Roman, a font that is not proportionately spaced.

PRELIMINARY STATEMENT

The following symbols have been utilized in the instant brief:

R. ___ Record on appeal of trial, FSC. No. 68,044.

Supp. R. ___ Supplemental record on appeal of trial, FSC. No. 68,044

R2. ___ Record on appeal of the resentencing, FSC. No. 75,725

R2.Supp. ___ Supplemental record on appeal of the resentencing, FSC. No. 75,725

PCR. ___ Record on appeal of the post-conviction proceedings herein, FSC. No. 95,134.

SPCR. ___ Supplemental record on appeal of post-conviction proceedings herein, FSC. No. 94,134.

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STATEMENT OF THE CASE AND FACTS

The Defendant was charged by indictment dated September 12, 1984, with two counts of first degree murders of Rolando and Onelia Betancourt, two counts of attempted robbery, burglary, and unlawful possession of a firearm while engaged in a criminal offense. (R.1-4A). He was tried by a jury on August 6, 1985. The jury rendered verdicts of guilty as charged. (R. 1010-11).

After a penalty phase, the jury recommended death for both of the first degree murder convictions, by a vote of seven (7) to five (5) on Count One, and a vote of eight (8) to four (4) on Count Two. (R. 1156). On October 25, 1985, the trial court imposed a sentence of life imprisonment with a minimum mandatory of twenty-five (25) years for the first degree murder of Rolando Betancourt, and a sentence of death for Onelia Betancourt's murder. The court also imposed a sentence of life imprisonment for the armed burglary, a sentence of fifteen years each for both of the counts of attempted robbery, and suspended the sentence for count six, unlawful possession of a firearm. Each of these sentences was to be served consecutively. (R. 233-34). The sentencing hearing at which the court entered its written findings was not recorded. This Court relinquished jurisdiction and the parties, after a hearing in the presence of the trial judge, entered a written stipulation reconstructing said hearing. (Supp.R. 1-11).

On direct appeal, this Court affirmed Mr. Cook's convictions, but remanded to the trial court for resentencing on the sentence of death. Cook v. State, 542 So. 2d 964 (Fla. 1989). The following historical facts of the crimes were set forth by this Court:

> On August 15, 1984, Rolando and Onelia Betancourt, who worked as the midnight cleaning crew at a Burger King in South Miami, were found dead, both of single gunshot wounds to the chest. Following an anonymous tip, police brought Cook in for questioning and obtained a statement. According to this statement, Cook and two companions, Derek Harrison and Melvin Nairn, went to the Burger King to commit a robbery. They waited behind a dumpster in the back until Mr. Betancourt came out the back door and emptied the garbage. Cook then picked up Harrison's .38 caliber revolver, which was lying on the ground, followed Mr. Betancourt to the door, and pushed him inside. The door slammed shut behind them, preventing entry by Harrison and Nairn. Cook told the police that when he demanded money from the safe, Mr. Betancourt responded that he did not speak English and could not open the safe. When Cook continued to demand money, Mr. Betancourt hit him in the arm with a long metal rod and Cook shot him. Cook said he was on his way out when Mrs. Betancourt started screaming and grabbed him around his knees. He then shot her, ran out the back door, and fled with Harrison and Nairn. Cook told the police that he thought he had shot both of the victims in the arm. The physical evidence, as well as the trial testimony of Harrison and Nairn, were consistent with Cook's version of the shootings.

581 So. 2d at 966. The Defendant had raised the following issues on direct appeal:

> Cook raises five issues on appeal: (1) whether the trial court erred in failing to excuse for cause two prospective jurors who stated they had difficulty understanding English; (2) whether the trial court erred in finding the aggravating circumstances of heinous, atrocious, and cruel; (3) whether the trial court erred in finding the aggravating circumstance of murder committed to avoid arrest; (4) whether the trial court erred in failing to find the two mental and emotional statutory mitigating circumstances; (5) whether the trial court's instructions during the

> sentencing phase, directing the jury to adhere to a "single ballot," discouraged juror deliberation and improperly compelled a premature recommendation of death. The state raises one issue on cross-appeal: whether the trial court improperly found the mitigating circumstance of no significant history of prior criminal activity.
>
> 542 So. 2d at 966.

This Court expressly considered and rejected claims 1, 4 and 5, and the State's cross-appeal. The Court agreed with points 2 and 3, and because it could not be certain that the trial judge would have imposed the same sentence in the absence of two aggravating factors, remanded the cause for reconsideration, without the need to empanel a new sentencing jury. 542 So. 2d at 971.

The trial court reimposed the sentence of death ore tenus on February 5, 1990, after having allowed the Defendant to file a sentencing memorandum and an opportunity to appear and be heard. (Supp. R. 22). No additional evidence was presented. The written order adopting sentence order was entered on March 30, 1990. (R2. Supp. 4).

On direct appeal from the resentencing, this Court affirmed the sentence of death. Cook v. State, 581 So. 2d 141 (Fla. 1991). This Court rejected Defendant's claims that his sentence was disproportionate, that the judge considered inapplicable aggravating factors; and, that the written sentencing order did not adequately address and discuss statutory and non-statutory mitigation. 581 So. 2d at 143-144.

The United States Supreme Court denied certiorari on October 7, 1991. Cook

v. Florida, 112 S. Ct. 252 (1991). On January 8, 1993, the Defendant filed a motion to vacate judgment of conviction and sentence with special request for leave to amend (PCR.100-157). He supplemented this on October 6, 1993 (PCR. 202-242). Defendant then filed a motion to compel production of public records from various agencies in Dade County, on April 7, 1996. (PCR. 251-257). The case was transferred to the original trial judge, who entered an order requiring the State to file a response, within 60 days, on March 7, 1996. (PCR. 250).

The State then filed its Response to the motion for post-conviction relief on May 9, 1996. The State's Response addressed both the substantive claims in the motion and supplement for post-conviction relief, and the public records issue. (PCR. 259-70). The State's Response reflects that it had provided the Appellant with a copy of the State Attorney's records in addition to those of the Dade County agencies connected with it, prior to the filing of the motion for post-conviction relief. (PCR. 260-61). After filing its Response, on July 15, 1996, the State then scheduled a hearing on the motion for post-conviction relief for August 30, 1996. (PCR. 258). The Notice of Hearing to the Appellant expressly stated: "YOU ARE HEREBY notified that the following pleading herein, to wit Defendant's Motion to Vacate Judgment, etc., is scheduled for hearing. ." Id. Said hearing was canceled due to scheduling conflicts, and reset for November 22, 1996.

The Defendant then filed a Motion to Transport the Defendant for this Hearing.

(PCR. 271). The State filed a Response, objecting to transport, and stating that the purpose of the hearing was to conduct a Huff v. State, 621 So. 2d 982 (Fla. 1993), hearing. (PCR. 273-75). At the November 22, 1996 Huff hearing, a substitute attorney appeared. She stated that she was "standing in" for prior lead counsel, who was "currently opening up a new branch office of CCR in Tampa." (PCR. 323). Substitute counsel then stated that she had not even read the motion for post-conviction relief. Id. She was unprepared to argue the merits of the defense claims. Substitute counsel instead stated that the purpose of her appearance was to inform the Court that there "may be" agencies outside of Dade County who had not fully complied with public records requests. (PCR. 324-25). She proposed that the defense would file "an amended motion to compel," on or before November 30, 1996. Id. No such amended motion was filed. The trial court, in accordance with its pronouncement at the Huff hearing, then entered a written order summarily denying the motion to vacate on December 4, 1996.

The Defendant then filed a motion to disqualify the trial court, (PCR. 292), in addition to a Motion for Rehearing dated December 24, 1996. (SPCR. 12-144). The circuit court denied the Motion for Rehearing on July 31, 1998. (PCR. 145-146). This appeal ensues.

SUMMARY OF THE ARGUMENT

1. The Defendant received a fair opportunity to orally argue at a duly noticed Huff hearing, but declined to do so. The Defendant's claims with resepct to outstanding public records are refuted by the record and waived.

2. The summary denial by the lower court was proper as claims of ineffective assistance of counsel, Ake, and Brady were legally insufficient, untimely and refuted by the record.

3. Claims of bias during trial and resentencing were insufficient, and procedurally barred where they were based on the record on direct appeal but not raised on appeal. Said claims were also refuted by the very record relied upon. Claims of bias during post-conviction proceedings are without merit, where they are nothing more than complaints as to adverse rulings which were fully supported by the record.

4. Complaint as to access to trial counsel's files is without merit where said files were destroyed by a hurricane. Likewise, complaints due to omissions in the record on direct appeal are barred, and without merit where appellate counsel had reconstructed said record in accordance with the rules of appellate procedure and precedent.

5. The remainder of the claims herein are procedurally barred because they were untimely, and should have been, or were raised and rejected on direct appeal.

The claim of cumulative error is without merit where the individual claims are considered and found to be without merit or procedurally barred.

ARGUMENT

I. THE APPELLANT'S CLAIM AS TO LACK OF A HUFF HEARING IS REFUTED BY THE RECORD.

The Appellant contends that the trial court erred in denying his motion for post-conviction relief and supplement thereto without conducting a Huff v. State, 622 So. 2d 982 (Fla. 1993) hearing. This argument is without merit. The record reflects that a properly noticed Huff hearing was in fact conducted, but that at said hearing Appellant declined any presentation with respect to the merits of his post-conviction claims. Appellant's counsel expressly stated that she had not even read the motion for post-conviction relief and was not prepared to argue same. (PCR. 323).[1]

The Appellant filed his motion for post-conviction relief and a supplement thereto within the two year time limit of Fla.R.Crim.P. 3.850 in effect at the time of these proceedings. (PCR. 100-157; 202-242). The case was then transferred to the original trial judge, who entered an order requiring the State to file a response, within 60 days, on March 7, 1996. (PCR. 250). On April 2, 1996, the Appellant then filed a motion to compel public records from various agencies in Dade County. (PCR. 251-52). The State then filed its Response to the motion for post-conviction relief on May

[1] Appellant's counsel stated that she was "standing in" for prior counsel who was "currently opening up a new branch office of CCR in Tampa." (PCR. 323).

9, 1996. The State's Response addressed both the substantive claims in the motion for post-conviction relief, and the public records issues. (PCR. 259-70). The State's Response reflects that it had provided the Appellant with a copy of the State Attorney's records in addition to those of the Dade County agencies connected with it, prior to the filing of the motion for post-conviction relief. (PCR. 260-61). After filing its Response, on July 15, 1996, the State then scheduled a hearing on the motion for post-conviction relief for August 30, 1996. (PCR. 258). The Notice of Hearing to the Appellant expressly stated:

> YOU ARE HEREBY notified that the following pleading herein, to wit Defendant's Motion to Vacate Judgment, etc., is scheduled for hearing . . . .

Id. Said hearing was canceled due to scheduling conflicts, and reset for November 22, 1996.

The Appellant contends that the above scheduled hearing was a "status conference," where "the trial court did offer counsel an opportunity to argue the merits of the case, but counsel was unprepared to do so, and did not do so both because the hearing was not noticed as a Huff hearing (PCR. 258), and because the motion to compel was still pending." Brief of Appellant at pp. 6-7, n. 2. This contention is without merit where, as seen above, the Notice of Hearing made no reference to any "status conference," and in fact expressly stated that the Defendant's motion for post-conviction relief was to be heard. More importantly, however, the

record reflects that the Appellant expressly understood that the scheduled hearing was not a "status conference," but a Huff hearing. First, the Appellant filed a Motion to Transport the Defendant, to Dade County, "in preparation for" the November 22, 1996 hearing. (PCR. 271). The State notes that a defendant's presence is not required for "status conferences." Indeed, the State filed a Response objecting to the Motion to Transport the Defendant (PCR. 273-75), wherein it expressly stated that the purpose of the November 22, 1996 hearing was to conduct a Huff hearing which did not require the Defendant's presence:

> In the instant case, defendant is represented by counsel and the single issue to be resolved is whether an evidentiary hearing is needed. In its seminal case of Huff v. State, 622 So. 2d 982 (Fla. 1993), the Supreme Court established a special rule; only for death penalty post-conviction cases which allows counsel to appear before the court and be heard on an initial 3.850 motion. The Supreme Court was very clear that its purpose was not to require an evidentiary hearing in all cases:
>
> > This does not mean that the judge must conduct an evidentiary hearing in all death penalty post conviction cases. Instead the hearing before the judge is for the purpose of determining whether an evidentiary hearing is required and to hear legal argument relating to the motion.
> >
> > 622 So. 2d at p. 983.

(PCR. 274) (emphasis added). The record is thus abundantly clear that the Appellant was aware and on notice that the November 22, 1996 hearing was to be a Huff hearing, and not a "status conference." The Appellant was given fair notice and opportunity to submit argument in accordance with Huff, but as conceded by

Appellant, counsel was "unprepared"[2] to do so. The transcript of the November 22, 1996 hearing fully supports the Appellant's concession of unpreparedness, and reflects that defense counsel expressly stated that she had not even "read the motion [for post conviction relief]." (PCR. 323). The Appellant's contention with respect to the lack of a Huff hearing is thus without merit. The trial court provided the Appellant with a fair opportunity to orally argue his position, but Appellant expressly declined to do so, as he was entitled to. See Lopez v. Singletary, 634 So.2d 1054, 1058, n.12 (Fla. 1993)(while the trial court must give the parties the opportunity to appear in person and argue the motion for post-conviction relief, "if the movant chooses, the opportunity to appear may be waived and the motion disposed of on the written pleadings.").

The Appellant has also argued that the November 22, 1996 Huff hearing was "premature," as the trial court failed to hear his "motion to compel public records, and resolve other outstanding public records issues." Brief of Appellant at p. 7. This argument is also without merit. The record reflects that the Appellant filed a motion to compel public records only from various Dade County agencies in April, 1996. (PCR. 251-52). The State's Response in May, 1996, asserted that the State Attorney had not only produced its own records but those of the Dade agencies connected with it, prior to the initial 1993 motion for post-conviction relief. (R. 260). Indeed, in the

[2] See Brief of Appellant at p. 7, n. 2.

court below, the Appellant had previously conceded that it had received such records, but objected on the grounds that the agencies connected with the State Attorneys office had to "directly" produce their records to the Defendant, as opposed to having sent the records through the State Attorney's office! (PCR. 203).[3] With respect to other agencies not connected with the State Attorney, such as the Clerks of Dade County Circuit and Juvenile Courts, the State Attorney's Response correctly noted that it was not responsible for such records. (PCR. 261). The clerks of the court are not subject to the Public Records Act. Times Publishing Company v. Ake , 660 So. 2d 255 (Fla. 1995).

At the November 22, 1996 Huff hearing, the State reiterated the above position in its prior written Response, and added that it had not withheld any documents. (PCR. 325-27). Counsel for Appellant did not dispute the State's position. Instead, defense counsel stated that she intended to file an "amended motion to compel," in accordance with the newly enacted Fla.R.Crim.P. 3.852 (1996), to list agencies which had not previously been within the jurisdiction of the court:

> [defense counsel]: . . . For capital cases, such as those that are in David Cook's posture, where there may be agencies outside that judicial circuit which have not fully complied with the public records requests, such agencies now fall within your Honor's jurisdiction.

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[3] The Appellee would note that the purpose of public records rules is to facilitate the Defendant's investigation of his post-conviction case. As such, Appellant should not be heard to complain that the State has assisted in obtaining and providing records to the Defendant in a timely manner.

> And Rule 3.852 gave us until 30 days from the date the rule was promulgated, which was October 31st, 1996, to file amended motion to compel to include those new agencies.
>
> So, your Honor, we propose to file a motion to compel on or before November 30th this year and respectfully submit that.
>
> At that point another status conference must be conducted with the focus of having a hearing on the outstanding public records request.

(PCR. 324-25) (emphasis added). No such motion to compel was filed within the above proposed time limits. The written order of the court denying post-conviction relief was then entered on December 4, 1996. The State would note that despite filing other pleadings, including a Motion for Rehearing which was not denied until July 31, 1998,[4] no such "amended motion to compel" has ever been filed by the Appellant. The Appellant has never scheduled any hearing on public records, either. Any public records claims have thus been waived. See Fla.R.Crim.P. 3.852(f)(2) (1996) (motions to compel public records must be served within 30 days of the effective date of the rule - October 31, 1996); Fla.R.Crim.P. 3.852(g)(3) (1996) ("the failure to file a motion to compel or complaint pursuant to the time period set forth in subdivision (f)(1) and (f)(2) waives any motion to compel or any complaint.") (emphasis added).[5]

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[4] See PCR 145.

[5] As noted by the Appellant, on November 26, 1996, with four (4) days remaining in the deadline for timely motions to compel, this Court tolled Fla.R.Crim.P., 3.852(f)(2). The tolling ended on March 3, 1997. The Notice of Appeal in the instant case was filed on August 21, 1998, with no amended motion to compel ever having been filed.

Appellant's reliance on Ventura v. State, 673 So.2 d 479 (Fla. 1996), is unwarranted. In Ventura, the defense filed a motion to compel, scheduled a hearing thereon, established non-compliance by various agencies, and obtained a court order compelling the agencies' records. The trial court in Ventura had dismissed the motion for post-conviction relief, at a time when the agencies were still refusing to comply with the court's order to produce records. In the instant case, however, the Appellant never scheduled a hearing on his motion to compel (which only named Dade County agencies). In any event, the Appellant admitted that the agencies subject to the Public Records act, had produced their records through the State Attorney's Office. The only complaint was with respect to said agencies not having "directly" provided records. As to agencies outside of Dade County, the Appellant has never filed any motion to compel, and has thus waived this issue.[6] In sum, the Appellant's contention with respect to a "premature" Huff hearing is also without merit.

II. THE TRIAL COURT'S SUMMARY DENIAL OF THE MOTION FOR POST-CONVICTION RELIEF WAS PROPER.

A. Proper Summary Denial Without Attachments

[6] The State would note that from the time of the initial filing of the post-conviction motion in 1993 and through the time of the 1996 Huff hearing, the Appellant could have pursued the procedures in Fla. Stat. 119 to obtain records, but did not do so. See Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1992).

The Appellant first contends that the post-conviction judge who was the original trial judge herein, erred in denying the motion for post-conviction relief without attaching portions of the record. This argument has been resolved against the Appellant, where as here the trial court's order states its rationale based upon the record, or, resolves issues based upon procedural bars and insufficiency of pleadings. (PCR. 292-96). See Mills v. State, 689 So.2 d 801, 804 (Fla. 1996) (summary denial of post-conviction relief, without attaching those portions of the record conclusively showing the defendant was not entitled to relief, was not error where the trial court provided an explanation for its ruling by specifically finding that the issues were, "procedurally barred as respecting matters which were or could have been raised previously for the reasons contained [in] the state's Response."); Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993) ("To support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion."); Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990) ("unless the trial court's order states a rationale based on the record, the court is required to attach those specific parts of the record that directly refute each claim raised.") (emphasis added); Crump v. State, 412 So.2 d 441 (Fla. 4th DCA 1982) (failure to attach portions of record not error, where the claims were procedurally barred or insufficient). The propriety of the trial court's ruling with respect to every individual claim is addressed in the ensuing arguments herein.

B. Ineffective Assistance of Counsel During Guilt Phase Claims

1. Trial counsel's Alleged Conflict of Interest Claim is Procedurally Barred and Without Merit

The Appellant, based upon a "series of articles published in the Miami Herald in 1992," asserts that his trial counsel, who was a specially appointed public defender, had a conflict of interest due to his desire to curry favor for future appointments, as demonstrated by his overbilling Dade County "for the time he supposedly spent on cases." Brief of Appellant at pp. 12-13. The Appellant notes that trial counsel was suspended for failure to pay restitution, "relating to court appointments between 1988 and 1991." Brief of Appellant, at p. 14. The instant claim is procedurally barred and without merit.

Despite reliance upon 1992 published articles,[7] the Defendant did not include any claim of conflict of interest, nor the factual basis relied upon herein, in the initial motion for post-conviction relief or supplement thereto, filed within the two year time limits of Fla.R.Crim.P. 3.850 (1993), on January 12, 1993 and October 6, 1993, respectively. The instant claim was first presented in the Defendant's Motion for Rehearing, filed on December 23, 1996. (SPCR. 32-35). The State respectfully submits that the injection of new claims in a motion for rehearing is improper. See,

[7] The Appellant has also relied upon trial counsel's affidavit for attorney's fees, contained in the record on direct appeal which was prepared and continuously available since June, 1986. (R. 242-245).

Delmonico v. State, 155 So. 2d 368 (Fla. 1963) ("the initial presentation of [claim] on rehearing is clearly improper."); Sarmiento v. State, 371 So. 2d 1047 (Fla. 3d DCA 1979), approved, 397 So. 2d 643 (Fla. 1981) (appellate argument could not be raised for first time in motion for rehearing). Moreover, the instant claim is also untimely, as it was first raised several years after the expiration of Rule 3.850 time limits, with no cause having been pled or demonstrated. See Preston v. State, 528 So. 2d 896, 898 (Fla. 1988) ("the judge properly declined to rule" on "new issues" which were not timely and were raised in motions filed after conclusion of the post-conviction hearing before the trial court); Woods v. State, 531 So. 2d 79, 83 (Fla. 1988) (there was "no error in the trial court's rulings," which found new claims in an "amended motion for post conviction " relief were time barred under the time limits of Fla.R.Crim.P. 3.851); Parker v. State, 537 So. 2d 969, 973 (Fla. 1988) ("supplementary petition," containing new claims, was found procedurally barred for failing to comply with the time limits of Fla.R.Crim.P. 3.851, where "Petitioner has presented no valid reason for this untimely filing."); McConn v. State, 708 So. 2d 308, 310 (Fla. 2d DCA 1998) ("if the two-year time period [under Fla.R.Crim.P. 3.850] has expired, the trial court can properly deny a motion to amend as untimely. If the two-year time period has not expired, the trial court should consider whether there was cause for failure to include the new allegations in the original motion [for post conviction relief]. The reasons which constitute cause under these circumstances

are the same reasons a court would address a successive motion under the rule . . . . Should cause be demonstrated, the trial court must determine the additional claims on the merits. However, if there is no cause demonstrated for failure to raise the claim in the original motion, the trial court can properly deny the motion to amend."). The instant claim of conflict, which was raised for the first time in a "Motion for Rehearing," filed years after the expiration of Rule 3.850 time limits, and without even alleging any cause, is thus untimely and procedurally barred. The trial court thus properly denied this claim.

In any event, the State would note that the Appellant is required to, "'establish that an actual conflict of interest adversely affected his lawyer's performance' in order to prevail on a conflict of interest claim. Cuyler, 446 U.S. at 350." Quince v. State, 24 Fla.L. Weekly S173, 174 (Fla. April 8, 1999). In the instant case, the Appellant has relied upon overbilling charges and court appointments during the period of 1988-1991. However, trial counsel's representation of the defendant ended in 1985, more than two years prior to said charges.[8] As such, no actual conflict of interest has been demonstrated. Moreover, as seen in the ensuing arguments in this section, no "adverse" effects have been demonstrated either. As such, the instant claim is procedurally barred and without merit.

[8] Trial counsel did not represent the Defendant on direct appeal, or at resentencing, or on direct appeal of the resentencing.

2. Trial Counsel Did Not Concede The Case

The Appellant first contends that trial counsel "conceded the entire case, every charge, and every element thereof, to the court and the jury;" Brief of Appellant at p. 16. The record refutes this assertion. The Appellant has quoted from a side bar conference where trial counsel was arguing a motion for judgment of acquittal after the conclusion of the State's evidence, before the trial judge and not the jury. (R. 849-50). The Defendant was charged with both premeditated and felony first degree murder. The Appellant's aforecited portion of the transcript reflects that trial counsel argued that the State had not proven premeditated murder, and moved for a judgment of acquittal on this basis: "I do not believe that the issue of premeditation has been sufficiently put forth to the court to allow this to even go to a jury as first degree murder." (R. 849). Trial counsel did not argue for a judgment of acquittal on felony murder, and instead stated that, "if" felony was the case, then he was requesting "a specific verdict form on felony murder." (R. 850). The judge denied the motion for judgment of acquittal. Id.

Trial counsel's lack of argument with respect to judgment of acquittal for felony murder, before the trial judge, can not be faulted, and can not be construed as conceding the "entire case," as now claimed by the Appellant. The instant case, after all, involved a full and detailed confession by the Defendant. The Defendant stated that he had been present at the murder scene, a closed Burger King, at "3:30 to 4:00"

a.m. when the double murders herein took place. (R. 89). He stated that he and his two codefendants had decided to "rob" the Burger King:

Q. Why were the three of you at the Burger King that morning?

[Defendant] To rob it.

Q. Whose idea was it to commit the robbery?

[Defendant] We all decided on it.

(R. 90).[9] The Defendant then added that he waited outside the closed Burger King, for "an hour-and-a half or two hours," (R. 90), and that he had a gun in his possession while hiding behind a garbage bin in the parking lot. (R. 94). The defendant waited until one victim came out to empty the garbage. When this victim opened the back door to go inside the Burger King, the Defendant stated that he "pushed" the victim inside, while directing the gun at the victim's "chest." (R. 97-98). Having thus gained entry alone, and without the codefendants who were still outside, the Defendant then saw the victim's wife. Id. The Defendant asked the victims to "open the safe." Id. The victims stated that they did not speak English and were not the manager. Id. The Defendant stated that he then shot the male victim because the latter "tried" to hit him with a pipe. (R. 98). He stated that he then shot the female victim, who had started to scream and was "kneeling" approximately 3 feet away from the back door, in order

[9] The defendant also stated that he knew "robbery was against the law, and expressed his understanding of the crime as, "Robbery is when you take something that belongs to someone or money by force." (R. 104).

to “keep her quiet.” (R. 100, 104). The Defendant stated that he then ran out, and retrieved his car which he had parked “three or four blocks away.” (R. 101). He then picked up the codefendants and drove them home. Id.

The Defendant’s above confession was corroborated at trial by the testimony of both of his codefendants. (T. 674-97; 874-84). One of these codefendants had crouched outside the locked door of the Burger King after the Defendant had gained entry. He had heard the Defendant’s demands for money; the shots and the victims’ screams described above. (R. 687-89). The Defendant’s confession was also corroborated by yet another friend of the Defendant’s, to whom the Defendant had related the details of the crimes, on the morning after the murders herein. (R. 581-86). In light of the detailed confession by the defendant, and corroboration thereof by three (3) other witnesses, the State fails to see how trial counsel could have in good faith argued a motion for judgment of acquittal for felony murder before the trial judge. Indeed, the Appellant herein has never, either in the court below or herein, suggested what arguments could have been made by trial counsel.

More importantly, however, the State notes that trial counsel in no way conceded guilt - whether premeditated or felony murder, before the jury. Rather, trial counsel argued reasonable doubt and that the State had not met its burden of proof. Counsel argued that the Defendant’s confession was “fed” to him by the police. Trial counsel added that the three witnesses (who corroborated said confession) were all

unreliable, and trying to minimize their involvement to save themselves. Counsel noted that the two (2) codefendants had pled to the lesser crimes of second degree murder. He argued that the codefendants could have shot the victims, but were testifying against the Defendant in order to save their plea bargains. Finally, trial counsel argued that, even "if" an attempted robbery or burglary was found, the defendant was not guilty of first degree murder and the jury should consider second degree murder, the crime which the codefendants had pled to. (R. 936-965).[10]

The Appellant's reliance upon Harvey v. State, 656 So. 2d 1253 (Fla. 1995), and United States v. Swanson, 943 F. 2d 1070, 1073 (9th Cir. 1991), is unwarranted. Harvey involved defense counsel having conceded his client's guilt before the jury. Likewise, in Swanson, the court noted that, "when a defense counsel concedes that there is no reasonable doubt concerning the only factual issues in dispute, the Government has not been held to its burden of persuading the jury that the defendant is guilty." No such concessions took place in the instant case, as seen above.

The Appellant has also argued that defense counsel conceded that "any defense

[10] The Appellant's reliance upon "R. 1136" is entirely devoid of merit. This portion of the record involves the closing arguments during the penalty phase of the trial, where the jury had already found the Defendant guilty of the murders, burglary and attempted robberies, all with a firearm. (R. 187-191). At this juncture the Defendant had also testified that he had intended "to rob." (R. 1088). The judge and jury having already found Defendant guilty of the felonies, defense counsel stated he could not "argue" that the murders were not committed during the course of a felony. (R. 1136).

alibi witnesses they put on would be committing perjury." Brief of Appellant at p. 17. This argument is also a mischaracterization of the record. The record reflects that immediately prior to jury selection and trial, the Defendant expressed dissatisfaction with counsel, which prompted a Nelson inquiry.[11] During this inquiry, the Defendant stated that he wished defense counsel to contact, "Employees, managers, notary publics around the neighborhood," who would testify to "my whereabouts" on the day of the crimes. (R. 331). The Defendant conceded that he had not told defense counsel about these witnesses previously. Id.[12] The trial court nonetheless granted a continuance and required defense counsel to contact said witnesses and ascertain whether their testimony would be useful. (R. 341). Defense counsel had asked for the names of the witnesses, noting that alibi witnesses had to be disclosed to the State.[13] (R. 332-35). Defense counsel then reported back that the had contacted every witness named by the Defendant, but that said witnesses had stated that they had no

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[11] See Nelson v. State, 274 So. 2d 256 (Fla. 4DCA, 1973).

[12] The record reflects that defense counsel explained what an alibi is, and asked if there were witnesses who would testify under oath that defendant was "nowhere near that Burger King" on the night of the crimes. (R. 335). The Defendant responded: "Well ---," at which point defense counsel stated that any potential witnesses, "would have to take a chance on five years of perjury." Id. The trial court immediately pointed out that the issue was whether alibi witnesses existed, and that the defendant was, "not responsible for perjury." (R. 336).

[13] See Fla.R.Crim.P. 3.200, which requires that defendants "shall" provide the State with the "names and addresses" of any alibi witnesses at least 10 days prior to trial, or at such other time as directed by the trial court.

knowledge of the Defendant's whereabouts at or around the time of the instant crimes. (R. 349-50). There was no mention of any alibi witnesses during the subsequent trial; indeed, no alibi issue has been raised in the post-conviction proceedings, either. The State fails to see how investigation of a claim announced by the defendant at the last minute constitutes deficient conduct or caused prejudice to the defendant, as required by Strickland v. Washington, 466 U.S. 668 (1984).

Finally, the Appellant has faulted defense counsel for having "commented" on defendant's right to remain silent and not to testify during trial. Again, the record refutes this claim. The record citations relied upon by the Appellant reflect that during voir dire, defense counsel informed the potential jurors that the Defendant had a "Constitutional Right" not to testify. (R. 463). Defense counsel questioned the potential jurors as to whether they could follow the law, or whether they would "hold it against" the defendant, "if" he did not testify. (R. 463-65). In sum, defense counsel's statement was in accordance with the standard jury instructions which inform the jury that the defendant has the right not to testify, and he performed his voir dire duty of ascertaining whether the potential jurors could follow the law. The Appellant has not cited any case law which deems defense counsel's performance of his duty during voir dire to be deficient, and the State is not aware of any such authority. The instant claim is also without merit.

3. Failure To Present Voluntary Intoxication Defense.

Claim Is Insufficient and Without Merit

The Appellant contends that his trial counsel did not investigate and failed to use "plentiful and available evidence" of the defendant's voluntary intoxication at the time of the offense. Brief of Appellant at p. 18. Appellant has initially relied upon the pretrial Nelson inquiry, detailed in section 2 at pp. 22-3 herein (R. 326-351), for the preposition that counsel had not investigated. The Nelson inquiry, however, reflects that it had nothing to do with investigation of a voluntary intoxication defense. Rather, as set forth previously, the Defendant was insisting upon last minute alibi witnesses!

In any event, the State would note that the Appellant has never stated what the "plentiful and available evidence" of intoxication was. As conceded by the Appellant, defense counsel faced the "testimony of codefendants' stating that Mr. Cook was not drunk". Brief of Appellant at p. 19. According to the Appellant, however, this was "not sufficient evidence that the defense was not viable." Id. The State would note that in addition to the co-defendant's testimony, the Defendant himself had stated that, he had spent at least "an hour and an half or two hours," in the presence of the codefendants, waiting outside the Burger King for one of the victims to emerge. (R. 90). He had added that his intent was to "rob"; and that he shot at least one victim to keep her "quiet." (R. 90; 104). The Defendant's confession had not mentioned any use of alcohol or drugs. Moreover, the Defendant, during his

sworn testimony at the penalty phase, expressly stated that his "family, friends and relatives" did not know about his alleged alcohol or drug problems, because he had "lied" to them and hidden his problems from them. (R. 1095-96).[14] The only "plentiful" evidence of intoxication herein is the Defendant's self-serving statements at the penalty phase, that he had "shared" alcohol and cocaine with friends. (R. 1087, 1095). However, immediately after this statement, when asked whether he knew what he was doing at the time of the crimes, the Defendant responded: "To rob. To rob, that's about it" (R. 1088), thus establishing the specific intent necessary for the underlying felonies herein.

Defense counsel can not be deemed ineffective for failing to present a voluntary intoxication defense when the only evidence of intoxication was Defendant's self-serving statement as to consumption, which was not only contradicted by the codefendants, but also by all of his friends and family members, not to mention his own confession and admission of specific intent "to rob." See Lambrix v. State, 534 So. 2d 1151, 1153-4 (Fla. 1985), where summary denial of claim of ineffective assistance for failing to develop voluntary intoxication defense was upheld. Lambrix had proffered "testimony by several family members as to his long history of drinking. He also proffered that an expert in addictionology could

[14] The Defendant had also told Dr. Haber that he had hidden his alleged drug problems from "everybody." (R. 1076).

testify that he suffered from substance abuse disorder, and that "the amount of alcohol ingested by him on the night of the offense rendered him intoxicated to the extent that he was incapable of forming the specific intent necessary to a conviction of first degree murder. 534 So. 2d at 1153. This Court held:

> At the outset, it should be noted that a jury instruction on the defense of voluntary intoxication need not be given simply because there is evidence that the defendant consumed alcoholic beverages prior to the commission of the offense. *Jacob v. State*, 396 So. 2d 1113 (Fla.), *cert. denied*, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981). If the evidence shows the use of intoxicants but does not show intoxication, the instruction is not required. *Linehan v. State*, 476 So. 2d 1262 (Fla. 1985). As a consequence, we are unable to conclude with any certainty that the proffered evidence would have even been admissible in the guilt phase of Lambrix's trial. Lambrix's relatives could not testify concerning Lambrix's condition when the killings were committed. Moreover, Dr. Whitman's proffered testimony would not have established the defense of voluntary intoxication. Assuming, without deciding, that defense counsel can be faulted for not having sought the opinion of an addictionologist, in order for such an expert to testify that Lambrix was so chemically dependent that he could not have formed the specific intent to commit this crime, it would have been necessary for him to know how much Lambrix had drunk on the night of the offense. Yet, the record shows nothing more than the fact that Lambix had been drinking that evening. Finally, given the testimony of those who actually saw Lambrix on the night of the crime, we cannot say that there is a reasonable probability that the jury would not have found him guilty of first-degree murder even if it had received an instruction on voluntary intoxication.

See also, Breedlove v. Singletary, 595 So. 2d 8, 11 (Fla. 1992)(summary denial of ineffective assistance of counsel for failure to investigate an intoxication defense was upheld when, "[w]hile the record shows that Breedlove had a history of alcohol and drug abuse, it also shows a lack of available facts for which an intoxication defense

could be established."); Engle v. Dugger, 576 So. 2d 696, 700 (Fla. 1991) (summary denial of ineffective assistance for failure to raise voluntary intoxication was upheld where: "Engle says that counsel should have called mental health experts to explain the effects of alcohol and cocaine on the ability to form a specific intent. ... Engle's counsel was adopting the trial strategy of attempting to show that Engle was not involved in the killing. The existence of other theories of defense does not mean that counsel was ineffective"); Bertolotti v. State, 534 So. 2d 386, 387 (Fla. 1988) (Defendant's "self serving declaration" that he was "high" on quaalude, which was unsupported by independent testimony or evidence and was specifically contradicted at trial, did not warrant an intoxication instruction. Trial counsel deemed not deficient for failure to raise an intoxication defense in such circumstances, and the decision to present a "reasonable doubt" defense was reasonable). The instant claim of ineffectiveness is without merit in light of the record herein.

4. Failure To Investigate Forensic Evidence Claim Is Insufficient and Without Merit

Appellant asserts that trial counsel was ineffective because he did not conduct any "forensic" investigation. According to the Appellant, bullet trajectories indicated that decedent was not "kneeling," and a competent expert would have challenged the State's contention of an "'execution style' killing", which would have "exonerated" Defendant. Brief of Appellant at p. 20. The instant claim is devoid of merit. First, the defense counsel, on cross examination of the pathologist at trial, in fact

established that the downward bullet trajectories relied upon by the State, was possible, without any "kneeling" by the victims, due to their short heights. (R. 654-55). Second, the Appellant has ignored the fact that State's contentions with respect to the victim "kneeling", were based upon the Defendant's own pretrial confession:

> **DEFENDANT:** She [victim] tried to keep me there.
>
> **Q:** She was holding you?
>
> **DEFENDANT:** Right
>
> **Q:** Was she standing or on the floor?
>
> **DEFENDANT:** She had fell and was holding me -- start holding me.
>
> **Q:** Was she on her knees at that time?
>
> **DEFENDANT:** Yes
>
> **Q:** That was when you shot her?
>
> **A:** She like backed off as I got away and I was on my way out the door and then I shot. She was still kneeling, but she was facing me. She was up.

(R. 100). The Defendant added that he had shot the above victim to keep her "quiet". (R. 104).

Most importantly, however, the State fails to see how the Defendant would have been "exonerated" even if the victim was not "kneeling." The Defendant admitted to having waited outside for a period of 1 ½ to 2 hours, in order "to rob" the victims. (R. 90-92). Once he gained entry, at gun point, he demanded money. The

victims were not armed, and were both shot in the chest. Mrs. Betancourt also had a bruise over the center, top of the head, consistent with being struck with the handle of a gun or another hard, smooth object. (R. 626-9). The Defendant admitted shooting this victim to keep her "quiet." (R. 104). Thus, whether the victim was kneeling or not, had nothing to do with guilt of first degree murder. Likewise, kneeling by the victim had no bearing on the aggravating factors herein - conviction of a prior violent felony and burglary/pecuniary gain - either. As such, the claim of ineffective assistance is without merit, as no deficient conduct nor any prejudice has been demonstrated as required by Strickland v. Washington.

5. Ineffective Assistance During Jury Selection Claim Is Insufficient and Without Merit

The Appellant asserts that counsel was not familiar with State v. Neil, 457 So. 2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79 (1986); and State v. Slappy, 522 So. 2d 18 (Fla. 1988). The Appellant then states that trial counsel, during voir dire, "pointed out" to the court that two of the State's peremptory challenges were exercised on black jurors. Appellant then argues that trial counsel was ineffective for having failed to ask the prosecution for race-neutral reasons. The instant claim is insufficient and without merit.

First, other than State v. Neil, all of the other cases relied upon herein were decided after Defendant's August 1985 trial. Counsel can not be deemed deficient in failing to anticipate evolutionary refinements in the law which post-date trial. Nelms v. State, 596 So. 2d 441, 442 (Fla. 1992); Muhammad v. State, 426 So. 2d 533, 538 (Fla. 1982). Second, pursuant to State v. Neil, "[t]he initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other sides' use of peremptory challenges must make a timely objection and demonstrate on the record that . . . there is a strong likelihood that they [potential jurors] have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race." 457 So. 2d 486. The Appellant neither in the court below nor herein has ever stated, let alone

demonstrated, how the record would support a "strong likelihood" that the State's two peremptory challenges had been exercised solely because of race, as required in Neil.[15] The instant claim is thus insufficient.

More importantly, however, the State would also note that there is no demonstration that the outcome of the trial would "probably" have been different, as required in Strickland v. Washington. The prejudice prong of ineffective assistance analysis is based, not on the results of what a "mini proceeding" within the trial (such as a motion for mistrial or objections to peremptories) would have been. The question is whether the outcome of the trial itself, would have been different. See Pope v. State, 569 So. 2d 1241, 1244-45 (Fla. 1990) (The failure to object to per se harmful error and the fact that if counsel had objected, the defendant "would have been entitled to a new trial on direct appeal is not dispositive." In order to meet the prejudice prong of Strickland v. Washington, the defendant must show that the failure to object "actually compromised the defendant's right to a fair trial."); State v. Stirrup, 469 So. 2d 845, 848 (Fla. 3d DCA 1985) ("We reject the contention that the likelihood of a different outcome in a 'mini-proceeding' (e.g., motion for mistrial), other than a proceeding which makes an ultimate disposition, is what is contemplated

[15] The Neil requirement of a showing of "strong likelihood" was deleted in 1993, eight (8) years after the trial herein, in State v. Johans, 613 So. 2d 1319 (Fla. 1993). As noted previously, defense counsel can not be faulted for failing to anticipate post-trial changes of law. Nelms, supra; Muhammad, supra.

by the term 'proceeding' as used in *Strickland* and *Knight v. State*, 394 So. 2d 997 (Fla. 1981). Furthermore, the likelihood that on a timely objection and motion, the trial would have started anew, or that a ruling on a nondispositive motion, if timely made, would have been favorable, or that an objection to an improper question might have been sustained, is not sufficient to meet the test for prejudice outlined in *Strickland* because the court's consideration of such motions or objections is not a 'proceeding' as that term is used in *Strickland*. Examples of proceedings, as used in the context of the *Strickland* test for prejudice, are those which determine guilt . . . or which determine in an adversarial hearing what sentence is to be imposed. . . . Even if a successful motion for mistrial had been made, there is a reasonable probability that the outcome of a new trial would not have been any different in light of the overwhelming weight of the evidence."); Martinez v. State, 655 So. 2d 166, 168 (Fla. 3d DCA 1995) (Allegations that had counsel objected to the State's use of peremptory challenges he would have prevailed, do not meet the prejudice prong of Strickland which requires denial of "a fair trial."); Murray v. Groose, 106 F. 3d 812, 815 (8th Cir. 1997) (to prevail on claim that state's reasons for peremptory challenges were pretextual and that counsel was ineffective for failing to argue such pretexts, defendant had burden of alleging that outcome of trial would have been different had counsel so objected). In the instant case, the defense did not assert, let alone demonstrate, that the outcome of the trial would have probably been different.

Indeed, that is a burden which the Defendant clearly can not demonstrate. As the jurors who did try the case were all presumptively fair and unbiased jurors, there is no reason to believe that a jury with any different members - i.e., the ones whom defense counsel presumably wished to have returned to the jury - would have rendered any different verdict, or that the sentencing judge would ultimately have rendered a different sentence.[16] The instant claim of ineffectiveness is thus legally insufficient and without merit.

C. Ineffectiveness During Penalty Phase

1. Failure to Investigate Mental Health Mitigation Claim Is Without Merit

The Appellant asserts that defense counsel was ineffective because he failed to provide his mental health expert with available background information as to his "substance abuse history," and thus the expert could not support her findings during the penalty phase. Brief of Appellant at pp. 24-25. The instant claim is without merit.

At the outset, it should be noted that prior to the penalty phase of the original trial, defense counsel requested and received assistance from two (2) mental health experts. One was a psychiatrist, Dr. Neally, at the Jackson Memorial Hospital mental

[16] The contentions with respect to jurors who allegedly did not understand English were fully raised and rejected on appeal. This Court expressly held that the denial of cause challenges to said jurors was not error. Cook v. State, 542 So. 2d at 967-70. The issue is thus procedurally barred, and raising a claim of ineffective assistance where the claim has been previously denied on the merits does not lift the bar. Valle v. State, 705 So. 2d 1331, 1335 (Fla. 1997)

health unit, and the other was a clinical psychologist, Dr. Merry Haber. (R. Supp. 13). Of the two experts, the psychologist, Dr. Haber, presented testimony before the jury at the penalty phase. (R. 1068-81).[17] Dr. Haber had examined the Defendant on the morning prior to the commencement of the penalty phase; the Defendant had discussed his life, his history and the night of the crimes. (R. 1069-70). Haber had also listened to the background testimony from the Defendant's family, friends and employer, presented at the penalty phase. (R. 1075-76). Dr. Haber testified that the Defendant had told her that he had ingested drugs and alcohol on the night of the crimes, as he had during the three years preceding the instant crimes. (R. 1070). Dr. Haber testified that the Defendant had a "long term" drug/alcohol problem, but that he had told her that he had "hid" this problem from his "family" and "everybody." (R. 1072, 1075-76). Dr. Haber testified that the ingestion of drugs and alcohol "influenced" and "impaired" the Defendant's judgment on the night of the crimes. (R. 1072-73). He had acted impulsively, in a nervous state, and was doing things he would not ordinarily do. Id. On cross-examination, Dr. Haber acknowledged that the Defendant's detailed recitation of the crimes reflected that, "he knew what he was doing. He was aware of it but I don't know that he realized the extent of it, the danger of it; his judgment was off." (R. 1075).

[17] The reports of both doctors were attached to the presentence investigation report in this cause. The psychiatrist's report reflects that Defendant did not suffer from any major mental illness.

The State would note that the Defendant himself, at the penalty phase, testified that his "family," "friends," and "relations" did not know about his alleged history of drug or alcohol problems. (R. 1095-96). Moreover, his family members, friends and employer corroborated the fact of their unawareness of such problems at the penalty phase. (R. 624-27; 1031-32; 1037-38; 1044-45; 1048-49; 1061-62; 1065-66).

In light of the factual record herein, the State respectfully submits that the Appellant's claim of ineffectiveness based on failure to investigate and produce background information on Defendant's substance abuse to the mental health experts, in order to corroborate their findings, is without merit. See Correll v. Dugger, 558 So. 2d 422, 426 at n. 3 (Fla. 1990) (claim of ineffective assistance of counsel for failure to investigate and present evidence of abuse was summarily denied, where the defendant and his family had testified to a normal background at the penalty phase of trial. This Court found no deficient performance, as, "[i]f this account [of abuse] is true, trial counsel can not be faulted for failing to know it, given the fact that diametrically opposite testimony was given by Correll and his mother.") (emphasis added)). See also Strickland v. Washington, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, . . . on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. . . . And, when a defendant has

given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.") (emphasis added). In the instant case, the Defendant unequivocably testified under oath that he had hidden his alleged drug/alcohol problems from everyone. Counsel thus can not be faulted for failing to investigate and produce corroborating background information which the Defendant and his family had testified did not exist at the time of the penalty phase.

2. Failure to Investigate Family Background Claim Is Without Merit

The Appellant contends that defense counsel was ineffective for failing to investigate and present Defendant's family background. This claim, too, is refuted by the record. The record reflects that defense counsel presented family background testimony through neighbors and friends who had known the Defendant from his childhood days until immediately prior to the crimes;[18] the Defendant's brother, the Defendant's sister and the Defendant's brother-in-law. For example, Mrs. Strong, a neighbor "down the road," testified that the Defendant and her own children "would always be out in the yard playing," and that the defendant would always come into her house and talk with her. (R. 1024-30). She had known the Defendant for more than 10 years; he was "like my own son." (R. 1024-25). The Defendant was a

[18] The Defendant's mother had passed away shortly prior to trial and could not testify. (R. 1033-34).

"pleasant child," who was happy and loved his family. He was a follower and had never been known to do anything violent. Id. Mrs. Strong also knew the Defendant's mother, who was a "very religious lady . . . . She lived for the Lord." (R. 1026). Mrs. Strong testified that she "prayed" with the Defendant's mother; she was "like a mother to me." Id. She stated that the Defendant's family was "wonderful," and had never had any problems with the Defendant. Id. The Defendant had never been a discipline problem, either at home or at school. (R. 1026-27). Finally, she testified that the Defendant had talked with her about getting married and had invited her to his wedding. Id. Another friend of the family testified that the Defendant's mother was a "missionary." (R. 1052). Yet another friend testified that she had been "a very close friend" of Defendant's mother, when the Defendant was growing up. (R. 1061-63). She knew the Defendant as a member of the junior choir, and "visited their home a lot." Id. She added, "David has grown up around me and David, I've never known David to have a violent attitude towards anything." Id. This witness also knew the Defendant's wife and his two children. She testified that the Defendant was a loving husband and good father. Id.

Likewise, the Defendant's brother testified that when they were growing up they were like "regular brothers." (R. 1032-33). Their mother was a "religious person," who "never" had any problems with the Defendant. He added that the Defendant's ability to learn "was kind of maybe slow at some times;" "below average

at some times." Id. The Defendant's sister then testified that the Defendant was the last of nine children in the family. He was "normal like anybody else." (R. 1065). There were, "No more [problems] than normal, like any other kid." Id. Finally, the Defendant's brother-in-law testified that they would play football together as kids; the Defendant "just wanted to have fun." (R. 1036-37). The Defendant was childlike, even in adulthood. Id. The Defendant was never violent and was a follower. Id. This witness testified that the Defendant was worth being "rehabilitated" because he hd children who needed their father and he was going to have "an opportunity, hopefully, to grow, hopefully to share [his experiences] with someone else." (R. 1040). Finally, the Defendant himself testified that he had been married for two years and had two children. (R. 1086). He confirmed that his mother was "an Evangelist and a missionary." (R. 1089). He stated that his mother was, "always merciful and beautiful towards every one . . . . it was a beautiful life." Id. "The way she was living was a beautiful way." (R. 1090-91). The Defendant testified that he would maintain a relationship with his children if incarcerated, and help and teach them about his own experiences. Id.[19]

[19] The Defendant's employer, the manager of"Church's Chicken," referred to by Appellant, also testified. This witness stated that the Defendant had been his employee for the preceding year and a half. (R. 1048). The Defendant was a "good employee," who was "good" with customers and other employees. (R. 1049). He had "no problems," was not violent, and got along "very well" with other employees. Id. A co-worker also testified that the Defendant was "warm hearted" and "respectful." (R. 1044). This witness stated that she had been to neighborhood places where

As seen above, defense counsel did in fact investigate and present family background testimony. Failure to present cumulative family testimony does not establish ineffectiveness. Valle, 705 So. 2d at 1334-35. To the extent that the Appellant is arguing that evidence of childhood "abuse" should have been presented, the State again submits that no deficient performance has been demonstrated as required in Strickland v. Washington. As previously noted, "[i]f this account [of childhood abuse] is true, trial counsel can not be faulted for failing to know it, given the fact that diametrically opposite testimony was given by [defendant] and his mother." Correll v. Dugger, 558 So. 2d at 426, n. 3. Likewise, in so far as the Appellant has relied upon drug and alcohol abuse, the State relies upon its prior arguments in section 3 of this claim, at pp. 24-28. Again, defense counsel can not be faulted for failing to present independent "background" evidence of such substance abuse, when the Defendant unequivocably testified that he had "hidden" such problems from "everyone," and the family and friends testified that they did not know of any such problems. Correll v. Dugger, 558 So. 2d at 426, n. 3; Strickland v. Washington, 466 U.S. at 691.

3. Failure to Object to Unconstitutional Instructions

The Appellant contends that trial counsel did not know the law and failed to

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people ingested "dope" and alcohol, but had "never seen [Defendant] there." (R. 1045).

object to vague jury instructions. The Appellant has not detailed in this section what jury instructions he is referring to. The State would note, however, that the instant claim has also been raised, in more detail, in issue VIII herein. The State thus relies upon its argument in issue VIII, at pp. 61-66, herein. As noted in said argument, the complained of jury instructions had been upheld by this Court at the time of trial, and defense counsel thus can not be deemed ineffective for having failed to object. Downs v. State, 24 Fla. L. Weekly at S234.

D. Ineffectiveness at Resentencing

The Appellant contends that his counsel at resentencing was ineffective because no new jury was impanelled, no additional witnesses were presented at resentencing, and the trial judge, ore tenus, reimposed the sentence of death after hearing argument by both counsel. Brief of Appellant at p. 35. The Appellant also argues that counsel should have objected and requested a mistrial based upon Grossman v. State, 525 So. 2d 833 (Fla. 1988), because the trial judge did not enter his written resentencing order until two months later. Brief of Appellant, at p. 36. The Appellant's contentions are without merit.

First, as noted by the Appellant, this Court, on direct appeal, remanded this case to the trial court for resentencing, after having invalidated two of the aggravating factors (avoid arrest and HAC). Cook v. State, 542 So. 2d at 971. This Court specifically stated: "We cannot be certain that the 'reasoned judgment' of the trial

court would have been the same had only two aggravating circumstances been considered. . . .There will be no need to empanel a new sentencing jury." Id.

In such a remand, the Defendant is not entitled to a new jury, and is not entitled to present new evidence or additional witnesses. In Davis v. State, 648 So.2 d 107, 108 (Fla. 1994), this Court, on direct appeal, employed virtually identical language as that in the instant case in remanding to the trial court: "Because we have eliminated two aggravating circumstances, we can not say beyond a reasonable doubt that the judge would have imposed the death sentence without consideration of those aggravating factors. . . ." On remand, the trial court did not allow new evidence and refused to empanel a new jury. This Court held that the correct procedure had been followed. 648 So. 2d at 109-110. First, this Court held that despite arguments of vague, unconstitutional instructions at the original penalty phase, the defendant was not entitled to a new jury sentencing because the original jury instructions had not been objected to and any error was procedurally barred.[20] This Court also held: "We also reject Davis's contention that he was entitled to present new evidence on remand." Id. See also Crump v. State, 654 So.2 d 545, 548 (Fla. 1995) (Where this

[20] The jury instructions in Davis, as in the instant case, had been upheld at the time of trial by this Court. Thus there can be no arguments of ineffective assistance of trial counsel for failure to object to the instructions. See Downs v. State, 24 Fla. L. Weekly S231, 234 (Fla. May 20, 1999) (counsel may not be deemed ineffective under Strickland for failing to object to jury instructions where this Court previously upheld validity of those instructions.); Harvey v. Dugger, 656 So.2 d 1235, 1238 (Fla. 1995).

Court invalidated the CCP aggravating factor and remanded for resentencing, the Defendant was not entitled to a new jury, despite claims of jury instructional error with respect to CCP, as there were no objections at trial to said instructions and the claim had been procedurally barred. This Court held that the Defendant was not entitled to present new evidence either. Furthermore, the trial court also did not err in "failing to hold an allocution hearing" prior to resentencing.). Resentencing counsel herein thus can not be held ineffective for failure to request a new jury or present additional evidence, as he was not entitled to do so.

In the instant case, the Defendant received that which he was entitled to under the law. Upon remand, the trial judge allowed defense counsel the opportunity to file a sentencing memorandum. (R2. 32-39). The trial judge then convened a hearing where the Defendant and his resentencing counsel were both present. (R2. 3-21). Both the Defendant and the State were allowed to and, in fact, argued their respective positions. Id. The trial judge, in the presence of the Defendant, having reiterated his prior findings with respect to mitigation, and having addressed defense counsel's contentions as to proportionality, then announced that "the sentence [death] will remain the same." (R2. 21-22). The judge thereafter entered his written resentencing order, which readopted his prior findings with respect to the remaining aggravating factors and the mitigation presented at the original trial. (R2. Supp. 1-4). The Appellant, however, also argues that resentencing counsel was ineffective for not

"requesting a mistrial," based on Grossman v. State, 525 So.2 d 833, 841 (Fla. 1988), where this Court announced the "procedural rule" that written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement. The record herein reflects that the written order which readopted the prior findings was entered at a subsequent hearing approximately two months after the judge, in the presence of the Defendant, had announced that, "the sentence will remain the same." (R2. 25-28). At this hearing, the judge stated that he had not realized previously that another written order was necessary but that he had then prepared such an order and had given copies of same to both counsel for the Defendant and the State. (R2. 26). The judge noted that the Defendant was not present, and that:

> COURT: I am attempting, through this method, if Mr. Fleck [Defendant's resentencing counsel] will waive his client's presence, to simply get this down without running the State of Florida the expense of returning him here for essentially what would be what he received at the second sentencing hearing when he was here.

(R2. 26-27). Resentencing counsel then stated:

> MR. FLECK: Mr. Cook was present in open court when your Honor orally pronounced the sentence. I see no reason for him to be here for what is essentially the ministerial duty of reducing this Court's oral sentence to writing, and that being the case, I expressly waive Mr. Cook's presence here today for this purpose.

(R2. 27). The judge then noted that a notice of appeal had been filed. (R2. 28). Defense counsel stated that he had filed the notice "prematurely," thinking that the

judge had already "entered" the written order. Id. Defense counsel stated that he would file a new notice of appeal. Id. Nothing else was discussed at said hearing.

Appellant's contention that resentencing counsel should have requested a "mistrial" based upon Grossman at this juncture, is insufficient, as there is no demonstration that the outcome of the resentencing would "probably" have been different, as required in Strickland v. Washington. As previously noted at pp. 32-34, herein, the prejudice prong of an ineffectiveness analysis is based, not on the results of what a "mini proceeding" within the trial, such as a motion for mistrial, would have been. The question is whether the outcome of the resentencing itself would have been different. Pope v. State, 569 So. 2d at 1244-45 (the failure to object to "per se harmful error" and the fact that if counsel had objected, the defendant "would have been entitled to a new trial on direct appeal is not dispositive." In order to meet the prejudice prong of Strickland v. Washington, the Defendant must show that the failure to object "actually compromised the defendant's right to a fair trial."); State v. Stirrup, 469 So. 2d at 848 ("We reject the contention that the likelihood of a different outcome in a 'mini proceeding' (e.g., motion for mistrial), other than a proceeding which makes an ultimate disposition, is what is contemplated by the term 'proceeding' as used in Strickland. . . .").

Moreover, the State would note that the "procedural rule" in Grossman did not result in any reversal of sentence until three (3) years after the 1990 resentencing in

the instant case, and even then only in cases involving the initial imposition of a death sentence. See Hernandez v. State, 621 So. 2d 1353 (Fla. 1993). In Hernandez, this Court having for the first time reversed a death sentence pursuant to Grossman, expressly held: "The purpose of this contemporaneity requirement is to implement the intent of the Legislature - to ensure that written reasons are not merely an after-the-fact rationalization for a hasty, visceral, or mistakenly reasoned initial decision imposing death." 621 So. 2d at 1357 (emphasis added).[21] The instant case does not involve an "initial" decision imposing death. Rather, it was a reweighing where no new evidence was presented, the trial judge had readopted his prior findings with respect to the remaining aggravators and mitigation - with which this Court had not previously found any fault, and where the trial judge had announced, in the presence of the Defendant, that: "the sentence will remain the same." Indeed, to date, the Grossman rationale has not been applied to a resentencing such as that in the instant case. As previously noted, defense counsel can not be deemed deficient for failing to anticipate changes in the law, especially those which are not even in existence to

[21] To the extent that the Appellant, in other issues in his brief, has relied upon Van Royal v. State, 497 So.2 d 625 (Fla. 1986), such reliance is unwarranted. Van Royal, too, involved an "initial" imposition of a death sentence. More importantly, the decision in Van Royal was based upon the fact that the initial sentencing order was not entered until after the record on appeal had been certified. This Court has held that where even the initial sentencing order is entered prior to the certification of the record, there is no basis for reversal. Grossman, 525 So.2 d at 841. In the instant case, the written resentencing order was entered in March, 1990; the record on appeal was certified on May 30, 1990.

date. See Nelms v. State, supra; Muhammad v. State, supra. Finally, the State would also note that the "legislative intent" which was relied upon by this Court in forming the "procedural rule" in Grossman and the reversal in Hernandez, no longer exists. The legislature has made it clear that it did not intend the lack of contemporaneity of written findings to be a basis for reversal of a death sentence. See Fla. Stat. 921.141(3) (1996) (contemporaneous written findings with oral pronouncement of death is not required; the trial judge has a 30 day period to enter the written findings). The instant claim is thus without merit.

E. The Ake Claim Is Insufficient And Without Merit

The Appellant contends that his rights pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985), were violated. This contention is without merit. The Court in Ake held that a defendant must have "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 85 (emphasis added). As previously noted at pp. 34-37 herein, the Defendant was evaluated and assisted by a psychiatrist, Dr. Neally, and a clinical psychologist, Dr. Haber. There are no assertions of incompetence with respect to Dr. Neally. As to Dr. Haber, the Appellant faults her for failure to speak with "family members or friends" and to review background records. This allegedly resulted in failure to discover drug and alcohol addiction and intoxication at the time of the offense. Brief of Appellant at pp. 37-38. The State hereby relies upon the factual recitation and arguments presented in Part C. 1 herein at pp. 34-37. As noted, the Defendant had unequivocably testified and told Dr. Haber that he had hidden his alleged alcohol/drug problems from "everyone," including his friends and family members. Moreover, Dr. Haber had been present when the Defendant's friends and family testified, and corroborated their lack of awareness as to any drug/alcohol problems. She nonetheless subsequently testified as to the Defendant's drug/alcohol problems, and opined that the Defendant's judgment was impaired. The instant claim is thus without merit. See Correll v. Dugger, 428 So. 2d at 426 (claim of lack of

adequate assistance of mental health expert summarily rejected, despite new psychiatric opinions which "seriously question" Defendant's mental capacity, where the defense attorney had specifically alerted the trial expert to Defendant's prior drug and alcohol use, and the expert had "explored" this area with the Defendant); Engle v. Dugger, 576 So. 2d at 702 (claim of incompetent mental health evaluation rejected where the original examining experts were aware of defendant's prior alcohol and drug use).

F. Brady Violation Claim is Insufficient AndWithout Merit

The Appellant contends that the State withheld "material and exculpatory" evidence, because it did not disclose an "undated letter" by codefendant Nairn "to his trial court and counsel offering further assistance in exchange for personal favors," in violation of Brady v. Maryland, 473 U.S. 667 (1963). Brief of Appellant at p. 40. The State would first note that the factual premise of this claim was first presented at the 1996 motion for rehearing, without any elaboration as to why it had not been presented in the initial motion to vacate and supplement thereto. (SPCR. 62-63). In accordance with the arguments presented at pp. 16-18 herein, the State submits that this claim was untimely and thus procedurally barred.

Moreover, the claim is facially insufficient and without merit. As conceded by the Appellant, Nairn was a defense witness, not a state witness. (R. 853-65). Second, the Appellant concedes that the offer of assistance was not to the State. Moreover,

the Appellant has never stated what "further assistance" was offered by Nairn, nor that the offer was ever accepted. The Appellant has thus failed to establish that the State possessed such evidence, let alone suppressed it. Furthermore, in light of the Defendant's own confession to the police; his confession to his friend, Ervin; and, the testimony of the other co-defendant, Harrison, presented at trial, there is no demonstration of materiality - that is a reasonable probability that the outcome of trial would have been different. See, Melendez v. State, 718 So. 2d 746, 748 (Fla. 1998) (quoting Heywood v. State, 575 So.2 d 170, 172 (Fla. 1991) (In order to establish a Brady violation, a defendant must establish: "(1) that the Government possessed evidence favorable to the defendant . . .; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different."). In sum, the instant claim is procedurally barred and insufficient.

III. THE CLAIMS OF JUDICIAL BIAS ARE PROCEDURALLY BARRED AND WITHOUT MERIT.

A. Claims of Judicial Bias During Trial and Resentencing are Procedurally Barred and Without Merit

The Appellant claims that the trial judge was biased during: a) the trial; b) the

resentencing; and, c) post-conviction proceedings. The claims of judicial bias during the trial and resentencing, although based entirely upon the record of the direct appeals herein, were first raised in the 1996 Motion for Rehearing. In accordance with the arguments and authority set forth in pp. 16-18 herein, the State respectfully submits that these claims were improperly raised and untimely. Moreover, said claims are based entirely on the record of the direct appeals and are thus also procedurally barred because they should have been raised on direct appeal. Lambrix v. State, 559 So. 2d 1137, 1138 (Fla. 1990) (post-conviction claims based on information contained in the original record are barred, as such claims must be raised on direct appeal); Kelley v. State, 569 So. 2d 754, 756 (Fla. 1990) (same); see also, Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1989) (post-conviction allegations of judicial bias which involved facts and circumstances known at the close of trial could have been addressed on direct appeal and were not cognizable under Rule 3.850).[22]

These claims are also entirely devoid of merit. The Appellant first claims that the trial judge was biased as reflected in his questioning of jurors to determine whether they understood English. The claim of jurors' difficulty with language was raised on direct appeal and addressed exhaustively by this Court, which quoted the

[22] No issue with respect to any allegation of ineffective assistance of appellate counsel can be raised in these proceedings, as such claims should be contained in a petition for habeas corpus which has to date not been filed by the Appellant. Downs v. State, 24 Fla. L. Weekly at S234, n. 5.

trial judge's questioning of the jurors at length. Cook v. State, 542 So. 2d at 966-70. The questioning does not reflect any bias. Moreover, one of the purposes of voir dire is to ascertain the jurors' qualifications. To this end, Fla.R.Crim.P. 3.300(b) expressly authorizes the trial judge to "examine" prospective jurors individually or collectively. The State fails to see how the time honored practice of questioning the jurors to ensure qualification constitutes judicial bias. The Appellant's reliance upon Chastine v. Broom, 629 So. 2d 293, 294 (Fla. 4th DCA 1993), is unwarranted, as that case involved a judge who was "passing" notes to the prosecutor with "tips" on how to minimize the defense testimony. The court deemed the "concern over the trial judge's advice to the prosecution on trial strategy" to be an indication that she may not be fair and impartial. Id. Chastine bears no resemblance to the instant case.

The Appellant then states that the "record is replete with instances in which the court abused its discretion," without identifying a single such instance. (Brief of Appellant at pp. 42-43). The Appellant then concludes that the "pattern" of bias extended to resentencing where the judge "attempted to salvage his prior finding of death based on a plethora of improper nonstatutory aggravating factors." Id. Again, this Court on direct appeal of the resentencing considered and rejected the claim that the judge had considered non-statutory aggravating factors. Cook v. State, 581 So. 2d at 142. Raising the claim with a different argument based on judicial bias is improper at this juncture. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). The

Appellant also argues, that it was "evident from the Court's comments," during a recorded hearing in the presence of defense counsel, that the judge had "ex parte" communications with the State, and relied on the State to prepare his resentencing findings. The judge had stated: "I have since then been persuaded that another order is necessary. To that end I have prepared one and have given copies to Mr. Waxman and to Mr. Cook's attorney." (Supp. R2. 26) (Brief of Appellant at p. 43).[23] The State respectfully submits that such a statement does not reflect "ex parte" contact with any party; the judge's own research and prior pronouncements were likely the more "persuasive" factor. Moreover, the quoted statement affirmatively reflects that it was the trial judge, not the prosecutor, who prepared the written resentencing order.[24] Allegations regarding ex parte communications must be set forth with specificity. Nassetta v. Kaplan, 557 So. 2d 919, 921 (Fla. 4th DCA 1990); Barwick v. State, 660 So. 2d 685, 692 (Fla. 1995) (". . . we find that the conclusory allegation . . . was not sufficient to allege that such an ex parte contact occurred."). In sum, the claims of

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[23] At the sentencing hearing when the judge had pronounced sentence, in the presence of the Defendant and his counsel, the judge had asked the prosecutor to prepare a written order from the "text" of his findings. (R2. 22-23). There was no objection and any claim of impropriety has been waived in this regard. See Nibert v. State, 508 So. 2d 1, 3-4 (Fla. 1987).

[24] As noted in Claim II, herein, at resentencing, in accordance with this Court's mandate, no new evidence had been presented, and the judge had readopted his prior findings of aggravation and mitigation in the written resentencing order. The Appellant's allegations as to "per se" reversible error in the timing of the written resentencing order have also been addressed in Claim II and relied upon herein.

judicial bias in the trial and resentencing are untimely, procedurally barred as they should have been raised on direct appeal, and without merit.

B. Judicial Bias During Postconviction Proceedings

The Defendant filed a motion to disqualify the trial judge, after the latter's entry of the order denying post-conviction relief. (PCR. 297-308). The Appellant claims that the judge should have recused himself, because his "bias and prejudice" towards Cook's counsel, "who had never even appeared before him in this case or any other case," was so severe that it resulted in the summary denial of the Rule 3.850 motion. Brief of Appellant at p. 48. The instant claim is without merit as the judge's adverse rulings, based upon record pleadings and arguments, are not a ground for disqualification. Barwick v. State, 660 So. 2d at 692 (the rule providing for disqualification of a judge is not intended as a vehicle to oust the judge because of disagreements with the judge's rulings); Hardwick v. Dugger, 648 So. 2d 100, 103 (Fla. 1994) ; Provenzano v. State, 616 So. 2d 428, 432 (Fla. 1993); Fischer v. Knuck, 497 So. 2d 240, 242 (Fla. 1986); Nateman v. Greenbaum, 582 So. 2d 643, 644 (Fla. 3d DCA 1991), rev. denied, 591 So. 2d 183 (Fla. 1991).

The Appellant's reliance upon Town Center of Islamorada v. Overby, 592 So. 2d 774 (Fla. 3d DCA 1992), Lemendola v. Grossman, 434 So. 2d 960 (Fla. 3d DCA 1983), and Hayslip v. Douglas, 400 So. 2d 553 (Fla. 4th DCA 1981), is unwarranted. All of said cases involved an "extra judicial" history of conflict. In Town Center, the

attorney, at a local bar luncheon, had announced that he intended to file an unrelated lawsuit against the judge. During the lawsuit at issue in Town Center, the judge had informed counsel that he "did not consider threat of a lawsuit to be friendly and the remark might warrant disciplinary measures by the Florida Bar." 592 So. 2d at 775. The appellate court thus held that, "In view of the extra judicial dispute between the judge and counsel," the litigant could reasonably conclude he would not receive a fair trial. Likewise, Lemendola v. Grossman involved "extra judicial conduct," which was derogatory to the attorney, coupled with the judge's statements that he would "deal with" the attorney for having "gone over" the judge's head. 439 So. 2d at 691. Similarly, Hayslip involved a "history of prior conflict," coupled with the judge's statement that he would like the attorney to withdraw, without any basis in the litigation at issue. 400 So. 2d at 554.

In the instant case, the judge's findings in the written order, that the public records claim was a "sham . . . to delay resolution," and, reference to counsel's failure to appear as a "waiver of the right to argue the merits, if not openly contemptuous," was based upon and wholly supported by the record herein. The circumstances of the Huff hearing and the public records claim have been detailed in claim I, and relied upon herein. As noted in said arguments, the record reflects that the State Attorney's Office, prior to the initial motion for postconviction relief in 1993, produced copies of not only its own records, but those of other Dade County agencies connected with

it to the Defendant. (PCR. 260; 325-27). The State Attorney represented that documents had not been withheld. Id. The Defendant had conceded, in 1993, that he had received the records through the State Attorney's Office, but was objecting on the grounds that the Dade County agencies should have "directly" produced said records. (PCR. 203). The motion to compel, which was solely directed to Dade County agencies, was filed three years later, in 1996. (PCR. 251-52). The Defendant never scheduled any hearing on this motion. As to other agencies outside of Dade County complained of herein, the Defendant had the remedy of pursuing the procedures set forth in Fla.Stat. 119, from 1993, continuously through the time of the November 22, 1996 Huff hearing. Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1993). However, there was never any effort to pursue such remedies. Instead, at the November 22, 1996 Huff hearing, a substitute attorney, who was totally unfamiliar with the instant case, appeared before the court. (PCR. 323). The State Attorney's representation with respect to its production of records was not disputed. Instead, the substitute attorney stated that she intended to file an amended motion to compel by November 30, 1996. (PCR. 324-5). No such motion was or has ever been filed.[25] The trial judge's finding of delay was thus entirely supported by the record.

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[25] The State recognizes that on November 21, 1996, this Court tolled the Fla.R.Crim.P. 3.852(f)(2). However, the tolling ended on March 3, 1997. As noted previously, the Notice of Appeal herein was filed on August 21, 1998, with no amended motion to compel ever having been filed.

Likewise, the judge's finding with respect to the lead attorney's "waiver" of argument on the merits, "if not openly contemptuous" conduct, was also supported by the record. As noted in Argument I at pp. 9-11 herein, the Notice of Hearing, the defense pleadings, and the State's pleadings which expressly referred to Huff v. State, made it abundantly clear that the November 22, 1996 hearing was to be a Huff hearing. Yet, a substitute attorney for the Appellant appeared and expressly stated that she had not even read the motion for post-conviction relief. (PCR. 323). The sole reason given for the substitution of counsel was that the lead attorney was opening an office in Tampa. Id. The trial judge's finding of waiver of oral argument on the merits was thus proper and in accordance with Lopez v. Singletary, 634 So. 2d at 1058, n. 12. The State recognizes that Appellant has sought to label the Huff hearing as a routine "status conference," where it is customary for lead counsel not to appear. However, the Appellant has relied upon a non-existent quote from the judge's order to justify his characterization. See Brief of Appellant at pp. 47-48 and n. 10. The trial judge's order appears at PCR. 292 and makes no reference to any "status conference" as claimed by the Appellant. In sum, adverse rulings by the court, based upon the record of litigation before it, are legally insufficient for disqualification. Barwick, supra; Francis v. Knuck, supra.

IV. THE PUBLIC RECORDS ISSUES IS WITHOUT MERIT AND WAIVED.

The Appellant claims that the lower court erroneously failed to hear his motion to compel, and he is entitled to yet another such motion and amendment of his pleadings. As noted in claim I, at pp. 11-14, and claim III.B, at pp. 54-56, the instant claim is without merit and has been waived. The State relies upon the factual recitation and argument presented in claims I and III.

V. THE CLAIM OF ACCESS TO TRIAL COUNSEL FILES IS WITHOUT MERIT.

The Appellant argues that his trial counsel's files should be turned over to him. The Appellant concedes that trial counsel has stated that his files had been stored in the Homestead area and were destroyed by Hurricane Andrew in 1992. The State submits that it cannot provide documents in the hands of private individuals. Lopez v. Singletary, 634 So. 2d at 1058, n. 11. Moreover, there is "no abuse of discretion in the trial court's failure to order the production of records when there is no demonstration that the records exist." Mills v. State, 684 So. 2d at 806.

VI. THE CLAIM OF IMPROPER ARGUMENT WAS PROPERLY FOUND TO BE PROCEDURALLY BARRED.

The Appellant contends that the prosecutor made improper comments during the closing arguments in the guilt and penalty phases of trial. The Appellant adds that to the extent that the penalty phase arguments were not objected to, his trial counsel

was ineffective. The trial court found the substantive claim of improper comments to be procedurally barred. The State would note that the claim of ineffectiveness herein was first raised in the 1996 Motion for Rehearing. The State thus respectfully submits that this aspect of the claim is untimely and procedurally barred, in accordance with the argument and law presented in claim II.B.1. at pp. 16-18 herein.

In any event, the claim is also procedurally barred, "as a matter of law", because it could and should have been raised on direct appeal. Robinson v. State, 707 So. 2d 688, 697-98 (Fla. 1998):

> Robinson next argues that trial court erroneously ruled that claims ...XIII (FN.17) and XIV (FN.18) were procedurally barred because he was improperly attempting "to relitigate substantive matters under the guise of ineffective assistance." We find no merit in this claim ... as a matter of law, we find that claims ... XIII and XIV below are procedurally barred because they could have been raised on direct appeal...
>
> FN.17. "Mr. Robinson was denied effective assistance of counsel because Pearl failed to object to numerous improper arguments by the prosecutor in closing, and failed to request a mistrial because of improper arguments, ..."
>
> FN.18. "The prosecutor's improper closing arguments at penalty phase rendered Mr. Robinson's death sentence unreliable, and Mr. Robinson was denied effective assistance of counsel at penalty phase by Pearl's failure to object thereto, ..."

The lower court thus properly rejected the alleged errors with respect to improprieties in arguments, as procedurally barred. Said alleged errors could have been raised on direct appeal if they constituted fundamental error. Robinson, supra; See also Atkins v. Dugger, 541 So. 2d 1165, 1166 n.1 (Fla. 1989).

VII. CLAIM OF INCOMPLETE RECORD ON DIRECT APPEAL IS PROCEDURALLY BARRED.

The Appellant asserts that his appellate counsel was rendered ineffective, as the record of the "entire sentencing hearing was missing on direct appeal." The court below properly rejected this claim. "Claims of ineffective assistance of appellate counsel are not cognizable in a rule 3.850 motion for post conviction relief, see *Groover v. Singletary,* 656 So. 2d 424 (Fla. 1995); *Chandler v. Dugger* 634 So. 2d 1066, 1068 (Fla. 1994), and are more appropriately raised in petitions for habeas corpus." Downs v. State, 24 Fla.L.Weekly at S234, n. 5. Moreover, the issue of the adequacy of the record could and should have been raised on direct appeal. Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323 (Fla. 1994)(claim of lack of transcription of charge conferences held to be procedurally barred as it could and should have been raised on direct appeal).

In any event, the instant claim is also without merit. The sentencing hearing before the judge and jury was in fact transcribed and part of the record on appeal. The only missing transcript is that of a hearing where the trial court entered its original written sentencing order. On direct appeal, Appellate counsel requested and this Court relinquished jurisdiction to the trial court for a reconstruction of said hearing. (Supp. R. 1). After a hearing before the trial judge, with the prosecutor, appellate and trial counsel all present, the parties reconstructed the record, and

entered into a written stipulation of this reconstruction. (Supp.R. 3-11;2). The record on direct appeal was supplemented to include both the transcript of the reconstruction hearing and the stipulation of the parties. Id. This procedure was in accordance with Fla.R.App.P. 9.300(f)(1). See also Draper v. Washington, 372 U.S. 487, 495 (1963)("Alternative methods of reporting trial proceedings are permissible if they place before the appellant court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides,... might all be adequate substitutes, equally as good as a transcript.").

VIII. THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT TO STANDARD JURY INSTRUCTIONS IS WITHOUT MERIT.

The Appellant contends that trial counsel was ineffective for having failed to object to various penalty phase jury instructions. The lower court's summary denial of said claim was proper. Downs v. State, 24 Fla.L.Weekly at S234-5, n.5 and 6; Byrd v. State, 597 So. 2d 252, 256 (Fla. 1992).

A. Majority Vote Instruction

The Appellant first claims that the penalty phase jury instructions gave "the erroneous impression that they couldn't return a valid sentencing verdict if they were tied six to six." Appellant's brief at p.59. The record herein refutes this claim and reflects the following instruction:

> If a majority of the jury determines that David Cook should be sentenced to death, your advisory sentence on Count one should be will be a majority of the jury by a vote of --put in the number-- advise and recommend to the Court that it impose the death penalty on David Cook.
>
> On the other hand, insofar as Count one is concerned, if by six or more votes the jury decides that David Cook should not be sentenced to death, your advisory sentence will be, the jury advises and recommends to the court that it impose a sentence of life imprisonment upon David Cook without possibility of parole for 25 years.
>
> ....
>
> When seven or more of you are in agreement as to what sentence should be recommended to the court, that form of recommendation shall be signed by the foreman and returned to the court.
>
> ....
>
> Okay. Let me amend my last sentence, please. When six or more are in agreement as to what sentence should be recommended to the court, then you shall return to the court with the verdict signed.

(R. 1153-55) (emphasis added). The above stated instructions have been expressly upheld by the court, and deemed to be a correct statement of the law. Byrd v. State, 597 So. 2d at 256 ("there was no erroneous jury instruction" where the jury was specifically informed that it could return a life recommendation by "six or more votes."). Trial counsel cannot be deemed ineffective for failing to object to correct instruction. Downs, 24 Fla.L.Weekly at S234; Harvey v. Dugger, 656 So. 2d at 1258.

B. Burden Shifting.

The Appellant claims that the standard jury instructions, the State and the judge shifted the burden of proving mitigating circumstances to him. The lower court held this claim to be procedurally barred, as it should have been raised on direct appeal,

in accordance with this Court's well-established precedents. See, Smith v. Dugger, 565 So. 2d 1293, 1294 at n.2 (Fla. 1990); Buenoano v. Dugger, 559 So. 2d 1116, 1118 (Fla. 1989); Clark v. Dugger, 559 So. 2d 192, 193 (Fla. 1990); Correll v. Dugger, 558 So. 2d 422, 426 at n.6 (Fla. 1990).

Moreover, this claim has repeatedly been rejected on the merits by this Court. See, Johnson v. State, 660 So. wd at 647; Robinson v. State, 547 So. 2d 108, 113 at n.6 (Fla. 1991). The defendant's conclusory allegations of ineffective assistance of trial counsel in this appeal are thus without merit. Harvey v. Dugger, 656 So. 2d at 1258 (trial counsel's failure to object to valid standard jury instructions does not constitute ineffectiveness. Downs, 24 Fla.L.Weekly at S234 (same).

C. Caldwell Error

The Appellant contends that the jury was improperly informed that its role was "advisory," in violation of Caldwell v. Mississippi, 472 U.S. 320 (1955), and that counsel was ineffective for failing to object. The trial court properly found the underlying claim to be procedurally barred as it could and should have been raised on direct appeal, (PCR. 293), in accordance with this Court's well established precedents. See, Buenoano v. Dugger, 559 So. 2d at 1118, n.2; Clark, 559 So. 2d at 193; Correll, 558 So. 2d at 421, n.6. Furthermore, couching a procedurally barred claim under the guise of ineffectiveness does not lift the bar. Valle, 705 So. 2d at 1336, n.6; Buenoano 559 So. 2d at 1118, n.2. In any event, an instruction which

informs the jury that their recommendation is "advisory" does not improperly minimize jury's role, and has been deemed to be a correct statement of Florida law. Combs v. State, 525 So. 2d 853, 855-58 (Fla. 1988). Failure to object to correct statements of the law which have been upheld by this Court is not deficient performance. Downs, supra; Harvey, supra.

D. Doubling Of Aggravating Circumstances.

The Appellant contends that the jury received instructions on both the burglary and financial gain aggravators. The Appellant has noted that the trial judge merged these aggravators, but claims that trial counsel was ineffective for failing to object or request a limiting instruction. This argument has been rejected by this Court in Downs v. State, 24 Fla.L.Weekly at S234, n.5, where the claim of improper instructions and doubling of aggravators was found to be procedurally barred, as it could and should have been raised on direct appeal. This Court has also rejected a claim of ineffectiveness in this regard:

> Downs' corresponding argument in issue (6) that counsel rendered ineffective assistance of counsel is likewise without merit because counsel was not deficient in failing to object or request a limiting instruction, See, Suarez v. State, 481 So. 2d 1201 (Fla. 1985)(finding no error in instructing jury on multiple aggravators so long as judge does not improperly double aggravators in sentencing order, and Downs has not demonstrated any prejudice according to the standards set forth in Strickland v. Washington, because the trial court merged these factors in its sentencing order.
>
> Id.

E. Automatic Aggravating Factor

The Appellant claims error in the trial judge's use of the felony-murder aggravator, on the grounds that it creates an automatic aggravator and renders death a possible penalty even in the absence of premeditation. The lower court properly found this issue to be procedurally barred, as it should have been raised on direct appeal. (SPCR. 285-86). See, Lopez v. Singletary, 634 So. 2d at 1056.

Moreover, this Court and the federal courts have repeatedly rejected this contention. Lowenfield v. Phelps, 480 U.S. 231 (1988); Stewart v. State, 588 So. 2d 972 (Fla. 1991); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995). As such, Appellant's conclusory allegations of ineffective assistance of counsel are also without merit. Lopez v. Singletary, supra; Harvey v. Dugger, supra; Downs, supra.

F. Jury Instructional Error As To HAC and Avoid Arrest Aggravators.

The Appellant contends that the jury instruction on the HAC and avoid arrest aggravators were unconstitutionally vague. The trial court properly found this claim to be procedurally barred in accordance with Ferguson v. Singletary, 632 So. 2d 53, 56 (Fla. 1993) (PCR. 293). There were no objections to these jury instructions by trial counsel, nor was any jury instructional error raised on appeal. The lower court thus properly found the instant claim to be procedurally barred, as the jury instructions were not challenged at the penalty phase or on appeal thereof. See also, Downs v. State, 24 Fla. L.Weekly at S234 (Fla. May 20, 1999); Harvey v. Dugger,

656 So. 2d at 1258; Bush v. State, 682 So. 2d 85, 88 (Fla. 1996); Crump v. State, 654 So. 2d 545, 548 (Fla. 1995); James v. State, 615 So. 2d 668, 669 (Fla. 1993).

The Appellant's claim of ineffective assistance of trial counsel is also without merit, as the failure to object to standard jury instructions previously upheld by this Court does not constitute deficient conduct under the standards set forth in Strickland v. Washington. Harvey v. Dugger, 656 So. 2d at 1258 (counsel may not be deemed ineffective under Strickland for failing to object to jury instructions where this Court previously upheld validity of those instructions); Mendyk, 592 So. 2d at 1080 ("When jury instructions are proper, the failure to object does not constitute a serious and substantial deficiency that is reasonably below the standard of competent counsel."); Downs, supra.

IX. CLAIM OF CONSIDERATION OF NON STATUTORY AGGRAVATING CIRCUMSTANCES IS PROCEDURALLY BARRED.

The Appellant claims that the trial judge considered inapplicable aggravators. The lower court properly found the instant claim to be procedurally barred, as it could have, should have, and was to a great extent raised on direct appeal. (PCR.294). On direct appeal of the resentencing the court noted:

> Included in this claim is Cook's assertion that the judge improperly considered aggravating factors found by this Court to be inapplicable in Cook's prior appeal. *See Cook,* 542 So. 2d at 970 (Onelia's murder was not heinous, atrocious or cruel and was not committed to eliminate a witness). We reject the claim that the judge considered the inapplicable

> aggravating factors. The written sentencing order clearly states that the judge did not find these factors and, therefore, gave them no weight when imposing the death sentence. We have reviewed the judge's statement concerning the witness-elimination factor at the oral sentencing, but do not interpret it to say that he considered this inapplicable factor when sentencing Cook.

Cook v. State, 581 So. 2d at 143. Post conviction proceedings are not a second appeal, and issues raised on direct appeal are procedurally barred. Swafford v. Dugger, 569 So. 2d 1264, 1267 (Fla. 1990). Francis v. Bartow, 581 So. 2d 583, 584 (Fla. 1991). With regard to additional arguments presented in support of the instant claim, the State would note that "it is not appropriate to use a different argument to relitigate the same issue." Medina v. State, 573 So. 2d 293, 295 (Fla. 1990); Cherry v. State, 659 So. 2d 1069 (Fla. 1995)(defendant could not relitigate in post-conviction motion, issue which was considered and rejected on direct appeal, even though defendant recharacterized the issue; Atkins v. Dugger, 541 So. 2d 1166, n.1. (claim of non-statutory aggravation in sentencing procedurally barred as it was either raised or should have been raised on direct appeal); See also, Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1988)("when a judge merely sees a victim impact statement contained in a presentence investigation report, but does not consider the statement for purposes of sentencing, no error has been committed.").

X. REFUSAL TO FIND AND WEIGH NON-STATUTORY MITIGATION.

The Appellant has raised the same claim previously raised on direct appeal, with respect to mitigating factors. This Court rejected the claim as follows.

> Cook next claims that the trial judge's written sentencing order fails to comport with the requirements of law because the judge did not adequately discuss the evidence Cook offered in mitigation. In the resentencing order the trial judge specifically adopted the discussion of mitigating evidence contained in his original sentencing order. In that order the judge discussed the reasons why each statutory mitigating factor listed in section 921.141(6), Florida Statutes (1989), did or did not apply in this case. As to nonstatutory mitigating factors, the judge noted in the resentencing order that
>
> > [d]efense counsel argues numerous purported non-statutory mitigating factors in a written submission, however, the Court does not believe that they exist, or those that do exist have so little weight when compared to the two aggravating factors, so as to have no weight at all.
>
> He concluded "that insufficient mitigating circumstances, either statutory or non-statutory exist, as demonstrated by any testimony or facts, ... to outweigh the aggravating circumstances."
>
> Cook most heavily relies on evidence of his substance abuse. Dr. Haber, a clinical psychiatrist, testified that Cook told her that he had been using drugs and alcohol for three years and that he had taken substantial quantities of both on the night of the killings. She expressed the opinion that as a consequence his judgment was impaired. However, family members denied knowledge of any substance abuse on the part of Cook. We believe the judge sufficiently addressed the subject of substance abuse in rejecting the statutory mental mitigating circumstances;...
>
> ....
>
> There was also testimony describing Cook as nonviolent and a follower, that he had undergone religious conversion in jail, and that he was a good worker and family man. Because the court's sentencing order does not specifically address any of these non-statutory mitigating

> circumstances, it does not fully comply with this Court's recent pronouncement in *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990)(footnote omitted):
>
> > When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature.
> >
> > However, particularly in view of the double murder involved in this case, we are convinced beyond a reasonable doubt that the judge still would have imposed the sentence of death even if the sentencing order had contained findings that each of these nonstatutory mitigating circumstances had been proven.

Cook v. State, 581 So. 2d at 143-144. As noted previously, post conviction proceedings are not a second appeal, and issues raised on direct appeal are procedurally barred. Swafford v. Dugger, 569 So. 2d at 1267; Francis v. Barton, 581 So. 2d at 584.

XI. THE CLAIM AS TO PECUNIARY GAIN FACTOR IS PROCEDURALLY BARRED.

The Appellant contends that the pecuniary gain factor was not supported by the evidence, that the judge and jury erroneously relied upon the aggravator, and that the "language of this aggravator is vague and overbroad." The instant claim could and should have been raised on direct appeal. Indeed, this Court, on direct appeal expressly noted: "There is ample evidence to support the other aggravating factors: that the killings were committed in the course of a robbery and burglary, that they

were committed for pecuniary gain." Cook v. State, 542 So. 2d at 970. Post conviction proceedings are not a means of obtaining a second appeal. Francis v. Barton, 581 So. 2d at 584. Moreover, the Appellant has not cited any authority for the proposition that said aggravator is vague. Finally, the State would note that the application of this aggravator is proper where the, "entire episode ... was motivated by the prospect of pecuniary gain," even though defendant did not actually take any money. Mendoza v. State, 700 So. 2d 670, 678 (Fla. 1997).

XII. ABSENCE FROM CRITICAL STAGE CLAIM IS PROCEDURALLY BARRED.

The Appellant contends that Defendant was prejudiced by his absence when the trial judge provided written copies of the sentencing order, at resentencing, to counsel. (PCR.59-63).[26] The instant claim could and should have been raised on direct appeal, and is procedurally barred. Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla. 1994)(claim of absence during critical stages should have been raised on direct appeal and was procedurally barred in post-conviction proceedings). Moreover, no prejudice has been demonstrated, where the entry of the written order was a

[26] It is undisputed that the Defendant was present at the resentencing hearing when counsel submitted arguments and the judge pronounced sentence. No new evidence was presented at resentencing. Moreover, as previously noted the resentencing order readopted the prior findings of aggravating factors, (minus those invalidated by this Court on direct appeal) and the mitigation presented at trial. To the extent necessary, the State also relies upon its recitation of facts and argument in Claim II.D, herein.

ministerial act which did not require any consultation or assistance from the Defendant. See also, Coney v. State, 653 So. 2d 1009, 1016, n.5 (Fla. 1995).

XIII. CLAIM WITH RESPECT TO JURY INTERVIEWS IS PROCEDURALLY BARRED.

The Appellant contends that the rule prohibiting defense counsel from interviewing jurors, to explore misconduct, is invalid. The instant claim was first raised in the 1996 Motion for Rehearing in the court below. (SPCR. 118-22). The State, in reliance upon its previous argument and law presented at pp. 16-18 herein, respectfully submits that this claim was improper and time waived. Moreover, the claim should have been raised on direct appeal, and is procedurally barred on this ground as well. See, e.g. Shere v. State, 579 So. 2d 86, 94-95 (Fla. 1991); State v. Hamilton, 574 So. 2d 124, 130 (Fla. 1991).

XIV. CLAIM OF JUROR MISCONDUCT IS BARRED.

Based solely upon the record on direct appeal, the Appellant contends that the jury failed to adhere to their instruction, because they deliberated for 20 minutes during the penalty phase. Again, this claim was first raised in the 1996 Motion for Rehearing in the court below. (SPCR. 122-3). The State in reliance upon its prior argument and authority set forth in pp.16-18 herein, respectfully submits that the instant claim was improper and time barred. Moreover, the claim is also procedurally barred, as it could and should have been raised on direct appeal. Lambrix v. State,

559 So. 2d 1137, 1138 (Fla. 1990)(claims based on information contained in the original record of case must be raised on direct appeal).

XV. THE GRUESOME PHOTOGRAPH CLAIM IS BARRED.

The Appellant contends that the trial court erred in allowing the State to present gruesome photographs during trial. Once again the instant claim, while entirely based upon the 1986 record on direct appeal, was first raised in the 1996 Motion for Rehearing in the court below. (SPCR. 130). In accordance with the arguments and authority submitted herein at pp. 16-18, the State submits that said claim is improper and untimely. In any event, the issue is also otherwise procedurally barred, as it is a direct appeal claim which could and should have been raised previously. Engle v. Dugger, 576 So. 2d at 702-3.

XVI. THE CLAIM OF INNOCENCE OF DEATH PENALTY IS BARRED.

The Appellant claims that he is innocent of the death penalty pursuant to Sawyer v. Whitley, 505 U.S. 333 (1992), as no aggravating factor is applicable to him. Again, the instant claim was first raised in the 1996 Motion for Rehearing in the court below. (SPCR. 132-33). In accordance with the arguments and authority submitted herein at pp. 16-18, the State submits that said claim is improper and untimely. Moreover, the claim is also otherwise procedurally barred as it could and should have been raised on direct appeal. Finally, the instant claim is without merit

in light of the applicability of the merged felony-murder/pecuniary gain aggravator, in addition to the prior violent felony factor, which contrary to Appellant's assertions, has never been challenged. Sawyer, after all, requires a lack of eligibility for any aggravating factors.

XVII. THE CLAIM OF CUMULATIVE ERROR IS WITHOUT MERIT.

The Appellant contends that cumulative effect of errors denied him a fair trial. The instant claim is without merit, where all specified errors have been considered and rejected. Downs, 24 Fla. L. Weekly S234, n. 5.

XVIII. THE CLAIM OF RIGHT TO SILENCE IS PROCEDURALLY BARRED.

The Appellant contends that his confession was not voluntary, and was obtained by use of threats, promises, etc., in violation of his Miranda rights. The instant claim was again first raised in the 1996 Motion for Rehearing. (SPCR. 114-117). In accordance with the arguments and authority submitted herein at pp. 16-18, the State submits that said claim is improper and untimely. In any event, the claim is also otherwise procedurally barred. The voluntariness of the confession was raised and resolved in a pretrial suppression hearing during which the Defendant and the officers involved all testified. (R. 253-319). This claim thus could and should have been raised on direct appeal. Byrd v. State, 597 So. 2d 252, 254 (Fla. 1992); Atkins v. Dugger, 541 So. 2d 1166, n.1.

XIX. THE CLAIM OF UNCONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY STATUTE IS PROCEDURALLY BARRED.

The Appellant claims that Florida's death penalty statute is unconstitutional on its face and as applied, and that electrocution is cruel and unusual punishment. The instant claim was again first raised in the 1996 Motion for Rehearing. (PCR. 34-36). As such, the State submits that it was improper and untimely, in accordance with the arguments and authority presented at pp. 16-18 herein. The claim is also otherwise procedurally barred, as it could and should have been raised on direct appeal, in addition to being without merit. See, e.g., Thompson v. State, 619 So. 2d 261, 267 (Fla. 1993); Jones v. Butterworth, 691 So.2 d 481 (Fla. 1997); Jones v. State, 701 So. 2d 76 (Fla. 1997).

XX. THE HARMLESS ERROR ANALYSIS ARGUMENT IS BARRED.

The Appellant has questioned the propriety of this Court's remand for resentencing before the judge and without a jury. The lower court found this claim procedurally barred. (PCR. 293). Summary denial of "matters that were addressed or could have been addressed on direct appeal and are attacks and criticisms of the decision of the Florida Supreme Court" is proper in Rule 3.850 proceedings. Eutzy v. State, 536 So. 2d 1014, 1015 (Fla. 1988). Moreover, the claim is without merit. Davis v. State, 648 So. 2d at 109-10 (Claim of error in remand for resentencing

without a jury, after this Court had invalidated two aggravators, based on contentions that erroneous penalty phase jury instructions impermissibly tainted the original jury recommendation, properly rejected where the instructional errors had not been preserved during trial).

CONCLUSION

Based on the foregoing, the State respectfully submits that the trial court's denial of post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by prepaid first class mail to **BRET B. STRAND,** Assistant CCRC, and **NEAL DUPREE**, Assistant CCRC, 101 NE 3rd Avenue, Suite 400, Ft. Lauderdale, FL 33301, on this 1st day of October,

1999.

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FARIBA N. KOMEILY