

IN THE SUPREME COURT OF FLORIDA

LARRY EUGENE MANN,

Appellant,

vs.

CASE NO. 94,885

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

CORRECTED ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

The facts of this case are recited in this Court's initial opinion, Mann v. State, 420 So. 2d 578, 580 (Fla. 1982):

On November 4, 1980 ten-year-old Elisa Nelson was abducted while bicycling to school after a dentist's appointment. Her bicycle was found later that day, and searchers found her body the following day. She died from a skull fracture and had been stabbed and cut several times.

The afternoon of the 4th Mann attempted to commit suicide. The police took him to a hospital where he stayed several days. On November 8th Mann's wife, while looking in his pickup truck for his eyeglasses, found a bloodstained note written by Elisa's mother explaining her daughter's tardiness because of the dentist appointment. The police obtained a search warrant to search Mann's truck and home and arrested him on the 10th.

In an Indictment returned on November 18, 1980, Mann was charged with the kidnaping and first degree premeditated murder of Elisa Nelson (DA-R. 6-7).¹ Mann pled not guilty and trial commenced on March 16, 1981, before the Honorable Philip A. Federico, Circuit Judge (DA-R. 1109-2466). After deliberations, the jury found Mann guilty as charged (DA-R. 354-355, 2343). Following the penalty phase of the trial, a jury recommended that the court impose a sentence of death (DA-R. 369, 2461). On March

¹The designation "DA-R." will be used to refer to the record in the direct appeal of Mann's convictions and sentences, Florida Supreme Court Case #60,569; "RS-R." will be used to refer to the record in the appeal from Mann's 1990 resentencing, Florida Supreme Court Case #75,952; and "PC-R." will be used to refer to the record in the instant postconviction appeal, Florida Supreme Court Case #94,885.

26, 1981, the judge followed the recommendation and imposed a sentence of death, finding four aggravating circumstances: prior violent felony conviction; murder committed during the course of a kidnaping; heinous, atrocious, or cruel; and cold, calculated, and premeditated (DA-R. 387-388, 1101-1102).

This Court affirmed the judgments, but remanded for resentencing due to the trial court's finding that Mann's prior conviction had involved violence, the trial court's failure to make its findings on mitigation with the requisite clarity, and the trial court's finding that the murder was committed in a cold, calculated and premeditated manner. Mann v. State, 420 So. 2d 578 (Fla. 1982). On remand, the court again imposed a death sentence, and this Court affirmed. Mann v. State, 453 So. 2d 784 (Fla. 1984). Mann sought certiorari review of that opinion in the United States Supreme Court, alleging that the admission of further evidence when the case was remanded to the trial judge for resentencing violated double jeopardy and due process principles. The Supreme Court denied his petition. Mann v. Florida, 469 U.S. 1181 (1985). Thereafter, on January 7, 1986, the Governor signed a death warrant, setting Mann's execution for February 4, 1986.

Mann filed a motion for postconviction relief which was summarily denied by the trial court, and Mann appealed. At the same time it considered the appeal, this Court entertained a petition for writ of habeas corpus, which alleged numerous

instances of ineffective assistance of appellate counsel, and a motion for stay of execution. In an opinion rendered February 1, 1986, this Court denied all relief. Mann v. State, 482 So. 2d 1360 (Fla. 1986).

Mann then filed a petition for writ of habeas corpus in federal court, alleging that the state court postconviction proceedings were constitutionally inadequate, along with eighteen other claims previously raised in state court. The federal district court denied relief, but in the appeal from that ruling, the Eleventh Circuit Court of Appeals ordered that a new sentencing proceeding before a jury was constitutionally mandated under Caldwell v. Mississippi, 472 U.S. 320 (1985). Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), cert. denied, 489 U.S. 1071 (1989).

Mann's resentencing was held January 29 - February 6, 1990, before the Honorable James R. Case, Circuit Judge. At that hearing, the State presented nine witnesses, including the victim of Mann's prior Mississippi burglary conviction. Mann's attorneys presented eleven witnesses, including the doctor that treated Mann following his suicide attempt; Mann's mother, two brothers, cousin, and wife; Mann's former attorney and legal assistant; Dr. Joyce Carbonell, a clinical psychologist; a nun; and a minister. In rebuttal, the State presented a psychologist; a neighbor that had coffee with Mann shortly before this offense; and a friend of Mann's wife.

Mann's mother and brothers testified about his early years, including his father's illness and death when Mann was sixteen years old, which they noted as the onset of Mann's troubles with alcohol (RS-R. Vol. 11/1403-09; Vol. 12/1449-57, 1469-73). His mother discussed Mann's Air Force service, his wives and children, his artistic talent, religion, and remorse (RS-R. Vol. 11/1411-22). His brothers told the jury that they both had lost a kidney to cancer, and that Mann had volunteered to donate one of his to help them (RS-R. Vol. 12/1461-62, 1475). Each of these witnesses professed their love for Mann and urged the jury to spare his life (RS-R. Vol. 11/1422; Vol. 12/1463, 1479).

Mann's wife, Donna, related the history of her relationship with Mann and noted the frustrations he suffered after they moved to Florida (RS-R. Vol. 13/1530-37). She stated that Mann had been depressed and emotional about his job situation and his first wife's refusal to let him see their son (RS-R. Vol. 13/1535-37). Donna had noticed that Mann had started drinking a lot more and, on the day of Elisa's murder, Mann had come home about four or five in the morning, so intoxicated that he could not find the bathroom (RS-R. Vol. 13/1539-40). However, by the time she left for work about 8:45, Mann was in good spirits and drinking coffee with a neighbor (RS-R. Vol. 13/1541, 1560).

All of Mann's family members, his previous attorney and legal assistant, the nun (Sister Loretta Pastva) and the minister (Dr.

Melvin Biggs) testified about the remarkable changes in Mann's life over the ten years that he had been in prison for Elisa's murder (RS-R. Vol. 11/1420-22; Vol. 12/1478, 1484-90; Vol. 13/1546-56, 1572, 1575-77, 1585-90; Vol. 14/1715-23, 1734-38; Vol. 15/1793-1804). Much of this testimony focused on Mann's strong relationships with his family, his deep religious beliefs and sincere remorse, and his willingness to accept responsibility for having committed this crime (RS-R. Vol. 11/1420-22; Vol. 12/1478, 1484-90; Vol. 13/1546-56, 1572, 1575-77, 1585-90; Vol. 14/1722-23, 1730, 1734-35; Vol. 15/1793-1804). Sister Pastva related that Mann had written her at least 399 lengthy letters, in addition to cards and paintings that he sent (RS-R. Vol. 14/1715-17). Mann had studied Greek, and used it to read the Bible (RS-R. Vol. 14/1722). He was involved in theological studies and wanted to start a prison ministry (RS-R. Vol. 12/1485-90; Vol. 13/1576-77, 1585-90; Vol. 14/1722-23; Vol. 15/1793-1804).

Dr. Joyce Carbonell is a clinical psychologist who taught graduate neuropsychology, supervised a crisis management unit at a community clinic, and had taught and practiced forensic psychology at the time of Mann's resentencing (RS-R. Vol. 14/1604-08). She met with Mann on two occasions in the fall of 1989 for a total of nearly ten hours (RS-R. Vol. 14/1610-12). In addition, Carbonell reviewed a great deal of material provided by Mann's prior collateral attorneys, including his medical records, school

records, trial transcript, and family affidavits, and she spoke with Mann's wife (RS-R. Vol. 14/1612-13). She conducted a complete evaluation, and included a neuropsychological examination because she was aware of Mann's serious history of drug and alcohol abuse and head injuries (RS-R. Vol. 14/1614). However, her neuropsychological testing did not reveal any brain damage; although she looked for brain damage, she did not see anything significant (RS-R. Vol. 14/1614). She conducted many tests in order to get as accurate a picture as possible (RS-R. Vol. 14/1615).

Carbonell extensively discussed Mann's history of substance abuse (RS-R. Vol. 14/1619-23). She noted that his elevated scales on various tests showed strong characteristics of a very serious abuser (RS-R. Vol. 14/1619-20). She determined that Mann began drinking when he was twelve or thirteen years old, and that at the time of this offense, he typically drank over a case of beer a day (RS-R. Vol. 14/1623). In addition, his scores indicated some social difficulties, family discord, low self-esteem, and heightened sensitivity and paranoia (RS-R. Vol. 14/1619-21). Carbonell also discussed Mann's ability to form close, lasting relationships, and how his father's illness and death had a lasting effect on Mann (RS-R. Vol. 14/1626-28). She explained why Mann would not meet the criteria for antisocial personality disorder or passive-aggressive personality disorder (RS-R. Vol. 14/1625-26).

Dr. Carbonell testified that Mann was a pedophile, describing a pedophile as someone who has sexual urges toward children, who may or may not act on the urges, and feels badly about having the urges (RS-R. Vol. 14/1624). She stated that Mann found the urges repulsive, and noted that although the pedophilia and Mann's drinking caused Elisa's kidnaping, Mann did not act on his pedophilia since there was no evidence that Elisa had been sexually assaulted (RS-R. Vol. 14/1690-91). In comparing her test results with those obtained by Dr. Merin in 1981, Carbonell noted that Mann continued to have psychological problems in 1989, but that his problems were less severe than they had been years earlier (RS-R. Vol. 14/1698). She opined that both statutory mental mitigating factors applied in this case (RS-R. Vol. 14/1628-31).

Mann's second jury also recommended the imposition of a death sentence for Elisa Nelson's murder, by a vote of 9 - 3, and the trial court again sentenced Mann to death (RS-R. Vol. 5/511; Vol. 16/2088, 2139-2140). This Court affirmed. Mann v. State, 603 So. 2d 1141 (Fla. 1992). Mann sought certiorari review of that opinion, claiming that his right to be free from self-incrimination was violated by testimony presented during the resentencing. The United States Supreme Court denied the petition for writ of certiorari. Mann v. Florida, 506 U.S. 1085 (1993).

The motion for postconviction relief giving rise to the instant appeal was filed in July, 1997 (PC-R. Supp. Vol. 2/36-106).

The State filed a response and a Huff hearing was held on February 26, 1998 (PC-R. Supp. Vol. 3). On December 1, 1998, an evidentiary hearing was conducted with regard to Mann's claim of ineffective assistance of counsel at his resentencing. Mann presented an attorney, Brian Donerly, and the State presented one of Mann's resentencing attorneys, David Parry (PC-R. Vol. 4/597, 660).

Donerly was offered as an expert in capital litigation to provide his opinion as to what reasonably competent counsel would have done at Mann's resentencing in 1990. According to Donerly, the decision to present evidence of Mann's pedophilia in mitigation brought counsel's representation below the community standard and there was a reasonable probability that this deficient performance affected Mann's sentence (PC-R. Vol. 4/605-606). Donerly based his opinion on the fact that, about 1990, there was a growing consensus within the death penalty community that most evidence of mental illness, while intellectually mitigating, would have a negative impact on the jury (PC-R. Vol. 4/606). Because many jurors would view mental health testimony as aggravating rather than mitigating, it became common to drop such testimony unless there was strong evidence such as long term schizophrenia or objective brain damage (PC-R. Vol. 4/607-608). Donerly acknowledged that the defense in this case had primarily focused on other mitigation, particularly Mann's moral and intellectual development since 1981, and opined that that aspect of the defense case had been well done (PC-R. Vol.

4/606-607).

Donerly admitted that the question of whether or not to pursue mental mitigation is a tactical decision; that Parry was not simply following blindly what someone else had developed without strategy, but that Parry chose a tactic within the death penalty community at that time (PC-R. Vol. 4/620-621). He noted it was the type of decision about which attorneys and judges may disagree all the time (PC-R. Vol. 4/623). Donerly's disagreement with the strategy to present the pedophilia relied on the assumption that the jury would not have become aware of the sexual motive for the crime if this information had not been presented (PC-R. Vol. 4/632-633). However, Donerly also agreed that the jury was likely to reach this conclusion even without this evidence, particularly since the sexual motive was revealed in letters to Sister Pastva that were admitted into evidence, and that the alternative was the jury thinking this was simply done out of meanness (PC-R. Vol. 4/636-637).

David Parry was an experienced capital defense attorney when he and co-counsel Nora McClure handled Mann's resentencing (PC-R. Vol. 4/660-666). This was his sixth capital trial; by the time of the evidentiary hearing, he had tried twenty-five capital cases, of which thirteen or fourteen had gone through penalty phase -- only Mann's case had resulted in a death sentence (PC-R. Vol. 4/662, 664). He received Mann's file from the Office of the Capital

Collateral Representative; he spoke extensively with Mann's original trial attorneys, Susan Schaeffer and Pat Doherty; and he reviewed several boxes of material from the first trial and the prior Mississippi conviction (PC-R. Vol. 4/667). There was a great deal of background information available due to the prior trial and postconviction proceedings (PC-R. Vol. 4/668). Parry spoke to all of the witnesses and met with a number of family members and psychiatrists (PC-R. Vol. 4/667-669).

Parry and McClure discussed at length the advantages and disadvantages of presenting the mental mitigation available, including consideration of what evidence would or would not otherwise come before the jury (PC-R. Vol. 4/673). They were stuck with the diagnosis of pedophilia; this had not originated with Dr. Carbonell, but had been previously litigated and was known to both sides prior to the resentencing (PC-R. Vol. 4/672, 674). They also knew based on the prior examinations that Mann did not suffer from brain damage (PC-R. Vol. 4/674). However, Parry believes that it is important to offer the jury some explanation of why a horrible crime has occurred, and after checking out Dr. Carbonell's credentials and background and talking with a number of attorneys that had used her, they decided to present her as an expert witness (PC-R. Vol. 4/670-672, 675-677, 686).

Parry disagreed with Donerly's opinion that there would have been a consensus in 1990 against using Carbonell in this case;

according to Parry, this is the type of issue where there is likely to be a split of opinion among experienced capital lawyers (PC-R. Vol. 4/680). In addition, Carbonell provided the opportunity to present other mitigation, since she had tested Mann and determined him to be a very serious alcoholic, and she could discuss his remorse; they knew they were not putting Mann on the stand, and Carbonell was better than the lay witnesses available to testify about these matters (PC-R. Vol. 4/681-682).

Following the evidentiary hearing, the judge issued an order denying relief on the effective assistance of counsel claim (PC-R. Vol. 3/538-540). The judge found that the allegation that Parry and McClure had merely adopted the decisions of prior counsel without tactic or strategy had not been proven (PC-R. Vol. 3/539). The judge also found that the decision to present mental mitigation, including pedophilia, was "a well-thought out tactical and strategic decision made after much reflection and consultation with co-counsel and superiors" (PC-R. Vol. 3/539). The court below concluded that Parry and McClure "were exceedingly talented trial lawyers, with experience in capital case litigation, who performed very competently in their representation of Larry Mann;" and determined that neither deficient performance nor prejudice had been demonstrated by the testimony presented at the evidentiary hearing (PC-R. Vol. 3/539-540). This appeal follows.

SUMMARY OF THE ARGUMENT

I. The trial court properly rejected Mann's claim of ineffective assistance of counsel at his resentencing. As the court below found, no deficiency or prejudice was established with regard to counsels' decision to present mental mitigation at the resentencing. The court below applied the correct legal standard, and its factual findings are supported by the testimony from the evidentiary hearing.

II. The trial court's summary rejection of Mann's other claims of ineffective assistance of counsel was proper. These claims were refuted by the transcript of the resentencing and/or facially insufficient.

III. - VII. Mann's claims regarding prosecutorial misconduct, consideration of nonstatutory aggravating factors, the rejection of mitigation, the propriety of limits on post-trial juror interviews, and the facial constitutionality of the death penalty statute were properly summarily denied as procedurally barred.

VIII. The trial court properly summarily denied Mann's claim of inadequate mental health assistance, as it was refuted by the record and factually insufficient.

IX. Mann's claim of an alleged witness comment on silence was properly summarily denied as procedurally barred.

X. Mann's claim of cumulative error must fail since no individual or collective error has been shown.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING MANN'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOLLOWING AN EVIDENTIARY HEARING.

Mann initially challenges the trial court's ruling on his claim of ineffective assistance of counsel which was litigated at the evidentiary hearing below. However, a review of the record demonstrates clear support for the trial court's findings with regard to this issue, and the court's conclusion that Mann's attorneys were effective should not be disturbed on appeal.

In Strickland v. Washington, 466 U.S. 668, 689 (1984), the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second

prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695; Valle, 705 So. 2d at 1333; Rose, 675 So. 2d at 569.

Mann's claim of ineffectiveness and the testimony from the postconviction hearing establish only that his current counsel disagree with trial counsels' strategic decisions. This is not the standard to be considered. Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) ("Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"); Rose, 675 So. 2d at 570 (affirming denial of postconviction relief on ineffectiveness claim where claims "constitute claims of disagreement with trial counsel's choices as to strategy"); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (noting "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result"); Bryan v. Dugger, 641 So. 2d 61, 64 (Fla. 1994); State v. Bolender, 503 So. 2d 1247, 1250 (Fla.), cert. denied, 484 U.S. 873 (1987). In reviewing Mann's claims, this Court must be highly deferential to counsel:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proven unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, 466 U.S. at 689; see also, Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993) ("The fact that postconviction counsel would have handled an issue or examined a witness differently does not mean that the methods employed by trial counsel were inadequate or prejudicial"); Mills v. State, 603 So. 2d 482, 485 (Fla. 1992); Stano v. State, 520 So. 2d 278, 281, n. 5 (Fla. 1988) (noting fact that current counsel, through hindsight, would now do things differently is not the test for ineffectiveness).

One of Mann's trial attorneys testified at the evidentiary hearing. Attorney David Parry testified that he and co-counsel Nora McClure discussed extensively what evidence to present in mitigation (PC-R. Vol. 4/666, 671-73). Although he spent a lot of time talking to Mann's former attorneys, Pat Doherty and Susan Schaeffer, he did not just accept what had been done in the prior

penalty phase, but conducted his own investigation (PC-R. Vol. 4/667, 672-73). Similarly, he did not just accept Dr. Carbonell as the expert inherited from prior counsel, but reviewed her background and credentials and spoke with several attorneys that had been involved on cases with her; Carbonell came highly recommended (PC-R. Vol. 4/671). Parry felt that the first penalty phase had not been successful, so they needed to look for other ways to handle the case (PC-R. Vol. 4/673). The case was unique because they had Mann's conduct while on death row for ten years, which had not previously been available; this became the focus of the penalty phase (PC-R. Vol. 4/673, 689).

Parry and McClure weighed the pros and cons of presenting mental mitigation; they knew that, to do so, they must label Mann as a pedophile (PC-R. Vol. 4/673, 694). Parry stated that he was aware of the social stigma involved with pedophilia, but acknowledged that a certain stigma exists with all mental mitigation (PC-R. Vol. 4/694, 700). Parry felt strongly that jurors need to know why a crime occurred (PC-R. Vol. 4/670, 677, 686). Parry also felt that Carbonell was clearly the best witness available to discuss other mitigation, including Mann's family background, alcoholism, and remorse (PC-R. Vol. 4/681-82, 692).

Even Mann's postconviction legal expert, Brian Donerly, acknowledged that Parry was not proceeding without strategy or

blindly following what someone else had done (PC-R. Vol. 4/621). Rather, Parry made a tactical decision which Donerly disagreed with, noting that it was the type of decision that attorneys and judges disagree about all of the time (PC-R. Vol. 4/623). Donerly also agreed that Carbonell provided some beneficial testimony, and testified that, except for presenting Carbonell, the defense attorneys had done their job very well (PC-R. Vol. 4/607, 610, 641).

Thus, Mann's repeated assertions that his attorneys merely adopted the strategy employed by prior counsel are clearly refuted by the record. Both of Mann's witnesses at the evidentiary hearing denied that the prior strategy was simply adopted without consideration; Donerly and Parry both acknowledged that a reasonable investigation was undertaken and tactical decisions were discussed and evaluated. Mann has not identified any evidence presented below to establish otherwise.

In addition, the conclusion to present evidence of Mann's pedophilia was a strategic decision, not subject to being second-guessed in a postconviction proceeding. Strickland, 466 U.S. at 689; Rutherford, 727 So. 2d at 223; Rose, 675 So. 2d at 569. In Rutherford, a strategic decision against presenting evidence of mental mitigation was upheld as effective assistance. Because counsel had investigated mental mitigation and weighed the

consequences of presenting this evidence to the jury, Rutherford's claim of ineffectiveness was rejected. Rutherford dictates that an informed decision with regard to the presentation of mental mitigation will defeat an allegation that counsel was constitutionally deficient. And in Davis v. Singletary, 119 F.3d 1471, 1478 (11th Cir. 1997), cert. denied, 523 U.S. 1141 (1998), defense counsel's decision not to present evidence of mental mitigation in order to preclude the State's ability to establish that Davis was a pedophile was upheld as a reasonable trial tactic. Curiously, in Davis, the defense legal expert at postconviction testified that he would have presented the mental mitigation, notwithstanding the pedophilia rebuttal, but acknowledged that this was a strategic decision about which legal experts commonly disagreed. See also, Rivera v. Dugger, 717 So. 2d 477, 485 (Fla. 1998) (summary 3.850 denial remanded for evidentiary hearing on effectiveness of counsel where allegations included claim that counsel failed to present evidence of Rivera's pedophilic urges).

In Rose, trial counsel was faulted for not presenting guilt phase witnesses that claimed to have seen the victim alive after the time she was alleged to have been kidnaped by Rose. In affirming the denial of postconviction relief, this Court noted that defense counsel had testified that each of the witnesses had inherent problems:

In light of counsel's testimony at the hearing, it is apparent that counsel was aware of the witnesses in question and knowledgeable about the pros and cons of calling them as witnesses. Based upon this knowledge, counsel made an informed strategic decision not to call them. In light of the strong likelihood that the State could have successfully impeached each of these witnesses, it is apparent that there was a reasoned basis for counsel's decision. Hence, the trial court did not err in concluding that Rose failed to demonstrate that counsel's performance was deficient.

675 So. 2d at 570. This reasoning applies equally to decisions to present evidence, as in the instant case, and establishes the lack of merit in Mann's argument.

Mann also asserts that the decision to present the mental mitigation in this case was particularly unreasonable due to the availability of other mitigation which was allegedly undeveloped, such as Mann's history of substance abuse. This is clearly refuted by the record of the penalty phase as well as the testimony presented at the evidentiary hearing below. Several lay witnesses discussed Mann's serious problems with alcohol, and even expert Donerly was impressed by Carbonell's discussion of Mann's serious history of abuse (RS-R. Vol. 11/1411-22; Vol. 12/1450-57; Vol. 13/1535-37, 1540; Vol. 14/1614, 1619, 1623, 1630; PC-R. Vol. 4/610).

Similarly, Mann's current claim that counsel was deficient for failing to obtain an expert in neurosubstance abuse to look for

brain damage is refuted by the record. Carbonell expressly testified that she examined Mann for brain damage, due to his history of substance abuse and head injuries (RS-R. Vol. 14/1614). Mann has been examined by a number of mental health experts, none of whom has ever identified any indication of brain damage (RS-R. Vol. 14/1603, 1615, 1657, 1698; Vol. 15/1823; PC-R. Vol. 1/59-61, 68-69; Vol. 2/207, 344, 373; Vol. 4/670). Even today, Mann has failed to identify any expert to opine that he suffers from brain damage; certainly no such testimony was presented at the evidentiary hearing below.

None of the cases cited by Mann compel a contrary result. He characterizes Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995), cert. denied, 519 U.S. 910 (1996), as "a case similar to Mr. Mann's where psychological exams found no brain damage, but counsel had reason to know of possible brain damage and failed to investigate the issue further" (Appellant's Initial Brief, p. 22). The most striking difference between the instant case and Glenn is that in Glenn, by the time of postconviction proceedings, the defense had secured two experts that found that Glenn had suffered global brain damage prior to his birth due to a surgical operation that had been performed on Glenn's mother during her pregnancy. A neuropsychologist, Dr. Taney, testified that Glenn's neurological impairment affected his behavior. Glenn was nineteen years old at

the time of the crime, had been labeled mentally retarded in school, and was acting under his older brother's influence. His defense attorneys agreed to the wrong legal authority and obtained court-appointed experts that would furnish reports to the jury rather than getting confidential defense experts, and then the defense had no contact with the experts appointed, so the jury only heard that the offense was not the product of mental illness or brain damage. The attorneys had been found to have rendered deficient performance by the state and federal courts, but until the Sixth Circuit decision, no prejudice had been found. Clearly, Glenn is remarkably different than the instant case and offers no basis for relief for Mann. Compare also, Hall v. Washington, 106 F.3d 742 (7th Cir.) (apparently for no other reason than personal animosity between the defendant and counsel, counsel did not conduct any investigation into sentencing phase of capital trial; did not meet with defendant to discuss sentencing or return phone calls to potential witnesses that wanted to testify on defendant's behalf), cert. denied, 522 U.S. 907 (1997); Hendricks v. Calderone, 70 F.3d 1032 (9th Cir. 1995) (defense failed to investigate or present mitigation, relying solely on a plea for mercy, not because the presentation of mitigation would open the door to damaging rebuttal, but because a plea for mercy was the strategy pursued in the only other capital case in which counsel had participated),

cert. denied, 517 U.S. 111 (1996).

Even if Mann's resentencing attorneys could be deemed to have performed deficiently based on their decision to present evidence of his pedophilia, no possible prejudice could be demonstrated on the facts of this case. As both attorneys below noted, this case was highly aggravated; with or without the testimony of pedophilia, no reasonable argument of disproportionality could be made (PC-R. Vol. 4/609, 685). Mann snatched a ten-year-old girl off her bicycle on the way to school, took her into the woods, beat her, fractured her skull, and stabbed her repeatedly. He had a prior conviction for burglary based on a rape he committed in Mississippi, a conviction about which the victim provided "very devastating" testimony at the resentencing (PC-R. Vol. 4/685). The fact that he had a substance abuse problem but had turned into a swell guy while serving ten years on death row does very little to mitigate the atrocity of this crime. Even taking the evidence of mental mitigation away, no reasonable jury could recommend a life sentence on these facts.

Donerly stated that he believed the presentation of evidence about Mann's pedophilia decreased the chance of getting a life recommendation; he felt there was a "decent chance" that keeping this evidence out would have changed the outcome, but also acknowledged there was a decent chance it would not have made any

difference (PC-R. Vol. 4/615, 639-40). To Donerly, a reasonable probability of a different result could mean something less than fifty percent (PC-R. Vol. 4/639-40). Both Donerly and Parry agreed that it was possible that the sexual nature of Elisa's assault would come before the jury even without Carbonell's testimony, and that the jury may have speculated about a sexual motive even if no such evidence was presented (PC-R. Vol. 4/632-37, 650, 652, 676-77). In light of the facts of this case and the testimony outlined above, no possible prejudice has been demonstrated.

This issue offers nothing more than disagreement with Mann's trial attorneys' decision to present mental mitigation, including the diagnosis of pedophilia, at his resentencing proceeding. This disagreement does not establish deficient performance -- this was, after all, mitigation which the Eleventh Circuit characterized as "compelling." Mann v. Dugger, 844 F.2d 1446, 1460 (11th Cir. 1988). Clearly, as found below, this decision was a strategic choice made after a thorough investigation, and as such is virtually unchallengeable. On the facts of this case, the trial court properly rejected Mann's claim of ineffectiveness, and no relief is warranted.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING OTHER INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

Mann also contests the trial court's failure to conduct an evidentiary hearing regarding his other allegations of ineffective assistance of counsel. Once again, a review of the record demonstrates the propriety of the rulings made below. When the particular allegations are considered individually, it is clear that no additional evidentiary hearing was warranted on these claims.

1. Failure to present Mann's history of substance abuse

Mann's assertion that his attorneys were ineffective for failing to present evidence of his history of substance abuse is refuted by the transcript of the resentencing hearing, which reflects that in fact such testimony was presented through Dr. Carbonell. At the resentencing, Dr. Carbonell testified that she conducted neuropsychological testing because she was aware of Mann's serious history of drug and alcohol abuse (RS-R. Vol. 14/1614). She discussed the test results which indicated that Mann had strong characteristics of a serious abuser (RS-R. Vol. 14/1619). She noted that Mann began drinking at about age twelve or thirteen, and that she believed he was intoxicated on the morning of the crime (RS-R. Vol. 14/1623, 1630). Other lay

witnesses also testified about Mann's history of alcohol abuse (RS-R. Vol. 11/1418; Vol. 13/1535-37, 1540). Even the State's expert agreed that he could not dispute Carbonell's testimony of substance abuse (PC-R. Vol. 4/681).

Although Mann now submits that Dr. Carbonell's testimony was insufficient because Carbonell was not a neuropharmacologist, he does not identify any additional testimony that could have been presented. In addition, since the defense strategy in this case was to focus on the positive changes in Mann's character over the previous ten years, extensive evidence of substance abuse would detract from the picture of Mann that the defense sought to present (PC-R. Vol. 4/606-07, 689). Of course, the portrait of Mann as a serious drug abuser would carry many of the same negative connotations as the evidence of pedophilia that now offends collateral counsel; Mann's legal expert at the hearing testified that mitigation regarding drug and alcohol use was a two-edged sword, and that he had "never suggested that drug abuse be used as a mitigator" (PC-R. Vol. 4/653). Defense counsel at trial knew about Dr. Fireman's testimony in the first penalty phase, but also knew that they wanted to try some things differently, as the first penalty phase had not been successful (PC-R. Vol. 4/673).

In light of the testimony of substance abuse that was presented to the sentencing jury, and the inconsistency between such testimony and the defense penalty phase theory, no evidentiary

hearing was warranted on this allegation. The summary denial of relief was proper.

2. Failure to investigate brain damage

Mann also asserts that counsel were ineffective for failing to explore the possibility of brain damage. Once again, Mann is not challenging a particular failure as much as he is challenging the way that brain damage was explored. That is, Mann is attacking his attorneys' choice of experts rather than identifying an avenue of investigation which counsel failed to pursue. In fact, Mann was examined by a number of mental health experts prior to trial as well as prior to his resentencing, and none of these examinations revealed any indications of brain damage (RS-R. Vol. 14/1614, 1615, 1657, 1698; PC-R. Vol. 1/59-61, 68-69; Vol. 2/344-53; Vol. 4/674). To this day, Mann has not identified any potential expert or any diagnosis of brain damage which would provide any mitigation above and beyond that provided by Dr. Carbonell.

Dr. Carbonell's expertise and qualifications were well established at the resentencing hearing (RS-R. Vol. 14/1603-09). Although he faults counsel for failing to secure CAT or PET scans or to hire yet another expert, he does not allege that any of this would have resulted in a finding of brain damage. Thus, his claim was insufficient to warrant an evidentiary hearing, and summary denial was again proper.

3. Failure to challenge prior (Mississippi) conviction

Mann next challenges his attorneys' failure to do something which the law would not permit them to do. Specifically, he claims that his attorneys should have attacked the reliability of his prior violent felony conviction for burglary in Mississippi by cross examining his victim regarding her identification of Mann as the perpetrator of the offense. However, in Finney v. State, 660 So. 2d 674 (Fla. 1995), this Court held that a defense attorney cannot go behind the validity of the prior conviction in the manner suggested herein.

Counsel at penalty phase objected to the State's use of the Mississippi conviction, claiming that the conviction was obtained in violation of Mann's constitutional rights (RS-R. Vol. 11/1394). Unless the Mississippi conviction had been vacated by a Mississippi court, there is little else that counsel could have done. Of course, Mann has never alleged that any court has found his prior conviction to have been improperly obtained. Dr. Carbonell noted at the resentencing hearing that Mann admitted all prior accusations of criminal behavior, except for the Mississippi rape (RS-R. Vol. 14/1697). His continued denial of that offense is essentially all that he has offered in support of this claim. On these facts, summary denial of this allegation was mandated by law. See, Eutzy v. State, 541 So. 2d 1143, 1146 (Fla. 1989).

4. Failure to cross examine Fred Daniels

Mann's next complaint concerns the cross examination of State witness Fred Daniels, a neighbor of Mann's that testified at trial that Mann did not appear to be intoxicated on the morning he killed Elisa. Mann speculates that, had Daniels been pressed, he may have admitted that he did not really know if Mann had been intoxicated or not. Such speculation does not compel an evidentiary hearing. Clearly, Daniels was cross examined about his familiarity with Mann's drinking habits (RS-R. Vol. 15/1896-1905). More importantly, however, Daniels was not the only witness to rebut Mann's allegation of intoxication. See, Mann, 603 So. 2d at 1142. Therefore, this claim was also properly summarily denied.

5. Failure to document actions by victim's rights organization

Mann also speculates that possible improprieties by a victim's rights organization may have influenced the jury, but once again no specific facts are offered to demonstrate any possible constitutional error. Neither the alleged improprieties nor the improper influence are even generally identified. In fact, when asked at the Huff hearing, counsel for Mann could not specify particularly what should have been documented or why; she merely reminded the court that she had inherited the motion as written and could not speak beyond the allegations presented in the motion (PC-R. Supp. Vol. 3/123-125).

Moreover, because the allegations of this claim are taken entirely from the record on appeal, it could have been presented in Mann's direct appeal. Once again, summary denial was warranted.

6. Failure to object to prosecutor's suggestion that Mann could be released on parole

Mann has failed to identify any impropriety in the prosecutor's comments on Mann's eligibility for parole. Eligibility for parole has consistently been recognized as a relevant sentencing factor, and the defense in this case repeatedly presented evidence that Mann did not expect or desire to ever be released from prison (RS-R. Vol. 13/1575-77, 1585-90; Vol. 14/1632, 1738). The prosecutor's comment was not a misstatement of fact or law. Since the comment was proper rebuttal to mitigation offered by the defense, trial counsel's failure to object presented no basis for an evidentiary hearing.

7. Failure to object to improper jury instructions

Mann's last claim of ineffective counsel attacks his attorneys' failure to adequately challenge the jury instructions regarding his prior violent felony conviction. In Mann's direct appeal, this Court held that there was no error presented in the trial court's instruction that Mann's prior burglary was a violent offense. Mann, 603 So. 2d at 1143. Since no error occurred, the claim that counsel should have objected is without merit. Summary

denial of this claim was proper.

In conclusion, Mann has failed to demonstrate any error in the trial court's summary rejection of these allegations of ineffective assistance of counsel. No evidentiary hearing, or any other relief, is warranted on the claims presented in this issue.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING CLAIMS OF PROSECUTORIAL MISCONDUCT.

Mann next presents a claim which could have been, and in fact, was raised on direct appeal. Although the court below clearly found Mann's argument of prosecutorial misconduct to be procedurally barred, Mann has not even attempted to identify any error in that ruling. Instead, Mann merely presents his claim, without mentioning that it was previously rejected by this Court in his direct appeal.

The lower court's finding of a procedural bar was proper. Robinson v. State, 707 So. 2d 688 (Fla. 1998); Haliburton v. State, 691 So. 2d 466, 472 (Fla. 1997). To the extent Mann is challenging comments included in the prosecutor's closing argument, this issue was litigated and rejected in his direct appeal. Mann, 603 So. 2d at 1143. See, Engle v. Dugger, 576 So. 2d 696, 699 (Fla. 1991) ("This claim is procedurally barred because it was rejected in the appeal from Engle's resentencing"). His suggestion of misconduct in other portions of the proceedings relies on the trial transcript, and therefore must have been raised on direct appeal. Kelley v. State, 569 So. 2d 754, 756 (Fla. 1990); Jennings v. State, 583 So. 2d 316, 322 (Fla. 1991).

Mann's attempt to recast the claim as one of ineffective assistance of counsel cannot revive the barred issue. Robinson; Johnson v. Singletary, 695 So. 2d 263, 265 (Fla. 1996). In

addition, as this Court previously found, the prosecutor's references to Mann as a child molester and pervert were fair comments on the evidence, and did not constitute improper argument. Mann, 603 So. 2d at 1143. No relief is warranted on this issue.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING MANN'S CLAIM REGARDING THE TRIAL COURT'S ALLEGED CONSIDERATION OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES.

Mann's claim that the trial court improperly considered nonstatutory aggravating circumstances is similarly procedurally barred. Rutherford, 727 So. 2d at 218, n.2 (Fla. 1998). Mann's characterization of this issue as involving fundamental error which must be considered due to the special scope of review in capital cases is not compelling; merely invoking the label "fundamental error" cannot be used as a means of thwarting our well established procedural rules.

It has long been the law in this state that claims which could have or should have been raised on direct appeal are not cognizable in a motion to vacate filed pursuant to Florida Rule of Criminal Procedure 3.850. Ziegler v. State, 654 So. 2d 1162, 1164 (Fla. 1995); Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323 (Fla. 1994); Raulerson v. State, 420 So. 2d 517 (Fla. 1982); Christopher v. State, 416 So. 2d 450 (Fla. 1982); Meeks v. State, 382 So. 2d 673 (Fla. 1980). It is also not appropriate to use a different argument to relitigate the same issue. Harvey v. State, 656 So. 2d 1253, 1256 (Fla. 1995); Torres-Arboleda, 636 So. 2d at 1323; Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). The purpose of Rule 3.850 is to provide a means of addressing alleged constitutional errors in a judgment or sentence, not to review errors which are

cognizable on direct appeal. McCrae v. State, 437 So. 2d 1388 (Fla. 1983). Since Mann's allegation of nonstatutory aggravating factors is predicated on the transcript of his trial proceedings, it must have been raised on direct appeal. Kelley, 569 So. 2d at 756; Jennings, 583 So. 2d at 322. His failure to present the issue at the appropriate time procedurally bars consideration of this claim.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING MANN'S CLAIM REGARDING THE TRIAL COURT'S ALLEGED FAILURE TO CONSIDER MITIGATING CIRCUMSTANCES.

As his next claim, Mann contends that the trial court failed to properly consider and find mitigating factors allegedly established by the evidence. This claim must be raised on direct appeal. Harvey, 656 So. 2d at 1256; Engle, 576 So. 2d 702. Therefore, this claim is procedurally barred, and Mann cannot obtain collateral relief on this point. Engle, 576 So. 2d at 699.

ISSUE VI

**WHETHER THE TRIAL COURT ERRED IN DENYING
MANN'S CLAIM REGARDING THE CONSTITUTIONALITY
OF RULES REGULATING JUROR INTERVIEWS.**

Mann's next challenge disputes the constitutionality of Florida rules limiting an attorney's right to interview jurors after the conclusion of a trial. As usual, Mann's counsel fails to acknowledge or attempt to distinguish case law directly on point rejecting his claim. In Young v. State, 24 Fla. L. Weekly S277, n. 5 (Fla. June 10, 1999), this Court expressly found this to be a direct appeal issue, procedurally barred in postconviction proceedings. See also, Ragsdale v. State, 720 So. 2d 203, 205 (Fla. 1998).

Even if not barred, the claim should be denied as meritless. The United States Supreme Court has held that "long-recognized and very substantial concerns" justify protecting jury deliberations from intrusive inquiry. Tanner v. United States, 483 U.S. 107, 127 (1986). Federal courts have consistently upheld the federal restrictions on post-trial juror interviews against constitutional challenges. See, United States v. Hooshmand, 931 F.2d 725, 736-737 (11th Cir. 1991); United States v. Griek, 920 F.2d 840, 842-844 (11th Cir. 1991). The reasoning of those cases applies equally well to Florida's rule restricting juror contact when considered in light of Florida's constitutional right of access to the courts, and demonstrates that Mann is not entitled to relief on this issue.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING MANN'S CLAIM REGARDING THE FACIAL CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY STATUTE AND THE JURY INSTRUCTIONS GIVEN IN THIS CASE.

Mann's next claim, a challenge to the facial validity of the death penalty statute, clearly should have been raised on direct appeal. It must be summarily denied as procedurally barred. Jennings, 583 So. 2d at 322. In addition, claims relating to jury instructions are consistently rejected in collateral proceedings as they should be raised both at trial and on direct appeal. See, Johnston v. Dugger, 583 So. 2d 657, 662-663, n. 2 (Fla. 1991); Gorham v. State, 521 So. 2d 1067, 1070 (Fla. 1988) ("Because a claim of error regarding the instructions given by the trial court should have been raised on direct appeal, the issue is not cognizable through collateral attack"). No relief is warranted.

ISSUE VIII

**WHETHER THE TRIAL COURT ERRED IN SUMMARILY
DENYING MANN'S CLAIM ALLEGING INADEQUATE
MENTAL HEALTH ASSISTANCE.**

Mann's next claim was presented as Claim XII in his postconviction motion; as presented in the motion, the claim was properly subject to summary denial because it failed to offer any factual support (PC-R. Supp. Vol. 2/91-97). Although, on appeal, Mann has at least added specific facts regarding Dr. Carbonell's involvement in his case, the facts which he has added² are refuted by the transcript from Mann's resentencing.

Mann's appellate brief contends that Dr. Carbonell was not a substance abuse expert, did not conduct an appropriate examination, and did not investigate Mann's history of drug abuse or test for brain damage. However, at the resentencing, Carbonell's expertise and qualifications were well defined. She testified that she was a clinical psychologist, focusing on the application of psychology to criminal justice (RS-R. Vol. 14/1603-05). She was the director of a community clinic at Florida State University, supervisor of the crisis management unit (RS-R. Vol. 14/1605). She taught

²The State objects to Mann's reliance on facts which were not offered to the court below during the postconviction proceeding. A defendant may not present a vague claim of constitutional error to the trial court, and then factually expound on the claim after it is summarily denied. Florida Rule of Criminal Procedure 3.850 expressly requires the recitation of specific facts in a postconviction motion; it is clearly improper for a defendant to save the factual support for a claim until the appeal from the summary denial of the issue is heard.

graduate neuropsychology and had taught and practiced forensic psychology (RS-R. Vol. 14/1605, 1608).

Carbonell reviewed a great deal of background information in addition to her interview and evaluation of Mann (RS-R. Vol. 14/1610-15, 1621, 1657, 1698). She conducted a complete evaluation, and included a neuropsychological examination due to his history of substance abuse and head injuries (RS-R. Vol. 14/1614-15). However, the neuropsychological testing did not reveal any brain damage; she looked for damage, but did not find anything significant (RS-R. Vol. 14/1614). Her conclusions with regard to the absence of brain damage was consistent with a number of other mental health professionals that had examined Mann (RS-R. Vol. 14/1615, 1667, 1698; PC-R. Vol. 1/59-61, 68-69; Vol. 4/674).

Even as bolstered with the addition of new facts, Mann's claim on this issue cannot withstand summary denial. In order to obtain an evidentiary hearing on a claim of this nature, a defendant must identify specific deficiencies in the mental health assistance that was provided and allege evidence that he is prepared to present in order to prove his claim. Jackson v. Dugger, 633 So. 2d 1051, 1054 (Fla. 1993); Engle, 576 So. 2d at 702. Mann does not allege that he has brain damage or that any mental health professional has ever diagnosed him with brain damage. Once again, no relief is warranted as the court below properly summarily rejected this claim.

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING MANN'S CLAIM REGARDING A WITNESS COMMENT WHICH ALLEGEDLY VIOLATED HIS RIGHT TO REMAIN SILENT.

This claim is again procedurally barred, since Mann relies on a comment reflected in his trial transcript for this allegation of constitutional error. In fact, Mann claimed that there was an impermissible comment on his right to remain silent as part of his appeal from his resentencing, and this Court found that, even assuming the comment was improper, any error was clearly harmless. Mann, 603 So. 2d at 1143. The United States Supreme Court declined to review the opinion as to this issue. The previous rejection of this issue bars consideration of this claim at this time. Engle, 576 So. 2d at 699. Furthermore, no relief is warranted for the same reasons given in the initial rejection of the issue.

ISSUE X

**WHETHER THE TRIAL COURT ERRED IN SUMMARILY
DENYING MANN'S CLAIM OF CUMULATIVE ERROR.**

Mann's assertion of cumulative judicial error fails to add a cognizable independent claim, since it relies on finding a number of constitutional violations; Mann merely alleges that numerous errors contaminated his trial. This claim is barred, since the effect of any cumulative error based on the issues raised in his direct appeal must have been considered at that time. To the extent Mann is asserting cumulative error based on the current postconviction issues, he is clearly not entitled to relief since none of the allegations which he has presented demonstrate any error that could have affected the fundamental fairness of his trial. See, Mendyk v. State, 592 So. 2d 1076, 1081 (Fla. 1992).

No facts are offered in support of Mann's claim that a combination of alleged errors rendered his trial fundamentally unfair. The specific errors are not even generally identified, warranting summary denial of this point. Engle, 576 So. 2d at 700, 702; Gorham, 521 So. 2d at 1070.

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's denial of postconviction relief must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Julius J. Aulisio, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida, 33619, this 3rd day of February, 2000.

Carol M. Dittmar

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