IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA

Appellant/Cross-Appellee,

v. CASE NO. 94,989

Circuit Court No. CR80-5117

FREDDIE LEE WILLIAMS,

Appellee/Cross-Appellant.

_____/

ANSWER BRIEF OF APPELLANT/CROSS-APPELLEE
FROM THE DENIAL OF POST-CONVICTION RELIEF
IN THE CIRCUIT COURT OF ORANGE COUNTY, FLORIDA

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TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO:

CERTIFICATE OF TYPE SIZE AND STYLE

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PRELIMINARY STATEMENT

The post-conviction record on appeal will be cited to as “PC-R-” followed by the volume and page number. The direct appeal record will be cited as “V” followed by the volume and page number.

PROCEDURAL HISTORY AND FACTS

The State generally accepts the limited statement of the case contained in appellant's brief, but cannot accept the statement of facts. A significant portion of the statement of the case and facts is devoted to the argument of postconviction counsel.

Procedural History

Appellant was convicted of the first degree murder of Mary Robinson on October 16, 1981. The jury recommended the death sentence by a vote of eight to four. (R. 1336). The trial court followed the jury's recommendation and sentenced appellant to death on December 18, 1981. (V-5, 849-862; V-8, 1369-1374). The trial court found two aggravating circumstances: That the murder was committed while appellant was under a sentence of imprisonment; and, 2) the defendant was previously convicted of prior felonies involving the use of violence or threat of violence to the person.[1] (PC-V-7, 1248). In the sentencing order, the trial court observed that in 1974, the appellant "had shot the victim, Mary Elizabeth Robinson." (PC-V-7, 1250). The trial court did not find any statutory mitigating factors and stated that the proffered non-statutory mitigation offered from relatives and friends concerning his character as a nice "good person" did not rise to "non-statutory mitigating circumstances which could offset the

1 Appellant was twice convicted of aggravated assault, the trial court noted: "In both of these aggravated assault cases Freddie Lee Williams shot his victims."

aggravating circumstances." (PC-V-7 1249-1250).

On June 23, 1983, this Court affirmed the conviction and sentence on direct appeal. Williams v. State, 437 So.2d 133 (Fla. 1983), cert. denied, 466 U.S. 909 (1984). On April 11, 1985, appellant sought permission to file a petition for writ of error coram nobis concerning allegedly newly discovered evidence from Gloria Davis. The request was denied by this Court on November 4, 1985. Williams v. State, 478 So.2d 54 (Fla. 1985). Appellant filed a petition for writ of habeas corpus on July 23, 1986. On January 29, 1987, this Court issued an opinion denying appellant's habeas petition. Williams v. Wainwright, 503 So.2d 890 (Fla. 1987), cert. denied, 484 U.S. 873 (1987).

On December 24, 1986, appellant filed his first motion for post-conviction relief. This was followed by an amended motion for post-conviction relief which was filed on December 4, 1987. (PC-V-7, 1252). The State's Response to that motion was not filed until February 15, 1991. (PC-V-8, 1352). On May 1, 1991, appellant filed a motion to strike the State's response as untimely. (PC-V-8, 1392). After hearing a supplemental motion to strike and the State's response, the trial court issued an order denying the motion to strike on March 7, 1996. (PC-V-8, 1495-1496). In this order, the trial court also granted an evidentiary hearing on several issues contained in the amended motion relating to the assistance of counsel during the penalty phase. The trial court

rejected, however, the allegations of ineffective assistance of guilt phase counsel after reviewing the motion and the entire record, finding none of the guilt phase claims met "both requirements of Strickland v. Washington, 466 U.S. 668, 105 S.Ct. 668, 80 L.Ed.2d 674 (1986)." (PC-V-8, 1495-1496). The trial court ruled that claims II, III and IV, regarding the effectiveness of counsel during the penalty phase required an evidentiary hearing. (PC-V-8, 1496).

A five day evidentiary hearing began on November 30, 1998. On January 29, 1999, the Honorable Jay Paul Cohen issued an order granting appellant's motion in part, finding defense counsel ineffective during the penalty phase and that the appellant suffered prejudice as a result of counsel's deficient performance. (PC-V-14, 2537). The State filed a notice of appeal of the order granting post-conviction relief, but voluntarily withdrew that appeal.[2] Appellant's cross-appeal on the guilt phase claims of ineffective counsel which were summarily denied below are the only issues now pending before this Court.

The court below commented on the long time that this case has been pending in circuit court. On this question, the trial court

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2 Assuming the notice of appeal was properly filed, the cross-appeal can survive dismissal of the initial appeal. C.f. Pelz v. Third District Court of Appeal, 605 So.2d 865 (Fla. 1992)(district court of appeal did not have jurisdiction to hear the cross-appeal even though it was filed within ten days of the notice of appeal where the initial notice of appeal was not timely filed).

condemned the undue delay which occurred in processing this case, noting that attorneys for the state, defense, and the circuit court share the blame. The lower court observed, in part:

> As a preliminary matter, the Court notes the inordinate and unacceptable passage of time between defendant's conviction and issuance of this Order. In particular, the file shows a seven year span from May 1989 to March 1996 during which apparently nothing was done to resolve this matter. The problem of undue delay is not novel to this case. It is virtually endemic in death penalty cases. Even now, Defendants are raising claims that extended confinement on death row constitutes cruel and unusual punishment. Thus far those challenges have been rejected.
>
> As result of the backlog of death penalty cases, the Florida Supreme Court has taken steps to closely monitor postconviction death penalty cases with tight time constraints. As trial judges, we are resistant and even resentful of orders that require us to drop everything else we are doing and respond to a Supreme Court mandated hearing. This case demonstrates why it has become necessary for the Supreme Court to take this approach. Justice Wells has written that such an extended time frame as seen in this case to finally rule on a postconviction motion "is totally unacceptable and is this Court's and the State's prime responsibility to correct." Knight v. State, 721 So.2d 287 (Fla. 1998)(Wells, J., concurring in part and dissenting in part). While it is not this Court's intention to place blame, it is apparent that defense counsel, the prosecution, and the court each bear responsibility...

(PC-V-14, 2523-2524).

Relevant Facts

> On direct appeal, this Court recited the following facts:
>
> The victim was Mary Robinson, Williams' longtime girlfriend. On the night of the murder, the victim went to her sister's house and there received a number of upsetting telephone calls from Williams. After these calls, the victim and her sister went to jai alai and returned to the Williams-Robinson apartment around eleven o'clock. The sister left; Williams soon arrived and

> shortly thereafter called the sister to report that something had happened to the victim. When the sister returned, the police were already present.
>
> Earlier that evening, Williams had borrowed a neighbor's handgun, telling him that he was going gambling. He testified that he left the gun on the dresser in a bedroom at home when he went out and that upon his return, the victim staggered toward him, already shot. He called the police and an ambulance. He also testified he did not want the police to find the weapon in his possession since he was on parole; he thus went into the bedroom and took the pistol from the dresser and threw it outside under a bush.
>
> The State's case revolved around the longstanding domestic arguments between Williams and the victim and in particular Williams' anger over the victim's supposedly taking a shower that night, a sign he took to mean that the victim was cleaning up after being with a boyfriend.

Williams, 437 So.2d at 134.

In rejecting a sufficiency challenge on the issue of premeditation, this Court stated, in part:

> According to Williams, the victim was already wounded when he entered the apartment and he claimed he tried to help her. The state established by ballistics tests that the pistol Williams had borrowed was the murder weapon. The physical evidence presented at trial shows that Williams' story about an unknown murderer as well as the circumstances surrounding the disposal of the gun is clearly unreasonable. Williams did not present any *reasonable* hypothesis of innocence. The jury could properly conclude that Williams was not telling the truth and, given the evidence, that Williams act represented premeditated murder. Defense counsel in closing argument suggested that the evidence showed, at most, second degree murder and that this killing could have been a domestic heat-of-passion murder. The jury could properly find otherwise based on what the evidence did *not* show. There was no evidence of any struggle or commotion or any facts which might suggest a confrontation of any physical or violent nature between the victim and Williams. Given the location of the victim crouching on the corner of the bed when she was shot, the presence of toothpaste and a toothbrush on the bed, and the fact that the gunshot wound was not suffered

> at close range, the jury could have found that Williams confronted the victim while she was brushing her teeth causing her to move to the bedroom. He then shot her once in the side of the neck while her head was turned away from him and while her arm was raised in a defensive posture. The fact that the victim was only shot once is not dispositive of lack of premeditation since, in this case, the wound was in the neck region and immediately caused massive and visible loss of spurting blood. While it was within the province of the jury to find second degree murder in this case, despite appellant's claim of innocence, we cannot say that the evidence, including the physical facts, is such that the jury was precluded, as a matter of law, from finding first-degree murder.

Williams, 437 So.2d at 135.

Evidentiary Hearing Testimony

While an evidentiary hearing was not held on guilt phase issues, trial counsel did testify regarding his discussions with appellant and the role intoxication may have played in this case.[3] Gerald W. Jones, Jr. did not believe that Williams was intoxicated when he murdered the victim. Jones based his opinion on the following:

> From talking to him and to numerous people who saw him that night. The police, next door neighbor, all the people that came in contact with him that were part of the case. He said -- he indicated to me, I think he had

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3 Jones worked for the Public Defender's Office between November of 1970 through the summer of 1973 and again in the summer of 1974 "and was there continuously until, I think, April or somewhere in there of '82." (PC-V-1, 33). From 1970 to 1981, Jones testified that his practice was primarily criminal defense. (PC-V-1, 80). During his time with the Public Defender's Office, Jones handled through trial and penalty "a half dozen, maybe[]" capital cases. Id. However, if you included the number of capital cases that were reduced or resulted in not guilty verdicts, the number reached "a dozen, maybe." (PC-V-1, 80). Jones testified that in 1981 he was Division Chief in the Public Defender's Office. (PC-V-1, 34).

four beers over a four-hour period.

(PC-V-1, 71). Jones did not seek to have Williams examined by an expert on the intoxication issue, stating:

> --took a statement from him, deposed the witnesses, and from everything I could glean from all of that, he had not consumed enough alcohol to render him intoxicated or to even affect his conduct to any appreciable degree. So, no, I did not ask to have him examined by an expert.

(PC-V-1, 76).

Jones testified that Williams was able to provide him with a detailed account of his activities on the evening of the victim's murder. (PC-V-1, 83-87). So, in Jones' opinion, Williams was able to provide him with a goal directed, logical explanation for what occurred that night. (PC-V-1, 87-88). Jones testified:

> Very much so. In fact, I learned later that he was given a gun shot residue test. So in this statement, he's accounting for the fact that he may have particles on his hands by saying that he test fired the gun into the tree, and also that he had fired another gun at the bar.

(PC-V-1, 88).

Jones did mention alcohol in his argument to the jury in the guilt and penalty phase, stating:

> Well, as I recall, the autopsy of Mary Lee showed that she had a blood alcohol content, and he had been drinking as well. So I was trying to make it as though these were two people who lived together that were having a marital dispute, and alcohol, whatever role it may have played, was present and, perhaps, there was a lessening of restrictions or standards that ordinarily would cause him to shoot her.

(PC-V-1, 101). He used this argument to counter the State's contention that this murder was "cold, calculated, premeditated[.]"

(PC-V-1, 101).

Similarly, trial counsel addressed mental health issues with regard to mitigation at the hearing. Jones testified that from talking with people in his office who may have had contact with Williams in the past he could not recall any indication of a mental health problem. And, in his contact with Williams in preparing the case, Jones recalled that Williams appeared to have a good recollection of facts and did not appear to have any mental health or "emotional problems[]." (PC-V-1, 96-97). In fact, Jones recalled that when Williams was informed of a blood splatter expert finding a foot print in blood in the room where the shooting occurred, Williams immediately recognized the significance of this fact and changed his story accordingly.[4] (PC-V-1, 97). Jones further testified:

> No. In fact, let me clear on one thing. I, along with other lawyers in my office at this time, were very sensitive to any allegation or symptom that may be indicative of a mental health problem. Because with that, then, we could file a motion and approach the judge and have two disinterested psychiatrists look at the

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4 Jones explained:

> This was the room where the shooting had actually taken place. And when I explained this to Freddie, he changed his story from never having been in that bedroom, to, yeah, I think I was in that bedroom, I went back there to see if the killer was still there. So that indicated to me that he was able to pick up on the fact that someone pairing his shoe, or a shoe just like his, had to step in that blood and that there was blood on top of the footprint or the foot impression that it made. (PC-V-1, 97).

> defendant. And I never got any of that from talking with Freddie or anyone who knew Freddie that he had any type of mental health problem.

(PC-V-1, 91-92). Jones testified that at the time he represented Williams, it was not the practice of defense attorneys to seek out psychiatric defenses when they had no evidence to support it. (PC-V-1, 92). This practice probably has changed since the time he represented Williams. (PC-V-1, 92). However, at that time, there would normally have to be some indication of a psychiatric problem for a screening or follow up to be done. (PC-V-1, 92).

Any additional facts necessary for resolution of the issues raised in this appeal will be discussed in the argument, *infra.*

ARGUMENT SUMMARY

ISSUE–The trial court properly summarily denied appellant's claim of ineffective assistance of counsel. An evidentiary hearing is only warranted on such a claim where specific facts, not conclusively rebutted by the record, demonstrate a deficiency in performance which prejudiced the defendant. Appellant's motion did not meet this test. Because the motion and record conclusively demonstrate that appellant is not entitled to relief, summary denial was proper.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR POST-CONVICTION RELIEF AS FACIALLY INSUFFICIENT ON HIS CLAIMS THAT COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE OF HIS TRIAL? (STATED BY APPELLEE).

Appellant complains that the trial court erred in denying his ineffective assistance of guilt phase counsel without an evidentiary hearing. The State disagrees.

A. Standard of Review For Summary Denial

In Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993), cert. denied, 502 U.S. 834, 116 L.Ed.2d 83, 112 S.Ct. 114 (1994), this Court observed that "[t]o 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." However, an evidentiary hearing is not a matter of right, a defendant must present "'apparently substantial meritorious claims'" in order to warrant a hearing. State v. Barber, 301 So.2d 7, 10 (Fla.), rehearing denied, 701 So.2d 10 (Fla. 1974)(quoting State v. Weeks, 166 So.2d 892 (Fla. 1960)).

In LeCroy v. Dugger, 727 So.2d 236, 239 (Fla. 1998), this Court stated: "The standard for determining whether an evidentiary hearing is required on an ineffectiveness claim is as follows:

> A motion for post-conviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. A defendant may not simply file

> a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant..."

B. Ineffective Assistance Legal Standard

Of course, the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel, and that the deficient performance prejudiced the defense. "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy." Id. at 688-689. The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 113 S.Ct. 838, 122 L.Ed 2d 180 (1993). A claim of ineffective assistance fails if either prong is not proven. Kennedy v. State, 547 So.2d 912 (Fla. 1989).

C. Analysis of Appellant's Claims

1) Whether counsel was ineffective in arguing alternative theories to the jury

Appellant claims that trial counsel indicated he did not believe his client in closing argument and pursued an incompatible theory of defense. Contrary to appellant's argument, trial counsel did not indicate that he did not believe his client's story, simply that if they decided that appellant committed the crime they should next consider the degree of the crime. As noted in the State's response to the postconviction motion below:

> Defense counsel argued that if the jury decided Williams committed the crime, the next step was to decide the degree of the crime (R. 673). He then argued that the state did not prove premeditated murder (R. 677). The fact that the single shot was fired from a distance and the assailant fired only one shot when he could have fired five or six shots showed lack of intent to kill (R. 676). If a person got mad or enraged and wanted to hurt someone, that was not premeditation (R. 677). It is not premeditation to shoot a gun or hurt someone, no matter how badly (R. 677). Counsel then addressed the lesser included degrees of murder: second degree murder and manslaughter (R. 678-680). He stated that Williams was not in the room that night, but asked that if the jury should choose to disbelieve the defendant's testimony, they not be vindictive (R. 680). He reiterated that the state must prove its case and the jury could only convict on the highest degree proved (R. 681). Counsel then attacked the testimony of the state witness[es] and the lack of proof of intent to kill (R. 685-91). If tempers flared, alcohol may have played a part in it (R. 693).

(PC-V-8, 1425-1426).

When Mr. Jones asked them not to be vindictive, Jones was not claiming that appellant had lied, but that if for some reason they choose to disbelieve his testimony–a very real possibility–that

they should not be vindictive and find him guilty of first degree murder. See generally Wade v. Calderon, 29 F.3d 1312, 1319 (9th Cir. 1994)(finding counsel was not ineffective in closing argument, noting that "[c]ounsel's tactic was to demonstrate that despite the horrible nature of the crime and his own personal feelings, the jury should not precipitate another tragedy by convicting Wade of first degree murder when he had lacked the intent to kill."). Defense counsel stressed that the appellant did not have to prove anything and that the state still maintained the burden of proof. (V-4, 680).

Counsel was obviously locked into alternative theories under the facts of this case. One, appellant did not commit the offense, and two, that even if the State could establish he pulled the trigger for the fatal shot, the State could not prove premeditation under the circumstances of this case. The first strategy was locked in by appellant's pretrial statements and trial testimony, the second, was an obvious attempt to exploit the perceived weakness in the State's circumstantial evidence case.

While some attorneys may disagree with the strategy of arguing alternative theories to a jury, such disagreement provides no basis for finding trial defense counsel ineffective. See United States v. Ortiz Oliveras, 717 F.2d 1, 3 (1st Cir. 1983)("[T]actical decisions, whether wise or unwise, successful or unsuccessful, cannot ordinarily form the basis of a claim of ineffective

assistance."). Within the wide range of reasonable professional assistance, there is room for different strategies, no one of which is "correct" to the exclusion of all others. Felker v. Thomas, 52 F.3d 907 (11th Cir. 1995). The test for determining whether counsel's performance was deficient is whether some reasonable lawyer at trial could have acted under the circumstances as defense counsel acted at trial; the test has nothing to do with what the best lawyers would have done or what most good lawyers would have done. White v. Singletary, 972 F.2d 1218 (11th Cir. 1992).

Appellant's reliance upon Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995), is misplaced. In Harvey, defense counsel conceded the defendant was guilty of second degree murder in his opening statement. This Court held that remand for an evidentiary hearing was necessary so that it could be determined whether or not the defendant was informed of and concurred with this strategy. Harvey, 656 So.2d at 1256.

Sub judice, Jones did not concede appellant's guilt. He repeated appellant's claim that he was not present at the time the victim was shot. (V-4, 680). However, as noted above, counsel argued that even if they did not believe his testimony, that the State had not carried its burden of establishing premeditated murder. Trial counsel was obviously concerned that if the jury rejected appellant's testimony as untruthful, the jury would hold it against appellant and find him guilty of a higher charge than

the evidence warranted.

The fact that defense counsel briefly mentioned an alternate scenario in closing argument, that the facts supported at best a heat of passion encounter was not ineffective. This scenario was offered to counter the State's claim that the facts of this case establish premeditation. (V-4, 722).

In sum, the trial court's denial of relief on the grounds that appellant had not sufficiently demonstrated both prongs of Strickland is supported by the record and should be upheld on appeal.

2) Failure to investigate appellant's claim of innocence.

Appellant summarily argues that his counsel was ineffective for failing to retain a gunpowder residue expert, failing to investigate the validity of the state's blood spatter testimony, and neglecting to investigate the possibility that the "Mary" referred to by several witnesses was actually another "Mary" who lived at the complex. Nor, appellant claims, did defense counsel investigate the validity of Gloria Davis's testimony as well as other leads suggesting that appellant was not the killer. (Appellant's Brief at 23-24).

Appellant's argument on appeal suffers the same deficiency it possessed below; insufficient facts are alleged to make a prima facie showing of ineffective assistance. Nor does counsel bother to allege what an adequate investigation in these areas would have

uncovered. Appellant failed to identify any specific, relevant, and admissible evidence that he has uncovered to suggest that he was innocent of the charged murder.

Appellant's allegations are speculative and unsubstantiated. For example, appellant faults trial counsel for failing to secure an independent gun powder residue expert. However, he neglects to inform the lower court whether or not he has retained such an expert who would be available to testify at the evidentiary hearing who has reached a different result than the expert who testified at trial. Instead, appellant merely claimed in his motion: "Defense counsel was further inadequate in failing to have cotton swab samples taken from the Defendant independently analyzed by a defense expert to determine <u>if</u> a positive opinion regarding whether or not the Defendant shot the gun could be reached. Defense counsel should not have merely relied on Mr. Scala's testimony on such a critical issue." (PC-V-7, 1261)(emphasis added).

The State's expert testified at trial there was insufficient presence of antimony to determine the presence of gunshot residue.[5] (V-4, 616). Aside from failing to allege facts showing a

5 The expert testified that blood can interfere with the test for gunshot residue: "It can interfere with the collection and the collection procedure. That is, if there is a sufficient quantity of blood, it could redistribute the gunshot residue from the hand. It may just wash it away or move it over to another part of the body..." (V-4, 616). Appellant had blood on his hands when he was arrested. And, appellant admitted that he fired the gun at a tree earlier on the evening the victim was murdered. (V-4, 651).

deficiency, appellant offered nothing below to show that appellant suffered any prejudice as a result of counsel's failure to hire a ballistic's/gunshot residue expert. See U.S. v. Berry, 814 F.2d 1406, 1409 (9th Cir. 1987)(a defendant must show what the witnesses would have testified to and how it would have changed the outcome.). As observed by the District of Colombia United States Court of Appeals:

> [W]e agree with the Seventh Circuit that to show prejudice, a defendant basing an inadequate assistance claim on his or her counsel's failure to investigate 'must make a comprehensive showing as to what the investigation would have produced. The focus on the inquiry must be on what information would have been obtained from such an investigation and whether such information, assuming its admissibility in court, would have produced a different result.'

U.S v. Askew, 88 F.3d 1065 (D.C. Cir. 1996), cert. denied, 136 L.Ed.2d 340, 117 S.Ct. 444 (1996)(quoting Sullivan v. Fairman, 819 F.2d 1382, 1392 (7th Cir. 1987)).

Similarly, appellant's allegation that counsel failed to investigate "the validity of the state's blood spatter expert testimony" was not accompanied by any facts showing the testimony that was presented was inaccurate or unreliable. See LeCroy v. Dugger, 727 So.2d 236, 240-241 (Fla. 1998)(upholding summary denial of claim regarding failure to hire a forensic communications expert to test the accuracy of the State's transcription where "the Defendant presented nothing to show that the tapes were, in fact, mistranscribed or not authentic...")(quoting the trial court). Nor

did appellant claim that he has obtained the assistance of an expert whose testimony can cast doubt on the expert testimony offered by the State at trial.

As for reference to "Mary" being someone else who lived in the building, appellant failed to allege facts showing that this was even relevant, much less how it might have changed the outcome at trial.[6] See Jenkins v. State, 633 So.2d 553 (Fla. 1st DCA 1994)(Rule 3.850 motions require a factual basis; "conclusory" statements without supporting facts are insufficient); Oakley v. State, 677 So.2d 879, 880 (Fla. 2d DCA 1996)(claims of ineffective assistance of counsel for failing to move for a change of venue and claim involving state's failure to disclose evidence were properly denied where the claims did not "allege sufficient facts to demonstrate the two prongs for ineffective assistance enunciated in Strickland v. Washington.").

Finally, any claim that counsel was ineffective for failing to investigate the credibility of Gloria Davis's testimony is without merit. The "letter" upon which this claim is based was not even in existence at the time of trial. Counsel cannot be faulted for failing to obtain or utilize "evidence" that was not even in

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6 Appellant's entire allegation on this issue in his motion was, as follows: "Failure to investigate the fact that the 'Mary' referred to by lay witnesses, including Rosa Lee Jones, referred to another lady named 'Mary' who lived in the same complex as the Defendant and the victim, and did not refer to the victim, Mary Robinson." (PC-V-7, 1263).

existence at the time of trial. In addition to noting that the letter allegedly from Gloria Davis was written one month after trial and that appellant failed to allege that counsel had any reason not to believe Ms. Davis's trial testimony, the State's response below observed that her testimony was cumulative to other witnesses who testified at trial. (PC-V-8, 1365-1366).

Appellant failed to allege sufficient facts below to show either deficient performance or resulting prejudice from counsel's performance regarding Gloria Davis's testimony. Consequently, the trial court did not err in summarily denying this claim.

3) Counsel's failure to pursue a voluntary intoxication defense.

Appellant claims that counsel failed to investigate and raise the voluntary intoxication defense. The trial court properly denied this claim as appellant failed to allege sufficient facts demonstrating either deficient performance or prejudice.

The State's response below provided a good analysis of this issue:

> An instruction on intoxication is warranted only when there is sufficient evidence of intoxication. Cirak v. State, 210 So.2d 706 (Fla. 1967); Gardner v. State, 480 So.2d 91 9Fla. 1985); Lambrix v. State, 534 So.2d 1151 (Fla. 1988); Hill v. Dugger, 556 So.2d 1385 (Fla. 1990). The evidence Williams cites is testimony from Mr. Peterson that Williams drank one beer in the afternoon (R 247, 249, 262); Rosa Lee Jones who said she noticed Williams had been drinking but was not drunk (R 318-319); Arthur Wilson who said Williams had been in a bar on Parramore Street and ABC Bar but said nothing about what Williams drank (R 433); and the defendant himself who said he had a beer with Mr. Peterson in the late

> afternoon hours (R. 631-32), drank a few beers at the Green Parrot (R. 635), drank another beer on the street (R. 636), and drank some gin during the two hours he was gambling on the street (R. 636). When Williams left the gambling spot he went to the ABC Bar for twenty-five minutes but there is no testimony he drank anything (R. 637). He then went to Hubbard and then to his mother's house (R. 637). He talked to his sister and Rosa Jones (R. 637). Rosa Jones took him home and was the last person with Williams before the murder. She said he was not drunk (R. 319).

(PC-V-8, 1362).

Appellant testified at trial. He claimed that he was not present when the victim was shot. (V-4, 642-44). In appellant's habeas petition, he argued that appellate counsel was ineffective for failing to argue intoxication as a mitigating factor. This Court rejected appellant's claim, stating: "We reject this suggestion as well and note the evidence at trial showed the petitioner was not intoxicated, although he had been drinking. Appellate counsel did bring this fact to the court's attention on direct appeal. We also note that intoxication was not presented at the penalty phase as it would have been totally inconsistent with petitioner's theory that he did not commit the murder..." Williams v. Wainwright, 503 So.2d at 891 n.1.

As this Court found in its opinion, although appellant had been drinking, there was no evidence to support a voluntary intoxication defense. In fact, the record shows just opposite. Appellant apparently had good, if somewhat self-serving recall of his activities the night the victim was murdered. Appellant

admitted that after 'finding' the victim was shot, he removed the gun from the murder scene, throwing it outside in an attempt to prevent the police from finding it. (V-4, 645). Appellant explained: "I didn't want the police to find the gun because I was on parole because I had ten years one time for a gun that I ain't never seen." Id. This conduct is indicative of logical, deliberate thought, which is certainly inconsistent with a voluntary intoxication defense. Trial counsel is not ineffective in rejecting an intoxication defense when it is inconsistent with the deliberateness of the defendant's actions. White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992); White v. State, 559 So.2d 1097, 1099 (Fla. 1990), cert. dismissed, 115 S.Ct. 2008, 131 L.Ed.2d 1008 (1991).

While appellant's alcohol use was certainly mentioned by defense counsel in closing argument, it was mentioned in the context of the possibility that it fueled a heated argument resulting in the victim's death. (V-4, 722). It was not mentioned in the context that appellant was so intoxicated that he could not form specific intent. An instruction on voluntary intoxication was simply not warranted under the facts of this case.

The trial court's conclusion that appellant's allegation was insufficient to warrant a hearing is supported by the record and

should be affirmed on appeal.[7] Appellant attempts to bolster his argument on appeal by reciting passages from the trial court's order summarizing evidence that might have been introduced in mitigation, including evidence of appellant's alcohol use. (Appellant's Brief at 34-35). However, the trial court's order on penalty phase mitigation was rendered after the evidentiary hearing and after the present claim was summarily denied. Appellant's tactic of citing evidence developed on a separate claim well after summary denial of the instant claim is questionable. However, if such a tactic is appropriate at this stage of the proceedings, then the State is surely entitled to cite portions of evidentiary hearing testimony which support denial of relief.

For example, trial counsel testified at the evidentiary hearing that he did not believe Williams was intoxicated when he murdered the victim. Jones based his opinion on the following:

> From talking to him and to numerous people who saw him that night. The police, next door neighbor, all the people that came in contact with him that were part of th case. He said -- he indicated to me, I think he had four beers over a four-hour period.

(PC-V-1, 71). Jones did not seek to have Williams examined by an

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7 The State acknowledges that the trial court's analysis on this issue was less than comprehensive. Nonetheless, the record supports denial of this claim without a hearing. Consequently, remand for additional consideration of this claim is unnecessary and would result in a waste of valuable time and judicial resources. The record refutes appellant's allegations regardless of whether or not the trial court's order lacked a thorough analysis of this issue.

expert on the intoxication issue, stating:

> --took a statement from him, deposed the witnesses, and from everything I could glean from all of that, he had not consumed enough alcohol to render him intoxicated or to even affect his conduct to any appreciable degree. So, no, I did not ask to have him examined by an expert.

(PC-V-1, 76). Jones also testified that Williams was able to provide him with a detailed account of his activities on the evening of the victim's murder. (PC-V-1, 83-87).

Since the postconviction motion filed below did not render the appellant's conviction vulnerable to collateral attack, the trial court properly denied the motion without an evidentiary hearing.

> 4) Whether defense counsel was ineffective for failing to object to the prosecutor's definitions and examples of premeditation?

First, while appellant argues that the prosecutor offered misleading definitions of premeditation in voir dire and closing argument, he fails to even identify the objectionable comment allegedly made by the prosecutor during voir dire. (Appellant's Brief at 28). Nor did he identify such a comment in his motion below to the trial court. Thus, this portion of appellant's claim is clearly insufficient.

While the trial court below did not find this claim procedurally barred, any allegation of error surrounding the prosecutor's closing argument appears in the record and should have been raised on direct appeal. Kelley v. State, 569 So.2d 754, 756 (Fla. 1990)(prosecutorial comments are reflected in the record and

therefore must be challenged on direct appeal); Ragsdale v. State, 720 So.2d 203, 205 n 1, 2 (Fla. 1998). In any case, the trial court properly denied this claim without a hearing as appellant's claim was insufficient to warrant a hearing.

The isolated comments referred to in closing argument by the appellant were not improper; they were simply the prosecutor's view of the evidence–i.e., that shooting someone in the head with a gun showed premeditation.[8] (V-4, 721). However, even if some strained reading of the prosecutor's argument can be interpreted to misstate the law on premeditation, trial defense counsel addressed premeditation at length in his own argument (V-4, 675-77, 683, 691, 720, 724), and the jury was later properly instructed on premeditation by the trial court (V-4, 727).

This is simply not the type of claim which requires development during an evidentiary hearing. Appellant's allegations

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8 The prosecutor's comments on the whole were neither improper nor misleading. For example, the prosecutor stated: "Now, this premeditation we are talking about is the intent to kill. That is all it is, a conscious intent or decision to do so. There is no instruction that will tell you that it is a fixed period of time on which this must occur. It just says there must be a reflection. That is all it is, a moment. It can be a moment. It can be anything, ladies and gentlemen, from a well-conceived plan all written out on a yellow pad months in advance, some scheme or something all the way down to a very short moment." (V-4, 699). Later, the prosecutor stated: "Mr. Jones wanted to take each piece that doesn't prove he had a premeditated intent to kill. I agree, you take any one piece of evidence, any one argument that I make, any one factor, and that in and of itself will not show premeditation. In looking and deciding cases of this nature, you have to look at all the evidence all together and make a decision based upon that." (V-4, 717-718).

did not show any deficiency in counsel's performance or the possibility of prejudice. Consequently, the trial court's summary denial of relief should be affirmed on appeal.

5) Cumulative Error

Appellant claims that under the prejudice prong of Strickland, this Court must consider the cumulative effect of the above alleged errors. (Appellant's Brief at 29-36). However, the only cumulative error argument made below was a "catch all" claim which encompassed more than ineffective assistance of counsel, but which provided absolutely no supporting facts or argument. (PC-V-7, 1292). Any attempt to add to his cumulative error claim at this level should be rejected as improper. See e.g. Shere v. State, 742 So.2d 215, 219, n. 9 (Fla. 1999) ("This claim is procedurally barred because it should have been raised in Shere's rule 3.850 motion, not for the first time in this appeal"); Doyle v. State, 526 So.2d 909, 911 (Fla. 1988) (finding claim "procedurally barred because it was not presented to the trial court in Doyle's rule 3.850 motion and cannot be raised for the first time in this appeal"). In any case, appellant's argument can be rejected on the merits.

This allegation of error rests upon the presumption that appellant has demonstrated error in more than one of the alleged deficiencies asserted above. This claim must be rejected because none of the allegations demonstrate any error, individually or

collectively. Melendez v. State, 718 So.2d 746, 749 (Fla. 1998)(where claims were either meritless or procedurally barred, there was no cumulative effect to consider); Johnson v. Singletary, 695 So.2d 263, 267 (Fla. 1996)(no cumulative error where all issues which were not barred were meritless).

Again, a hearing is only warranted on an ineffective assistance of counsel claim where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrate a deficiency in performance that prejudiced the defendant. Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995); Jackson v. Dugger, 633 So.2d 1051, 1055 (Fla. 1993); Mendyk v. State, 592 So.2d 1076, 1079 (Fla. 1992). Appellant's motion did not meet this standard; summary denial was therefore appropriate.

CONCLUSION

WHEREFORE, the Appellee, State of Florida, respectfully requests that this Court affirm the decision of the trial court below.

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. Mail to Chandler R. Muller, 1150 Louisiana Avenue, Suite 2, Post Office Box 2128, Winter Park, Florida 32790-2128, on this _____ day of April, 2000.

_____
COUNSEL FOR APPELLEE