**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC95370**

**BURLEY GILLIAM,**

Appellant,

vs.

**THE STATE OF FLORIDA,**

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION**

# ANSWER BRIEF OF APPELLEE

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES**

## INTRODUCTION

This brief is written in 12 point Courier New Font. The parties will be referred to as they stood in the Court below. The symbol "D.A.R." will refer to the record from the direct appeal, which includes the trial transcripts. The symbol "D.A.R.S." will refer to the supplemental record from the direct appeal, which includes transcripts. The symbol "D.A.R.S.S." will refer to the State's supplemental record, which includes the record and transcript from Defendant's first trial, filed contemporaneously with the instant Answer Brief. The symbols "R." and "T." will refer to the record and transcripts from the Rule 3.850 proceeding, respectively. The symbol "S.R." will refer to the supplemental record on appeal. The symbol "S.T." will refer to the supplemental transcripts from the Rule 3.850 proceeding.

## STATEMENT OF THE CASE AND FACTS

On July 8, 1982, Defendant was charged by indictment in the Eleventh Judicial Circuit Court, Case No.82-14766, with the first degree murder of Joyce Marlowe; the sexual battery of Joyce Marlowe; and grand theft.(D.A.R. 1). All crimes were alleged to have been committed between the 8th and 9th days of June, 1982. (D.A.R. 1).

After a trial in which Defendant proceeded pro se with standby counsel, a jury convicted Defendant of first degree murder and

sexual battery.[1] The trial court followed the jury's unanimous recommendation of a sentence of death. On direct appeal, this Court reversed and remanded Defendant's case for a new trial. *Gilliam v. State*, 514 So. 2d 1098 (Fla. 1987).

Defendant's second trial commenced on June 6, 1988. On June 17, 1988, the jury found Defendant guilty of first degree murder and sexual battery. (D.A.R. 334-35). The jury recommended imposing a sentence of death by a vote of ten to two. (D.A.R. 336). The court imposed a sentence of death for the first degree murder count and imposed a consecutive term of life imprisonment for the sexual battery count. (D.A.R. 491-503).

Defendant appealed the convictions and sentences from his second trial to this Court, raising the following issues, verbatim:

ARGUMENT I.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO RECUSE WHERE (A) THE MOTION WAS TIMELY; (B) THE MOTION WAS LEGALLY SUFFICIENT; AND (C)THE TRIAL COURT PASSED UPON THE TRUTH OF THE ALLEGATIONS, IN VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

A. The Motion to Recuse Was Timely and Legally Sufficient.

B. A Trial Judge May Not Pass On The Truth of the Allegations.

ARGUMENT II.

WHERE THE DEFENDANT ESTABLISHED A PRIMA FACIE CASE OF EXTRINSIC CONTACT BY A JUROR OF A

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[1] The jury acquitted Defendant of grand theft. (D.A.R.S. 2).

POTENTIALLY HARMFUL NEWSPAPER ARTICLE, THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY IN FAILING TO ALLOW DEFENSE COUNSEL TO CONDUCT POST VERDICT INTERVIEWS.

ARGUMENT III.

THE APPLICATION OF THE FLORIDA'S CAPITAL SENTENCING STATUTE TO BURLEY GILLIAM UNDER THE FACTS OF THIS CASE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. The Trial Court Improperly Found the Aggravating Circumstances of Heinous, Atrocious or Cruel.

B. The Trial Court's Sentencing Order Does Not Reflect The Reasoned Judgment Required in Imposing Death.

C. The Court Relied On Impermissible Hearsay Evidence and Used It as a Nonstatutory Aggravating Circumstance.

ARGUMENT IV.

THE TRIAL COURT ERRED IN IMPOSING A MORE SEVERE SENTENCE UPON THE DEFENDANT'S RECONVICTION FOR SEXUAL BATTERY WHERE NO REASONS FOR DOING SO AFFIRMATIVELY APPEAR IN THE RECORD, IN VIOLATION FO THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW.

On March 2, 1991, the Court affirmed Defendant's convictions and sentence of death, but remanded the case with an order for the lower court to resentence Defendant to a concurrent life sentence for the sexual battery count. *Gilliam v. State*, 582 So. 2d 610 (Fla. 1991). In affirming Defendant's convictions and sentence of death, the Court outlined the facts of the case as follows:

The victim, Joyce Marlowe, was last seen

alive on the evening of June 8, 1982, in the company of appellant. That same evening, Burroughs, fishing on a lake, heard a woman screaming. When he arrived on shore, he found a truck (later identified as one Gilliam was driving) stuck in the sand, and its driver acting "very very nervous," but otherwise sober and normal. The next day Burroughs noticed that the lake area was roped off, and was told by police that a woman had been raped and murdered.

Appellant gave several accounts of his activities on the day of the murder to Detective Merrit, and in so doing stated that he and the victim were swimming in the lake and he ducked her under too long; he attempted resuscitation, but was unsuccessful.

* * *

The victim sustained brutal injuries. The medical experts testified that death was caused by strangulation; the victim had injuries to her face, neck, breast, shins, arms, rectum, and vagina; she had bruises from being grabbed; one of her nipples was almost bitten off by appellant; from the anal rape there were tears extending through the anal and rectal region, including into the skin surrounding the anus (where, in the words of the trial judge, she was in effect torn apart); there was hemorrhaging from the vagina to the neck of the urinary bladder; and the victim was alive when these injuries were inflicted. We reject appellant's argument that the victim's consciousness was insufficiently proved. The medical examiner testified unequivocally that there was no injury to the victim's brain or the tissue surrounding it, that the victim died of strangulation, and that the victim's injuries were sustained while she was alive. The victim sustained numerous bruises to her upper arm, wrist, and leg from being grabbed. Furthermore, a woman's screams were heard in the vicinity at the time of the murder.

*Gilliam*, 582 So. 2d at 611.

On March 10 1995, Defendant filed an amended motion for post conviction relief, raising the following twenty-three claims for relief, verbatim:

CLAIM I

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. GILLIAM'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. MR. GILLIAM CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED THE PUBLIC RECORDS MATERIALS AND BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

CLAIM II

MR. GILLIAM WAS DEPRIVED OF HIS RIGHT TO CONFRONT WITNESSES AGAINST HIM WHEN THE TRIAL COURT PROHIBITED THE PRESENTATION OF EVIDENCE REGARDING THE VICTIM'S WORK AS A PROSTITUTE AND HOW THAT LED TO HER DEATH. THIS EVIDENCE WOULD HAVE CORROBORATED THE DEFENDANT'S TESTIMONY. WITHOUT THE EVIDENCE, THE STATE WAS PERMITTED TO ARGUE THAT THE FAILURE TO PRESENT SUCH EVIDENCE MEANT THAT THE DEFENDANT'S CLAIM WAS NOT TRUE.

CLAIM III

MR. GILLIAM WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN

NATURE AND/OR PRESENTED MISLEADING EVIDENCE AND/OR ENGAGED IN OTHER PROSECUTORIAL MISCONDUCT. SUCH OMISSIONS RENDERED DEFENSE COUNSELS' REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

CLAIM IV

MR. GILLIAM WAS DRPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING AND DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF MR. GILLIAM'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS. AS A RESULT, CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JURY'S GUILT VERDICT.

A. TRIAL COUNSEL OPENED THE DOOR TO THE TEXAS RAPE CONVICTION ALLOWING THE STATE TO USE THE RAPE CONVICTION AS IMPROPER WILLIAMS RULE EVIDENCE.

B. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE, DEVELOP, AND PRESENT AMPLY AVAILABLE EVIDENCE IN SUPPORT OF A VOLUNTARY INTOXICATION DEFENSE.

C. TRIAL COUNSEL FAILED TO REQUEST INSTRUCTIONS THAT AN EPILEPTIC SEIZURE MAY NEGATE SPECIFIC INTENT.

D. OTHER GUILT PHASE ERRORS BY TRIAL COUNSEL

CLAIM V

MR. GILLIAM WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING AND DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

A. TRIAL COUNSEL FAILED TO PRESENT MITIGATION WITNESSES TO THE JURY DURING THE PENALTY PHASE.

B. COUNSEL DID NOT ZEALOUSLY ADVOCATE ON BEHALF OF HIS CLIENT.

C. OTHER PENALTY PHASE ERRORS BY TRIAL COUNSEL.

CLAIM VI

MR. GILLIAM'S SENTENCE WAS TAINTED BY THE IMPROPER INSTRUCTIONS IN VIOLATION OF *ESPINOSA V. FLORIDA*, *STRINGER V. BLACK*, *SOCHOR V. FLORIDA, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER,* AND THE EIGHTH AND FOURTEENTH AMENDMENTS. NO MEANINGFUL HARMLESS ERROR WAS PERFORMED.

CLAIM VII

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN MR. GILLIAM'S CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE NARROWING CONSTRUCTIONS. AS A RESULT, MR. GILLIAM'S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED NOW IN LIGHT OF NEW FLORIDA LAW, *ESPINOSA V. FLORIDA* AND *RICHMOND V. LEWIS*.

CLAIM VIII

MR. GILLIAM'S SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF *STRINGER V. BLACK, MAYNARD V. CARTHWRIGHT, HITCHCOCK V. DUGGER,* AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM IX

THE FINDING OF THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS, AND CRUEL VIOLATED THE

EIGHTH AMENDMENT, *JACKSON V. VIRGINIA*, 443 U.S. 307 (1979), AND *LEWIS V. JEFFERS*, 110 S. CT. 3092 (1990), BECAUSE NO RATIONAL FACTFINDER COULD FIND THE ELEMENTS OF THIS AGGRAVATOR PROVEN BEYOND A REASONABLE DOUBT.

CLAIM X

MR. GILLIAM'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE DENIED BY THE JUDGE'S CONSIDERATION OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES.

CLAIM XI

THE INTRODUCTION OF A "STATUTORY RAPE" AS A PRIOR VIOLENT FELONY AGGRAVATING FACTOR SO PERVERTED THE SENTENCING PHASE OF MR. GILLIAM'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND FLA. STAT. SEC. 921.141(5)(B). MR. GILLIAM RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ADVOCATE AND LITIGATE THIS ISSUE ZEALOUSLY, IN VIOLATION OF MR. GILLIAM'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XII

MR. GILLIAM'S SENTENCING JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XIII

MR. GILLIAM'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. GILLIAM TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR.

GILLIAM TO DEATH. FAILURE TO OBJECT OR ARGUE EFFECTIVELY RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.

CLAIM XIV

THE TRIAL JUDGE FAILED TO DISQUALIFY HIMSELF FROM MR. GILLIAM'S CASE AND THE PREJUDICE RESULTING THEREFROM, VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM XV

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE STATEMENT MADE BY MR. GILLIAM WHICH WAS OBTAINED ILLEGALLY, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM XVI

THE TRIAL COURT ERRED IN FAILED TO SUPPRESS THE STATE'S WARRANTLESS SEIZURE OF PHYSICAL EVIDENCE FROM THE TRUCK IN BURLEY GILLIAM'S POSSESSION AND CONTROL, WHERE THE TRUCK WAS NOT ABANDONED AND THE SEARCH WAS NOT VALIDLY CONSENTED TO IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM XVII

MR. GILLIAM'S JURY WAS MISLED AND INCORRECTLY INFORMED ABOUT ITS FUNCTION AT CAPITAL SENTENCING, IN VIOLATION OF EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XVIII

MR. GILLIAM WAS DEPRIVED OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE THE TRIAL COURT IMPROPERLY ALLOWED HEARSAY TESTIMONY AT GUILT/INNOCENCE PHASE IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE CONSTITUTION.

CLAIM XIX

MR. GILLIAM WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE REFUSED TO FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XX

MR. GILLIAM WAS DENIED HIS RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY IN VIOLATION FO HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS, BY IMPROPER BAILIFF'S CONDUCT, AND BY THE TRIAL COURT'S FAILURE TO ADEQUATELY ENSURE THAT A FAIR AND IMPARTIAL JURY WAS GUARANTEED TO MR. GILLIAM.

CLAIM XXI

MR. GILLIAM'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XXII

MR. GILLIAM WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AT THE PENALTY PHASE, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE; BECAUSE COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE. SUCH OMISSIONS PREVENTED A FULL ADVERSARIAL TESTING.

CLAIM XXIII

MR. GILLIAM WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENTS, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS, BECAUSE DEFENSE COUNSEL FAILED TO OBTAIN A MENTAL HEALTH EXPERT WHO COULD CONDUCT A

> PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATION OF MR. GILLIAM DURING THE TRIAL COURT PROCEEDINGS. MR. GILLIAM'S RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION WERE DENIED.
>
> (S.R. 152).

In an order issued October 13, 1995, the trial court found there had been no violation of Chapter 119 of Florida's Public Record Law. (S.R. 334). Specifically, the court determined that the jail, Miami-Dade Police Department, and State Attorney's Office did not withhold information or records. (S.R. 334). The court denied Defendant's *Brady* violation claims, finding that Defendant failed to show that he did not have such information at trial or how it could have yielded a different result. (S.R. 334). With regard to Defendant's claims of ineffective assistance of counsel during the guilt phase of trial, the court found that counsel's representation did not fall below acceptable professional standards nor that Defendant was prejudiced by counsel's strategic decisions. (S.R. 336). The court summarily denied all of Defendant's remaining claims, except for Claim V.(A), as procedurally barred. (S.R. 334). As to Claim V(A), the court ordered an evidentiary hearing. (S.R. 337).

At the evidentiary hearing, defense counsel testified that he had worked at the Public Defender's Office for approximately 19 years. (T., Vol. 10, pg. 63). He further testified that at the close of the evidence of Defendant's trial, he did not feel that

the jury would be receptive to mitigation evidence and such mitigation evidence was best presented to the judge:

> It was obvious to me in context of what occurred during the trial and from my sense of the jury, that they were not highly [sic] to be receptive to mitigation evidence that we had for penalty phase. In other words, it was obvious to me at that point, at least I sensed, that the jury was likely to return a death sentence."

(T. Vol. 10, pg. 69). Rather than parade the seven witnesses before a perceivably hostile jury for mitigation testimony to fall on unreceptive ears, defense counsel opted to present such testimony to the judge in the *Spencer* hearing:

> A: Well, in essence the court has the ultimate decision on the penalty to be imposed. So when mitigation evidence was presented to a jury or not, the ultimate decision was going to be made by the Court. So what I was asking the court was permission to present that mitigation to the Court directly.
>
> Q: So, in essence were you trying to persuade the Court to sentence Mr. Gilliam to life?
>
> A: Yes.
>
> (T. Vol. 10, pg. 71).

Additionally, at the evidentiary hearing, Defendant proffered the testimony of two expert witnesses, Dr. Eisenstein, Ph.D. and Dr. Burglass, M.D., in support of his claim that defense counsel failed to investigate, discover, and present evidence of Defendant's drug addiction and mental health. Defendant argued:

> Let me explain, we are contending right, that there was, we are contending that he could have explored the mitigation as far as drug history is concerned, drug addiction is concerned and as far as the family dynamics and whether Gilliam had some unique type of mental disposition dealing with his upbringing and that type of thing.
>
> (T. Vol. 10, pg. 81).

In its order dated December 6, 1996, the lower court denied Claim V(A), finding that counsel made a strategic decision in deciding when to call witnesses. (S.R. 365).

Defendant appealed the denial of motion for post-conviction relief.

## SUMMARY OF THE ARGUMENT

The lower court properly summarily denied Defendant's claims which were procedurally barred, legally insufficient or conclusively rebutted by the record.

The lower court properly denied Defendant's claim regarding defense counsel's strategic decision to present mitigation witnesses during the *Spencer* hearing. Moreover, much of the alleged mitigation was present during the guilt phase. In light of the Dr. Rao's testimony and Mr. Burroughs' testimony regarding the evidence of the victim's screams, there is no reasonable probability that the challenge to the aggravating factor would have yielded a different sentencing recommendation from the jury. As defense counsel's strategic decision was not deficient and Defendant cannot show prejudice, the lower court denied this claim.

As defense counsel did investigate and present evidence that Defendant suffered drug addiction, psychological problems and abuse as a child, the lower court properly denied Defendant's claim that counsel was ineffective for not doing so.

The lower court properly denied Defendant's claim regarding defense counsel's strategic decision to introduce evidence of his prior rape in Texas. As this evidence was properly admissible as *Williams'* Rule evidence, Defendant cannot demonstrate prejudice. Additionally, defense counsel was not deficient for his strategic decision to elicit testimony regarding the rape where such

testimony served to mitigate the impact of the rape on the jury. As Defendant demonstrated neither prejudice nor that defense counsel was deficient, the lower court properly denied this claim.

The lower court properly denied Defendant's claim that defense counsel was deficient for failing to present evidence of voluntary intoxication. Defense counsel did present such evidence and requested and received an instruction on voluntary intoxication. Nonetheless, voluntary intoxication is not a defense to sexual battery and thus Defendant's claim is meritless.

Counsel was not ineffective for failing to present mental health experts on Defendant's behalf. Defense counsel presented two experts who, in conjunction, testified that Defendant suffered brain damage, drug addiction and seizure disorders. Counsel was not ineffective merely because Defendant has since secured expert testimony which he feels would be more favorable. As such, the lower court properly denied this claim.

The lower court properly denied Defendant's *Brady* claim, as Defendant could establish neither that he did not possess and could not have obtained the evidence, nor that there is a reasonable probability that the result of his trial would have been different, as the evidence that the victim was allegedly a prostitute was not relevant.

Defendant's claim that the jury instructions improperly shifted the burden to prove death was inappropriate is procedurally

barred and meritless. As counsel is not ineffective for failing to raise a meritless issue, the lower court properly summarily denied this claim.

Defendant's claim that his sentence rests upon an automatic aggravating circumstance is procedurally barred, as it could have or should have been raised on direct appeal. Moreover, this Court has held an underlying felony can be used as an aggravating factor. As such, the lower court properly denied this claim.

The lower court properly denied Defendant's claim that the trial court failed to correctly weigh the mitigating and aggravating circumstances of Defendant's case. This issue was raised on direct appeal and therefore procedurally barred.

Defendant's claim that his prior rape conviction was improperly used as an aggravating factor is procedurally barred, as such the lower court correctly denied this claim.

Defendant's *Caldwell* claim is procedurally barred, as it could have or should have been raised on direct appeal. Moreover, the jury was not misinstructed on their role in the capital sentencing procedure and the claim is without merit. As such, the lower court correctly denied this claim.

Defendant's claim regarding the jury instructions during the penalty phase could have or should have been raised on direct appeal. Thus, this claim is procedurally barred and the lower court correctly denied it as such.

Defendant's claim that the lower court failed to weigh the mitigating factors of his case is procedurally barred, as Defendant raised this issue on direct appeal. Accordingly, the lower court properly summarily denied this claim.

Defendant's claim regarding the instructions for the heinous, atrocious, and cruel and prior violent felony aggravating circumstances is procedurally barred and meritless. These issues could have or should have been raised on direct appeal. As such, the lower court properly denied this claim.

Defendant's public records claims have already been adjudicated. Defendant has not alleged how the lower court's ruling was incorrect or what documents he is missing. As such, this claim should be denied.

Defendant's claim regarding his confession is procedurally barred. This issue could have or should have been raised on direct appeal.

Defendant's claim regarding the seizure of evidence from his truck is procedurally barred. This issue could have or should have been raised on direct appeal.

## ARGUMENT

### I. THE LOWER COURT DID NOT ERR IN SUMMARILY DENYING DEFENDANT'S CLAIMS.

"A motion for postconviction relief can be denied without a hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief." *See Teffeteller v. Dugger,* 734 So. 2d 1009, 1016 (Fla. 1999), citing *Roberts v. State*, 568 So. 2d 1255, 1256 (Fla.1990). Accordingly, the lower court in the instant case did not err by summarily denying Defendant's claims which were procedurally barred, legally insufficient, or conclusively refuted by the record. With regard to Defendant's claim that the victim was a prostitute, jury instruction claim, and claims VII - XXIII,[2] the lower court properly found these were issues that "could have been raised on direct appeal, thus they [were] not properly before this court." (S.R. 337).

Moreover, Argument I of Defendant's Amended Initial Brief fails to specifically plead a basis for relief. An appellant must allege specific deficiencies erroneously denied by the lower court to plead a facially sufficient claim for relief. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998); *Williams v. State,* 553 So.

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[2] Due to scrivener's error, the section indicating which claims were denied as procedurally barred read "Claims VII-XIII" (S.R. 337); however, as noted in the court's oral pronouncement, the actual claims summarily denied by court on this basis were Claims VII-XXII.

2d 309 (Fla. 1st DCA 1989). To the extent that Defendant alleges individually that the lower court erred by summarily denying his postconviction claims in Arguments II, III, VI, VII, and VIII, the State will address such arguments *infra*.

## II. THE TRIAL COURT PROPERLY FOUND THAT DEFENSE COUNSEL WAS NOT INEFFECTIVE WHEN MAKING A STRATEGIC DECISION TO PRESENT MITIGATION EVIDENCE AND EVIDENCE CHALLENGING THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATOR AT THE *SPENCER* HEARING RATHER THAN TO THE JURY.

Defendant contends that the lower court erred in rejecting his claim that his counsel was ineffective by not presenting to the jury during the penalty phase of his trial evidence he suffered a tragic childhood, was abuse by his father and step-father, and had various medical problems. (See Amended Initial Brief of Appellant, pg. 15-18). However, during the guilt phase of his trial, Defendant presented substantial and extensive evidence of such through the testimony of: Luden Wilkins, Defendant's mother; John Beagle, Defendant's brother-in-law; Cecil Beagle, Defendant's sister; James Fancher, Defendant's nephew; Kay Salem, Defendant's sister; Dr. Stillman, Defendant's expert witness; and Daniel Campbell.

Defendant's mother, Luden Wilkens, testified that Defendant's father was a violent alcoholic who regularly got drunk and beat Defendant from the age of one. (D.A.R. 1836-38). Additionally, Ms. Wilkins testified that her third husband beat Defendant with a closed fist when Defendant was approximately ten years old such that Defendant slept with a croquet mallet to protect himself. (D.A.R. 1841, 1843). She also testified that Defendant suffered

from stomach aches and headaches as child which caused him to frequently miss school. (D.A.R. 1844-45).

Likewise, Cecil Beagle, Defendant's older sister testified that she saw their step-father hit Defendant "in the head, lots of times." (D.A.R. 1869). Ms. Beagle further testified that Defendant "always tried to protect mama, and [Defendant and she] used to take croquet mallets to bed with us." (D.A.R. 1870). According to Ms. Beagle, Defendant left home at approximately 13 or 14 years of age due to his troubled home life. (D.A.R. 1870-71).

James Francher, Defendant's nephew, gave lay testimony regarding Defendant's alleged seizures:

> Q: What did you see or hear at that particular point in time?
>
> A: He just started talking and whatever, and he started kicking and moving, shaking and stuff like that.
>
> Q: Okay.
>
> A: Weird movements.
>
> Q: What kind of weird movements?
>
> A: His feet started kicking and his hands started kicking.
>
> Q: Was he standing up or sitting down when this occurred?
>
> A: He was laying down, and then, you know, he sat up afterwards.

(D.A.R. 1888).

Kay Salem, Defendant's other sister, offered additional

testimony regarding the beatings Defendant suffered at the hands of his step-father. (D.A.R. 1896). Ms. Salem also testified that she saw Defendant have a seizure: "He was jumping. His whole body was jumping around." (D.A.R. 1900).

Although Defendant asserts that counsel was ineffective for failing to present to the jury Dr. Marquit's expert testimony regarding an overview of Defendant's unfortunate upbringing, counsel did, in fact, present the testimony of Dr. Stillman to the jury who testified "that there was a great deal of neglect and inattention" in Defendant's life. (D.A.R. 1978). Dr. Marquit's summarized his testimony at the *Spencer* hearing by quoting his report:

> In my report, I put it this way: "he is of an unimpressive statute, and his weaknesses are health, and he is a product of a broken family, continually being exposed to people of alcoholic abuse, and cruelty; he had a significant lack of civilized experiences, a victim of an early learning disability."

(D.A.R. 2864). Nonetheless, the jury heard evidence that Defendant was the "product of a broken family," exposed to alcoholic and abusive people, and had early difficulties in school. Thus, Dr. Marquit's testimony in this regard would merely have been cumulative to the testimony of the witnesses presented during the guilt phase. Counsel is not ineffective at the penalty phase for omitting witnesses whose testimony would have been cumulative. *See Occhicone v. State*, 25 Fla. L. Weekly S529 (Fla. June 29, 2000).

Defendant contends that in addition to the testimony related to Defendant's unfortunate and unhappy childhood, the penalty phase jury should have heard testimony presented to the judge concerning Defendant's positive impact on the lives of family members and Defendant's change in demeanor. However, since the testimony presented concerning Defendant's purported good character and his help to family members would at least allowed the prosecutor to ask the defense witnesses if they were aware of Defendant's violent treatment of his son and former wife (D.A.R. 2866-69,2935, 2936),[3] the strategic decision not to present evidence to the jury was certainly reasonable. *See Breedlove v. State*, 692 So.2d 874, 877-78 (Fla. 1997). Numerous cases have upheld the denial of a claim of ineffective assistance of counsel based upon counsel's failure to call family members during a penalty phase when an adequate showing of prejudice was not made. *See Rose v. State*, 617 So. 2d 291 (Fla. 1993); *Mendyk v. State*, 592 So. 2d 1076 (Fla. 1992); *Routley v. State*, 590 So. 2d 397 (Fla. 1992); *Provenzano v. Dugger*, 561 So. 2d 541 (Fla. 1990); *Tompkins v. Dugger*, 549 So. 2d 1370 (Fla. 1989); *Lusk v. State*, 498 So. 2d 902 (Fla. 1986); *Maxwell v.*

[3] While the prosecutor was properly allowed to ask defense witnesses if they were aware of the violent crimes Defendant committed against his son and ex-wife, the admission into evidence of hearsay reports of these crimes was error. *Gilliam v. State*, 582 So. 2d 610 (Fla. 1991). However, trial counsel's decision not to call witnesses before the jury, who would open the door to such evidence, was reasonable since it prevented the prosecutor from even asking about the crimes and was made when non-hearsay testimony about the crimes was a possibility.

*Wainwright*, 490 So. 2d 927 (Fla. 1986); *Harich v. State*, 484 So. 2d 1239 (Fla. 1986).

In addition to the testimony of his family members, Defendant also contends defense counsel's failure to present testimony challenging the heinous, atrocious and cruel aggravator to the jury constituted ineffective assistance of counsel. This claim is predicated on Dr. Reeves' testimony at the *Spencer* hearing that essentially the only way to determine whether the victim had been conscious at the time Defendant inflicted her wounds was by "someone seeing what would have happened." (D.A.R. 2807). With regard to the brutal injuries to the victim's genitalia, Dr. Reeves offered:

> Q: Were you able to determine whether or not Joyce Marlow was conscious or unconscious when she sustained these injuries to the genitalia?
>
> A: The only conclusion that I think anyone could draw based upon the evidence available is that she was alive. There is no way to determine whether she was conscious or not just by the vital reaction.

(D.A.R. 2825). However, Mr. Burroughs testified he heard a woman screaming the evening Defendant murdered the victim which certainly provides circumstantial evidence that she suffered. In light of Mr. Burroughs' testimony and Dr. Rao's extensive testimony regarding the graphic and horrific nature of the victim's injuries, there is no reasonable probability that Dr. Reeves' testimony

before the jury would have resulted in a different sentence. The trial judge, who obviously heard Dr. Reeves' testimony, nevertheless imposed the death penalty:

> The capital felony was especially heinous, atrocious and cruel. The victim, Joyce Marlow, was tortured by the defendant. The evidence establishes that she was anally raped prior to her death in a manner which, in effect, tore her apart. The tremendous pain and suffering incurred by virtue of this was attested to by Doctor Valerie Rao, forensic pathologist, and common understanding. In addition, the defendant inflicted multiple bite wounds on the victim while she was alive, one of which nearly severed the nipple of her breast. The pain and suffering inflicted by these wounds was extreme. The defendant also injured the head of the victim and finally caused her demise by strangulation, which permitted realization by the victim of her impending death.
>
> In reaching the conclusion that the murder of Joyce Marlowe was especially heinous, atrocious and cruel, this Court has considered the testimony of Doctor Ronald Reeves, a defense witness. The Court finds that the testimony of Doctor Reeves is deserving of very little weight and does not place into doubt the testimony of Doctor Valerie Rao which supports the Court's finding.

(D.A.R. 2997). The State respectfully submits that the lack of credibility and import of Dr. Reeves' testimony directly bears on the determination of whether defense counsel's conduct was deficient in not presenting such testimony to the jury, as required by *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Jones v. State*, 709 So. 2d 512, 521-22 (Fla. 1988); *Blanco v. State*, 702 So.

2d 1250, 1251 (Fla. 1997); *Parker v. State*, 641 So. 2d 369, 376 (Fla. 1994), *cert. denied*, 513 U.S. 1131 (1995).

Moreover, this Court affirmed the lower court's finding that the murder was heinous, atrocious and cruel:

> Appellant next argues that the trial court improperly found the murder heinous, atrocious, or cruel. We disagree. The victim sustained brutal injuries. The medical experts testified that death was caused by strangulation; the victim had injuries to her face, neck, breast, shins, arms, rectum, and vagina; she had bruises from being grabbed; one of her nipples was almost bitten off by appellant; from the anal rape there were tears extending through the anal and rectal region, including into the skin surrounding the anus (where, in the words of the trial judge, she was in effect torn apart); there was hemorrhaging from the vagina to the neck of the urinary bladder; and the victim was alive when these injuries were inflicted. We reject appellant's argument that the victim's consciousness was insufficiently proved.
> The medical examiner testified unequivocally that there was no injury to the victim's brain or the tissue surrounding it, that the victim died of strangulation, and that the victim's injuries were sustained while she was alive. The victim sustained numerous bruises to her upper arm, wrist, and leg from being grabbed. Furthermore, a woman's screams were heard in the vicinity at the time of the murder. In arriving at a determination of whether an aggravating circumstance has been proved the trial judge may apply a "common-sense inference from the circumstances," *Swafford v. State,* 533 So. 2d 270, 277 (Fla.1988), cert. denied, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989), and the common-sense inference from these facts is that the victim struggled with her assailant and suffered before she died.

*Gilliam v. State*, 582 So. 2d 610 at 611. As every judge and

justice that has considered the evidence that Defendant claims should have been presented to the penalty phase jury has concluded that the death penalty is the proper sentence, Defendant cannot establish a reasonable probability that the jury would have concluded otherwise.

Not only has Defendant failed to establish that he was prejudiced from counsel's decision to forgo present mitigation witnesses to the jury, he cannot establish that counsel's strategic decision to do so fell to the level of deficient performance. Indeed, counsel articulated his reasoning for calling such witnesses at the *Spencer* hearing to the trial judge:

> If we were to go back to the days of the early cases, at that point when the State of Florida was attempting to defend the death penalty in the Appellate Courts, one of the provisions that the Appellate Courts look to and the Legislature was dealing with, as a legislative problem, was the provision of the State of Florida that provides the definite and distinct responsibilities to the Court and to the jurors.
>
> In the case that I brought, in the case that I wish to cite, which I had, quite frankly, forgotten about your Honor, until your Honor brought it to my attention, the following language is from the case of *Cooper vs. State of Florida*, which is a 1976 case, going back to the beginning of the death penalty litigation in the State of Florida.
>
> This quotation from the Florida Supreme Court is as follows, and this is in *Cooper*:
>
> "There we have elaborated upon the separate functions of the judge and jury in death-penalty cases. In explaining that, the

> judge's rule primarily is to ensure that the jury adheres to the law and to protect against a sentence resulting from passion rather than reason."
>
> The Court knows from its days when it was trying cases that a lawyer, an experienced lawyer, goes ahead and picks a jury and goes ahead and tries a particular case in front of a jury, speaks to the jury in a closing argument as a sense of the jurors.
>
> I had a sense of this particular jury. That's why I needed to and that's why I did rely on a provision that is specifically contemplated by the Florida Supreme Court as it relates to your role. And that is that a judge's role is primarily to ensure that the jurors adhere to the law, and protects against a sense resulting from passion rather than reason.
>
> With your Honor's experience, both as a prosecutor and as a trial judge, I felt that this put you in a rather unique position relative to a lay jury in an effort to be able to assess the gravity of this offense, to assess the defense and to assess the human being, this individual who is before the Court.
>
> And that's why I did what I did, that that's why, quite frankly, we are relying upon that language in *Cooper* to be able to ensure that just penalty is given to Burley Gilliam.

(D.A.R. 2979-80). Trial counsel's "sense of the jury" was based upon a lengthy trial during which the jury was presented with much of the evidence, which Defendant now claims should have been presented again during the penalty phase. Based upon his perception of how the jury reacted to the trial testimony about Defendant's childhood, counsel had a sense that cumulative

testimony in this regard would not help the defense, and perhaps even further alienate the jury. Under these circumstances, counsel's decision to present mitigation testimony as he did was certainly within the "wide range of professionally competent assitance." *Strickland,* 466 U.S. at 690.

## III. THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIM THAT DEFENSE COUNSEL FAILED TO INVESTIGATE AND PRESENT ADDITIONAL MITIGATION EVIDENCE.

Defendant's contention that counsel was ineffective for failing to investigate and present additional mitigation evidence is clearly refuted by the record. Although Defendant asserts that counsel should have presented evidence that Defendant allegedly(1) suffered from organic brain damage and psychological problems, (2) was dependent on drugs, and (3) suffered physical abuse, the record indicates that, in fact, counsel investigated and presented testimony of all such evidence.

Dr. Stillman opined to the jury that Defendant suffered from "some organic change in his brain with scarring," and that he was incapable of "telling the difference between right and wrong at the time this homicide occurred." (D.A.R. 2001, 2002). Additionally, Dr. Stillman testified that Defendant "used as many as 12 qualudes a day for about four or five years and he drank as much as a fifth of whiskey a day. He knew he should not do that but he couldn't stop himself, the addiction was stronger than his will, as is often the case." (D.A.R. 1974). According to Dr. Stillman, Defendant had "thinking disorders" resulting from his drug use:

> He has had hallucinations, especially under the influence of drugs, in which he saw strange things; he said things come to mind was [sic] a dinosaur breathing fire, which is a common one with LSD and with cocaine and

with heroine.

(D.A.R. 1983). Dr. Stillman further testified that Defendant's drug addiction exacerbated his seizure disorder as he got older. (D.A.R. 1977). Even Dr. Mutter, an expert witness called by the State during the guilt phase, diagnosed Defendant with "drug and alcohol dependence." (D.A.R. 2188).

Defendant himself testified that he suffered from a seizure disorder stemming from a beating he received from inmate guards while in prison for rape in Texas. (D.A.R. 1919, 1920). Defendant also testified to his use of medication and drugs (D.A.R. 1922). Indeed, Defendant testified that on the night of the murder, he had ingested 400 milligrams of Dilantin and 320 milligrams of Phenobarbital, as well as consuming a six pack of Budweiser beer and a third of a fifth of Jack Daniels. (D.A.R. 1925, 1926). Defendant said he was "high" when he was at the topless lounge where he met the victim and "pretty drunk" during the time he was talking with her. (D.A.R. 1926, 1929).

Extensive testimony was also presented to the jury regarding the abuse Defendant allegedly suffered during his childhood. As previously cited, Defendant's mother and sisters testified that Defendant was beaten by his father and step-father since the age of one. (D.A.R. 1896, 1870-71, 1836-38). Furthermore, Dr. Stillman advised the jury that Defendant was neglected as a child. (D.A.R. 1978).

As the jury, in fact, heard evidence that Defendant(1) suffered from organic brain damage and psychological problems, (2) was dependent on drugs, and (3) suffered physical abuse, clearly counsel investigated and presented such mitigating evidence. Further testimony regarding Defendant's abuse, drug addictions, or brain damage would merely have been cumulative. Failure to present cumulative evidence does not constitute ineffective assistance of counsel. *See Reichman v. State,* 25 Fla. L. Weekly S163 (Fla. February 24, 2000); *Valle v. State*, 705 So. 2d 1331 (Fla. 1997).

With respect to his motion for post-conviction relief, Defendant proffered the testimony of two additional mental health experts: Dr. Hyman Eisenstein, a psychologist; and Dr. Milton Burglass, a psychiatrist. (T., Vol. 10, pg. 81-84). Defendant contends that Dr. Eisenstein would have testified at trial that at the time of the crime, Defendant was "under the influence of extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired." (See paragraph 12, pg. 32 of Initial Brief of Appellant). Likewise, Dr. Burglass would have testified that Defendant has "floridly positive polydrug history." (See paragraph 16, pg. 32 of Initial Brief of Appellant). Defendant contends that counsel was ineffective for failing to secure and present Drs. Eisenstein and Burglass' testimony at trial.

Nonetheless, Dr. Burglass testimony regarding Defendant's drug use would still have been cumulative to the other witnesses who testified at trial regarding Defendant's drug abuse. Similarly, Dr. Eisenstein's testimony regarding Defendant's mental capacity would have been cumulative to Dr. Stillman's testimony that Defendant could not discern right from wrong at the time he committed the crime. (D.A.R. 2002). The mere fact that Defendant has now secured what he feels would be more favorable expert opinions is in insufficient basis for relief when counsel presented an expert at trial and provided such expert with the opportunity to interview Defendant and review Defendant's records. *See Turner v. Dugger*, 614 So. 2d 1075,1079 (Fla. 1992); *Provenzano v. Dugger*, 561 So. 2d 541, 546 (Fla. 1990). Moreover, counsel is not deficient for failing to present "mitigation evidence" testimony from mental health experts which would be cumulative to the testimony of witnesses who testified. *See Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999)(where trial counsel was not deficient for failing to present mitigation evidence that was cumulative to the testimony of mental health experts presented); *Routly v. State*, 590 So. 2d 397, 401(Fla. 1991)(Defendant did not demonstrate reasonable probability that sentence would have been different if counsel had presented proffered mitigation evidence when much of the same evidence was presented to the judge and jury though in different form). As such, the lower court properly denied this claim.

## IV. THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIM CONCERNING COUNSEL'S STRATEGIC DECISION TO INTRODUCE TESTIMONY REGARDING DEFENDANT'S PRIOR RAPE CONVICTION.

Defendant contends that the trial court erred by denying Defendant's claim that his counsel was ineffective for allowing the State to introduce testimony concerning his prior rape conviction in Texas. However, the evidence would have been properly admissible to rebut Defendant's claim of insanity which was premised on an alleged epileptic seizure disorder induced from beatings he received while incarcerated for the rape conviction. (D.A.R. 1920-1922). Defendant contended his murder of Ms. Marlowe resulted from an epileptic seizure. Thus, *Williams* rule evidence that he had committed a sexual battery in a similar manner prior to contracting his alleged seizure disorder would have been relevant and admissible to rebut Defendant's claim that Ms. Marlowe's sexual battery and murder resulted from his seizure disorder. *Williams v. State*, 110 So. 2d 654 (Fla. 1959); *Jackson v. State*, 538 So.2d 533 (Fla. 5th DCA 1989)(defendant's prior sexual battery charge involving the defense of sex for pay was admissible during his trial for another charge of sexual battery to rebut his defense of sex for pay at trial on second charge).

Even if the evidence related to Defendant's Texas rape had not been admissible as rebuttal to Defendant's insanity defense,

defense counsel cannot be faulted for misinformation provided to him by Defendant. The reasonableness of trial counsel's actions may be determined or substantially influenced by Defendant's own statements or actions. *Strickland*; *Sheiner v. State*, 452 So. 2d 929 (Fla. 1984). In this case, counsel's decision to elicit testimony that Defendant had only had consensual sex with Ms. Lester, the victim in his prior rape conviction, was reasonable because that is what Defendant had told him. Moreover, at the time the evidence was elicited there were no listed witnesses from the State who could testify to the contrary. (D.A.R. 2384, 2385). Counsel's performance cannot be deficient when it is based on information provided by his client and there is no indication from the State's witness list that such information may be rebutted.

Moreover, Defendant cannot demonstrate that there exists a reasonable probability that the verdict would have been different had Detective Poe's testimony not been admitted to rebut Defendant's claim of insanity. The jury's guilty verdict and rejection of his insanity defense are supported by the overwhelming weight of the evidence. In support of the insanity defense, Dr. Stillman, a psychiatrist, testified for the defense that in his opinion Defendant was suffering from an alcohol induced epileptic seizure when he killed the victim and thus did not know right from wrong. (D.A.R. 2001, 2002). However, Dr. Stillman's testimony was tested and rebutted by the State's expert witnesses, Dr. Hendrick

Dinkla and Dr. B.J. Wilder.

Dr. Dinkla conducted a physical examination of Defendant, including three electroencephalograms (EEG's), and found no indication or corroboration of Defendant's alleged seizure disorder. (D.A.R. 2255-2260). While he was not able to conclusively rule out the possibility that Defendant suffered from epilepsy, Dr. Dinkla did testify that there has never been a documented case in which someone committed the crimes of murder and rape while suffering from an epileptic seizure. (D.A.R. 2277, 2278).

Dr. Widler testified that he has observed hundreds of epileptic seizures. (D.A.R. 2342). He testified that the most severe seizure is the generalized tonic/clonic seizure, in which virtually all the muscles in the body contract. (D.A.R. 2346). Under the influence of such a seizure, which lasts for 30 to 90 seconds, the individual would convulse and would be incapable of doing anything else. (D.A.R. 2347, 2348, 2370, 2371). Dr. Widler also described the less severe complex partial seizure of a confused state, in which the individual is unable to perform goal directed behavior, which lasts for three to five minutes. (D.A.R. 2348-2352).

Based upon his review of Defendant's medical records and the depositions of Defendant's friends and relatives who claim to have seen him have seizure, Dr. Widler expressed the opinion that to a

reasonable medical certainty, that Defendant suffers from generalized tonic/clonic seizures (R. 2358-2369). Contrary to Dr. Stillman's testimony that Defendant had had a psychomotor seizure (also known as a complex partial seizure), when he killed the victim and traveled to Nashville, Tennessee (D.A.R. 2002), Dr. Widler testified that there is no indication in the records or depositions that Defendant had had this type of seizure at the time the crime was committed. (D.A.R. 2366). Dr. Widler further testified that an individual is incapable of behavior that would result in the death of another person, or of any other goal directed behavior when experiencing a generalized tonic/clonic seizure. (D.A.R. 2366,2367).

In the context of the overwhelming evidence of Defendant's guilt and expert testimony refuting Defendant's alleged insanity defense, Defendant cannot sustain his burden of demonstrating a reasonable probability that the result would have been different had Detective Poe not testified. Thus, Defendant cannot establish the requisite prejudice, the lower court was correct in summarily denying Defendant's claim of ineffective assistance in opening the door to Detective Poe's testimony.

## V. THE LOWER COURT WAS CORRECT IN SUMMARILY DENYING DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE DURING CLOSING ARGUMENT.

"In order to prevail on a claim of ineffective assistance of counsel in the penalty phase of a capital case the defendant must demonstrate that he or she would have probably received a life sentence but for counsel's errors." *Johnson v. State*, 25 Fla. L. Weekly S578 (Fla. July 13, 2000)(citing *Hildwin v. Dugger*, 654 So. 2d 107, 109(Fla. 1995). In light of the incontrovertible and compelling evidence that Joyce Marlowe was brutally murdered, Defendant cannot establish that had counsel given a different closing the jury would have recommended a different sentence nor that counsel's closing was in any manner erroneous or deficient. "Although in hindsight one can speculate that a different argument may have been more effective, counsel's argument does not fall to the level of deficient performance simply because it ultimately failed to persuade the jury." *Ferguson v. State*, 593 So. 2d 508, 511 (Fla. 1992).

Defendant contends that counsel's closing was deficient because he failed to argue the mitigating circumstances of Defendant's case, challenge the aggravating circumstances of Defendant's case, or offer a compelling argument for the jury to recommend life in prison (See pg. 43 of Initial Brief of Appellant). However, in fact, counsel did direct the jury's

attention to the extensive mitigating evidence he presented regarding the difficult circumstance of Defendant's life:

> I want to address you briefly about this aspect of the case; much of what we want to present to you was presented to you through the testimony of some of Burley's family members, who testified earlier. I guess under the law, those are mitigating circumstances, it gives you an idea to learn a little bit about Burley.
>
> ***
>
> I guess that is where the mitigating circumstances sort of come in. I'm a little bit - - I know lawyers spend a lot of time standing in front of juries and telling juries what they just heard. But, I simply refer you back to the testimony of Burley's mother and his children, to get some perspective of the type of upbringing he had, not as an excuse; at this juncture, as I told you, your consideration is what is the appropriate penalty, appropriate penalty in this life. Appropriate as punishment for him, because that should be your consideration.
>
> ***
>
> But, think about the appropriateness of the penalty, think about it. You know, its really simple, you are a survivor, you know, and in Burley's family, there are survivors. And they testified. And there is Burley, who obviously is not a survivor. And, you know, maybe to some degree each of us has some control with the way we respond to life's situations. Some of us are stronger than others. Obviously, he did not respond as strongly, as constructively as some of the other members of his family.

(D.A.R. 2690, 2692, 2694).

At the evidentiary hearing on counsel's failure to present

mitigation witnesses to the jury, counsel repeatedly referenced that the jury had been "non verbally conveying" a sense that they were probably going to return a death recommendation. (T., Vol. 10, pg. 69, 70,). In view of the hostile "non verbal" sense from jury, it was not an unreasonable strategy for counsel to forgo attempts to belittle the substantial evidence that the murder was heinous, atrocious or cruel. Indeed, as both the lower court found and this Court upheld, the medical examiner's testimony regarding the gruesome injuries to the victim's face, neck, breast, shins, arms, rectum, and vagina, in conjunction with the lack of injury to brain tissue indicating she was alive throughout the infliction of her injuries and eventual strangulation and the evidence she was screaming, clearly established that the murder was heinous, atrocious and cruel. *Gilliam* 582 So. 2d at 612. Accordingly, there is no reasonable probability that had defense counsel attempted to challenge the heinous, atrocious and cruel aggravator during the penalty phase closing that the jury would have reached a different sentence recommendation. Moreover, counsel's strategic decision to not risk losing credibility with the jury by attempting to belittle the substantial evidence of HAC aggravator was certainly not deficient. *Strickland*.

Similarly, counsel's election to proceed with reasoned and thorough brevity during his address to the jury cannot be considered deficient performance. Defendant contends counsel was

ineffective because the transcript of his closing argument was "less than six pages" in length (See pg. 43 of Initial Brief of Appellant). Not only do such considerations amount to stylistic differences, but it cannot be said that a long-winded and exhaustive closing argument is more persuasive than a concise and streamlined one.

Counsel made a reasoned plea to the jury that in light of their guilty verdict that a life sentence would guarantee security that society would be safe from Defendant:

> Burley Gilliam has demonstrated, and you have found by your verdict that he should not live in society. He should not live among us. That is a given at this point.
>
> Your responsibility at this juncture is to protect all of us. Then the question becomes: Well, in what way? In what way? There are two possible options that are available to you; one involves imposition of the death penalty, and one involves imprisonment.
>
> Now, one big problem I have in talking to you at this juncture, about imprisonment is based upon a lot of the mistrust society has, concerning the criminal justice system. You all come into the Courtroom having heard or read stories about a person gets sentenced to 50 years in prison and he serves 8 months and he's out. And you have been told that under law that applies to this case. The options are: Number one, death. Number two, life imprisonment with a minimum mandatory sentence of 25 years.
>
> The only thing I can tell you, maybe you won't believe it, but, the only thing I can tell you, that means precisely life imprisonment with a minimum sentence of 25

> years. It doesn't mean that a person gets out in 5, 6, 7 years. It means life imprisonment with a minimum of 25 years. In other words, after 25 years an individual first becomes eligible to be considered for parole. At the age of 65 Burley Gilliam will not get out of prison. At the age of 65, Burley Gilliam will be considered for the first time to even be eligible for parole.

(D.A.R. 2690-92). Although Defendant broadly charges that counsel's argument was "anemic," he has failed to establish that counsel's argument was either deficient under the circumstances of his case or that the outcome of the penalty phase would have been different had counsel chosen a different theme for his penalty phase closing. Similarly, as counsel did ask the jury to consider the mitigation testimony of Defendant's mother and siblings, Defendant cannot establish deficient performance simply because counsel did not ask in a manner Defendant feels would have been more persuasive in hindsight. *See Thompson v. State*, 25 Fla. L. Weekly S346 (Fla. April 13, 2000)(where defendant alleged ineffective assistance of counsel for failing to argue mitigating factors in closing, this Court found counsel told the jury to consider in mitigation "anything else" that the jury had heard and was therefore not deficient). Hindsight challenges to the closing argument presented by trial counsel, who had a unique "sense of the jury," does not establish the requisite deficiency. *Ferguson.*

## VI. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CLAIM THAT DEFENSE COUNSEL FAILED TO INVESTIGATE AND DISCOVER EVIDENCE OF VOLUNTARY INTOXICATION.

Defendant erroneously contends that "defense counsel failed to investigate, develop and present the defense of voluntary intoxication." (See pg 47 of Initial Brief of Appellant). However, the record conclusively illustrates the contrary; defense counsel presented extensive testimony regarding Defendant's drug and alcohol use.

Counsel recalled Jeffrey Sherrie to testify to prior statements that Defendant had been intoxicated while at the topless lounge. (D.A.R. 1442, 1443). Defendant testified to having consumed a combination of whiskey, a six pack of beer, Dilantin, and Phenobarbital and being "pretty drunk" and "high" the night of the murder. (D.A.R. 1925, 1926, 1929). Dr. Mutter, the State's mental health expert, testified that Defendant was drug and alcohol dependent. (D.A.R. 2188). Despite Defendant's contention that intoxication evidence was "not developed for . . .the consideration by the mental health expert" (See pg. 49, Initial Brief of Appellant), Dr. Stillman attested to Defendant's drug addiction and abuse of alcohol, qualudes, and other street drugs. (D.A.R. 1974, 1983, 1977). Furthermore, Dr. Stillman opined that Defendant's drug problem contributed to and exacerbated Defendant's seizure disorder, which according to Dr. Stillman rendered Defendant

legally insane at the time of the crimes. (D.A.R. 1977).

Although several State witnesses testified that Defendant was not intoxicated around the time of the offense, (D.A.R. 1163-65, 1284-86, 1296-98), defense counsel requested and the trial court gave an instruction on voluntary intoxication. (D.A.R. 2475, 2476, 2602). As counsel not only investigated, discovered, and developed evidence of intoxication but presented extensive testimony of same, Defendant cannot charge counsel with failing to do what he, in fact, did. *Strickland v. Washington*, 466 U.S. 668 (1984).

In light of the evidence of intoxication that was introduced and Defendant's failure to allege with any specificity whatsoever what additional evidence could have been produced, Defendant cannot show that counsel's performance was deficient in this regard. Likewise, he cannot show prejudice. Moreover, even if counsel had failed to introduce evidence of intoxication, such failure could not have prejudiced Defendant since voluntary intoxication is not a defense to sexual battery, which was the underlying felony for first degree murder. *Buford v. State*, 492 So. 2d 355 (Fla. 1986). As such, the lower court properly summarily denied this claim.

## VII. THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE WHEN COUNSEL OBTAINED AND PRESENTED AT TRIAL TWO MENTAL HEALTH EXPERTS ON DEFENDANT'S BEHALF.

Two experts testified at trial regarding Defendant's mental condition. The mere fact that he has now "secured an expert who

might have offered more favorable testimony is an insufficient basis for relief." *Provenzano v. Dugger*, 561 So. 2d 541, 546 (Fla. 1990)(citing *Stano v. State*, 520 So. 2d 278 (Fla. 1988)). Dr. Stillman reviewed Defendant's personal information, educational background, medical history and family history, as well as conducted a standard psychiatric evaluation of Defendant. (D.A.R. 1971-73). Dr. Marquit devoted twelve hours to his psychological evaluation of Defendant, which included interviewing him, conducting a series of psychological tests, reviewing his personal history and speaking with his family. (D.A.R. 2842-43).

Counsel provided ample information regarding Defendant's medical and personal history to Drs. Stillman and Marquit upon which they based their expert opinions. As previously discussed, Dr. Stillman testified Defendant suffered from "some organic change in his brain with scarring," and that he was incapable of "telling the difference between right and wrong at the time this homicide occurred." (D.A.R. 2001, 2002). Additionally, Dr. Stillman testified to Defendant's drug and alcohol addiction, resulting "thinking disorders," and a nexus between Defendant's alleged seizure disorder and substance abuse problem (D.A.R. 1974, 1977, 1983). Similarly, Dr. Marquit offered his professional opinion that Defendant was "a man who never had a chance for a decent life." (D.A.R. 2864).

Defendant fails to establish what specific information was

"available but not known my the mental health experts that would have led the expert to conclude that there were 'significant competency and mental health mitigation issues'" other than those already presented. *Teffeteller v. Dugger,* 734 So. 2d 1009, 1022 (Fla. 1999). Although Defendant alleges that "Dr. Stillman overlooked Mr. Gilliam's mental health state that rendered him incapable of premeditation" (pg. 50 of Initial Brief of Appellant), Florida has steadfastly refused to recognize a defense based on diminished mental capacity theory. *Chestnut v. State*, 538 So. 2d 820 (Fla. 1989); *Wheeler v. State*, 344 So. 2d 244 (Fla. 1977), *cert denied*, 440 U.S. 924 (1979); *Campbell v. State*, 227 So. 2d 873 (Fla. 1969); *Holston v. State*, 208 So. 2d 98 (Fla. 1968); *Van Eaton v. State* 205 So. 2d 298 (Fla. 1967); *Piccot v. State*, 116 So. 2d 626 (Fla. 1959); *Everett v. State*, 97 So. 2d 241 (Fla. 1957), *cert. denied*, 355 U.S. 941 (1958); *Tremain v. State,* 336 So. 2d 705 (Fla. 4th DCA 1976), *cert denied*, 348 So. 2d 954 (Fla. 1977). Because Florida does not recognize this defense, evidence that Defendant suffered from any mental state that does not rise to the level of insanity is inadmissible. *Chestnut v. State*, 538 So. 2d 820 (Fla. 1989); *Knight v. State*, 512 So. 2d 922, 929-931 (Fla. 1987), *cert denied*, 485 U.S. 929 (1988); *Zeigler v. State,* 402 So. 2d 365 (Fla. 1981), *cert denied*, 455 U.S. 1035 (1982); *Brown v. State*, 245 So. 2d 68 (Fla. 1971), *vacated on other grounds*, 408 U.S. 938 (1972); *Campbell*, 227 So. 2d 873 at 877; *Ezzell v. State*, 88 So. 2d 280

(Fla. 1956); *Tremain*, 366 So. 2d 707-708; *Bradshaw v. State*, 353 So. 2d 188 (Fla. 2nd DCA 1977); *Evans v. State*, 140 So. 2d 348 (Fla. 2d DCA 1962). Furthermore, such a defense would not be a defense to felony murder based on sexual battery, as sexual battery is not a specific intent crime. As such, the trial court properly denied this claim.

## VIII. THE LOWER COURT PROPERLY DENIED DEFENDANT'S ALLEGED *BRADY* VIOLATION CLAIM.

Defendant claims that the State violated *Brady v. Maryland*, 373 U.S. 373 83 (1963), by withholding exculpatory evidence that allegedly showed that the deceased was a prostitute. To prevail on this claim, Defendant must establish that the State possessed evidence favorable to the defense, that the defense did not possess and could not have obtained through the exercise of reasonable diligence, and that had the evidence been disclosed there is a reasonable probability that the result of the trial would have been different. *Maharaj v. State,* 25 Fla. L. Weekly S1097 (November 30, 2000); *Provenzano v. State*, 616 So. 2d 428 (Fla. 1993); *Melendez v. State*, 612 So. 2d 1366 (Fla. 1992); *Mendyk v. State*, 592 So. 2d 1076 (Fla. 1992).

Defendant cannot even make the requisite showing that he did not possess the alleged exculpatory evidence prior to trial or could not have done so through the exercise of due diligence. Indeed, at the evidentiary hearing, counsel testified that he had information that the victim was a prostitute but that the trial judge had ruled such information inadmissible:

> We were attempting to show that number one, that the decedent, and I believe she used the name Joyce Marlowe at the time, was a prostitute. That she was the one that actually picked up Burley at the bar.
>
> * * *

> What I outlined to you was our defense strategy, the jury didn't hear much or any of that because rulings made during the trial. The Court ruled that we could not introduce evidence about her prostitution.

(T., Vol. 10, pg.66, 67). Additionally, Defendant indicated that trial counsel was in possession of the information allegedly showing that the deceased was a prostitute in his Amended Motion to Vacate Judgment and Conviction and Sentence with Special Leave to Amend filed on April 15, 1994 ( D.A.R. 45). Accordingly, the lower court properly found that the requirement of Brady had not been met as Defendant failed to "show that he did not possess this information." (S.R. 335). As Defendant had the evidence, the lower court properly denied this claim.

Moreover, Defendant attempted to present testimony that the deceased was allegedly a prostitute and the trial court ruled the evidence inadmissible; therefore, this evidence was not material. *Wood v. Barthomew*, 516 U.S. 1 (1995). In a case in which Defendant never claimed that he did not kill or sexually batter the deceased, but rather only contested whether he should be held criminally responsible for the crimes, any evidence that the deceased was a prostitute would have ben irrelevant and certainly not of such significance that the result of the trial could have been different if the evidence had been disclosed. As such, the trial court properly denied this claim.

## IX. THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIM THAT DEFENDANT WAS INEFFECTIVE FOR FAILING TO REQUEST A JURY INSTRUCTION REGARDING EPILEPTIC SEIZURES WHEN JURY WAS INSTRUCTED ON INSANITY.

Defendant claims that trial counsel provided ineffective assistance of counsel because he failed to request an instruction that epilepsy negates specific intent. However, the jury was instructed that they should find the defendant not guilty by reason of insanity if they find that at the time of the offense he had menal infirmity, disease or defect, and as a result he did not know what he was doing or its consequences or did not know it was wrong. (D.A.R. 2600-02). Thus, if the jury agreed with Dr. Stillman's opinion (D.A.R. 2002), they would have found Defendant not guilty.

An additional instruction that epilepsy negates specific intent would not have aided Defendant in any way, as sexual battery is not a specific intent crime and Defendant's first degree murder charged was a felony-murder count based on sexual battery. Thus, deficiency and prejudice prong can therefore not be established. *See McCrae v. State*, 510 So. 2d 874 (Fla. 1987); *Buford v. State*, 492 So. 2d 355 (Fla. 1986). As such, the trial court properly denied this claim.

## X. THE LOWER COURT CORRECTLY DENIED DEFENDANT'S PROCEDURALLY BARRED CLAIM REGARDING IMPROPER HEARSAY TESTIMONY.

Although Defendant contends that counsel failed to object to Detective Poe's testimony, the record reflects lengthy discussions between the defense counsel, the prosecutor and the trial judge concerning the defense counsel's objection to the admission of such testimony. (D.A.R. 2385-19). In addition to obtaining a full Richardson hearing, defense counsel objected on the basis of not having the opportunity to confront and examine the other officers involved in the case, as well as the victim. (D.A.R. 2419). The trial court overruled defense counsel's objection: "Obviously he can't testify to conversations that he had with the victim because he wasn't the first officer and there is no exception that would cover subsequent conversations. If he happens to be the first officer then you might get into spontaneous declarations, etcetera. But I'm going to allow the testimony over the Defense's objection." (D.A.R. 2406). After further discussion, the court added: "Well, somewhere as the trial judge you have to rule on what is in front of you , and I am going to allow his testimony over your objection. It is very well preserved for the record, and you know, I am going to allow his testimony." (D.A.R. 2419) As defense counsel's objection to the testimony was clearly preserved for direct appeal, the lower court properly barred this issue on post conviction as it could have been raised on direct appeal. *Francis v. Barton*, 581

So. 2d 583 (Fla. 1991). Moreover, there is no reasonable probability that the result of the proceeding would have been different. *Strickland*. Thus, even if counsel erroneously failed to object to Detective Poe's testimony, such deficiency would not have been serious enough to deprive Defendant of a fair trial. *See Rutherford v. State*, 727 So. 2d 216 (Fla. 1998)(where defense counsel failed to object to hearsay testimony regarding victim's fear of defendant, appellate court found issue waived on direct appeal and defense counsel admitted at the 3.850 hearing that he "should have objected to the testimony," the court properly denied defendant' claim of ineffective of assistance because the alleged deficiency was not serious enough to deprive defendant of a fair trial).

## XI. DEFENDANT'S CLAIM THAT THE PENALTY PHASE INSTRUCTIONS IMPROPERLY SHIFTED THE BURDEN TO PROVE DEATH WAS INAPPROPRIATE IS PROCEDURALLY BARRED AND MERITLESS.

Defendant contends the trial court erred by improperly instructing the jury regarding burden of proof to find death appropriate, non-statutory mitigators, and aggravating factors of Defendant's case. These issues could have or should have been raised on direct appeal. As, such Defendant's claim is procedurally barred. *Lambrix v. State*, 641 So. 2d 847 (Fla. 1994); *Bryan v. State*, 641 So. 2d 61 (Fla. 1994); *Chandler v. State*, 634 So. 2d 1066 (Fla. 1994); *Rose v. State*, 617 So. 2d 291 (Fla. 1993). Furthermore, the courts have repeatedly rejected the claim that the instruction improperly shifts the burden of proof. *Walton v. Arizona*, 497 U.S. 639, 649-51 (1990); *San Martin v. State*, 705 So. 2d 1337, 1350 (Fla. 1997); *Kennedy v. State*, 455 So. 2d 351 (Fla. 1984); *Arango v. State*, 411 So. 2d 172, 174 (Fla. 1982). Thus, counsel would not have been ineffective for failing to raise this meritless claim, and the claim was properly summarily denied. *See Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *see also Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990).

Furthermore, contrary to Defendant's assertion that the penalty phase instructions presented a *Hitchcock* claim, the court instructed the jury that:

> You may consider as a mitigating factor any aspect of Burley Gilliam's character or background or any of the circumstances of the

> offense that the defendant offered as a basis for a sentence less than death.

(D.A.R. 2701). Thus, jury was not "precluded from considering mitigating evidence,...and from evaluating the 'totality of the circumstances' in considering an appropriate penalty," as Defendant asserts. (See pg. 67, Initial Appeal of Appellant). *Teffeteller v. Dugger*, 734 So. 2d 1009, 1026 (Fla. 1999)(where defense counsel advised jury that they could consider any other aspect of defendant's character or record or any other circumstance of the offense as a mitigating circumstance, this Court found no merit to *Hitchcock* claim).

As Defendant's argument that the jury was improperly instructed on the aggravating circumstances that support his death penalty is procedurally barred because it was not raised on direct appeal, the lower court was correct in summarily denying this claim as such. *Chandler v. State*, 634 So. 2d 1066 (Fla. 1994); *Rose v. State*, 617 So. 2d 291 (Fla. 1993).

## XII. DEFENDANT'S CLAIM THAT HIS SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE IS PROCEDURALLY BARRED.

Defendant's argument that the jury was improperly instructed on a unconstitutional and vague aggravating circumstance is procedurally barred because it was not raised on direct appeal. Accordingly, the lower court correctly summarily denied this claim. (S.R. 337). *Lambrix v. State*, 641 So. 2d 847 (Fla. 1994); *Bryan v. State*, 641 So. 2d 61 (Fla. 1994); *Chandler v. State*, 634 So. 2d 1066 (Fla. 1994); *Rose v. State*, 617 So. 2d 291 (Fla. 1993).

Additionally, Defendant charges that to the extent counsel failed to object to the automatic aggravating circumstance, counsel was deficient. However, "this Court has held there is no merit to the argument that an underlying felony cannot be used as an aggravating factor." *Freeman v. State*, 25 Fla. L. Weekly S451 (Fla. June 8, 2000)(*citing Blanco v. State*, 702 So. 2d 1250 (Fla. 1997)); *Arbelaez v. State*, 25 Fla. L. Weekly S586 (Fla. July 13, 2000). Thus, Defendant cannot show that the outcome of his trial was affected by counsel's failure to object to these aggravating factors. As such, the trial court properly denied this claim.

Defendant also contends that he was denied a reliable and individualized sentencing determination because:

> In addition to the nonstatutory mitigation mentioned by the trial court, Mr. Gilliam also presented: (1) he was addicted to alcohol and drugs; (2) that he was a changed man; (3) that he was a father to his siblings; (4) that he

> defended his mother and sister from brutal attacks from his father; (5) that he was learning disabled; (6) that he suffered a brutal childhood; (7) that he was from an impoverished background."

(See pg. 71 of Initial Brief of Appellant). However, Defendant addressed this issue on direct appeal, and this Court held:

> We find the sentencing order sufficient. The order recites the statutory aggravating circumstances that were found proved, and the reasons supporting the findings. The order also recites the nonstatutory mitigating circumstances that the court found proved. In view of the trial judge's findings regarding nonstatutory mitigating circumstances, we can assume he followed his own instructions to the jury in considering the statutory mitigating circumstances despite the fact that he did not enumerate them. As we noted in *Johnson v. Dugger*, 520 So. 2d 565, 566 (Fla. 1988): "When read in its entirety, the sentencing order, combined with the court's instructions to the jury, indicates that the trial court gave adequate consideration to the evidence presented.

*Gilliam v. State*, 582 So. 2d 610, 612 (Fla. 1991). As this claim was raised and rejected on direct appeal, the lower court properly found this claim was procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

## XIII. DEFENDANT'S CLAIM THAT THE COURT IMPROPERLY CONSIDERED NONSTATUTORY AGGRAVATING CIRCUMSTANCES IS PROCEDURALLY BARRED.

Defendant contends that the prosecutor improperly appealed to the jury's emotion by suggesting that Defendant posed a future threat to society during closing argument. Defendant also argues that he was denied a fair sentencing determination because the judge relied upon a hearsay report concerning Defendant's violent attack on his son. Finally, Defendant contends that a letter from Defendant's ex-wife expressing her fear of Defendant should he ever be released was improperly considered by the judge during Defendant's sentencing phase. Defendant argues that cumulatively these circumstances created impermissible aggravating factors which "evoked a sentence that was based on an 'unguided emotional response.'" (pg. 74, Initial Appeal of Appellant).

Defendant's claim is procedurally barred. Claims concerning allegedly improper comments made during the guilt and penalty phases could have and should have been raised on direct appeal. *See Teffeteller v. Dugger*, 734 So. 2d 1009, 1022 (Fla. 1999)(where defendant alleged counsel was ineffective for objecting to improper comments during prosecutor's closing argument, this Court found the claim procedurally barred as it should have been raised on direct appeal); *Koon v. Dugger*, 619 So. 2d 246, 247 (Fla. 1993); *Wood v. State*, 531 So. 2d 79,83 (Fla. 1988). Defendant next contends that his counsel was ineffective for failing to object to the comments

in closing. However, recasting a procedurally barred claim in terms of ineffectiveness does not raise the bar. *Robinson v. State*, 707 So. 2d 668, 697-99 (Fla. 1998).

Similarly, Defendant's claim that the judge impermissibly relied upon a hearsay report concerning an incident in which Defendant violently attacked his son is also procedurally barred, as Defendant raised this issue on direct appeal:

> Appellant urges that it was error to admit during the penalty phase of his trial, a hearsay report of his attack upon his infant son, without an opportunity for rebuttal. We agree the admission of the this report was error, but because it was not presented to the jury and was not used to aggravate appellant's sentence, we find it harmless.

*Gilliam*, 582 So. 2d at 612. As this claim was raised and rejected on direct appeal, the lower court properly found this claim was procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

Finally, with regard to Defendant's contention that the letter from his ex-wife expressing her fear of Defendant amounted to an impermissible aggravating factor, this issue is also procedurally barred. The record reflects that defense counsel strongly objected to the admission of the letter from Defendant's ex-wife (D.A.R. 2954). The letter was never presented to the jury but rather only admitted during the *Spencer* hearing and the judge gave equal weight to another letter written by her expressing warm sentiment to Defendant which Defendant presented as mitigation. (D.A.R. 2954). The State submits the court made no error by balancing both letters

against one another. As previously discussed, the judge's order reciting the mitigating and aggravating circumstances found proven by the court was upheld on direct appeal. *Gilliam* at 613. Any claim with regard to the admission of such letter should have been raised on direct appeal and is procedurally barred. *Francis v. Barton,* 581 So. 2d 583 (Fla. 1991).

## XIV. DEFENDANT'S CLAIM THAT HIS PRIOR RAPE CONVICTION WAS IMPROPERLY USED AS AN AGGRAVATING FACTOR IS PROCEDURALLY BARRED.

Although Defendant's claim that his prior rape conviction does not qualify as a prior violent felony is wholly without merit, such claim is also procedurally barred as Defendant could have raised it on direct appeal. *Lambrix v. State*, 641 So. 2d 847 (Fla. 1994); *Bryan v. State*, 641 So. 2d 61 (Fla. 1994); *Chandler v. State*, 634 So. 2d 1066 (Fla. 1994); *Rose v. State*, 617 So. 2d 291 (Fla. 1993).

Furthermore, Defendant contends that defense counsel was ineffective for not objecting to this aggravating circumstance. However, merely framing a procedurally barred claim in terms of ineffectiveness does not raise the bar. *Robinson v. State*, 707 So. 2d 668, 697-99 (Fla. 1998). Moreover, the record reflects that defense counsel did object to the presentation of Detective Poe's testimony concerning the Defendant's rape conviction in Texas(D.A.R. 2409). Hence, Defendant cannot claim defense counsel was ineffective for failing to object to the admission of testimony concerning this aggravating circumstance. Further, there is absolutely no evidence in the record, nor has Defendant specifically identified the existence of any alleged information, indicating that the rape was anything but violent. Thus, the lower court properly summarily denied this claim.

## XV. DEFENDANT'S *CALDWELL* CLAIM IS WITHOUT MERIT.

Defendant alleges that his counsel was ineffective for failing to object to comments by the trial court and prosecutor that allegedly violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985). However, this claim could or should have been raised on direct appeal and is therefore procedurally barred. *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991). Moreover, given that the comments did not incorrectly state the jury's role in the capital sentencing procedure, counsel cannot be deemed ineffective for failing to raise this nonmeritorious issue. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover*, 656 So. 2d at 425; *Hildwin v. Dugger*, 654 So. 107 (Fla. ), cert denied, 469 U.S. 1098 (1984); *Breedlove*, 595 So. 2d 8,11 (Fla. 1992).

Under *Caldwell*, error is committed when a jury is mislead regarding its responsibility for a sentencing decision so as to diminish its sense of responsibility for that decision. However, "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989). This Court has recognized that the jury's penalty phase decision is merely advisory and that the judge does make the final sentencing decision. *Combs v. State*, 525 So. 2d 853, 855-58 (Fla. 1988).

Accordingly, the trial court properly instructed the jury:

> Your advisory sentence is entitled to great weight and may be rejected by the Court only if the facts are so clear and convincing that virtually no reasonable person could differ.

(D.A.R. 2705). As these comments properly characterized the jury's role under Florida capital punishment procedures, they did not violate Caldwell. *Davis v. Singletary*, 119 F.3d 1471, 1481-85 (11th Cir. 1997). As such, the trial court properly denied this claim.

## XVI. DEFENDANT'S CLAIM THE JURY INSTRUCTION CLAIM IS PROCEDURALLY BARRED.

Although Defendant claims that the jury was incorrectly advised during the penalty phase regarding the majority vote necessary to recommend death, this issue could have and should have been raised on direct appeal. *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991). Accordingly, it is procedurally barred on postconviction. Similarly, Defendant's claim that counsel was deficient for not objecting at trial to this issue is also procedurally barred, as he cannot merely re-frame a procedurally barred claim in terms of ineffectiveness to raise the bar. *Robinson v. State*, 707 So. 2d 688, 697-99 (Fla. 1998).

Even if Defendant's claim was not procedurally barred, a review of the record patently refutes that the jury was instructed improperly. (D.A.R. 2705). The court correctly instructed the jury regarding the majority required to recommend death:

> If the majority of the jury determines that Burley Gilliam should be sentenced to death, your advisory sentence will be a majority of the jury by vote of whatever happens to be, advise and recommend to the Court that it impose the death penalty upon Burley Gilliam. On the other hand, if by six or more votes the jury determines that Burley Gilliam should not be sentenced to death, your advisory sentence will be the jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Burley Gilliam, without the possibility of parole for 25 years.

(D.A.R. 2705-2706). Moreover, Defendant has not alleged how, even if the jury had been misinstructed regarding the majority required

for a recommendation of death, the outcome of his penalty phase would have been different. Merely asserting the blanket allegation of error without sufficient allegations that demonstrate prejudice does not entitle Defendant to relief. *Teffeteller v. Dugger*,734 So. 2d 1009 (Fla. 1999). As such, the trial court properly denied this claim.

## XVII. THE CLAIM THAT THE COURT IMPROPERLY CONSIDERED THE MITIGATING FACTORS OF DEFENDANT'S CASE IS PROCEDURALLY BARRED.

Defendant's claim that the court failed to properly weigh the mitigating factors in his case during sentencing is procedurally barred, Defendant raised this claim on direct appeal. As previously discussed *infra*, this Court found that the lower court did properly weigh the mitigating factors of Defendant's case and upheld the lower court's sentence of death:

> We find the sentencing order sufficient. The order recites the statutory aggravating circumstances that were found proved, and the reasons supporting the findings. The order also recites the nonstatutory mitigating circumstances that the court found proved. In view of the trial judge's findings regarding nonstatutory mitigating circumstances, we can assume he followed his own instructions to the jury in considering the statutory mitigating circumstances despite the fact that he did not enumerate them. As we noted in *Johnson v. Dugger*, 520 So. 2d 565, 566 (Fla. 1988): "When read in its entirety, the sentencing order, combined with the court's instructions to the jury, indicates that the trial court gave adequate consideration to the evidence presented.

*Gilliam v. State*, 582 So. 2d 610, 612 (Fla. 1991). As this claim was raised and rejected on direct appeal, the lower court properly found this claim was procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

## XVIII. THE LOWER COURT WAS CORRECT IN SUMMARILY DENYING DEFENDANT'S CLAIM REGARDING THE BAILIFF'S CONDUCT.

Defendant's claim regarding a juror's letter to the trial judge which complimented the bailiff for "remaining professionally aloof and simultaneously protective" of the jury and "sharing some very amusing stores to help. . .pass the time" is procedurally barred. Defendant addressed the issue of the juror's letter on direct appeal in his claim that he was denied his right to a fair trial when defense counsel was prohibited from conducting post verdict interviews regarding whether the letter was written in response to a newspaper article published after the jury recommended the death penalty. *Gilliam,* 582 So. 2d at 611. The juror's letter, which is the exclusive basis for Defendant's claim that the bailiff's acted impartially or improperly, was addressed at length and placed into the record by the trial court. (D.A.R. 2732-44). As this claim was raised and rejected on direct appeal, the lower court properly found this claim was procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

Moreover, although Defendant claims that the face of the record presents "the appearance of impartiality" in that the "bailiff's activities were improper," a review of the actual record conclusively refutes such claim. The juror's letter actually commended the bailiff for remaining "professionally aloof," rather than suggest that the bailiff behaved in any manner impartial:

> P.S. I think Wally deserves a big pat on the back for always being in a good humor, for somehow managing to remain professionally aloof and simultaneously protective of us, and

> for sharing some very amusing stories to help us pass the time. He helped tremendously in creating a very positive experience out of one that could have become merely tedious and annoying.

(D.A.R. 427). Despite the bare assertion that the bailiff acted improperly, Defendant cannot establish specific facts or allegations demonstrating how the bailiff acted in any way impartially. Therefore, Defendant cannot demonstrate how he was prejudiced. *Strickland*. As such, the trial court properly denied this claim.

## XIX. DEFENDANT'S CLAIM THAT INSTRUCTIONS ON PRIOR VIOLENT FELONY AND HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCES ARE PROCEDURALLY BARRED AND MERITLESS.

For a number of reasons the defendant alleges the constitutionality of Florida's prior violent felony and heinous atrocious and cruel aggravating circumstance instructions. At trial defense counsel objected to the instruction regarding heinous, atrocious and cruel aggravating circumstance, specifically citing a *Maynard* vagueness challenge. (D.A.R. 2636). However, these issues could and should have been raised on direct appeal and are barred. *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991). Moreover, the record reflects that after painstaking discussion with the prosecutor and defense counsel over the issue (D.A.R. 2640-46, 2665-69), the trial court instructed the jury as to preclude any claim the heinous, atrocious and cruel instruction was vague:

> Premeditation does not make a killing heinous, atrocious, or cruel. Your advisory sentence is entitled to great weight and may be rejected by the Court only if the facts are so clear and convincing that virtually no reasonable person could differ. Acts committed after the death of the victim are not relevant in considering whether the homicide was especially heinous, atrocious or cruel. **What is intended to be included in the category of heinous, atrocious and cruel are those capital crimes where the actual commission fo the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies; the conscientiousless or pitiless crimes which is unnecessary tortuous to the victim.**

(2700-2701).

Defendant did not challenge the jury instruction regarding the prior violent felony aggravating factor, nor raise the issue on

direct appeal. As such, this issue is procedurally barred and cannot be raised in this motion for post-conviction relief. See Hodges v. State, 619 So. 2d 272 (Fla. 1993). The procedural bar cannot be avoided by couching either claim in terms of ineffective assistance of counsel. See Robinson v. State, supra. As such, the trial court properly denied this claim.

## XX. DEFENDANT'S PUBLIC RECORDS CLAIMS HAVE ALREADY BEEN ADJUDICATED.

Defendant claims that several agencies have not responded to his public records requests. However, the lower court specifically found he had received all documents from the respective agencies. (D.A.R. 334). Defendant has not alleged how the lower court's ruling was incorrect or what documents he did not receive. As Defendant has not alleged facts sufficient for a claim, the lower court's denial should be affirmed. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998); *Williams v. State,* 553 So. 2d 309 (Fla. 1st DCA 1989).

## XXI. DEFENDANT'S CLAIM REGARDING DEFENDANT'S CONFESSION IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Defendant contests the admission at trial of his confession in Texas to Detective Merrit. As this claim could have or should have been raised on direct appeal, it is procedurally barred. The record reflects that defense counsel filed a motion to suppress Defendant's confession prior to Defendant's first trial on November 1, 1982 (D.A.R.S.S. 1171-72). Although Defendant eventually proceeded pro se with different standby counsel during his first trial, counsel was initially appointed and filed a number of pre-trial motions prior to his withdrawal. After the appeal of Defendant's first trial, counsel was re-appointed and represented Defendant through the completion of the second trial in which Defendant now alleges he received ineffective assistance of counsel.

After filing his Motion to Suppress Defendant's Statement, counsel later withdrew his motion because he made a strategic decision not to expose Defendant to cross-examination at the hearing:

> A defense of insanity is incompatible with any defense of denial. In other words, with a defense of insanity, basically the accused is saying, I did it but I was insane, okay?
>
> * * *
>
> Now, because of the defenses being incompatible, I cannot knowingly make a determination, for example, as to whether Burley Gilliam should testify at the Motion to Suppress His Statements. The reason being that, what may be advisable with a defense of denial may be inadvisable if the defense is ultimately is one if insanity...
>
> * * *

> This morning the Court heard a motion that addressed an issue that dealt with our ability to present testimony and evidence on the Motion to Suppress as it dealt with people other than Judge Gray. I explained what was in the motion, itself, the position we were in....We are still in that position, obviously this afternoon, and that is basically, that is why the motion was withdrawn with respect to these other people.

(D.A.R.S.S. 16,17). Although counsel's strategic decision based on a defense of insanity was made prior to Defendant's first trial, counsel still proceeded with the same defense of insanity in the second trial. Not exposing Defendant to potentially damaging cross-examination in a pre-trial hearing which could weaken Defendant's insanity defense at trial was a reasonable strategic decision. Moreover, Defendant's confession was properly admissible because the record reflects that Detective Merrit thoroughly advised Defendant of his rights:

> Q: Did there come a time when you advised Defendant of any rights he might have under the Constitution of Texas, the State of Florida or the United States of America?
>
> A: Yes. I advised him from a Constitutional rights card I have had since the Police Academy.
>
> Q: Do you have it in the courtroom today?
>
> A: Yes. (Complies).
>
> Q: Do you always carry this card with you?
>
> A: Yes.
>
> Q: Did you have this same card with you in Texas at that time?
>
> A: Yes.
>
> Q: Was it from this exact card that you

advised the Defendant of his rights?

A: Yes....You have the right to remain silent. The Constitution requires that I so inform you of this right. You need to talk to me or answer any questions if you do no wish to do so.
Should you talk to me, anything which you say can and will be introduced into evidence in court against you.
If you want an attorney to be present at this time or anytime hereafater you are entitled to such counsel. If you cannot afford to pay for such counsel, we will furnish you with counsel. Knowing your rights as I have just related them to you, are you now willing to answer my questions without having an attorney present?

Q: Did the Defendant answer you?

A: Yes, he did.

Q: What did he tell you?

A: First he said that he had a call in to his lawyer. I said fine, go ahead and call him and after you talk to him if you want to talk, we will talk, and he said, that is all right, I will go ahead and talk to you and went on.

(D.A.R.S.S. 62-63). Additionally, Detective Merrit testified that Defendant did not appear under the influence of any drugs or alcohol and that he only inquired about receiving his medication after he gave his confession. (D.A.R.S.S 65). Defendant contends that his confession was taken in violation of his constitutional rights because prior to advising Detective Merrit that he wanted "to talk," Defendant had mentioned that he had a call into his lawyer. However, even if he had indicated a desire to speak to his attorney "[i]f the suspect subsequently voluntarily initiates contact or communication with the police and validly waives the right he or she had previously invoked, police interrogation can

resume." *Jones v. State* 748 So. 2d 1012, 1018 (Fla. 1999). Here, Defendant clearly initiated conversation with Detective Merrit after his mention of an attorney; thus, his confession to Detective Merrit was admissible. More importantly, Defendant's mere mention that he had a call into his attorney is not an unequivocal request for an attorney under *Miranda*. "If the alleged statement is at best an "equivocal or ambiguous request," the questioning may continue." *Id.* at 1020.

As Defendant cannot allege any specific facts that would vitiate the legal voluntariness of Defendant's confession and the confession was properly admissible, he cannot demonstrate any prejudice resulted from of his counsel's decision to withdraw his motion to suppress. As such, the trial court properly denied this claim.

## XXII. DEFENDANT'S CLAIM REGARDING THE SEIZURE OF EVIDENCE FROM HIS TRUCK IS PROCEDURALLY BARRED.

Defendant asserts the lower court erred by denying his claim regarding allegedly improper seizure of evidence from his truck. As this issue could have or should have been raised on direct appeal, is it procedurally barred. This issue was litigated during Defendant's first trial before the same trial judge that presided over Defendant's second trial. Moreover, counsel, who ended up representing Defendant again in his second trial, filed the Motion to Suppress Physical Evidence. Thus, having litigated the issue before the same court on the same facts and evidence, counsel had no reason to believe that a successive motion on the same grounds would yield a different ruling. Accordingly, counsel was not deficient for electing to not relitigate the issue pertaining to the seizure of items from Defendant's truck. Nor can counsel "be deemed ineffective for failing to prevail on a meritless issue." *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999). As such, the trial court properly denied this claim.

## CONCLUSION

For the foregoing reasons, the trial court's order denying Defendant post conviction relief from his convictions should be affirmed.

Respectfully submitted,
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **Dan D. Hallenberg**, Assistant CCR South, Office of the Capial Collateral Regional Counsel - South, 101 NE 3rd Ave. Ste. 400, Fort Lauderdale, FL 33301 this day of December 11, 2000.

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