

IN THE SUPREME COURT OF FLORIDA

CHARLIE THOMPSON,

Appellant,

vs.

CASE NO. SC96641

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

On January 14, 1987, an amended indictment was filed charging Appellant Charlie Thompson with two counts of first degree murder and two counts of kidnaping (DA-R. I/21-23).¹ Thompson was initially convicted as charged and sentenced to death in 1987 following a trial before the Honorable William Graybill. Thompson v. State, 548 So. 2d 198 (Fla. 1989). This Court remanded for a new trial, and Thompson was again convicted and sentenced to death by the Honorable Robert Bonnano in 1990. Thompson v. State, 595 So. 2d 16 (Fla. 1992). This Court again remanded and, following a third trial conducted by the Honorable Diana Allen, Thompson was again convicted and sentenced to death. In 1994, this Court affirmed the convictions and death sentences. Thompson v. State, 648 So. 2d 692 (Fla. 1994), cert. denied, 515 U.S. 1125 (1995).

In its opinion affirming the case, this Court described the facts of Thompson's crimes as follows:

The appellant, Charlie Thompson, was a groundskeeper at Myrtle Hill Cemetery in Tampa. Although he was a large man, about six feet tall and weighing 220 pounds,

¹References to the record from the direct appeal affirming Thompson's convictions and sentences, Florida Supreme Court Case No. 81,039, will be designated as "DA-R." followed by the appropriate volume and page number; references to the record of the instant postconviction proceeding, Case No. 96,641, will be designated as "PC-R." followed by the appropriate page number (no volume number is included as the record only contains one volume). The record from the initial direct appeal, Case No. 70,401, will be cited as "1DA-R." and the record from the second appeal, Case No. 76,147, will be cited as "2DA-R."

Thompson injured his back while digging a grave and began collecting workers' compensation benefits through the cemetery's office. After the workers' compensation benefits ran out, Thompson persisted in his belief that the cemetery owed him \$150 more than he had collected. Thompson was fired from his job at the cemetery in July of 1986 for failing to show up for work.

In the early afternoon of August 27, 1986, the bodies of Russell Swack and Nancy Walker were found in a wooded area near the Myrtle Hill Cemetery. Swack was the bookkeeper for the cemetery and Walker was his assistant. A medical examination revealed that Swack had been stabbed nine times and shot once in the face. All of the injuries had been inflicted while Swack was alive. The medical examination of Walker established that she had been shot once in the back of the head. A watch and ring were missing from Swack's body.

One of the managers of the cemetery testified that he had last seen Swack and Walker at about ten o'clock on that same morning and that the victims were speaking with a large unidentified man in the cemetery's business office. The witness also stated that he left the office and that, when he returned about fifteen minutes later, the victims were gone and the office door was locked.

A search of the office revealed that Walker's purse was under her desk and her typewriter was still turned on. In addition, Swack's adding machine was left on and a bookkeeping ledger was on Swack's desk. The last entry in the ledger, dated that same day, was for a check payable to Charlie Thompson in the amount of \$1,500.

Several witnesses, including the mother of Thompson's children, testified that Thompson had a watch and a ring in his possession on the afternoon and evening of the crime. The watch and ring were recovered and identified as belonging to Swack. Two days after the crime, Thompson was arrested when an alert car salesman contacted the police after Thompson and three others attempted to purchase a used car with the \$1,500 check from Myrtle Hill Cemetery.

At Thompson's trial for the murders, the State presented this and other evidence to the jury, including the testimony of a jailhouse informant who stated that Thompson admitted killing Swack and Walker. Thompson

presented no witnesses in his defense. The jury found Thompson guilty of two counts of first-degree murder and two counts of kidnapping. In the penalty phase of the trial, the defense presented two psychologists who testified as to Thompson's mental deficiencies. Thompson's sister also testified to a history of mental illness in the family. After hearing this testimony, the jury recommended the death penalty for each murder by a 7-to-5 vote.

648 So. 2d at 693-94.

The guilt phase theory of defense was that Thompson had not committed the murders. However, this Court found that the evidence of Thompson's guilt was "more than sufficient" to support the convictions. 648 So. 2d at 695.

During the initial trial in 1987, Thompson was represented by Assistant Public Defenders Craig Alldredge and Charles O'Connor; the State was represented by Assistant State Attorney Mike Benito. Prior to trial, there was a challenge to Thompson's competency to stand trial. Following a hearing at which four mental health experts testified (Dr. Arturo Gonzalez, Dr. Daniel Sprehe, Dr. Robert Berland, and Dr. Michael Maher), the court found Thompson competent (1DA-R. VIII/1128-1142, 1143-1157, 1157-1165; IX/1271-1291). Penalty phase defense witnesses included two family members, a jail records custodian to testify that Thompson did not have any disciplinary reports, his probation officer, and two mental health experts, Drs. Maher and Berland (1DA-R. VII). Dr. Maher testified that, although Thompson did not meet the definition

for insanity under Florida law, he was functionally in the borderline mentally retarded range and suffered organic brain dysfunction (1DA-R. VII/958-964). Dr. Berland also opined that Thompson was sane but had an IQ of 70 and organic brain damage (1DA-R. VII/987-995). The jury recommended death sentences for both murders by a vote of nine to three (1DA-R. VII/1063).

For the second trial, two new attorneys, Frank Johnson and Robert Simms, were appointed to represent Thompson (2DA-R. VI/838-839, 844-845). Penalty phase witnesses included Thompson's sister, the sister of Thompson's former girlfriend, the jail records custodian, Dr. Maher, and Dr. Berland (2DA-R. IV). The jury recommended death sentences for both murders by a vote of seven to five (2DA-R. IV/652-653).

Prior to the third trial, defense counsel Robert Simms had become a circuit judge and attorney William Murphy was appointed to assist Frank Johnson in representing Thompson (DA-R. II/209, IX/627-632; 2DA-R. Supp/1016). A different prosecutor, Chris Watson, represented the State. Prior to trial, the defense requested a competency evaluation and filed a notice of insanity; the trial court appointed Drs. Gonzalez and Sprehe to conduct the competency evaluations (DA-R. I/59-60, 63-67; IX/638-647). In addition, Dr. Berland and Dr. Maher were reappointed as confidential experts to assist the defense (DA-R. I/61-62; IX/638-

647).

After Gonzalez and Sprehe found Thompson to be competent (DA-R. I/71-75; IX/648-665), the defense requested that an HRS team be appointed to determine whether Thompson was retarded and/or competent to proceed; this request was also granted (DA-R. I/76-82; IX/652-665). Dr. Charles Logan, from the HRS team, concluded that Thompson was in the range of mild mental retardation and was not competent for trial but could be trained to become competent in the foreseeable future (DA-R. I/106, 109-113). Prior to trial, the court held a hearing on Thompson's competency; after hearing testimony from Drs. Gonzalez, Sprehe, and Logan, the court found Thompson to be competent (DA-R. IX/672-775).

At the beginning of voir dire, the judge discussed capital case procedures and questioned the panel about their views on the death penalty, reminding the potential jurors that death is not appropriate for all first degree murder cases (DA-R. III/12-16). The defense moved to quash the entire panel, noting that only six of the fifty prospective jurors were black; the court denied this request (DA-R. III/19). The prosecutor briefly questioned the panel collectively (DA-R. III/21-36). Defense counsel Johnson then questioned the panel, focusing initially on the presumption of innocence and the defendant's right to remain silent (DA-R. III/36-39). All of the prospective jurors agreed that they would follow

the law and find Thompson not guilty if the State did not meet its burden of proving guilt beyond a reasonable doubt (DA-R. III/41). All agreed that the defendant had the right to face his accusers and not testify (DA-R. III/43). Defense counsel discussed the fact that Thompson is black, and the panel indicated they would be colorblind (DA-R. III/41-42). He also discussed their responsibility to determine the credibility of witnesses, encouraging them to use common sense (DA-R. III/43-45).

At one point, prospective juror Richard Hebble indicated that he had problem with a defendant not testifying; although he understood that there was a right to remain silent, he had difficulty because he felt like an innocent defendant "would be able to get up there and speak his piece" (DA-R. III/48-49). Prospective juror Lenora Walcott indicated that she also had difficulty with the concept (DA-R. III/49). Thereafter, the panel indicated that they understood that the case would be decided on the strength of the State's case, and nothing more (DA-R. III/51).

Following the questioning, the defense objected when the State sought to excuse five of the venire for cause based on their opposition to the death penalty; the court overruled Thompson's objection (DA-R. III/54-56). Defense counsel requested that six potential jurors be excused for cause due to difficulties that they had identified in sitting on the jury (DA-R. III/57-59). At the

request of the defense, the court struck one prospective juror that had indicated he had previously worked on death penalty legislation, and struck another that had voiced child care concerns (DA-R. III/56, 58). When the defense asked for a cause excusal on Mr. Hebble, the court responded that Hebble had not indicated that he could not follow the law; but when the prosecutor stated that he would not object to excusing Hebble, the court granted the challenge (DA-R. III/57-58).

The jury was repeatedly reminded that the defendant had an absolute right to remain silent, that he had no duty to prove his innocence, and that the jury could not draw any inference from his failure to take the stand or allow it to influence their verdict in any way (DA-R. IV/78-79; VI/430). At the conclusion of the trial, the court noted for the record that although the defense had objected to having only six black prospective jurors in the venire, that five of the six were selected on the jury; although one of these was an alternate later excused by the court for personal reasons, four of the twelve jurors to deliberate were black (DA-R. VI/414-415).

As had the prior two sentencing proceedings, the penalty phase evidence in the third trial focused on Thompson's mental problems, including his retardation and chronic mental illness; testimony of Thompson's family background was also presented. Dr. Logan, a

psychologist, testified that he examined Thompson pursuant to a court order and determined Thompson had a IQ in the mild range of mental retardation (DA-R. VII/453-455). According to Logan, Thompson showed evidence of having met the criteria for retardation on a long-term basis, since prior to his 18th birthday (DA-R. VII/456). Logan noted that the cause of Thompson's mental deficits could be genetic or due to physical injury, although he saw no indication of injury (DA-R. VII/456).

Dr. Robert Berland also testified once again for Thompson. Dr. Berland testified at length about Thompson's very low intellectual functioning and psychotic disturbances (DA-R. VII/465-510). Berland stated that Thompson was both under the influence of a mental or emotional disturbance and impaired in his ability to conform his conduct to the requirements of law (DA-R. VII/475). Berland described various tests he had conducted and concluded that Thompson was not malingering and that he suffered from a long-term psychotic disturbance and mental illness that went back to at least age nine (DA-R. VII/475-486, 497). Thompson's psychosis involved hallucinations, delusions, and mood disturbances (DA-R. VII/498). Berland also discussed Thompson's history of drug use, including his admission that he had used cocaine for a considerable period of time up to the time of his arrest (DA-R. VII/498). According to Berland, such drug use was like throwing gasoline on the flames of

mental illness, increasing the severity of the symptoms of psychosis (DA-R. VII/499). On cross examination, Berland admitted that Thompson was sane at the time of the offense; that Berland had previously acknowledged being surprised at how well Thompson could read; and that Berland was not aware of any medical testing to verify his opinion on Thompson's brain damage (DA-R. VII/502-508).

Thompson also presented the deposition testimony of his sister, Darlene Harman. Ms. Harman was the oldest of the twelve children in Thompson's family; Thompson was the seventh or eighth child (DA-R. VII/529). Thompson was born in Mississippi, where he went through about the 4th or 5th grade in school (DA-R. VII/530-531). His mother died when Thompson was about seven; his father died when he was about 22 (DA-R. VII/530). The house where Thompson grew up in Mississippi had no electricity or running water; the life was tough (DA-R. VII/533). One of Thompson's sisters had spent twenty years in a mental hospital, and a brother had been institutionalized at Chattahoochee for two years (DA-R. VII/532).

The trial court concluded that six aggravating factors applied: prior felony conviction; murder committed during kidnaping; murder committed to avoid arrest; murder committed for pecuniary gain; heinous, atrocious or cruel; and cold, calculated and premeditated. Although the trial court rejected the statutory

mental mitigators, weight was given to the mental health testimony as nonstatutory mitigation and family background mitigation was also found. On appeal, this Court upheld all of the trial court's findings with regard to the aggravating and mitigating circumstances.

Thompson filed his substantive postconviction motion on April 7, 1999 (PC-R. 97-127). The motion presented four claims, which are repeated nearly verbatim as Issues I, III, V, and IX in the instant appeal. The remaining issues in Thompson's appellate brief were never presented to the trial judge.

Judge Allen did not request a written response from the State, but conducted a Huff hearing on June 16, 1999 (PC-R. 177-193). At the hearing, counsel for Thompson acknowledged that all of the claims in his motion except for ineffective assistance of counsel had already been rejected by this Court and were included in the motion in order to preserve Thompson's right to raise the issues in any federal habeas petition that might ultimately be filed (PC-R. 179-180). Counsel also noted that the two alleged alibi witnesses named in the postconviction motion had not been located (PC-R. 183).

Following the Huff hearing, Judge Allen entered an order denying Thompson's request for an evidentiary hearing (PC-R. 130). The trial court later entered a thirty-six page order denying all

relief (PC-R. 131-166). This appeal follows.

SUMMARY OF THE ARGUMENT

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

Issues II, IV, VI, VII, and VIII are procedurally barred because they were not presented to the trial court in the postconviction motion. Even if they had been, claims VI, VII and VIII would have been procedurally barred at that point as direct appeal issues; Issues II and IV would be insufficiently pled.

Issues III, V, and IX were properly summarily denied by the court below. These issues were all procedurally barred, as they should have been raised at trial and on direct appeal; they are also without merit.

Issue X is procedurally barred since it was not presented to the trial court for consideration. It should have been presented in Thompson's habeas petition to this Court. In addition, this Court has previously rejected Thompson's arguments as to the constitutionality of Florida's lethal injection statute.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THOMPSON'S CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Thompson's first claim presents a multi-faceted attack on the adequacy of his attorneys' performance during the trial and sentencing proceedings. Each of Thompson's allegations will be examined in turn; as will be seen, none of his assertions warranted an evidentiary hearing in the court below.

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

deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. 466 U.S. at 687, 695; 705 So. 2d at 1333; 675 So. 2d at 569. A proper analysis requires that counsel's performance be reviewed with a spirit of deference; there is a strong presumption that counsel's conduct was reasonable. 466 U.S. at 689.

It must be noted that, for much of this claim, Thompson's allegations are speculative and unsubstantiated. For example, Thompson faults trial counsel for failing to secure independent forensic experts; an expert on retardation and its possible effect on Thompson's competency; an independent forensic pathologist; an independent crime scene analyst; and an expert toxicologist. However, Thompson never identifies what particular information would have been provided by these additional experts. Instead, the postconviction motion repeatedly asserted that postconviction counsel was currently obtaining such experts to assist them with the case. In Strickland, the Court rejected the idea that speculation that alleged errors "could have" or "might have" affected the verdict would demonstrate ineffectiveness; thus, such allegations are not sufficient to warrant an evidentiary hearing. 466 U.S. at 694.

A. JURY SELECTION

Thompson first challenges his attorney's questioning of potential jurors, claiming that there was no adequate inquiry regarding possible racial bias, the credibility of witnesses, or opinions relating to the presentation of mental health evidence and mental health experts. He also asserts that counsel failed to remove and discover biased jurors, or to preserve the issue for appeal. It must be noted initially that the claim that counsel failed to conduct jury selection in a reasonably professional manner is procedurally barred, as it is based entirely on the transcript of the trial and therefore could have been raised on direct appeal. Robinson v. State, 707 So. 2d 688, 697, n. 16 (Fla. 1998) (claim of ineffective assistance of counsel based on jury selection was procedurally barred). Even if considered, however, no relief is warranted in this claim.

The court below noted that the trial record reflects that defense counsel did address possible racial bias, reminding the panel that race had nothing to do with deciding the case, and all of the prospective jurors acknowledged the necessity for "color blindness" (PC-R. 133; see DA-R. III/41-42). The court also noted that counsel addressed the need to assess witness credibility, and that, although the credibility of police officers was not specifically discussed, any possible deficiency in this regard

could not have prejudiced Thompson (PC-R. 134-35; see DA-R. III/43-45). Similarly, the court found that any possible deficiency in failing to ask jurors about mental health experts and mitigation could not reasonably have affected the outcome of the trial (PC-R. 140).

The claim that counsel failed to exclude a biased juror is premised on counsel's failure to request that potential juror Walcott be excused for cause.² During jury selection, Walcott admitted that she had "difficulty" with the concept that an accused defendant would chose not to testify in his own defense, even if the law did not require him to do so. Although Thompson characterizes Walcott's comments as "insist[ing] that [she] would not be able to follow the judge's instructions," this characterization is not a reasonable construction of Walcott's statements. The record reflects that, although Walcott was not asked individually about her ability to follow the law, there were several times when the prospective panel as a whole acknowledged that the case would have to be decided on the strength of the State's evidence, and nothing else; they also acknowledged the defendant's fundamental right not to testify (DA-R. III/41, 43, 51-52).

²As noted by the court below, the second identified prospective juror disputed by Thompson did not serve on the jury (PC-R. 141; DA-R. III/60-61).

A review of the transcript of the jury selection as a whole clearly demonstrates that defense counsel acted reasonably as the advocate required by the Sixth Amendment. In addition, even if some possible deficiency were contemplated based on Thompson's current counsel's suggestion that he would have done things differently during voir dire, no prejudice can be discerned in this case. Given the strength of the State's evidence against Thompson -- including weighty circumstantial evidence that Thompson possessed some of the victim's jewelry shortly after the murders and was arrested attempting to use a check which one of the victims had written to him for no apparent reason just prior to the murders, as well as direct evidence of Thompson's inculpatory statements to a cellmate -- no reasonable juror would have failed to convict Thompson of these murders. Since the outcome would not have been different even if voir dire had been conducted as now suggested, no prejudice accrued. See, Thomas v. Borg, 159 F.3d 1147, 1152 (9th Cir. 1998) (in rejecting claim that counsel was ineffective for failing to establish underrepresentation of blacks on his jury, court found no prejudice because evidence was so overwhelming that no reasonable juror, black or white, would have voted to acquit Thomas). Given the speculative nature of Thompson's second-guessing trial counsel's jury selection, the lack of any clearly identifiable bias among the jurors that convicted

him and recommended his death sentences, and the absence of any possible prejudice, the court below properly summarily denied this claim.

B. GUILT PHASE INVESTIGATION

Thompson's next allegation relates to his attorney's failure to present alibi witnesses, an independent forensic expert, and testimony relating to Thompson's mental retardation during the guilt phase of the trial. As to this claim, it is critical to note that the alleged alibi witnesses did not actually account for Thompson's whereabouts during the time frame of the murders. Although one witness allegedly would have provided information about giving Thompson a ride before 10:00 a.m. the day of the murders, the record reflects that the victims were still alive at that time (DA-R. IV/154, 180). The other witness allegedly saw Thompson at a barbecue that day, but no time frame is offered.

Furthermore, in Thompson's first trial, he testified that he was at the cemetery just prior to the murders (1DA-R. VI/796-798). In addition, postconviction counsel represented at the Huff hearing that these witnesses had not been located and the record does not reflect they could be available for any evidentiary hearing; to the contrary, Thompson's current brief asserts that these witnesses are now dead. No basis for an evidentiary hearing exists on these

facts.

The claim as to the independent forensic expert, as previously noted, is speculative. Thompson's concerns that other individuals may have been witnesses, that tangible evidence from the scene may have implicated someone else, and that a bag of clothing found at the scene may have provided exculpatory evidence do not offer specific facts to support his postconviction claim, only unsubstantiated guesswork. Thus, no evidentiary hearing was required.

Thompson's claim that trial counsel failed to investigate the effect of his retardation on his competency to stand trial is clearly refuted by the record. Prior to Thompson's October, 1992 trial, defense counsel moved for another competency examination (DA-R. I/59-60). Drs. Gonzalez and Sprehe were appointed to evaluate Thompson, and both found him to be competent (DA-R. I/71-75). Thereafter, defense counsel filed another motion, reciting the facts regarding Thompson's retardation from prior trials, and requesting the court to appoint a team of experts from HRS to determine his retardation and competency (DA-R. I/76-77). The court granted the motion and continued the trial in order to provide sufficient time to investigate this aspect of Thompson's competence (DA-R. I/78-82; IX/652-665). The HRS team concluded that Thompson was both retarded and incompetent to stand trial, and

defense counsel presented the testimony of Dr. Charles Logan to the trial judge at a competency hearing (DA-R. I/106-113; IX/736-759).³

Clearly, on these facts, Thompson's assertion that defense counsel failed to investigate the effect of his retardation on his competency to stand trial is well refuted. Furthermore, Thompson has not actually asserted in postconviction that he was in fact incompetent, only that counsel should have investigated further and that he was currently seeking the services of a mental health expert in this matter (PC-R. 106). It should also be noted that, although postconviction counsel repeatedly faults trial counsel for failing to present testimony about competency to Thompson's guilt phase jury, the question of competency is a legal issue for the court, not a factual issue for the jury. See, Watts v. State, 593 So. 2d 198, 202 (Fla. 1992) (noting that, in Florida, competency determination is ultimately for trial court). Thompson has never alleged that he was insane at the time of the crime,⁴ and therefore counsel should not be faulted for failing to present mental health testimony in the guilt phase of Thompson's trial.

Finally, it must be noted that Thompson's current brief improperly suggests that the court below found trial counsel to

³Dr. Logan also testified during the penalty phase of Thompson's trial, along with Dr. Robert Berland (DA-R. VII/452-464, 465-510).

⁴Defense experts consistently acknowledged that Thompson was sane at the time of the crime (DA-R. VII/508; 1DA-R. VII/958).

have been deficient, and rejected the postconviction claim solely on the basis of lack of prejudice (see, Appellant's Initial Brief, p. 17, "The court again makes a finding that the deficient performance did not result in prejudice" and p. 18, "... the court again admits that it was deficient performance but did not result in prejudice ..."). In fact, the court below repeatedly found that no possible prejudice could be demonstrated if deficiency were to be assumed, and repeatedly recognized that due to the lack of prejudice, it was not necessary to determine whether deficient performance had been adequately pled (PC-R. 143-145).

C. PRESENTATION OF EVIDENCE

Thompson's next complaint about trial counsel's performance suggests that counsel should have refuted the State's theory, and the medical examiner's testimony, that there was a struggle between the murderer and victim Swack; counsel should have demonstrated that the crime scene could have been contaminated; and counsel should have presented testimony about Thompson's drug use at the time of the crime and the effect on his mental retardation. Once again, many of Thompson's allegations in this regard are wholly speculative and unworthy of an evidentiary hearing.

At the trial, Dr. Diggs noted that victim Swack had sustained a total of nine knife wounds: two shallow wounds on the left side

of his neck; two over the left side of his chest, one of which penetrated his chest and went into his lung; another superficial wound to his side; two deep wounds to his left abdomen which penetrated the abdominal cavity; another deep wound on his right side which also penetrated the abdominal cavity; another superficial wound in his right shoulder, at the base of his neck; and the last one behind his right ear which went through his scalp but did not penetrate his skull (DA-R. V/253-260). All of the wounds were inflicted while Swack was alive, and all were prior to the final injury, a gunshot wound to the head, at the corner of Swack's left eye, which would have rendered him immediately incapacitated (DA-R. V/260-263). According to Diggs, the random fashion in which the wounds were found at different locations indicated some sort of struggle had been taking place (DA-R. V/260).

Thompson now challenges Diggs' testimony, but the only specific factual support for his claim that counsel should have investigated the validity of the theory that a struggle occurred is counsel's footnote that the superficial wounds to Swack's neck look, according to counsel's untrained review of the autopsy photos, "just as consistent with a scrape or bite as with a stab wound" (Appellant's Initial Brief, p. 19). This lone fact is surely insufficient to warrant an evidentiary hearing. Although

the postconviction motion asserts that counsel was obtaining the services of independent forensic experts including a pathologist, crime scene analyst, and toxicologist, no facts as to what these particular experts could offer to support this claim are provided. Speculation that "perhaps" other suspects could have been discovered or other theories about the crime scene may have been developed is insufficient to require a hearing.

Furthermore, the suggestion that counsel should have presented testimony regarding Thompson's drug and alcohol abuse is refuted by the record. During the penalty phase, Dr. Berland testified about Thompson's history of drug use, including his having used cocaine for a considerable period of time right up to the time of his arrest (DA-R. VII/498). According to Berland, drug or alcohol use by psychotic people will typically increase the severity of their symptoms, like throwing gasoline on the flames of mental illness (DA-R. VII/499). Thompson has not identified any particular drugs he allegedly used the day of the murders, and Berland's notes did not suggest that Thompson told him that he was using drugs that day; in addition, Dr. Sprehe's competency report indicated that Thompson had admitted a history of cocaine use, but not on the day of the crime (DA-R. I/71-72; VII/501). Thus, Thompson's current allegations about drug use provide no more than what was offered to his jury in the penalty phase, and do not warrant a hearing.

D. STATE INTERFERENCE WITH EVIDENCE

Thompson next challenges trial counsel as ineffective due to alleged problems with the State's investigation of the murders. Specifically, Thompson asserts that the State failed to compare Herman Smith's fingerprints with evidence found at the murder scene; failed to investigate Debra Swack's ex-husband as a possible perpetrator; and failed to identify the derivation of a male hair found on victim Walker's body. Although this claim was presented below as a Brady violation (PC-R. 109-110), it is clear from the record that defense counsel was aware of other possible suspects, as well as the unidentified hair found on Walker (DA-R. IV/145, 177, 195-197, 208). Now offered as a claim of ineffective assistance of counsel, the issue is not sufficiently pled to compel any relief.

Notably, Thompson does not allege that he can establish Smith's fingerprints indeed matched prints taken from the scene, or that Swack's ex-husband was the killer, or that the source of the hair could even be determined. Although counsel is faulted to failing to prevent what is purported to be shoddy police work, there are no allegations as to what would have been discovered had a more thorough investigation been conducted. Instead, Thompson claims only that further investigation possibly could have revealed something exculpatory, and prejudice resulted because Thompson has

been sentenced to death. This issue, as pled, does not suggest deficient performance or prejudice and therefore was properly summarily denied.

E. COMPETENCY EXPERTS AND EVIDENTIARY ERRORS

In this sub-issue, Thompson alleges that counsel should not have stipulated to the qualifications of Drs. Gonzalez and Sprehe at the competency hearing; counsel should have presented evidence of Thompson's retardation to his guilt phase jury; counsel should have objected to the admission of Thompson's identification card; and counsel should have objected and requested a Richardson hearing when a witness testified that his work crew had seen Thompson leaving with a gun on the victims around the time of the murders. Once again, however, no basis for an evidentiary hearing has been presented.

As to the stipulation to the qualifications of the competency experts, Thompson does not describe their qualifications or explain why these doctors were not qualified, he merely states that the stipulation precluded defense counsel from impeaching the experts about their knowledge of retardation and their failure to conduct any intelligence tests as part of the competency examinations. Thompson's current concerns misconstrue the extent of the stipulations at issue. Trial counsel did not stipulate to the

experts' findings, only to their qualifications to render an expert opinion. Such stipulation does not preclude impeaching the opinions or bringing out all relevant information about the examinations. In fact, such matters are more appropriately brought out in cross examination than in voir dire of a witness' qualifications.

The record from the competency hearing reveals that counsel did question Dr. Sprehe about any tests performed during his exam, and about his knowledge of prior tests that had been conducted by Dr. Berland in 1987 (DA-R. IX/731-732); counsel similarly questioned Dr. Gonzalez (DA-R. IX/680, 682-685). In addition, counsel argued to the judge after the hearing that Gonzalez's and Sprehe's failure to test for mental retardation was a reason to reject their findings of competency (DA-R. IX/687-688, 768-769). Thompson does not allege that he was in fact incompetent or identify any evidence of his incompetency that should have been presented but was not. Thus, no deficiency or prejudice has been shown with regard to defense counsel's actions at the competency hearing.

As to the suggestion that defense counsel should have presented evidence of Thompson's retardation during the guilt phase of the trial, no basis for admission of this evidence has been cited. The mere fact that mental deficiencies exist that do not

rise to the level of legal insanity is not necessarily relevant. Diminished capacity based on low intelligence is not a defense in Florida. Chestnut v. State, 538 So. 2d 820 (Fla. 1989). This is particularly unavailing when Thompson has not taken issue with the theory of defense offered at trial that he did not commit the crime. Thompson has not even alleged that he was insane at the time of the murders, or that his level of retardation precluded his ability to premeditate these offenses. Absent some relevance of his mental state to a particular defense, counsel cannot be deemed ineffective for failing to offer testimony regarding his retardation to the guilt phase jury.

The claims that counsel should have objected to the admission of the ID card and to Smith's testimony about his work crew having seen Thompson on the morning of the murders were also properly summarily denied. The issue of Smith's testimony was considered by this Court in the direct appeal, and therefore was not subject to being revisited in postconviction proceedings. See, Robinson, 707 So. 2d at 697-698 (cannot relitigate direct appeal claims under guise of ineffective assistance of counsel). If Smith's statement was prejudicial enough to warrant a finding of ineffective assistance of counsel, this Court would have previously reversed the trial court's denial of the requested mistrial.

The identification card was clearly relevant; it was admitted

during the testimony of Det. Childers, as Childers described Thompson having attempted to use the \$1500 check that he forced Swack to write to buy a \$500 car (DA-R. IV/197-200, 214-215). Thompson showed the card as proof of the validity of the check (DA-R. IV/214-217). The card provided an address for Thompson which was the same address as written on the back of the check which Thompson endorsed (DA-R. IV/198-199). Since the identification card corroborated the testimony about Thompson trying to spend the check and linked Thompson directly to the check, there was no reason to object to its admission. Once again no basis for an evidentiary hearing has been offered in this claim.

F. FAILURE TO OBJECT DURING PENALTY PHASE

Thompson next claims that trial counsel was ineffective for failing to object to the prosecutor's penalty phase closing argument. Such a claim is an improper attempt to use postconviction proceedings as a second appeal, and should be rejected as procedurally barred. Ragsdale v. State, 720 So. 2d 203, 204-205, n. 1, 2 (Fla. 1998). Even if considered, however, no relief is warranted. Thompson specifically disputes the prosecutor's directions to "listen to the instructions and you go back and weigh which of these you think are more important." The court below reviewed the challenged comment in context and determined that the

prosecutor's statements were not improper and that, therefore, no deficiency was shown by counsel's failure to object (PC-R. 157). According to Thompson, the statement was improper because it "directed the jury to place their own worth on the aggravators and the mitigators rather than listening to the judge's instructions as to how to give them proper weight" (Appellant's Initial Brief, p. 29). Thompson has not cited any law which requires a judge to instruct a jury as to what weight to give aggravating and mitigating factors; in fact, the law requires the jurors to weigh these factors for themselves. See, Boyde v. California, 494 U.S. 370, 376 (1990) (Eighth Amendment requires jury to evaluate weight of aggravating and mitigating factors). As the court below found, the lack of any impropriety in the prosecutor's statements refutes Thompson's claim that trial counsel was deficient for failing to object, and no relief is warranted.

G. MITIGATING MENTAL HEALTH EXPERTS

Thompson next asserts that his trial attorneys failed to provide adequate background information to his mental health experts. Once again, Thompson fails to allege any information which should have been, but was not, provided to the experts. His claim is also clearly refuted by the record.

In the penalty phase, Dr. Robert Berland testified to

Thompson's history of substance abuse, as well as the effect it would have on his mental illness. Berland had also previously consulted with Dr. Maher, who was aware of Thompson's family history and impoverished background (1DA-R. VII/967-970, 986-995). Berland spent hours with Thompson, and also reviewed psychological reports going back to 1982, depositions, police reports, tests and profiles (1DA-R. VII/986-995). Thompson's failure to identify with particularity any information which was overlooked by or unknown to his mental health experts precludes relief on this claim.

Although current counsel criticizes the testimony of Dr. Logan as "very short and devoid of the intricacies and hardships of Mr. Thompson's life," it is important to keep in mind that Dr. Logan was not the only penalty phase witness that testified for the defense. Since Dr. Berland testified extensively about Thompson's history and mental deficits, and the deposition of Thompson's sister related much of Thompson's family background, limited education, and impoverished childhood, the failure to elicit such testimony from Dr. Logan demonstrates neither deficient performance or prejudice.

Thompson also faults trial counsel for not objecting to or refuting the prosecutor's comments that Thompson could read, that children are punished for bad conduct, that the jury should weigh the mitigating evidence, and that Mr. Thompson may have driven Swack's car to the park. Such a claim is an improper attempt to use

postconviction proceedings as a second appeal, and should be rejected as procedurally barred. Ragsdale, 720 So. 2d at 204-205, n. 1, 2. No impropriety has been shown with regard to any of these remarks, and the allegation that counsel was ineffective on this basis was properly summarily denied.

H. MEETING WITH THOMPSON PRIOR TO PENALTY PHASE

Thompson's last allegation of ineffectiveness complains that his penalty phase counsel did not meet with him prior to trial and never questioned him about facts relating to mitigation issues. On the facts of this case, this claim was not sufficient to compel an evidentiary hearing.

This claim demands consideration of the fact that Thompson had been through two prior trials and two prior penalty phases before his 1992 trial and sentencing. Thompson's lead attorney for the 1992 proceedings, Frank Johnson, had also represented Thompson in his 1990 trial. However, by the time of the 1992 trial, the 1990 penalty phase attorney, Robert Simms, had become a circuit judge; therefore, the court appointed William Murphy to assist Johnson in the 1992 penalty phase (DA-R. II/209; 2DA-R. Supp/1016). Murphy presented much of the same testimony that had been presented at the 1990 penalty phase, which was very similar to the testimony presented at the initial, 1987 sentencing proceeding. Murphy also

presented Dr. Charles Logan, the HRS doctor that had determined Thompson to be incompetent prior to the 1992 trial; Logan had not previously testified for Thompson. Murphy secured death recommendations of 7 to 5 for both murders (DA-R. VII/574-575).

Thompson's claim that, as a consequence of Murphy's failure to meet with him, the jury never heard "about his retardation, his state of mind, and other mental health issues" is clearly refuted by the record. The mental health issues were thoroughly explored in the 1992 sentencing through Drs. Logan and Berland. Jurors also heard about his drug habits and his family background. Thompson's failure to identify even one fact which was not presented to the jury due to Murphy's alleged failure to meet with Thompson clearly demonstrates the lack of any possible prejudice with regard to this allegation. Summary denial was proper.

CONCLUSION

Although trial courts are encouraged to have evidentiary hearings on postconviction motions, if the motion lacks substantial factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied. Steinhorst v. State, 498 So. 2d 414, 414-415 (Fla. 1986); Porter v. State, 478 So. 2d 33 (Fla. 1985). A hearing is only warranted on an ineffective assistance of counsel claim

where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrate a deficiency in performance that prejudiced the defendant. Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995); Jackson v. Dugger, 633 So. 2d 1051, 1055 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076, 1079 (Fla. 1992); Roberts v. State, 568 So. 2d 1255, 1256-1260 (Fla. 1990); Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). Since the postconviction motion filed below did not render Thompson's convictions or sentences vulnerable to collateral attack, the trial court properly denied the motion without an evidentiary hearing.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THOMPSON'S CLAIM THAT COUNSEL FAILED TO OBTAIN A COMPETENT MENTAL HEALTH EXPERT.

Thompson's next argument raises a claim which he never presented to the trial court. Since this issue was not included in his postconviction motion, it is procedurally barred. See, Shere v. State, 742 So. 2d 215, 219, n. 9 (Fla. 1999) ("This claim is procedurally barred because it should have been raised in Shere's rule 3.850 motion, not for the first time in this appeal"); Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988) (finding claim "procedurally barred because it was not presented to the trial court in Doyle's rule 3.850 motion and cannot be raised for the first time in this appeal").

Even if considered, this claim does not provide sufficient facts to have warranted an evidentiary hearing. Thompson has not identified any specific deficiency with regard to any of his numerous mental health evaluations. He has not cited any relevant mental health evidence which was available at the time but not considered by his experts. Thompson does not claim that a new expert could offer additional, favorable testimony, but even if he did, such would not be a sufficient basis for relief. Engle v. Dugger, 576 So. 2d 696, 700 (Fla. 1991); Correll v. State, 558 So. 2d 422, 426 (Fla. 1990); Hill v. Dugger, 556 So. 2d 1385, 1388 (Fla. 1990), cert. denied, 116 S. Ct. 196 (1995); Stano v. State,

520 So. 2d 278, 281 (Fla. 1988) ("That Stano has now found experts whose opinions may be more favorable to him is of little consequence"). See also, Engle, 576 So. 2d at 701 ("This is not a case like Mason v. State, 489 So. 2d 734 (Fla. 1986), in which a history of mental retardation and psychiatric hospitalizations had been overlooked").

Psychiatric evaluations may be considered constitutionally inadequate so as to warrant a new sentencing hearing where the mental health expert ignored "clear indications" of either mental retardation or organic brain damage. Rose v. State, 617 So. 2d 291, 295 (Fla.), cert. denied, 510 U.S. 903 (1993); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). Since both retardation and organic damage were identified and presented to all three of Thompson's juries, this claim has no merit.

In order to obtain an evidentiary hearing on this claim, Thompson must have alleged more than the conclusory argument presented in his motion. Engle, 576 So. 2d at 702. Since Thompson has failed to specifically identify any inadequacies in his mental health examination, or to otherwise show that his mental health assistance was constitutionally ineffective, this claim would have been properly summarily denied.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THOMPSON'S CLAIMS OF JURY INSTRUCTION AND JUDICIAL ERROR FROM THE TRIAL RECORD.

Thompson's third argument presents a claim which should have been raised on direct appeal. This Court should specifically find Thompson's attempt to raise this issue for the first time in postconviction proceedings to be procedurally barred. Downs v. State, 24 Fla. L. Weekly S231, n. 4, 5 (Fla. May 20, 1999); Ragsdale v. State, 720 So. 2d 203, n. 2 (Fla. 1998). As the judge below found, this Court has previously rejected this issue as barred, Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992), as well as meritless. Jackson v. Wainwright, 421 So. 2d 1385, 1388-89 (Fla. 1985).

ISSUE IV

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

Thompson's next argument again raises a claim which he never presented to the trial court. Since this issue was not included in his postconviction motion, it is procedurally barred. See, Shere, 742 at 219, n. 9 (Fla. 1999); Doyle, 526 So. 2d at 911. In addition, since none of the asserted postconviction claims of error are meritorious, no relief is warranted.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN SUMMARILY
DENYING THOMPSON'S CLAIM REGARDING THE
CONSTITUTIONALITY OF FLORIDA'S CAPITAL
SENTENCING STATUTE.

Thompson's claim as to the constitutionality of Florida's capital sentencing statute is also procedurally barred and without merit. See, Ragsdale, 720 So. 2d at 204-205, n. 1, 2; Ziegler v. State, 452 So. 2d 537, 539 (Fla. 1984).

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THOMPSON'S CLAIM REGARDING NON-STATUTORY AGGRAVATING FACTORS.

Thompson's next argument again raises a claim which he never presented to the trial court. Since this issue was not included in his postconviction motion, it is procedurally barred. See, Shere, 742 at 219, n. 9 (Fla. 1999); Doyle, 526 So. 2d at 911. Even if the claim had been presented in the postconviction motion, it would have been barred at that time as a direct appeal issue. Teffeteller v. Dugger, 734 So. 2d 1009, n. 8 (Fla. 1999). Therefore, denial of relief is mandated.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THOMPSON'S CLAIM THAT THE JURY WAS MISLED AS TO ITS ROLE IN HIS SENTENCING.

Thompson's next argument again raises a claim which he never presented to the trial court. Since this issue was not included in his postconviction motion, it is procedurally barred. See, Shere, 742 So. 2d at 219, n. 9; Doyle, 526 at 911 (Fla. 1988). Even if the claim had been presented in the postconviction motion, it would have been barred at that time as a direct appeal issue. Ragsdale, 720 So. 2d at 204-205. Therefore, denial of relief is mandated.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THOMPSON'S CLAIM REGARDING THE CONSTITUTIONALITY OF THE AGGRAVATING FACTORS IN FLORIDA'S DEATH PENALTY STATUTE.

Thompson's next argument again raises a claim which he never presented to the trial court. Since this issue was not included in his postconviction motion, it is procedurally barred. See, Shere, 742 So. 2d at 219, n. 9; Doyle, 526 So. 2d at 911. Even if the claim had been presented in the postconviction motion, it would have been barred at that time as a direct appeal issue. Remeta v. Dugger, 622 So. 2d 452, 454 (Fla. 1992). Therefore, denial of relief is mandated.

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN SUMMARILY
DENYING THOMPSON'S CLAIM OF AN AUTOMATIC
AGGRAVATING FACTOR.

Thompson's next claim was denied by the court below on the merits, but should have been rejected as procedurally barred. Teffeteller, 734 So. 2d at 1011. In addition, this Court has repeatedly found this argument to be without merit. Melendez v. State, 612 So. 2d 1366 (Fla. 1993), cert. denied, 510 U.S. 934 (1993).

ISSUE X

**WHETHER FLORIDA'S LETHAL INJECTION STATUTE IS
CONSTITUTIONAL.**

Thompson's final claim challenges the constitutionality of the statutory provisions adopted in January, 2000, providing for executions by lethal injection, both facially and as applied to Thompson. As Thompson notes, this claim was not presented in his postconviction motion. Rather than presenting the issue in the brief from the postconviction appeal, Thompson should have raised this claim in the petition for writ of habeas corpus filed simultaneously with the brief in this case. Since the issue is not properly before this Court, it must be rejected as procedurally barred. Shere, 742 So. 2d at 219; Doyle, 526 So. 2d at 911. Even if considered, however, all of the concerns presented in this argument were previously rejected, and the claim can also be denied as meritless. See, Sims v. State, 25 Fla. L. Weekly S128, 130-131 (Fla. Feb. 16, 2000); Bryan v. State, 25 Fla. L. Weekly S159, 161-162 (Fla. Feb. 22, 2000).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to JACK CROOKS and ERIC PINKARD, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida, 33619, this _____ day of April, 2000.

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