

IN THE SUPREME COURT OF FLORIDA

JAMES FLOYD,

Appellant,

vs.

CASE NO. SC97043

STATE OF FLORIDA,

Appellee.

_____ /

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

ANSWER BRIEF OF THE APPELLEE

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

PRELIMINARY STATEMENT

The record on appeal in this case leaves much to be desired. This brief relies on the record compiled in Floyd's initial direct appeal, Florida Supreme Court Case No. 66,088 (7 volumes), which will be cited as "DA." followed by the volume and page number; and in Floyd's direct appeal from his resentencing proceedings, Florida Supreme Court Case No. 72,207 (7 volumes), which will be cited as "RS." followed by the volume and page number; and in Floyd's first postconviction interlocutory appeal, Florida Supreme Court Case No. 89,783 (5 volumes), which will be cited as "IA." followed by the volume and page number; and in the instant appeal, Florida Supreme Court Case No. 97,043 (1 volume, which begins on page 929, to be followed by several supplemental volumes), which will be cited as "PC." followed by the volume and page number. Since the supplemental volumes have not been received as of the writing of this brief, those documents which this Court has directed to be supplemented on the record will be referred to by identifying the particular document and page number; some of these documents have also been attached as exhibits to this brief, and may be cited by exhibit number rather than document name.

STATEMENT OF THE CASE AND FACTS

The facts of this case are outlined in this Court's opinion in the initial appeal of Floyd's judgments and sentences:

James Floyd was indicted for the murder of Annie Bar Anderson. He was also charged with two counts of forgery, two counts of uttering a forged check, and two counts of grand theft.

The victim was found dead in one of the bedrooms of her home on the evening of Tuesday, January 17, 1984. She was last seen alive on the afternoon of January 16, 1984, when she cashed a check at her bank. According to the testimony of the medical examiner, she had been killed sometime that afternoon or evening by a stab wound to her chest. When the police arrived at the victim's home on January 17, 1984, the back door was unlocked, and there were no signs of a forced entry. In the room in which they found the victim, there were fresh "pry marks" beneath the window, indicating that someone had attempted to exit from that window.

On the afternoon of the victim's death (Monday, January 16), Floyd had cashed a check for \$500 from the victim's account. He was arrested after attempting to flee from the police when he tried to cash a second check for \$700 on the same account two days later (Wednesday, January 18). When questioned by the police, Floyd admitted forging the \$700 check, explaining that he had found the checkbook on Tuesday near a dumpster. He subsequently revised his story when confronted with the police knowledge that he had cashed the \$500 check on Monday. In addition, he admitted owning a brown jacket that was found outside the bank where he was arrested. A sock soaked with blood of the victim's blood type (which was not the defendant's blood type) was found in one of the jacket pockets.

Over objection at trial, the court permitted an officer to testify to Floyd's statement at the police station that: "I know the police are mad at me for running, but I've

been in jail before and I don't want to go back."

At trial the state also presented the testimony of Greg Anderson, a cellmate of Floyd's who testified that Floyd told him that he had stabbed the victim when she surprised him in the course of the burglary.

Floyd v. State, 497 So. 2d 1211, 1212-13 (Fla. 1986), cert. denied, 501 U.S. 1259 (1991).

Floyd's trial was conducted August 21 - 24, 1984 (DA. V3 - V6). In addition to the evidence outlined above, the State presented testimony that tire tracks on the driveway at the victim's house were consistent with the tire tread on Floyd's motorcycle, and that ten Negroid hairs were found on or around the victim's body (DA. V4/609; V5/678-680, 699-702). Floyd's initial alibi for the day of the murder was contradicted by his girlfriend and by Huie Byrd, and his explanation of finding the checkbook near a dumpster was rebutted by testimony from an employee of the store where Floyd claimed to have purchased beer at the time he claimed the checkbook was found (DA. V4/593-600; V5/628-637, 642-651, 662-665). The victim, Mrs. Anderson, was an eighty-six year old woman who received multiple stab wounds, including one to her upper chest that penetrated her heart, eleven to her abdomen that were potentially fatal, and one defensive wound to her left wrist (DA. V4/453-456).

The theory of defense was to acknowledge that, although Floyd

had committed the thefts and forgeries, he did not kill Mrs. Anderson but had found her checkbook in an alley (DA. V3/390-392). The jury rejected Floyd's defense and convicted him on all counts (DA. V6/883-886). During the penalty phase, the defense called only one witness, the victim's daughter, to testify that neither she nor her mother believed in capital punishment, and neither would want Floyd to be sentenced to death for this murder (DA. V6/901-911). Correspondence between Floyd and the daughter, Ann Anderson, was also admitted into evidence. Floyd wrote that he did not take or do drugs, and only drank beer now and then (DA. V7/1016). He also expressed his love for his family and his concern for his alcoholic mother. He hoped that Miss Anderson would come and visit him in prison, as she had offered, and explained the visiting arrangements at the prison that she would have to negotiate (DA. V7/1014-1016). The jury recommended death by a vote of seven to five (DA. V6/940). The judge thereafter imposed a death sentence, finding five aggravating factors and no mitigation (DA. V1/107-108).

On appeal, this Court determined that two of the aggravating factors should not have been applied, and that the jury was not properly instructed on mitigation; the case was remanded for resentencing. The resentencing commenced on January 12, 1988 (RS. V5 - V7). In this proceeding, the defense called six character

witnesses in addition to Miss Anderson, the victim's daughter. Floyd was presented as an honest, nonviolent and dependable person, who had not been in trouble until his father died about a year before Mrs. Anderson's murder.

Defense counsel presented the testimony of Eula Williams, who had known Floyd and his family as a neighbor for eight or nine years, and thought of Floyd as a son (RS. V6/848-849, 851). Floyd had done good work for her on her yard and working on her car (RS. V6/850). Mrs. Williams had observed that Floyd's mother was an alcoholic since the time Floyd's family moved into the neighborhood (RS. V6/850). Floyd's mother was always high on alcohol and would have blackout spells. It was Floyd's father who kept the family together, but he had died within a year of the murder (RS. V6/850-851). Floyd and his brother managed for awhile after their father's death to keep up the yard service that they had worked with their father (RS. V6/851). Mrs. Williams testified that Floyd was always respectful to her and not violent to anyone (RS. V6/851-852). She had believed him when he called her, after he had been arrested for the murder, and said that he had not done it (RS. V6/852). She believed he was not the type of person that would do anything like that (RS. V6/852).

Rex Estelle testified for the defense that he had known Floyd for a year and a half before the murder, and had been his

supervisor while Floyd worked at the First Baptist Church for over a year (RS. V6/854-855). Floyd had been a good worker, easy going and even tempered, and progressed to a custodian (RS. V6/855-856). Floyd had learned that Mr. Estelle was a recovered alcoholic and asked him to speak to his mother (RS. V6/857). He and another female did so, but found that Floyd's mother was not interested in recovery, but believed life was easier for her when she drank (RS. V6/857-858). There came a time when Mr. Estelle noticed a change in Floyd of extreme mood swings, including depression and being manic, as though he were high on something (RS. V6/858-860). From his own experience, Mr. Estelle believed he recognized someone taking drugs, and spoke to Floyd about it (RS. V6/859-860). He recalled that this was the only time the Floyd got mad at him (RS. V6/859). Mr. Estelle also had to question Floyd about several instances of money and equipment missing from the church (RS. V6/860). Floyd also began missing work, which Mr. Estelle believed to be another sign of a person taking drugs (RS. V6/860-861). Mr. Estelle found out that Floyd's problems at the church job began at the time his father had died of cancer (RS. V6/858-860). Floyd was terminated for coming to work late about a week before Christmas (RS. V6/862).

Thomas Snell, a communications officer with the St. Petersburg Police Department, testified that he had known Floyd and his family

as a neighbor for 15 years (RS. V7/871). Mr. Snell testified that Floyd's mother had been an alcoholic as long as he knew her, and that this had an effect on Floyd (RS. V7/872-873). He knew Floyd to be passive, nonviolent, even-tempered and never in trouble; Floyd had even babysat for his kids (RS. V7/873). He knew Floyd to be dependable, doing the lawn at the A & P and all the yards in the neighborhood, and serving as the man of the house since his father became disabled before dying of cancer (RS. V7/873-874).

Lela Richardson testified that she had known Floyd since he was four years old, and had known his mother and father for 27 years (RS. V7/901-902). Floyd's mother was currently living with her after a recent hospital stay (RS. V7/904). She knew Floyd's mother to have a serious alcohol problem, which had affected Floyd very much (RS. V7/904). Floyd's father had kept him busy with the family's lawn service (RS. V7/904-905). She knew Floyd to be industrious, hardworking and dependable (RS. V7/902-903). His father's death had affected him, and he got in with a wrong crowd, but was not a violent kind of person (RS. V7/905-906). She knew Floyd to have committed a prior crime, but that did not change her opinion of him (RS. V7/907). She knew that he had a son old enough to go to school, and that he helped to support him when he could (RS. V7/906).

Floyd's mother, Pinky Floyd, testified that Floyd had worked

with his father before he died of cancer in March of 1983, and that Floyd had a job of his own after his father's death (RS. V7/909). She said that her son was a very nice boy, and asked the jury to spare his life (RS. V7/910).

Ben Boykins testified that he had known Floyd for fifteen years, through Floyd's father (RS. V7/911). He knew Floyd to be industrious, dependable and a good worker with a good personality, and not violent (RS. V7/911). Mr. Boykins knew that Floyd's mother had a drinking problem, but could not say whether that had an affect on Floyd (RS. V7/915). Although he had less contact with Floyd after the death of his father, he did continue to see him once or twice a month after that, and did not notice any change in Floyd's personality during that time (RS. V7/914).

The defense mitigation witnesses concluded with the victim's daughter, Ann Shirley Anderson, who had visited Floyd in prison and conveyed her belief that he should not receive the death penalty (RS. V7/932-934).

Following the testimony, the jury recommended a death sentence by a vote of eight to four (RS. V7/1039). The court held a sentencing hearing on February 29, 1988 (RS. V7/1044). Floyd addressed the court and spoke of his love for his family and his father (RS. V7/1047). He accepted responsibility for his actions and expressed remorse (RS. V7/1047-1048). Annie Anderson also

addressed the court, again expressing her resistance to the death penalty and her belief that Floyd could turn his life around in prison (RS. V7/1049). Defense counsel argued against the aggravating factors submitted by the State, and recited the evidence about Floyd's character and nonviolent traits (RS. V7/1050-1060). Counsel also noted that Floyd had not caused any trouble while in prison, but had helped guards to calm down other prisoners; he stated that Floyd was not bitter and could still lead a constructive life (RS. V7/1057). The prosecutor briefly addressed the court and then, following a recess, the court reconvened and announced the imposition of the death sentence, finding two aggravating factors (RS. V7/1061, 1063, 1066-1067). Although he rejected any statutory mitigating factors, the sentencing judge noted that Floyd was remorseful, desired to live within the confines of the rules while in custody, wanted to help others, and had a rapport with his children; however, the court determined that this mitigation was outweighed by the aggravating factors that applied (RS. V7/1069-1071).

In the appeal from the resentencing, Floyd's death sentence was affirmed. Floyd v. State, 569 So. 2d 1225 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991). Floyd filed an unverified motion to vacate his judgments and sentence on August 17, 1992. Also in August, 1992, the State provided about 1800 pages of documents in

response to a request for public records (PC. V1/954). Floyd thereafter filed a motion to compel the production of public records on October 8, 1992, and amended motions to vacate were filed on August 1, 1994; April 9, 1998; and July 2, 1998. Floyd's final, substantive motion for postconviction relief was filed on November 13, 1998.

A hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), was held on January 29, 1999 (PC. V1/1009-53). The court issued an Order on March 2, 1999, summarily denying some of the issues presented in Floyd's motion, and directing the State to file a response to the remaining issues. The State filed a response on April 16, 1999, and, on July 22, 1999, the court entered an Order summarily denying these remaining issues. This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court properly summarily denied Floyd's claim of ineffective assistance of counsel (Issue I). 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; Floyd's motion did not meet this test. Because the motion and record conclusively demonstrated that Floyd is not entitled to relief, summary denial was required.

The court below also properly summarily denied Floyd's claim that the State withheld material, exculpatory evidence (Issue II). The trial court correctly ruled that information in a police report about other possible suspects could have been discovered by defense counsel, and further that this information was not shown to be exculpatory or material; that information about another witness' polygraph results was in fact disclosed to defense counsel; and that information about Floyd's former cellmate and State witness Greg Anderson was not sufficiently specific to be considered. The allegations regarding Greg Anderson are also clearly refuted by the trial and resentencing testimony. Thus, no hearing was warranted on this claim.

Floyd's motion for disqualification of Judge Luce following the summary denial of his postconviction motion was properly denied

as legally insufficient (Issue III). At most, the allegations in Floyd's motion suggested that someone from the court's office requested the State to provide records referenced in the State's response but omitted from the supporting exhibits. On these facts, Floyd's claim of a presumptive ex parte communication was too speculative to demand the judge's disqualification.

Floyd's claims asserting the trial court failed to find mitigation (Issue IV); prosecutorial misconduct (Issue V), constitutional error with regard to jury instructions (Issue VII), and the invalidity of Florida's death penalty sentencing statute (Issue VIII), were properly summarily denied as these claims were procedurally barred, legally insufficient, and without merit.

Finally, Floyd's public records claim (Issue VI) is without merit since the State disclosed, and Floyd's counsel reviewed, the records which Floyd now insists were improperly withheld.

ARGUMENT

ISSUE I

**WHETHER THE TRIAL COURT ERRED IN SUMMARILY
DENYING FLOYD'S POSTCONVICTION MOTION.**

Floyd's initial challenge to the trial court's denial of his motion for postconviction relief asserts that his allegations of ineffective assistance of counsel warranted an evidentiary hearing. His claim presents a multi-faceted attack on the adequacy of his attorneys' performances during the trial and resentencing proceedings. Each of Floyd's allegations will be examined in turn; as will be seen, none of his assertions warranted any further relief from 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.

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. LeCroy v. Dugger, 727 So. 2d 236, 239 (Fla. 1998); 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), cert. denied, 515 U.S. 1133 (1995);

Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989).

Floyd claims that an evidentiary hearing should have been granted because his factual allegations are consistent with other cases where this Court has remanded for an evidentiary hearing, citing Ragsdale v. State, 720 So. 2d 203 (Fla. 1998), Gaskin v. State, 737 So. 2d 509 (Fla. 1999), Freeman v. State, 25 Fla. L. Weekly S451 (Fla. June 8, 2000), and Arbelaez v. State, 25 Fla. L. Weekly S586 (Fla. July 13, 2000). His claim is without merit, as those cases are fully distinguishable. In Ragsdale, the penalty phase attorney "put on only one witness, Ragsdale's brother, who provided only minimal evidence in mitigation." 720 So. 2d at 208. This witness had testified for the State in the guilt phase and, in cross examination during the penalty phase, provided derogatory information about Ragsdale. Similarly, in Gaskin, the penalty phase mitigation consisted of only two witnesses, a cousin and an aunt; "[t]he total sum of their testimony was that Gaskin was well-liked by everyone growing up, he worked hard at a lumber mill where he was employed and seemed to enjoy his job, and there was nothing about Gaskin's past or background that would have caused him to act violently or commit murder." 737 So. 2d at 514. The newly proffered mitigation involved Gaskin's history of abuse and neglect as well as his longstanding mental health disorders, such as schizophrenia, which caused hallucinations and led to the

applicability of statutory mental mitigation which has not been alleged in the instant case. In Freeman, the initial penalty phase testimony of Freeman's mother and brother, that he had been abused by his stepfather, possessed artistic ability, and enjoyed playing with children, and a clinical psychologist's testimony about his low IQ, was characterized as very limited nonstatutory mitigation. An evidentiary hearing was required due to substantial allegations of specific incidents from Freeman's childhood, such as Freeman having suffered a severe head injury after being run over by a car, and a substantial history of alcohol abuse and marijuana use, which were not presented to Floyd's jury. Finally, Arbelaez is not specific about the actual mitigation presented at the penalty phase, but his trial judge found only the statutory mitigator of no significant criminal history and the nonstatutory mitigator of remorse in sentencing Arbelaez to death. His postconviction motion alleged substantial mental mitigation including epilepsy, mental retardation, and organic brain damage, as well as abuse, deprivation, suicide attempts, and a lifetime of drug abuse that was available but not presented to his jury.

Floyd had the burden of establishing a prima facie case of a legally valid claim in order to receive an evidentiary hearing. Freeman, 25 Fla. L. Weekly at S452. Since the postconviction motion filed below did not render Floyd's convictions or sentence

vulnerable to collateral attack, for the reasons outlined below, the trial court properly denied the motion without an evidentiary hearing.

A. PENALTY PHASE MITIGATION

Floyd alleges that his school records indicate that he was diagnosed as mentally retarded when he was in the eighth grade, that he was below grade level, that he missed weeks of school, and that he was slow and below average. He also claims that mitigation about his mother's alcoholism and neglect of her children and his father's explosive anger and unreasonable demands was available but not presented for consideration in the recommendation or imposition of his sentence. In addition, Floyd claims that his alleged substance abuse problems should have been presented in his resentencing proceeding.

When viewed in light of the mitigating evidence presented at his resentencing, it is clear that the facts now offered by Floyd would not rise to the level of mitigating his actions toward Mrs. Anderson. The trial court's rejection of this claim determined that the facts offered were either actually presented at the resentencing (such as his mother's alcoholism) or were refuted by the trial and resentencing evidence (such as his claim of severe mental disabilities). Based on this determination, the court's

summary denial of this claim was appropriate.

Floyd's claim of mental disabilities will be addressed in the subissue that follows, which discusses his attorney's failure to retain a mental health expert. As to the claim that his family history and background provided mitigation which was never investigated or presented, this claim is refuted by the record of the resentencing proceeding. This Court's opinion affirming Floyd's sentence summarizes the mitigation presented at the resentencing as follows:

In mitigation, the defense offered the testimony of numerous witnesses who had known Floyd for many years. Eula Williams regarded Floyd as a son. She stated that he was always respectful and helpful to her, especially in maintaining her yard. Rex Estelle, Floyd's supervisor at the First Baptist Church, testified that Floyd had been a willing and good worker and had been promoted to custodian about six months before the murder.

Floyd's father died of cancer within one year before the murder. Estelle testified that after Floyd's father died, Floyd exhibited extreme mood swings and had been fired after the church discovered missing property and money. Evidence also showed that Floyd's mother was an alcoholic who was hospitalized for her illness.

Thomas Snell, a police communications officer who had known Floyd for fifteen years, testified that Floyd took over Floyd's father's lawn service business after his death. Floyd was known as a conscientious, dependable, and hard worker who cared for his family during the period surrounding his father's demise and mother's alcoholism. He never knew Floyd to be a violent person or to have been in any kind of trouble.

Floyd's mother urged the jury to spare her son's life. Ann Shirley Anderson, the

victim's daughter, testified that she corresponded with and visited Floyd in prison, and she urged the jury to consider that "[t]he people that God gives life to are worthwhile."

Defense counsel proffered additional testimony from Ms. Anderson. He asked whether she thought that Floyd should be executed for his crimes, and she responded that he should not be executed. The trial court ruled that Ms. Anderson could not express her opinion about the specific sentence to be imposed in the case.

569 So. 2d at 1228-29.

Thus, the resentencing jury and the sentencing judge were well aware of Floyd's mother's alcoholism, and although the testimony about Floyd's father's character was not extensive, any negative testimony about his father would have lessened the impact of the mitigation about Floyd's father having died about a year before Mrs. Anderson's murder. In addition, although the resentencing evidence demonstrated that Floyd had some legal and substance abuse difficulties after his father's death, further evidence of Floyd's substance abuse would have detracted from the testimony about Floyd being industrious and dependable.

Furthermore, although Floyd makes conclusory allegations of having been intoxicated at the time of the crime and having a history of substance abuse, these assertions are far too vague to have warranted an evidentiary hearing. Floyd does not identify any particular evidence of intoxication and does not detail the specifics of his alleged substance abuse. He asserts only that unnamed "acquaintances knew about his problems and would have

testified extensively about them" (Appellant's Initial Brief, p. 21). Clearly, his claim in this regard is factually insufficient. See, LeCroy, 727 So. 2d at 239 (noting defendant's burden to allege *specific facts* which are not conclusively rebutted by the record and which demonstrate a deficiency on the part of counsel that was detrimental to the defendant). Particularly in light of Floyd's letters to the victim's daughter stating that he did not take or do drugs, and only drank beer now and then, the current conclusory claim of intoxication and substance abuse did not warrant an evidentiary hearing (DA. V7/1016).

Since Floyd has not identified any compelling evidence that would have contributed significantly to the family history testimony which was presented at his resentencing, this allegation of ineffective assistance did not warrant an evidentiary hearing. See, Provenzano v. Dugger, 561 So. 2d 541, 546 (Fla. 1990) (cumulative background witnesses would not have changed result of penalty proceeding); Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987) (the mere fact that other witnesses might have been available or other testimony might have been elicited is not a sufficient ground to prove ineffectiveness), cert. denied, 487 U.S. 1241 (1988). As in Spaziano v. Singletary, 36 F. 3d 1028 (11th Cir. 1994), cert. denied, 115 S. Ct. 911 (1995), "[t]here is nothing in the record to indicate that [Floyd's] present counsel are either more experienced or wiser than his trial counsel, but even if they

were, the fact that they would have pursued a different strategy is not enough." If the best lawyers or even most good lawyers "could have conducted a more thorough investigation that might have borne fruit," it does not mean that this attorney's performance fell outside the wide range of reasonably effective assistance. Id. at 1040, 1041.

B. MENTAL HEALTH INVESTIGATION

Floyd also claims that his resentencing attorney was ineffective for failing to investigate and present evidence about Floyd's mental disabilities. As this Court has recognized, mental health is not an issue in every case. Mills v. State, 603 So. 2d 482, 485 (Fla. 1992); Blanco v. Wainwright, 507 So. 2d 1377, 1383 (Fla. 1987). Since no facts have been offered which should have reasonably alerted counsel to the need to further explore mental health issues, no basis of ineffectiveness has been demonstrated. Melendez v. State, 612 So. 2d 1366, 1368 (Fla. 1992) ("We find nothing in the record calling Melendez's sanity or mental health into question or alerting counsel or the court of the need for a mental health evaluation; accordingly, we do not find that counsel was ineffective in failing to investigate further and present additional evidence"), cert. denied, 510 U.S. 934 (1993).

Floyd claims that, had his attorney sought his school records, evidence about his having been tested as mentally retarded and

below average years before the murder could have been discovered. Floyd's claim is premised on the suggestion that counsel had a duty to obtain all school records in every capital case, and that the failure to do so will amount to a constitutionally deficient performance. Contrary to this suggestion, there was no affirmative duty to secure such materials in 1987. Rather, the scope and focus of penalty phase investigation is unique to each case, based on an attorney's evaluation of the particular facts and relevant circumstances for each defendant.

As found by the trial court, any mitigation that may have been available from a review of Floyd's school records would not be compelling on the facts of this case. Floyd relies heavily on his claim of low intelligence, yet the facts of Mrs. Anderson's murder and the other penalty phase testimony clearly demonstrate that Floyd's intellect was sufficiently developed to negate any mitigating value of his poor school performance. Floyd's actions in stealing Mrs. Anderson's checkbook, forging a check to himself with her daughter's signature, endorsing the check and presenting it to the bank holding Mrs. Anderson's account, all reflect that Floyd had the mental ability to plan and execute a course of action to achieve his goal of financial gain. In addition, the penalty phase testimony about his taking over his father's lawn business while working a second job demonstrates that any mental infirmities that may have existed years after Floyd's poor academic record

could not significantly ameliorate his behavior in January, 1984.

Floyd's allegations in this regard are similar to those presented in LeCroy, where this Court determined that the trial court properly denied an evidentiary hearing. In that case, counsel was alleged to have been ineffective for failing to develop mitigating evidence including present mental health evidence through mental health experts and school records of LeCroy's low mental age, his immaturity, his learning disability, his emotional disturbance, his compulsivity, his indecisiveness, his insecurity, his adjustment to jail, his diminished level of psychological functioning at the time of the offense, and his poor and abusive upbringing - yet no evidentiary hearing was necessary. See also, Mendyk, 592 So. 2d at 1080 (asserted failure to investigate and present evidence of mental deficiencies, intoxication at time of offense, history of substance abuse, deprived childhood, and lack of significant prior criminal activity "simply does not constitute the quantum capable of persuading us that it would have made a difference in this case," given three strong aggravators, and did not even warrant a postconviction evidentiary hearing). Similarly, when considered in light of the testimony presented at the resentencing, no hearing was warranted in the instant case.

C. EVIDENCE OF GOOD PRISON RECORD

Floyd's next complaint about trial counsel's performance

suggests that counsel should have presented evidence for the jury to consider regarding Floyd's good prison record. The record clearly reflects that Floyd's attorney was aware of this evidence, and in fact argued this mitigation to his judge at the sentencing hearing (RS. V7/1057). Thus, the failure to present such evidence to the resentencing jury was a strategic decision which should not be second-guessed in a postconviction action. Strickland, 466 U.S. at 689; Kennedy, 547 So. 2d at 914 (finding strategic decision without evidentiary hearing from the face of the record). Certainly, an attorney's determination against reminding a jury that Floyd had already spent years confined on death row cannot be deemed deficient. Since the defense presented extensive evidence of Floyd's positive character traits, the fact that he maintained these traits in prison does not add anything to the picture already painted for the jury. Thus, no deficiency or prejudice can be shown with regard to this subissue.

D. PENALTY PHASE JURY SELECTION

Floyd next challenges trial counsel as ineffective due to alleged problems with voir dire. 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). The issues of the State's excusal of prospective juror Edmonds and the preservation of error with regard to prospective juror Hendry's excusal were both considered by this Court in the direct appeal, and therefore are not subject to being revisited in postconviction proceedings. See, Arbelaez, 25 Fla. L. Weekly at S588; Robinson, 707 So. 2d at 697-698 (cannot relitigate direct appeal claims under guise of ineffective assistance of counsel). Floyd's complaint of his inability to interview the jurors is similarly barred; Floyd even notes that his trial counsel's request to interview the jurors is reflected in the prior appellate record. See, Ragsdale, 720 So. 2d at 204-205, n. 1, 2 (claim of inability to interview jurors procedurally barred in postconviction motion). Even if considered, however, no relief is warranted on the claims in this issue.

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. Under the law in effect at the time of Floyd's resentencing, the prosecutor was only required to provide a reason for a disputed racial peremptory strike if the trial court found a likelihood of an improperly motivated challenge. See, State v. Neil, 457 So. 2d 481, 486 (Fla. 1984). Defense counsel could have reasonably believed that, as the prosecutor stated at the time, he had not met his burden for

requiring an inquiry into the basis for the challenge. In addition, even if some possible deficiency were contemplated based on Floyd's current counsel's suggestion that he would have done things differently during voir dire, no prejudice can be discerned in this case. Since the jury recommendation for death was eight to four, Floyd would have to have had at least two jurors reach a different conclusion as to the propriety of the death sentence, contrary to the result of a prior jury and two trial judges. More importantly, there is no claim that any juror on the resentencing panel was biased or prejudiced, and Floyd has still not offered a particular objection to any of the jurors that participated in his trial. 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 Floyd's second-guessing trial counsel's jury selection, the lack of any clearly identifiable bias among the jurors that recommended his death sentence, and the absence of any possible prejudice, the court below properly summarily denied this claim.

E. GUILT PHASE

In this sub issue, Floyd alleges that his guilt phase counsel, Martin Murry, was ineffective. His claims are classic examples of the Monday-morning quarterbacking prohibited by Strickland. His argument simply criticizes counsel's actions during the trial, claiming no investigation was ever conducted, and concludes counsel's performance was deficient. Notably, Floyd never explains how his current suggestions for trying the case could have possibly made any difference, and his allegations of guilt phase ineffectiveness fall far short of demanding an evidentiary hearing.

Floyd's claim that counsel did not prepare or investigate this case is premised on his inability to locate the file from the now-deceased trial attorney. Although he faults counsel for allegedly failing to investigate, he characteristically fails to allege any information or evidence that could have been discovered had additional investigation been undertaken. For example, he criticizes counsel for failing to cross examine certain witnesses (all of whom related evidence which Floyd's theory of defense did not dispute), without suggesting what should have been asked on cross examination or how this could have affected the trial. He faults counsel for failing to hire hair and blood experts, without mentioning that the State's own experts readily admitted the limits of the forensic evidence available.

Floyd's suggestion that counsel's opening statement promised

that the defense would present witnesses is not supported by a review of the opening statement. As the court below found, defense counsel merely stated that Floyd's innocence would be demonstrated from the testimony of witnesses, and did not suggest they would be called by the defense. In his opening statement, Mr. Murry actually said, "On a witness-to-witness basis, I'm going to show you through 14 people that there is no basis for you to find him guilty of first degree murder" (DA. V3/391). Viewed in context, Murry was clearly referring to witnesses that would be called by the State.

Approximately half of Floyd's argument on this issue focuses not on Murry's performance during his representation of Floyd, but rather on Murry's later difficulties with the Florida Bar, culminating in his disbarment in 1988. Murry's disbarment was based on problems that occurred three and four years after Floyd's trial, and are clearly irrelevant to demonstrate either deficiency or prejudice in the instant case. Jones v. Page, 76 F.3d 831, 845, n. 14 (7th Cir. 1996); Bridge v. Lynaugh, 838 F.2d 770, 776 (5th Cir. 1988). Closer in time to Floyd's trial, Murry was recognized as a successful, experienced criminal defense attorney. See, State ex rel. Redenour v. Bryson, 380 So. 2d 468 (Fla. 2d DCA 1980); Slioger v. State, 382 So. 2d 373 (Fla. 1980); L.J.E. v. State, 384 So. 2d 981 (Fla. 2d DCA 1980). And in Smith v. Wainwright, 457 So. 2d 1380, 1382 (Fla. 1984), this Court referred to Murry (misspelled as

Murray) as an "experienced trial attorney ... who had previously represented defendant in capital cases."

Floyd's failure to allege specific facts of guilt phase deficiency or to suggest how the outcome of his trial could have been affected had the case been tried differently establishes that no claim worthy of an evidentiary hearing has been offered. As in Ragsdale, "[Floyd] has provided insufficient facts as to what would have been introduced or how the outcome would have been different had counsel acted otherwise" to obtain an evidentiary hearing. 720 So. 2d at 208. The court below properly summarily denied his allegations of guilt phase ineffective assistance of counsel.

F. PREJUDICE

On these facts, Floyd has failed to offer sufficient allegations of any attorney deficiency to warrant an evidentiary hearing on this claim. However, Strickland also counsels that, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, it is not necessary to address whether counsel's performance fell below the standard of reasonably competent counsel. 466 U.S. at 697. In this case, even if deficient performance is presumed, the lack of prejudice is clear.

In Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990), trial counsel had allegedly failed to present mitigating evidence that Buenoano had an impoverished childhood and was psychologically

dysfunctional. Buenoano's mother had died when Buenoano was young, she had frequently been moved between foster homes and orphanages where there were reports of sexual abuse, and there was available evidence of psychological problems. Without determining whether Buenoano's counsel had been deficient, the court held that there could be no prejudice in the failure to present such evidence in light of the aggravated nature of the crime. See also, Routly v. State, 590 So. 2d 397, 401-402 (Fla. 1991) (additional evidence as to defendant's difficult childhood and significant educational/behavioral problems did not provide reasonable probability of life sentence if evidence had been presented); Rutherford v. State, 727 So. 2d 216, 224-225 (Fla. 1998) (postconviction identification of evidence cumulative to that at trial will not establish ineffectiveness of counsel).

In light of the testimony that was presented at the resentencing, the newly proffered evidence is not compelling. Floyd was presented as a nice person, who was respectful to women and who had been affected by the death of his father to the extent that he had lost his job at the church where his supervisor believed he may have been taking drugs and money from the church. Defense presented the circumstances of Floyd's mother having been a chronic and long-term alcoholic, and even put her on the stand for the jury to observe her for themselves. People who had known Floyd for a long time testified as to his having been a respectful,

responsible person due to the influence of his father, whose death had affected him. This is not a case where the postconviction motion revealed substantial mitigation that had not been presented at trial; the only significant new mitigation offered, Floyd's low IQ, is rebutted by the facts of the case and the penalty phase testimony presented.

In order to establish prejudice to demonstrate a Sixth Amendment violation in a penalty phase proceeding, a defendant must show that, but for the alleged errors, the sentencer would have weighed the balance of the aggravating and mitigating factors and found that the circumstances did not warrant the death penalty. Strickland, 466 U.S. at 694. The aggravating factors found in this case were: committed during the course of a burglary and for pecuniary gain, and committed in a heinous, atrocious or cruel manner. This was a senseless, brutal crime against a defenseless, 86-year-old woman. Floyd has been represented by two different attorneys at two sentencing proceedings, resulting in two jury recommendations for death, which have been followed by two different judges. Floyd has not and cannot meet the standard required to prove that his resentencing attorney was ineffective when the facts to support the aggravating factors are compared to the purported mitigation now argued by collateral counsel.

The investigation and presentation of mitigating evidence in this case was well within the realm of constitutionally adequate

assistance of counsel. Trial counsel conducted a reasonable investigation, presented appropriate penalty phase evidence, and forcefully argued for the jury to recommend sparing Floyd's life. There has been no prejudicially deficient performance established in the way Floyd was represented in the penalty phase of his trial.

Similarly, no possible prejudice can be discerned from the guilt phase allegations of ineffective assistance of counsel. As outlined by the court below, the evidence against Floyd was strong, and no reasonable claim of a different verdict has been offered. No allegation of innocence is submitted and no new theory of defense has been suggested. Although Floyd now criticizes his attorney's alleged failure to investigate, he never identifies what fruit may have been borne of further investigation or how the outcome may have been affected. In fact, Floyd's brief does not even present a conclusory allegation of guilt phase prejudice with this issue.

On these facts, Floyd has failed to demonstrate any error in the denial of his claim that his attorney was ineffective in the investigation and presentation of mitigating evidence, or any other aspect of the trial or resentencing. The trial court properly summarily denied this issue.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING FLOYD'S BRADY V. MARYLAND CLAIM.

Floyd's next claim of error alleges that the State violated Brady v. Maryland, 373 U.S. 83 (1963), at the time of trial. Specifically, Floyd claims that the State withheld information about a witness having told the police that she saw several white men force their way into the victim's home around the time of the murder; information about State witness Huie Byrd having shown deception in a polygraph examination; and information that allegedly could have been used to impeach State witness Greg Anderson. However, when Floyd's allegations are closely examined, it is readily apparent that the trial court properly denied an evidentiary hearing on this claim.

As to the assertion regarding other possible suspects for Mrs. Anderson's murder, the trial court found that Floyd failed to show or even allege that he could not have obtained the witness statement himself with due diligence (7/21/99 Order, p. 8). Floyd's response to this finding states that it was not necessary for him to allege due diligence, because he only has to show that the information could be exculpatory, that it was possessed by the State, and that trial counsel did not receive it (Appellant's Initial Brief, p. 52). Floyd offers no authority to support this description of his burden. In fact, due diligence is one of the elements required for relief on a Brady claim. Thus, the trial

court's ruling was a correct application of law, since it is widely recognized that Brady does not impose a duty to disclose exculpatory evidence that is equally available to the defense. Freeman, 25 Fla. L. Weekly at S453; Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995); Mendyk, 592 So. 2d at 1079; Roberts, 568 So. 2d at 1260; James v. State, 453 So. 2d 786 (Fla.), cert. denied, 469 U.S. 1098 (1984).

In this case, defense counsel deposed the lead detective, Robert Engelke, on August 7, 1984, and could have asked about other suspects, but did not (DA. V2/175-190). In fact, Floyd has alternatively suggested that counsel was ineffective for failing to discover this information (11/13/98 Motion, p. 47; Appellant's Initial Brief, p. 50). The State is not required to actively assist the defense in investigating a case. Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991); Hasbrough v. State, 509 So. 2d 1081 (Fla. 1987). Therefore case law clearly supports the trial court's ruling on the lack of due diligence and defeats Floyd's current claim for relief.

Floyd's criticism of the trial court's reliance on the police report detailing this witness' statement to support a finding that this evidence was discoverable at the time of trial is unwarranted. Although Floyd asserts that this police report was not made part of the record on appeal, his counsel is well aware of the shortcomings in the instant record, where even his substantive motion and the

court orders denying his relief were also not originally part of the record. The report should have been included since it was attached as an exhibit to the State's response filed below. Surely a court may consider the only document offering support for a defendant's claim in analyzing the claim itself. In this case, the police report demonstrates that, despite Floyd's repeated assertions to the contrary, the witness was not able to identify the men she allegedly saw at the victim's house (See Ex. 1 to State's Response, 4/16/99).

The court below also found that this information had not been shown to be exculpatory, noting that police investigation of other suspects is not automatically favorable to a defendant. Once again, case law supports this ruling. Spaziano v. State, 570 So. 2d 289, 291 (Fla. 1990) (noting "[t]he fact that ... [there] was [a different] suspect early in the investigation, though this theory was later abandoned, is not information which must be disclosed under Brady"); Medina v. State, 690 So. 2d 1241, 1249 (1997); Swafford v. State, 679 So. 2d 736, 738-39 (Fla. 1996). In this case, although the police report was provided to postconviction counsel in 1992, Floyd has never offered any reason to believe that the witness statement recounted in the report could lead to any admissible, exculpatory evidence.

Furthermore, the court below determined that the information alleged to have been suppressed could not meet the test of

materiality. Evidence is only "material" for Brady purposes if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. United States v. Bagley, 473 U.S. 667, 682 (1985); Jones v. State, 709 So. 2d 512 (Fla. 1998); Porter v. State, 653 So. 2d 374, 379 (Fla. 1995). This "reasonable probability" must be sufficient to undermine confidence in the outcome. Id. The mere possibility that information "might have" helped the defense or affected the outcome of the case does not establish materiality, and the proper test is whether the suppressed information creates a reasonable doubt of guilt that does not otherwise exist. United States v. Agurs, 427 U.S. 97 (1976).

The possibility that another man or men murdered Mrs. Anderson is fully refuted by the record. As outlined by the lower court's rejection of this claim, the evidence against Floyd was strong. Floyd was arrested while trying to cash a check forged from the victim's account; he possessed her checkbook and a sock stained with blood consistent with the victim's type but inconsistent with his own. His initial statement to the police about having found the checkbook the day before his arrest was contradicted by a videotape of him cashing another of the victim's checks within hours of her murder. His original alibi was refuted by testimony from his girlfriend and his motorcycle buddy, Huie Byrd. Motorcycle tire tracks and Negroid hair evidence from the scene

contradicts the suggestion that several white men in a Lincoln committed the crime. And of course, Floyd admitted both the forgeries and the murder to Greg Anderson, and accepted full responsibility for Mrs. Anderson's murder at his sentencing hearing in 1988 (DA. V5/730-733; RS. V7/1047). Therefore, even if Floyd were able to establish that this information should have been disclosed and was not, any such failure to disclose could not possibly meet the standard for materiality required for relief. Thus, Floyd has failed to establish any error in the trial court's denial of relief on this claim.

As to the claim that the State improperly withheld information about Huie Byrd's polygraph results, the court below found that this information was in fact disclosed to defense counsel during the deposition of Det. Crotty (7/21/99 Order, p. 9). Clearly, counsel was aware that Byrd's polygraph showed "little signs of deception" (DA. V2/145-146). Floyd's brief does not even acknowledge this disclosure, let alone attempt to explain it, claiming instead that "No where in the record is this claim rebutted" (Appellant's Initial Brief, p. 52). Since a crucial element of any Brady claim is the actual suppression of some information, the trial court was correct to deny an evidentiary hearing where the face of the record established that the allegedly withheld information was in fact disclosed. Freeman, 25 Fla. L. Weekly at S453; Provenzano v. State, 616 So. 2d 428, 430 (Fla.

1993).

Floyd's final Brady claim alleges that the State withheld information with regard to State witness Greg Anderson. According to Floyd, Anderson offered false testimony and had been coached by the State to elicit incriminating statements from Floyd, and could have been impeached if the State had disclosed Brady material. Neither the substance of the allegedly false testimony nor the alleged impeachment are identified by Floyd, and the court below found this claim was not specific enough to be analyzed. Of course, Anderson's trial testimony expressly and directly rejected the suggestion that he was acting on behalf of the State when Floyd described killing Mrs. Anderson to him; Det. Pflieger also discussed Anderson's having independently come forward with this information (DA. V5/736-784, 800-807; RS. V6/780-805). In light of the sworn testimony refuting the current conclusory allegations of any misconduct involving Greg Anderson, no evidentiary hearing was warranted on this claim as well.

On these facts, no error has been demonstrated with regard to the trial court's summary denial of Floyd's Brady claim. Although evidentiary hearings are frequently conducted when Brady violations are alleged, no hearing is necessary where, as here, the information has previously been held to not constitute Brady material, and could not have affected either the verdict or sentence. White v. State, 664 So. 2d 242 (Fla. 1995); Cherry v.

State, 659 So. 2d 1069, 1073-74 (Fla. 1995). No relief is warranted on this issue.

ISSUE III

**WHETHER THE TRIAL COURT ERRED IN DENYING
FLOYD'S MOTION TO DISQUALIFY THE TRIAL JUDGE.**

Floyd's next claim asserts that the court below erred in denying his Motion to Disqualify.¹ He claims that an alleged improper communication between the trial judge and the State Attorney's Office required the judge to recuse himself. However, a review of the record demonstrates that the motion to disqualify was properly denied as legally insufficient.

Floyd's motion to disqualify was filed after the trial court issued its final order denying the motion for postconviction relief. According to the allegations in the motion, an improper communication must be presumed because that final order incorporated record documents filed in a supplemental exhibit by the State two weeks before the order was rendered. The record reflects that these documents were clearly cited in the State's response to the order to show cause, which was filed several months before the final order was issued, but that they were omitted from the initial exhibits filed with the State's response. Although the subsequent filing may suggest that some communication between the court staff and the prosecutor may have occurred (as is in fact

¹Neither the motion to disqualify, the State's response, nor the Order denying the motion are included in the current record. Undersigned counsel is filing another motion to supplement the record contemporaneously with the filing of this brief, and anticipates that these documents will be produced in Supplemental Volume 3. They are also attached to this brief as exhibits 6, 7 and 8, respectively.

conceded in the State's response to the motion to disqualify, which was filed after the motion had been denied), there is no basis for further speculation that the judge himself contacted the State to supply requested information.

Case law demonstrates that no meritorious basis for Judge Luce's disqualification has been offered on these facts. In Hardwick v. Dugger, 648 So. 2d 100, 103 (Fla. 1994), this Court rejected the claim that a judge's contact with the State requesting a change on the date provided in a proposed order amounted to an improper ex parte communication. Similarly, a judge's request to the State for the preparation of an order did not require disqualification in Swafford v. State, 636 So. 2d 1309, 1311 (Fla. 1994). And in Barwick v. State, 660 So. 2d 685, 692 (Fla. 1995), an allegation that the judge and prosecutor held a colloquy outside the presence of the defense regarding the need for a hearing on a defense motion for a psychiatrist was ruled insufficient to require disqualification. As in these cases, any possible communication requesting the filing of additional documents in the instant case would not involve any substantive, improper discussion on the merits of Floyd's pending motion. See also, Arbelaez, 25 Fla. L. Weekly at S588 (prohibition on ex parte communication does not extend to strictly administrative matters not dealing in any way with merits of the case); Diaz v. Dugger, 719 So. 2d 865, 876 (Fla. 1998) (noting alleged ex parte communication was with judicial

assistant, not judge).

Unsubstantiated, conclusory allegations of an improper ex parte communication do not require judicial disqualification. See, Valle, 705 So. 2d at 1334 (insufficient allegation of ex parte communication where judge and prosecutor were seen leaving chambers together during trial). A factual basis for disqualification is insufficient where it relies on speculation or a subjective fear of impartiality. 5-H Corporation v. Padovano, 708 So. 2d 244, 248 (Fla. 1998); Fischer v. Knuck, 497 So. 2d 240, 242 (Fla. 1986).

Floyd's reliance on Rose v. State, 601 So. 2d 1181 (Fla. 1992) and State v. Riechmann, 25 Fla. L. Weekly S163 (Fla. Feb. 24, 2000), is misplaced. In Rose, the State initially responded to a postconviction motion, conceding that an evidentiary hearing would be necessary. Thereafter, the State submitted a proposed order, not provided to Rose's attorney, summarily denying all relief, which was adopted in its entirety by the trial court. In the instant case, the State did not change its position or offer a substantive order for the court's consideration, it merely supplied supporting documents from the appellate record, referenced in but omitted from its initial response. Riechmann is also easily distinguished, since it involved an established ex parte communication where the trial judge directed the State to provide a sentencing order without even identifying which aggravating and mitigating factors the court would apply, an action which would be

improper even if no ex parte communication had occurred. Thus, neither of these cases provide any support for Floyd's current claim.

The court below properly denied the motion to disqualify, and no relief is warranted on this issue.

ISSUE IV

WHETHER THE COURT ERRED IN DENYING FLOYD'S CLAIM THAT THE SENTENCING JUDGE FAILED TO FIND MITIGATION.

Floyd's next issue was properly rejected as procedurally barred (3/2/99 Order, p. 6). Floyd contends that the trial court failed to properly consider and find mitigating factors allegedly established by the evidence. It has long been the law in this State that claims which could have been, should have been, or were raised on direct appeal are not cognizable in a motion to vacate filed pursuant to Florida Rule of Criminal Procedure 3.850. Shere v. State, 742 So. 2d 215 (Fla. 1999); Ragsdale, 720 So. 2d at 205, n. 2; Jennings v. State, 583 So. 2d 316, 322 (Fla. 1991); Engle v. State, 576 So. 2d 696, 699 (Fla. 1991); Roberts, 568 So. 2d at 1258; Meeks v. State, 382 So. 2d 673 (Fla. 1980), cert. denied, 459 U.S. 1155 (1983). Clearly, the trial court's consideration of (or failure to consider) mitigating evidence is a matter to be raised on direct appeal. See, Shere, 742 So. 2d at 218 (claim that trial judge failed to adequately consider mitigation was procedurally barred); Teffeteller v. Dugger, 734 So. 2d 1009, 1016, n. 9 (Fla. 1999); LeCroy, 727 So. 2d at 241, n. 11; Harvey v. State, 656 So. 2d 1253, 1256 (Fla. 1995); Jennings, 583 So. 2d at 322; Engle v. State, 576 So. 2d at 702. In fact, this claim was raised and rejected in Floyd's resentencing appeal. Floyd, 569 So. 2d at 1233. Therefore, this claim is procedurally barred, and Floyd

cannot obtain collateral relief on this point.

ISSUE V

WHETHER THE COURT ERRED IN DENYING FLOYD'S CLAIM OF PROSECUTORIAL MISCONDUCT.

Floyd's next claim alleges prosecutorial misconduct based on the State's penalty phase closing argument as well as allegedly using Greg Anderson as a State agent. The claim of misconduct from the State's closing argument was properly rejected as procedurally barred. Claims of prosecutorial misconduct that are derived from the record must be raised on direct appeal. Although the court below found this argument to be procedurally barred, Floyd has not even attempted to identify any error in that ruling (7/21/99 Order, pp. 12-13). The finding of a procedural bar was proper. Robinson v. State, 707 So. 2d 688 (Fla. 1998); Haliburton v. State, 691 So. 2d 466, 472 (Fla. 1997). Floyd's attempt to avoid a procedural bar by alleging that counsel was ineffective for failing to litigate this claim must be rejected as well. Robinson, 707 So. 2d at 697-98 (improper to litigate barred, substantive matters in postconviction proceedings under the guise of ineffective assistance of counsel). Thus, to the extent Floyd attempts to recast the claim as one of ineffective assistance of counsel, he cannot revive the barred issue. Johnson v. Singletary, 695 So. 2d 263, 265 (Fla. 1996); Cherry, 659 So. 2d at 1072; Medina v. State, 573 So. 2d 293, 295 (Fla. 1990).

In addition, Floyd's claim is without merit. Floyd has failed to establish that the Sixth Amendment was violated by the lack of

an objection to the prosecutor's argument. When the entire argument is read in context, it is clear that no objectionable statements were made. As the court below found, Floyd's "cut and pasted quotes lifted from the record misrepresent the total content of the State's closing argument" (7/21/99 Order, p. 12).

Floyd has recited isolated comments from the closing argument and suggests that the comments improperly offer lack of remorse as an aggravating factor; argue cold, calculated and premeditated after that factor had been struck by this Court; and rely on victim information to inflame the jury. However, a review of the prosecutor's argument, in context, demonstrates that the comments recited merely explain why Mrs. Anderson's murder was conscienceless and pitiless, and therefore within the definition of heinous, atrocious or cruel. See, Muehleman v. State, 503 So. 2d 310, 317 (Fla.) (comments may have excited passions but were highly relevant in establishing aggravating factors), cert. denied, 484 U.S. 882 (1987).

Furthermore, even if the prosecutor's comments in this case were deemed to be improper, the failure to object did not demonstrate ineffectiveness, since the challenged remarks did not become a feature of the trial. See, Sims v. State, 602 So. 2d 1253, 1257 (Fla. 1992) (rejecting claim of ineffective assistance of counsel for failure to object to Golden Rule violation), cert. denied, 506 U.S. 1065 (1993); Bertolotti v. State, 476 So. 2d 130,

133 (Fla. 1985) (prosecutor's penalty phase closing argument, including Golden Rule violation, not egregious enough to warrant new sentencing), cert. denied, 497 U.S. 1044 (1990). In this case, the prosecutor's closing argument comprises twelve pages of transcript (RS. V7/985-997). Floyd has noted isolated comments from the argument; however, reading the comments in context demonstrates the propriety of the argument as outlined above.

This was a deplorable offense involving two strong aggravating circumstances (one of which was merged from two factors). Floyd has not shown that the prosecutor's argument was improper; but even if some of the statements were improper, they did not rise to the level of reversible error since they were not a feature of the trial. On these facts, any objection would not have made any difference in the outcome of the penalty phase. Thus, Floyd cannot establish either a deficient performance or prejudice based on his attorney's failure to object to the prosecutor's closing penalty phase argument.

Floyd also alleges misconduct in the State's failure to disclose that witness Greg Anderson was a State agent. In this regard, Floyd's claim that Anderson was placed in Floyd's cell and coached to elicit incriminating statements was directly refuted by trial and resentencing testimony. Anderson himself was extensively cross examined, and flatly denied that he sought out Floyd's statements or acted on behalf of the State (DA. V5/736-784; RS.

V6/780-805). St. Petersburg Police Detective Ralph Pflieger also testified about the circumstances of Anderson's contacting him about Floyd's statements (DA. V5/800-807). Floyd has not offered any reason to question the sworn testimony of these witnesses with regard to this issue.

On these facts, no evidentiary hearing was warranted, and Floyd is not entitled to any relief.

ISSUE VI

WHETHER FLOYD IS ENTITLED TO ADDITIONAL PUBLIC RECORDS.

Floyd's next claim alleges that he was denied his right to disclosure of public records when the State failed to provide information in its possession on suspect Lionel Renard Flemming. Incredibly, Floyd's argument on this issue neglects to mention that the State in fact made these records available for Floyd's counsel's review ten days after the records were requested, and that counsel for Floyd in fact reviewed these records two months later, on December 15, 1998. A proper analysis of this claim requires a review of the relevant facts, which unfortunately are not provided in Floyd's brief.

The record reflects that in 1992, the State Attorney's Office provided about 1800 pages of public records in response to a request from Floyd's counsel (PC. V1/954). Six years later, on October 13, 1998, Floyd requested additional public records from the State Attorney's Office and the St. Petersburg Police Department (Ex. 1). Specifically, Floyd requested any and all records on four individuals: Lionel Renard Flemming, Dwayne Walton, Darryl Murphy, and Kim V. Walker. The State Attorney's Office responded on October 23, 1998, indicating that although the State objected to any delay in the postconviction proceedings for disclosure of these records because they were not relevant to Floyd's case, the records would be produced and were available for

review during office hours; counsel was requested to provide 48 hours notice in scheduling the records review (Ex. 2). The State's response also indicated that some of the records were being withheld pursuant to specific exemptions codified in Chapter 119, as outlined in the response. The State also filed an objection to the disclosure pursuant to Florida Rule of Criminal Procedure 3.852(a)(1) on the grounds of relevancy and requested a hearing (Ex. 3). Floyd's counsel filed a Response to the State's objection, which is essentially mirrored in the argument now presented in his brief (Ex. 4).

On November 13, 1998, Floyd filed his Third Amended Motion to Vacate Judgments of Conviction and Sentences, the denial of which is the subject of this appeal. On November 20, 1998, the trial court held a hearing pursuant to the State's objection and request for hearing (PC. V1/950-961). At that time, the State noted that these records had been made available, subject to the outlined exemptions, but that counsel had never contacted the prosecutor to schedule a time to review the records (PC. V1/952-53). The State clarified that it was not objecting to disclosure of these records, since they in fact had been disclosed a month earlier, but the objection was to any additional delay in the proceedings (PC. V1/954). Counsel for Floyd acknowledged that the State had made the records available, but that she had not reviewed them because she "didn't want to do anything until we had this hearing." (PC.

V1/956). The trial court found that the State had fulfilled its duty, but directed the State to continue to make these records available for another thirty days, cautioning counsel that if she did not review the records within that time, it would appear to the court that she was waiving any right to view or use the records (PC. V1/956-57). The court also, with the agreement of the parties, accepted the withheld documents outlined in the State's response for an in camera inspection (PC. V1/959). The court specifically declined to make a ruling as to the relevancy of the records requested (PC. V1/956).

Floyd's counsel reviewed the records on December 15, 1998, but at the Huff hearing on January 29, 1999, still could not identify any potential postconviction claim available from these records (PC. V1/1016-17). Even in the appellate brief, counsel has not identified any relevant or significant information from the records reviewed, choosing instead to argue to this Court simply that these records must be relevant and should be disclosed.

Following an in camera inspection of the records submitted, the court below entered an order upholding the withheld documents as legally exempt (Ex. 5). With regard to Lionel Flemming, the exemptions claimed and found were: some records were destroyed pursuant to Section 119.041(1); victim's information pursuant to Section 119.07(3)(s); FDLE arrest history records pursuant to Section 943.053; juvenile records pursuant to Sections 39.12 and

985.04(3)(a); grand jury proceedings pursuant to Section 905.27(1); and attorney work product which did not meet the definition of public records under Chapter 119 (Ex. 2, 5). Since the trial judge complied with all applicable law regarding public records requests by examining all withheld records in camera and no claim has been made with regard to the trial court's order upholding the exemptions, no basis for relief as to failure to disclose any records on Lionel Flemming has been offered. See, Ragsdale, 720 So. 2d at 206 (trial judge's in camera review complied with all applicable public records requirements). Thus, Floyd's current claim of entitlement to additional public records must be rejected.

ISSUE VII

WHETHER THE COURT ERRED IN SUMMARILY DENYING JURY INSTRUCTION CLAIMS.

Floyd's allegation of constitutional error with regard to several jury instruction issues was clearly procedurally barred and without merit. Jury instruction claims are classic appellate issues, since they are obviously reflected in the transcript of the trial, and therefore must be challenged on direct appeal. Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Thus, claims relating to jury instructions are consistently rejected in collateral proceedings as they should be raised both at trial and on direct appeal. See, Downs v. State, 740 So. 2d 506, 509, n. 4, 5 (Fla. 1999) (rejecting same burden shifting claim presented herein); Teffeteller, 734 So. 2d at 1016, n. 9 (same); Ragsdale, 720 So. 2d at 205, n. 2; Jennings, 583 So. 2d at 322; see also, Johnston v. Dugger, 583 So. 2d 657, 662-663, n. 2 (Fla. 1991); Gorham, 521 So. 2d at 1070 ("Because a claim of error regarding the instructions given by the trial court should have been raised on direct appeal, the issue is not cognizable through collateral attack"). Once again, any attempt to revive this claim as one of ineffective assistance of counsel cannot succeed. Robinson, 707 So. 2d at 697-98; Johnson, 695 So. 2d at 265; Cherry, 659 So. 2d at 1072; Medina, 573 So. 2d at 295. Floyd does not even attempt to explain why this claim should be subject to consideration at this time.

In addition, Floyd's claims are clearly without merit. See,

Floyd, 569 So. 2d at 1232 (finding sufficient evidence to support finding of heinous, atrocious or cruel); Johnston, 583 So. 2d at 662-663, n. 2 (rejecting claims that defense counsel's failure to properly litigate Caldwell v. Mississippi, 472 U.S. 320 (1985), issue during the trial and direct appeal amount to ineffective assistance of counsel); Gorham, 521 So. 2d at 1070 (same); Rose v. State, 617 So. 2d 291, 297 (Fla. 1993); Mendyk, 592 So. 2d at 1080-1081; Provenzano, 561 So. 2d at 545; Archer v. State, 673 So. 2d 17, 21 (Fla.), cert. denied, 519 U.S. 876 (1996) (Florida standard jury instructions adequately describe role to jury); Pope v. Wainwright, 496 So. 2d 798, 805 (Fla. 1986), cert. denied, 480 U.S. 951 (1987); Preston v. State, 531 So. 2d 154, 160 (Fla. 1988) (no merit to claim that instructions improperly shift burden of proof); Arango v. State, 411 So. 2d 172, 174 (Fla.) (same), cert. denied, 457 U.S. 1140 (1982). Notably, the resentencing court granted several defense requests for special jury instructions, including an expanded definition of heinous, atrocious or cruel (RS. V7/968-971, 1025); an instruction on the jury's role in sentencing (RS. V7/965-66, 1030), and an enhanced instruction on nonstatutory mitigation (RS. V7/971-972, 1026-1027). Clearly, no jury instruction error has been demonstrated, and no relief is warranted on this issue.

ISSUE VIII

WHETHER THE COURT ERRED IN DENYING FLOYD'S CLAIM THAT FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Floyd's last issue asserts that Florida's death penalty statute is unconstitutional on its face and as applied. Floyd does not present any argument with this issue, but states that he is only offering the claim in order to preserve any arguments relating to the constitutionality of the death penalty. Since this is again a direct appeal issue, it is procedurally barred at this point and therefore does not serve the purpose of preserving any claims. See, Hall v. State, 742 So. 2d 225, 226 (Fla. 1999); LeCroy, 727 So. 2d at 241, n. 11; Ragsdale, 720 So. 2d at 204-205, n. 1, 2; Ziegler v. State, 452 So. 2d 537, 539 (Fla. 1984). To the extent that Floyd is challenging Florida's lethal injection statute which did not exist at the time of his resentencing, this Court has rejected his claim on the merits. Sims v. State, 754 So. 2d 657 (Fla.), cert. denied, 120 S.Ct. 1233 (2000); Bryan v. State, 753 So. 2d 1244 (Fla.), cert. denied, 120 S.Ct. 1236 (2000); Provenzano v. State, 761 So. 2d 1097 (Fla. 2000). In addition, Floyd's failure to identify his specific arguments beyond his conclusory allegation of unconstitutionality renders this claim insufficient. Freeman, 25 Fla. L. Weekly at S455 ("A postconviction movant must specifically identify the claims which demonstrate the prevention of a fair trial. Mere conclusory allegations are insufficient").

Once again, Floyd does not identify any error in the finding of a procedural bar entered below, and the trial court's ruling summarily denying this claim must be affirmed.

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's order summarily denying 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 Pamela Izakowitz, 303 S. Westland Ave., P. O. Box 3294, Tampa, FL 33606, this _____ day of September, 2000.

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