IN THE SUPREME COURT OF FLORIDA

DUSTY RAY SPENCER,

Appellant,

vs. **CASE NO. SC00-1051**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

CITATIONS: Reference to the transcript of the guilt phase proceedings will be referred to as "TR" followed by the appropriate page number. Reference to the penalty phase proceedings of the original trial will be cited as "P" followed by a page number. Citation to the post-conviction record on appeal will be referred to as "PC-R" followed by the appropriate volume and page numbers.

STATEMENT OF THE CASE AND FACTS

The State generally accepts the Statement of the case and facts set forth in appellant's brief but adds the following.

A. Trial

This Court summarized the trial facts adduced below as follows:

> In early December 1991, Karen asked Spencer to move out of the house. On December 10, 1991, Spencer confronted Karen about money which she had withdrawn from the business account. During this argument, Spencer choked and hit Karen and threatened to kill her. Spencer was arrested after Karen reported the incident to the police. According to Karen's account to a police officer, Spencer called her from jail the next day and stated that he was going to finish what he had started as soon as he got out of jail.
>
> Although Karen asked Spencer to return home during the holidays, she asked him to leave again after Christmas was over. While Spencer was drinking with friends on New Years day, he told one friend that he should take Karen out on their boat and throw her overboard. Two days later he told that friend that Karen refused to go out on the boat anymore.
>
> On January 4, 1992, Spencer returned to Karen's home and got into a fight with Karen in her bedroom. Karen's teenage son Timothy Johnson was awakened by this fight. When Timothy entered his mother's bedroom, he saw Spencer on top of Karen, hitting her. When Timothy tried to intervene, Spencer struck him in the head with a clothes iron. Spencer followed Timothy back to his bedroom and struck him several more times with the iron. Spencer told Timothy, "You're next; I don't want any witnesses." Karen fled the house and sought help from a neighbor. When Timothy attempted to summon help on the telephone, Spencer yanked the phone cord from the wall. Spencer then fled the house and left town. Timothy and Karen were taken to the hospital and treated for their injuries. At the hospital, Karen told the treating physician that Spencer had hit her with an iron. At trial, the physician stated that Karen's wounds were consistent with having been inflicted with an iron.
>
> Spencer returned to Karen's house on the morning of

> January 18, 1992. Timothy was again awakened by a commotion, grabbed a rifle from his mother's bedroom, and found Karen and Spencer in the backyard. Timothy testified that Spencer was hitting Karen in the head with a brick, and that he observed a lot of blood on Karen's face. Timothy tried to shoot Spencer, but the rifle misfired and he instead struck Spencer in the head with the butt of the rifle, which was shattered by this impact. Spencer pulled up Karen's nightgown and told her to "show your boy your pussy." He then slapped Karen's head into the concrete wall of the house. Karen told Spencer to "stop." When Timothy attempted to carry his mother away, Spencer threatened him with a knife. Timothy ran to a neighbor's house to summon aid.
>
> When the police arrived at the scene, they found Karen dead. She had been stabbed four or five times in the chest, cut on the face and arms, and had suffered blunt force trauma to the back of the head. The medical examiner testified that cuts on Karen's right hand and arm were defensive wounds and that death was caused by blood loss from two penetrating stab wounds to the heart and lung. The medical examiner also testified that all of the wounds occurred while Karen was still alive and that she probably lived from ten to fifteen minutes after receiving the stab wounds in the chest. According to the medical examiner, Karen suffered three impacts to the back of the head that were consistent with her head being hit against a concrete wall. Because this impact would have caused Karen to lose consciousness, the medical examiner testified that the defensive wounds had to have occurred before the head trauma.

Spencer v. State, 645 So. 2d 377, 379-80 (Fla. 1994). In addition to those facts recited in this Court's opinion, the State adds the following.

On January 4, Karen Spencer's neighbor, Mr. Elmore, heard frantic knocking on his door between seven and seven thirty. (TR. 568-69). When Mr. Elmore opened the door he observed Karen with blood on her hands, face, down the side of her neck and on the front of her gown. (TR. 570). Karen was hysterical and kept

saying: "please help Timmy. He is trying to kill us." (TR. 571). She indicated that appellant had tried to kill her and that he was going to kill Timmy. Karen asked Elmore to "please go help him." (TR. 571). Elmore then left for Karen's house and he observed appellant's Grand Prix car in Karen's yard. (TR. 572). When he was approximately seventy five feet from Karen's house, Elmore observed Spencer get into his car, back up and drive off. (TR. 573). Elmore entered the Spencer home and found Timothy Johnson with blood on him and shaking so badly he had difficulty putting on a shirt. (TR. 574-575).

Nancy Elmore also recalled observing Karen on January 4th, she asked her for help: "Nancy, you have to help me, Dusty is down there, he beat me and he is beating Tim with an iron." (TR. 586). Karen appeared pale, shaky, and had a cut on her left eye. (TR. 586). She had blood all down the front of her, and her eye was milky looking. (TR. 587).

Dr. Bowman treated Karen Spencer for injuries resulting from appellant's January 18th attack. Dr. Bowman observed that Karen had two lacerations around the left eye, and bruising in the whole area of the left side of her head. (TR. 643). Karen told Dr. Bowman that she had been beaten with an iron. (TR. 648). Her injuries were consistent with having been beaten with an iron. (TR. 648).

B. Penalty Phase

On December 10, 1991, Deputy Hughley responded to a call from

the Spencer's house. Karen indicated that she and appellant had been arguing over money in the painting business account. (P. 125). Appellant told Karen that "he wanted her to get some money, or else he was going to kill her." (P. 125). On Karen's way to the bedroom, Spencer put his right hand around her throat, choking her, and put his left hand over her mouth and nose so that she could not breath. (P. 126). He told her "this is only a sample of what you are going to get. I'm going to kill you if you don't get the money from the account." (P. 126). Karen indicated she would get the money and appellant let her go. When Karen was outside the door, appellant told Karen, "if you scream, I'll kill you." (P. 126). Deputy Hughley observed an abrasion under Karen's nose, a cut under her nose and also that her nose was swollen. (P. 127). Appellant was arrested and on December 11, 1991, called Karen from jail and said he was going to finish what he started when he got out of jail. (P. 128).

On January 4, 1992, Karen told Deputy Weyland that she heard a noise when she was in her bedroom and called out to her son. Appellant answered, stating: "It's not Rodney. You have messed up my life, I'm going to kill you." (P. 137). Karen met appellant coming in the bedroom door, but he knocked her to the floor. (P. 137). Karen gave a written statement to Deputy Weyland. (P 137).

C. Evidentiary Hearing

(I) Defense Counsel's Testimony

Don Smallwood and Nick Kelly were appointed to represent the appellant. They worked together in the same office and used an investigator to prepare for trial and penalty phase. (PCR-2, 96-97). At the time of appellant's trial, 90 percent of his work was in criminal law. (PCR-2, 97). However, neither Smallwood nor Kelly had tried a capital case through to the penalty phase. (PCR-2, 98). From the time he was appointed, Smallwood estimated he had nine months to prepare for trial. (PCR-2, 99). Smallwood felt like he had had ample time to prepare the case. (PCR-2, 100). Smallwood testified that he agreed with Kelly that he would prepare the guilt phase and Kelly would focus on the penalty phase. (PCR-2, 100). However, Smallwood testified that they both worked on each phase of the trial. (PCR-2, 101). After his appointment, Smallwood made an appointment to review the public defender's file and talked with the previous counsel. Smallwood also went to the jail to talk with the appellant. (PCR-2, 102).

The defense investigator assisted defense counsel in finding potential witnesses and investigating appellant's family background. (PCR-2, 104). The investigator had previously worked on death cases. (PCR-2, 105). Smallwood deposed all of the State's witnesses. (PCR-2, 104). The theory of defense centered upon arguing a lack of premeditation. (PCR-2, 105). Smallwood did locate a witness who he felt could shed light on the Spencers' relationship, but was cognizant of the need not to assassinate the

victim's character:

> But we didn't take the position that we were going to present evidence that would really have painted a picture that she was deserving of this kind of behavior or anything like that.
>
> We were very cognizant about making sure that there was no relationship between the acts that took place and there was some kind of justification based on her behavior, we were not going to present that.

(PCR-2, 106-107).

Smallwood did have his investigator run down a lead on possible infidelity on the victim's part, information related to him by the appellant. (PCR-2, 107). But, Smallwood testified that he found no evidence of infidelity and therefore had no evidence to present. (PCR-2, 166). And, again, Smallwood emphasized that an attack upon the character of the victim was not a good option for the defense:

> So I tried to demonstrate to the jury this domestic situation. But by the same token, the publicity that was out there, the pictures of showing the injuries to her were pretty significant and for me to paint in any way that she deserved anything or that, you know, she was -- she brought this upon herself and it was all her fault and not Dusty's, I felt that the jury would have just turned off right there and we would have had no credibility whatsoever.

(PCR-2, 165). However, when appellant gave him the name of people to talk to, Smallwood testified that he followed those up. (PCR-2, 167).

While Smallwood could not recall much about jury selection in this case, he testified that he would consider the remaining people in a jury pool before exercising his challenges. (PCR-2, 169).

Smallwood knew who he was getting next if he exercised a peremptory challenge on a particular juror. (PCR-2, 170).

As for not presenting any witnesses on the guilt phase, Smallwood testified that he probably didn't have any witnesses to present on the issue of guilt and that he "didn't want to present witnesses for the sake of presenting witnesses and lose the opportunity to have first and last chance at closing." (PCR-2, 109). Smallwood proceeded on a theory of defense that the State failed to show premeditation. (PCR-2, 109-10). Smallwood testified that he attempted to use state witnesses to show that this was a crime of passion. For example, Smallwood testified:

> Well, I remember using the testimony of the son where he had struck Dusty in the head with a gun and I used that example to show that – that Dusty was in such a high state of emotion that even where he was hit with the butt of that gun which broke the butt of that gun, it did not phase Dusty at all.
>
> And I used that as an example to show that, you know, he wasn't cool, calm and calculated but rather he was at such a frenzy or at a high state of emotions that it was a, more of a crime of passion as opposed to a crime of premeditation.

(PCR-2, 110). When asked about his closing argument, and specifically any concessions he might have made, Smallwood testified:

> Basically my argument to the jury was this, the evidence that they had before them was there was an eyewitness in the son who saw Dusty in the act of hurting his mother and she died as a result of that.
>
> And I was not going to get up there and say it didn't happen. I couldn't do that. I mean, I would have no credibility.
>
> So my goal was to say, yes, these acts did take

> place, we're not disputing that the acts didn't take place but it was not from a premeditated design.

(PCR-2, 135). Smallwood put forth the defense theory through cross-examination of the State's witnesses and closing argument. (PCR-2, 135).

With regard to the fact appellant came over wearing gloves and apparently possessed a knife, Smallwood essentially ignored or downplayed the gloves. (PCR-2, 135-36). However, Smallwood knew there was no evidence that appellant planned to paint at the Spencer house when he arrived the morning of the victim's murder. (PCR-2, 172). And, Smallwood believed the evidence in his possession was that appellant used the gloves so that he could steal the car title. (PCR-2, 172). In fact, he kept that information out of the guilt phase because "there's intent the fact that he's putting gloves on to commit a crime." (PCR-2, 173).

Smallwood testified that appellant's statements to Tim during the attack on his mother were considered. (PCR-2, 176). However, Smallwood attempted to turn those statements to appellant's advantage, showing that those statements showed someone whose anger was out of control. (PCR-2, 176). Smallwood considered Lipman's report that calculated the alcohol level (0) and considered that in determining whether to present a capacity defense. (PCR-2, 177). Smallwood understood that diminished capacity was not available as a defense. (PCR-2, 178). While Smallwood could not recall his discussions with regard to presenting the experts during the guilt

phase, he testified:

> I can remember knowing that the information we had obtained from Mr. Spencer and the information we knew that we wanted the doctors to obtain from Mr. Spencer were important to get that information before the jury because I knew that the opportunity was not there to put Mr. Spencer on the stand.
>
> And -- and that information that we felt was important for the jury to consider had much more credibility and impact in a penalty phase than it would have in the guilt phase and so...

(PCR-2, 180).

Nick Kelly also confirmed that the experts were not called on the guilt phase as they could be a conduit for damaging statements. Further, he felt that if the jury found appellant guilty anyway of first degree murder the experts would be less persuasive for the penalty phase. (PCR-2, 186). Finally, they did not want the State to hire their own experts had the defense sought to introduce their testimony on the guilt phase. (PCR-2, 187). Kelly testified that he thought they hired the experts early on. Kelly dealt with the issue of premeditation by "cross-examination of the State's own witnesses, was hoping to show his state of mind was such in a frenzy or overwhelmed with emotion that that showed lack of premeditation." (PCR-2, 190). Kelly acknowledged that Timothy's description of the knife was describing a kitchen or steak knife, a knife with ridges in the blade. (PCR-2, 192). Since it was described in that manner, it made no sense to suggest that appellant carried such a knife around with him all the time. (PCR-2, 193). And, there was evidence to suggest that this entire

episode started in the kitchen area of Karen's house, so the knife might have been picked up in that area. (PCR-2, 193). This would suggest that the knife was only picked up in the heat of passion before the stabbing occurred. (PCR-2, 194).

With regard to the knife, Smallwood testified that he put the burden back on the State to show where the knife came from: "What the State has got to prove is whose knife it was, where did it come from, was this the knife. I kept throwing it back, has the State shown you beyond and to the exclusion of a reasonable doubt that. My argument was, no, the State hadn't done that." (PCR-2, 136).

As for the medical report of Dr. Rose, the trial court sustained an objection to the report as impeachment evidence, noting that the prosecutor below, knowing the rules of evidence, would have objected to admissibility of the report. The prosecutor noted that the report appeared to be that of a witness, a doctor, who did not even testify. (PCR-2, 140). Defense counsel stated that he would proffer his examination of Smallwood based upon the report, but failed to do so. (PCR-2, 141).

Smallwood recalled retaining Dr. Burch and Dr. Lipman for the penalty phase. He did not want to call them during the guilt phase: "I did not want to open the door for the State to ask questions about what communications Mr. Spencer may have told them that would have gone on the issue of guilt or innocence." (PCR-2, 142). The doctors ultimately found the statutory mitigators of

substantial impairment and extreme duress. (PCR-2, 145). Smallwood was aware of at least the possibility of presenting the doctors during the guilt phase. (PCR-2, 145).

Smallwood did testify that most of the family he talked to were loyal to Karen and the only good friend of appellant's who could shed light on the relationship was a painter, Ben Abrams. (PCR-2, 133). Smallwood did recall talking with Curtis Zink and believed, but was not sure he talked with Andy Brachold. (PCR-2, 133).

Smallwood recalled a moment during closing argument where Kelley leaned over and asked if the prosecutor was crying, Smallwood thought he heard sobbing, but couldn't say for sure. (PCR-2, 13). Smallwood testified: "And by the time, you know, I heard it, to really listen, because I didn't want to stand up and -- and lose credibility of the jury, she quit that quick." (PCR-2, 113). Smallwood thought he mentioned it to the judge before he did his own closing. (PCR-2, 113).

Smallwood believed that before trial he asked if the prosecutor would waive the death penalty, but the State did not appear receptive to a deal: "I felt that door was -- was closed." (PCR-2, 115). Smallwood testified that he and Kelly would have been happy with a plea to life. (PCR-2, 116). However, Smallwood testified: "But let me say this, I felt like the State Attorney's Office in this case wanted to set an example with Mr. Spencer and

they were going to do everything they could to seek the death penalty. And they did." (PCR-2, 116). According to Smallwood, the publicity in the case resulted in an informal "Spencer Rule" that no one was going to let anybody out on a domestic, that they would at least spend a night in jail. (PCR-2, 117).

Smallwood testified that he did not object to the prosecutor's opening statement regarding Krista Mays' observation of the victim carrying a rifle, because he did not know how the judge would ultimately rule on the admissibility of this testimony. Second, what the prosecutor offers in opening is not "evidence and her credibility toward that jury is just as important as her witnesses. And by not – you say you're going to present something and then you don't, that plays into a great argument from a defense standpoint to say the prosecutor made a promise to you and, look, they didn't live up to it." (PCR-2, 125). Smallwood did not recall a statement in opening regarding Timothy Johnson's observation of appellant hitting his mother with an iron. (PCR-2, 126). However, he did utilize a strategy of pointing out and emphasizing the fact that Tim did not actually observe appellant hitting Karen with the iron during his own closing. (PCR-2, 149). Smallwood used the prior attack to show the fiery and domestic nature of the relationship, that appellant would just lose control, as opposed to a "cold calculated premeditated murder." (PCR-2, 150). And, as for the iron incident, Smallwood identified a letter in appellant's

own handwriting where he recalls the iron incident and indicates that he had recollection of it. (PCR-2, 155). [State's Exhibit B]. Smallwood talked to appellant about testifying but had concerns about him testifying on his own behalf: "Well, we had had conversations with -- with Mr. Spencer and -- his demeanor, the way I thought he could present himself in court and things lie that all made an issue as to whether he would be right to take the stand." (PCR-2, 155). When counsel for CCRC objected, stating that it had not asked Smallwood about the failure of appellant to testify, and claimed it was abandoning this claim in the post-conviction motion, the prosecutor pointed out that it was doubtful the defense could have presented the experts without offering appellant as a witness. (PCR-2, 156).

Smallwood received and reviewed Dr. Burch's report in September of 1992 and considered it in determining strategy for both the guilt and penalty phases of the trial. (PCR-2, 160). Smallwood thought that he could portray the statement appellant made to Ben Abrams about throwing his wife overboard in a joking manner. Moreover, Abrams was a friend of appellant's and Smallwood believed he could use him to appellant's advantage with regard to casting light on the Spencer's relationship. (PCR-2, 162-63). He did not intend to impeach Abrams, appellant's friend, as he planned to call him during the penalty phase. (PCR-2, 163-64).

Smallwood had his investigator do an extensive investigation

of the appellant's background, medical records from elementary school, hospital records, and records of prior incidents with his first wife, Beverly Spain. (PCR-2, 152). Smallwood was cognizant of the danger of inviting comment on prior conduct of appellant with his first wife if he pursued a certain line of testimony. (PCR-2, 152). Consequently, Smallwood was careful in bringing out background information on appellant because admission of such evidence concerning his relationship with his first wife would certainly be damaging. (PCR-2, 153).

(II) Expert Testimony Presented At The Evidentiary Hearing

Capital collateral counsel called the same two experts who testified on behalf of the defense during the penalty phase. Each expert testified during sentencing that the statutory mitigators applied in this case. Capital collateral counsel called these experts to support his claim that counsel was ineffective for failing to call these experts during the guilt phase of the trial.

Dr. Elizabeth Burch testified that between 22 and 65 percent of perpetrators of violent crimes claim to have no recollection of committing the violent offense. (PCR-2, 265). Her analysis of appellant revealed a number of personality "characters that are consistent with a likelihood or at least a potential of dissociative amnesia or psychogenic amnesia." (PCR-2, 265). Dr. Burch testified that psychological testing revealed appellant's over control of hostility and that he had a vulnerability to sudden

explosive episodes of violence under extreme stress or duress or threat. (PCR-2, 266-67). Dr. Burch explained: "And so there is a loss of ego controls when he is under extreme stress and this is consistent with a tendency to have ego splitting under extreme stress and that would be what happens when someone disassociates." (PCR-2, 268). According to Dr. Burch, the traumatic occasion on the porch caused the "disassociative state", "[i]f that in fact, did. [occur]" (PCR-2, 269).

Appellant possessed a normal IQ and Dr. Burch did not find any significant evidence of neurological dysfunction. (PCR-2, 275). Appellant appeared to recall the iron incident involving the victim. (PCR-2, 275). Appellant did not tell Dr. Burch that he had any difficulty remembering the iron incident. (PCR-2, 276). Dr. Burch admitted that in a report dated September 16, 1992, she indicated that she was suspicious about appellant's claim of amnesia. (PCR-2, 276). Dr. Burch admitted that she submitted no additional reports to the defense team after that point. (PCR-276). Dr. Burch testified that appellant suffered from a personality disorder and had amnesia covering at least part of the time during the murder. (PCR-2, 279).

On cross-examination, Dr. Burch admitted that during the penalty phase Mr. Kelly asked open ended questions which would allow her to discuss any part of her diagnosis. (PCR-2, 279-80). Dr. Burch acknowledged that she was able to discuss all of the

psychological tests she administered and the conclusions derived therefrom. (PCR-2, 281). Dr. Burch acknowledged her previous deposition testimony wherein she answered "[o]f course not" to the question had she ruled out the possibility that he acted with premeditation to go over to the house and harm the victim. (PCR-2, 283). She remained suspicious of appellant's claim of amnesia in November, which is the month the trial took place. (PCR-2, 284-85). Dr. Burch, however, attempted to explain that had she been asked to appear for the guilt phase she would have been more prepared in pulling together all aspects of appellant's personality functioning and "may have come to the -- the stronger opinion that it was the result of discontrol under a severe stress and not premeditated at the time of trial had I been asked to testify then." (PCR-2, 285).

In December of 1992, Dr. Burch acknowledged that she did not know whether appellant actually contemplated murdering the victim. (PCR-2, 286). And, during the penalty phase, Dr. Burch admitted that appellant was able to distinguish between right and wrong. However, at this time, while acknowledging that appellant's claim of amnesia was possibly false, Dr. Burch testified: "I would have to say there is a possibility but I think that it's slight. In other words, it's more consistent with everything about his personality that he would have the amnesia than that he's malingering." (PCR-2, 287).

Dr. Burch admitted that appellant was not intoxicated at the time of the murder but stated that he may have suffered from lingering effects of exposure to alcohol. (PCR-3, 290). In her opinion, more likely than not appellant suffered from amnesia for the time period in question. And, Dr. Burch testified that amnesia is simply the failure to remember what happened. (PCR-2, 290). To Dr. Burch, this implied that appellant was suffering some type of altered consciousness: "He is someone who is subject to loss of control when under extreme duress." (PCR-3, 291). Dr. Burch testified that she learned of two separate incidents of loss of control and possibly a third which occurred during Mr. Spencer's life. (PCR-2, 291). Appellant told Dr. Burch about another incident when he was a young boy being involved in a violent encounter with another boy and was not aware of what he was doing until he was pulled off by a female authority figure. (PCR-2, 272).

While Dr. Burch admitted that some of appellant's behaviors may appear goal directed at the time of the murder, she stated they could also be "reflexive." (PCR-3, 296-97). The following colloquy then occurred between the prosecutor and Dr. Burch:

> Prosecutor: Okay. In fact, telling a son or telling a woman to show her private parts to her son would require the thought that there's a mother and there's a son, that she will be embarrassed if her private parts are shown, it requires thought in putting people in order and that sort of thing, does it not, that wouldn't be involved in just mere reflexive behavior?

> Dr. Burch: It's not a mere reflexive behavior but as an out of control behavior. It's an extreme rageful behavior.

(PCR-2, 297). Dr. Burch testified that she could not tell when the rage expressed by the appellant began. (PCR-3, 298). And, Dr. Burch testified that "you can't really" describe the difference between a person in an automatic condition and a person who is not. (PCR-3, 298).

Dr. Jonathan Lipman testified that he is a neuropharmacologist and as such is an expert in the area of the effect of drugs on the brain. (PCR-3, 302). He has only been qualified to testify as an expert in neuropharmacology. (PCR-3, 303). He has testified specifically on the "effect of drugs on nerve, brain and behavior." (PCR-3, 306). Dr. Lipman concluded that given appellant's personality and previous alcohol usage it was predictable that "in extremes of emotional distress, it is extremely credible that he will actually disassociate." (PCR-3, 317).

Appellant told Lipman about the iron incident, but thought that although appellant told him of the offense, he may not have actually recalled the incident. (PCR-3, 320). Lipman admitted that a close friend, Brachold, was told by appellant that he blacked out and did not recall hitting the victim with the iron. (PCR-3, 320). However, appellant was able to tell Lipman what had happened. Lipman admitted that he had two inconsistent statements, wherein appellant claimed not to recall hitting her with the iron

and one where he did apparently recall hitting her with an iron. (PCR-3, 321).

In childhood another instance of dissociative state was related to Lipman by the appellant. (PCR-3, 321). It involved appellant and a violent encounter wherein he was pulled off another child. (PCR-3, 321). Lipman admitted that no alcohol was involved in the earlier incident with the child. (PCR-3, 321). There were a total of three instances of appellant committing a violent act and claiming not to recall committing it. (PCR-3, 322).

Lipman admitted it was not "uncommon" for individuals who commit horrendous or violent acts to claim they do not recall committing the act. (PCR-3, 322). Given the three instances, Lipman concluded that the common denominator other than appellant claiming not to remember committing the violent act was the "extremity of emotion"; i.e, "an emotional violent encounter." (PCR-3, 323).

Lipman did recall learning of a threatening phone call appellant made to the victim shortly before the murder.[1] And, Lipman agreed that appellant harbored a great or fair amount of

[1]Lipman acknowledged that he had been told something about a call appellant made from jail threatening to kill the victim. (PCR-3, 338). Lipman understood that appellant was "enraged with his wife, he felt dispossessed, he was disturbed, distraught, and being a psychologically damaged individual, extremely vulnerable, sensitive, tender-minded, easily hurt, he was likely to say such a thing. I don't know whether that means that's really predisposition to kill but certainly he was angry." (PCR-3, 339).

anger and resentment toward the victim. (PCR-3, 324). Lipman agreed that appellant parked his car two blocks away from the marital home, wore gloves, and entered the house at the rear, through the sliding glass door. (PCR-3, 325). Admitting rather abundant evidence of deliberate conduct, Lipman attempted to pinpoint the point of disassociation as the period after appellant was struck by the gun. However, when it was noted that appellant coherently spoke after having been struck by the gun, Dr. Lipman stated that dissociative people can speak, "quite well." (PCR-3, 326). And, Lipman thought that after being struck, appellant looked up and told Tim that "she's either F'd up my life or messed up my life." (PCR-3, 326-27). When asked if that showed some deliberate thought and goal directed behavior, in that appellant was killing the person who F'd up his life, Lipman stated that this was a complicated question involving various levels of consciousness. (PCR-3, 327). According to Dr. Lipman, it was not necessarily the rifle blow that caused the disassociative state. (PCR-3, 328). And, Lipman agreed that the claim of amnesia or dissociation relied entirely upon appellant's self-report: "...that is not confirmed by anyone other than his lack of memory." (PCR-3, 338).

As to the knife, appellant told Lipman that he did not "know how that knife got there." (PCR-3, 341). According to Lipman, appellant was able to provide the following account of the murder:

> He said, and I quote, she started screaming and I held her mouth to silence her screams and she struggled and she pushed me and I held her by the back of the mouth and the back of the head and the two of us fell down, fell outside the door. And she continued struggling on the ground and she picked up a brick and she hit me.
>
> I reacted, I hit her in the head with the brick.
>
> She's screaming and I'm frightened and I have feelings of love although I -- she won't even talk to me. As soon as she sees me, she screams. When I hit her in the head with a brick, I'm astride her. And when Tim comes up behind me and hits me over the head with the butt of a gun, I only remember -- him hitting me once but his statement says he hit me with the stock of a rifle three times but I don't remember.
>
> Then as I got up, Tim said, you killed her, and he's pulling her away from me by her armpit.
>
> And in my hand there with the brick was -- there is the knife and it's all over and I don't remember how it got there.
>
> I asked him where he had stabbed his wife. He said I don't remember. I saw blood coming out of her mouth as Tim picked her up and drug her away and said, man, you killed her.
>
> And I started to come back from an unconsciousness or from a blackout place coming out of a fog and Tim took off and ran down the road and I left and went to the woods.

(PCR-3, 343-44).

Lipman did recall a statement appellant made to him comparing the situation he was in with Karen to his first marriage. (PCR-3, 331). The following colloquy occurred:

> Q: [Assistant Attorney General] Do you also recall a statement of anger that he made to you, I'll quote, the horror of being screwed just because she's got a gash between her legs, end quote?
>
> A: [Lipman] I do remember that, I believe, yes.

(PCR-3, 332).

When asked by the trial court what he could have testified to

had he been called in the guilt phase, Lipman stated:

> I would have testified that his mind was impaired at the time of the offense and that his ability to think coherently was degraded and that his emotional unbalance was extreme.

(PCR-3, 333). In addition to emotional unbalance, Dr. Lipman believed that appellant was impaired by long term use of alcohol and that his ability to reason may have been clouded. (PCR-3, 334). Appellant's ability to think clearly was certainly diminished. (PCR-3, 334). Lipman agreed that he discussed the issue of intoxication with the defense attorneys at the time of trial and specifically, told them he estimated appellant's alcohol level of zero at the time of the offense. (PCR-3, 335). However, Lipman stated that it did not mean appellant was not impaired from prior use of alcohol. (PCR-3, 335). Lipman admitted that perhaps the lawyer has difficulty with this concept and "maybe jurors would, that it's possible to be intoxicated without have a (sic) measurable blood alcohol concentration." (PCR-3, 336).

The following colloquy occurred on recross examination on the effects of alcohol on the appellant:

> Q [Assistant Attorney General] So you're claiming that although there was a zero percent level of alcohol, that the defense could have maintained some kind of hangover intoxication defense?
>
> A: [Lipman] He was intoxicated, though not on the actual alcohol blood level itself but on the persistent affects of continuous drink.
>
> Q: The hangover?

A: Hangover doesn't really describe it. I'm calling it a hangover because it hangs off the end of a binge. But what you and I might call a hangover after having too much one night which, of we would never do –

...

--Is– Is a fraction of what a binger who goes on a two week binge feels. The headache is not really the point. The point is that they are neuropsychologically impaired, they cannot perform cognitive tests, the tests that we use, for instance, to measure intoxication when we give people alcohol, they remain impaired on those tests.

Q: Well, doctor, but wouldn't they show psychomotor problems, in other words –

A: Yes. Though, they would be subtle.

Q: But there is no evidence that Mr. Spencer suffered from any of that because you would admit he successfully drove to his ex-wife's house, parking two blocks away, putting on gloves which probably aren't that easy, latex kind to put on, determining and deciding to go around the house and enter through the back to surprise her, now, are we to believe that he's in some kind of intoxicated state at that point?

A: Yes. I describe it as subtle.

(PCR-3, 343-45).

Any additional facts necessary for disposition of the assigned errors will be added in the argument, infra.

SUMMARY OF THE ARGUMENT

ISSUE I--Appellant's allegations of prosecutorial misconduct are procedurally barred from review in this post-conviction proceeding. The comments at issue were either raised and addressed on direct appeal or should have been. In any case, the prosecutor's comments at issue were either not improper or were so insubstantial in nature that they could not form the basis for post-conviction relief.

ISSUE II--Appellant was represented by two competent defense attorneys. Appellant's attack upon the competence of their representation at the guilt phase falls far short of establishing the type of deficiency and resulting prejudice necessary to warrant post-conviction relief.

ISSUE III--Appellant failed to establish his trial counsel were ineffective in representing him during the penalty phase. Trial counsel offered substantial evidence in mitigation including two experts who testified that both statutory mental mitigators applied.

ISSUE IV--Appellant failed to establish that the State withheld any material, exculpatory information from the defense. The defense was well aware of the potential witness whose name appeared on a police report turned over to the defense prior to trial.

ISSUE V--The trial court did not err in summarily denying several claims for relief. The claims were either conclusory and insubstantial or clearly rebutted by the record.

ISSUE VI--Appellant's allegation that the State knowingly presented false evidence in this case is without merit.

ISSUE VII--Appellant failed to offer any good-faith basis for juror interviews in this case. The rules relating to juror interviews in Florida are not unconstitutional.

ISSUE VIII--Appellant's cumulative error allegation was properly denied below. Appellant's individual allegations of error were without merit.

ARGUMENT

PRELIMINARY STATEMENT ON PROCEDURAL BAR

Matters which either were raised or could have been raised on direct appeal or previous post-conviction proceedings are procedurally barred on collateral review. It is well settled that a Rule 3.850 motion is not a substitute for, nor does it constitute a second direct appeal. "[A] Rule 3.850 motion based upon grounds which either were or could have been raised as issues on appeal may be summarily denied." McCrae v. State, 437 So. 2d 1388, 1390 (Fla. 1983)(string citations omitted). See generally Parker v. State, 718 So. 2d 744 (Fla. 1998), cert. denied, 526 U.S. 1101 (1999)(claims procedurally barred on second 3.850 motion for failure to object at trial, for having raised issue on direct appeal, or for having raised issues in prior motions or petitions); Maharaj v. State, 684 So. 2d 726 (Fla. 1996)(Post-conviction relief petitioner's claims which were either raised or could have been raised on direct appeal were properly denied without an evidentiary hearing); Engle v. Dugger, 576 So. 2d 696, 702 (Fla. 1991)(claim that the trial court failed to provide a factual basis to support imposition of death sentence was "procedurally barred because it should have been raised on the appeal from resentencing."). Accord Cherry v. State, 659 So. 2d 1069 (Fla. 1995); Medina v. State, 573 So. 2d 293 (Fla. 1990); Clark v. State, 690 So. 2d 1280 (Fla. 1997).

Any attempt by a defendant to avoid the application of a procedural bar by simply recasting a previously raised claim under the guise of ineffective assistance of counsel is not generally successful. See Sireci v. State, 469 So. 2d 119, 120 (Fla. 1985)("[c]laims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel.") "Procedural bars repeatedly have been upheld as valid where properly applied to ensure the finality of cases in which issues were or could have been raised." Atkins v. State, 663 So. 2d 624, 627 (Fla. 1995).

ISSUE I

WHETHER THE TRIAL COURT'S RULING DENYING POST-CONVICTION RELIEF ON ALLEGATIONS OF PROSECUTORIAL MISCONDUCT IS SUPPORTED BY THE RECORD? (STATED BY APPELLEE).

A. Appellant's Claims Of Prosecutorial Conduct Are Procedurally Barred From Review As Such Claims Either Were, Or, Could Have Been Raised At Trial And On Direct Appeal

Appellant first contends that several instances of prosecutorial misconduct occurred during the course of the trial. Appellant's Brief at 32. The trial court recognized below that these allegations of prosecutorial misconduct should have been raised, if at all, at trial and on direct appeal. Consequently, the trial court held that such claims were barred from review, stating:

> "Rule 3.850 does not authorize relief based upon grounds which could have been or should have been raised at trial and, if properly preserved, on direct appeal." *Bates v. Dugger*, 604 So.2d 457, 458 (Fla. 1992), *quoting* Fla.R.Crim.P. 3.850; *see Mikenas v. State*, 460 So.2d 359 (Fla. 1984). The Court finds that these claims could have been, and to a certain extent were, raised on direct appeal and, therefore, they are all procedurally barred.

(PCR-6, 838-39). Despite finding these claims procedurally barred, exercising an abundance of caution, the trial court considered the claims of prosecutorial misconduct on the merits.

B. Prosecutorial Misconduct Did Not Deprive Appellant Of His Right To A Fair Trial

(I) The Display Of Gloves During Closing Argument

The trial court below denied this claim, noting that although the prosecutor did put on a pair of gloves during closing argument, this conduct was not improper. The trial court stated:

> The prosecutor did put on a pair of latex gloves like those allegedly worn by Mr. Spencer during the murder and show them to the jury. (T 1035; 1061; EH T 143-44). The gloves had been introduced into evidence. (T968). At the evidentiary hearing, the prosecutor testified that she felt it was necessary to show the jury the gloves during closing because in her mind they were strong evidence of premeditation. (EH T 143-45). The Court finds this claim is procedurally barred. Further, the Court finds that even if this claim was considered on its merits, the alleged misconduct does not meet the standard set forth in *Spencer v. State*, 645 So.2d at 383.

(PCR-6, 844). The gloves were in evidence and they constituted evidence of premeditation in this case, that is, appellant prepared for his fatal encounter by putting on a pair of gloves with the rather obvious intent of preventing his fingerprints from

being found. A display of the gloves that were admitted into evidence was entirely proper.

Appellant's claim that the facts of the instant case are "analogous" to those of Jenkins v. State, 563 So. 2d 791 (Fla. 1st DCA 1990) cannot withstand even a cursory review of the two cases. In Jenkins the court reversed the defendant's conviction because the prosecutor repeatedly accused the defense attorney of further "victimizing the victim and of seeking an acquittal at all costs." In addition, the prosecutor engaged in improper "golden rule" arguments, "the most egregious of which occurred when he pointed the shotgun involved in the incident at one juror while arguing to the others that this was the same circumstance that confronted the victim." Jenkins, 563 So. 2d at 791.

The facts addressed by the court in Jenkins are in no way comparable to those presented in the instant case. The prosecutor did not make a threatening gesture when she put the gloves on, nor did she ask the jury to place themselves in the position of the victim as she was wearing the gloves. Simply putting the gloves on while discussing **appellant's** premeditation does not implicate a violation of the golden rule. The prosecutor was not placing the jury in the position of the victim. See Shaara v. State, 581 So. 2d 1339, 1341 (Fla. 1st DCA 1991)(A Golden Rule argument is made when a prosecutor asks "the jurors to place themselves in the victim's position, [or] to think how they would feel if the crime

happened to them.")(string citations omitted). Consequently, any contention that this conduct violated the Golden Rule is without merit.

(II) Emotional Display During Closing Argument

In addition to finding this allegation of prosecutorial misconduct procedurally barred, the trial court found this claim was without merit. The trial court stated:

> Mr. Spencer also argues that the prosecutor cried during closing arguments. At the evidentiary hearing, the prosecutor testified that she did not cry during closing argument. (EH T 142; 146-147). Rather, her voice "quavered" for a few seconds and she then turned away from the jury and composed herself before proceeding with her closing argument. (EH T 143; 146-147). The State introduced a videotape which depicts the incident in question. In the videotape, the prosecutor's voice can be heard "quavering," but there is no indication that she was actually crying. The Court has determined that the prosecutor did not cry during her closing argument and, hence, finds that this claim is procedurally barred and without merit.

(PCR-6, 844).

The prosecutor in this case did not cry during closing argument. Thus, appellant failed to prove the specific claim he made in his motion for postconviction relief. And, even if the prosecutor did show a brief display of emotion, under the facts of this case, such a display does not mandate reversal of appellant's conviction. The State's Response below provided an excellent analysis of this issue:

> Given the overwhelming character of the evidence that defendant did in fact murder the victim, the mere fact of the prosecutor crying in and of itself would not

> be sufficient to merit relief even if the crying did occur. C.f. *Hill v. Arkansas*, 54 Ark. App 31, 977 S.W. 2nd 234 (1998)(declining to reverse conviction on the basis that prosecutor had cried during closing argument); *Illinois v. Cloutier*, 178 Ill.2d 141, 87 N.E.2d 930 (Ill)(holding that victims crying out from the grave did not so influence the jury as to warrant reversal); *Martinez v. State*, 822 S.W. 2d 276 (Tx App 1991); *Rodriguez v. State*, 588 So.2d 1031 (Fla. 3d DCA 1991)(Holding that there was no possibility that the remark caused the verdict where prosecutor in closing called attention to the victim's crying during her testimony); *State v. Green*, 46 Wash App 92, 730 P.2d 1350 (Wash. 1986)(holding that the prosecutor's weeping did not merit reversal because the trial judge had properly instructed the jury to disregard emotional argument); *Cohern v. State*, 461 N.E. 2d 1154, 1158 (Ind. App. 1984); *Agee v. Wyrick*, 414 F.Supp. 435, 439 (1976)(holding that the prosecutor's weeping did not merit reversal because the trial judge had properly instructed the jury to disregard emotional argument); *Cohen v. State*, 461 N.E. 2d 1154, 1158 (Ind. App. 1984); *Agee v. Wyrick*, 414 F.Supp. 435, 439 (1976)(holding that prosecutrix in rape case crying did not merit habeas corpus relief because the incident did not render the trial fundamentally unfair). In the instant case the prosecutor closed her argument with a reminder of how the jury was to decide the case: "you should find Dusty Ray Spence[r] guilty on all the charges **based upon the evidence proven** beyond and to the exclusion of every reasonable doubt." (T. 1048)(emphasis added). The trial judge also specifically instructed the jury that they must not decide the case because they were sorry for anyone or angry at anyone. He also instructed the jury that their feelings should not influence their decision in the case. (T. 1084). On this record, the Defendant can not prove that the prosecutor's conduct with regard to crying merits relief.

(PCR-5, 745-46).

In sum, this procedurally barred claim cannot form the basis for post-conviction relief on appeal. Indeed, the prosecutor's extremely brief display of emotion in this murder case was simply not a significant factor worthy of mention in a collateral attack

upon appellant's conviction.

(III) The Iron Comment During Opening Statement

Again, this is a procedurally barred claim as it appears in the record and should have been raised at trial and on direct appeal. Nonetheless, in addition to being procedurally barred, the trial court concluded that appellant's claim lacked any merit. The trial court stated that although Timothy Johnson, the victim's son, did not testify he actually observed his mother being beaten with the iron, his testimony did implicate the iron. The trial court stated: "...Instead, Timothy testified that he saw Mr. Spencer beating Karen Spencer and his testimony implied that Mr. Spencer beat her with an iron because Mr. Spencer first beat her, then picked up the iron, then hit Timothy with it in his room, and then returned to Karen Spencer's room. (T 462-466). Dr. Bowman testified that Karen Spencer stated she was hit with an iron and her wounds were consistent with that explanation. (T 648). The iron was introduced into evidence during trial. (T 534)." (PCR-6, 840).

The trial court found that a simple misstatement did not constitute misconduct. The trial court stated:

> At the evidentiary hearing, the prosecutor testified that she believed that Timothy would testify at trial that he saw Mr. Spencer hit Karen Spencer with an iron. (EH T 150). The prosecutor indicated that her interpretation of the evidence available prior to trial was that Timothy had actually seen Mr. Spencer hit Karen Spencer with an iron. (EH T 151). The State also introduced a copy of the police report prepared by Deputy Weyland in which

> Timothy indicated that Mr. Spencer had beaten both he and Karen Spencer with an iron. (State's Exhibit 7). The Court finds that this claim is procedurally barred. The Court finds that, even if this claim is considered on the merits, the prosecutor's statement does not constitute misconduct and does not meet the standard set forth in *Spencer v. State*, 645 So.2d at 383.

(PCR-6, 840).

Appellant calls the prosecutor disingenuous for stating under oath that she believed Tim would state he observed his mother being struck by the iron. (Appellant's Brief at 41). However, the State notes that the prosecutor in fact, corrected her misstatement at the time of trial, during her own closing argument. (TR. 1022). The jury was not misled by the prosecutor's opening statement. Appellant's personal attack upon the prosecutor is wholly unwarranted.

The evidence did reveal that Ms. Spencer was struck by the iron through her statement to the treating physician and the fact her injuries were consistent with being struck by the iron. The comment was not at all prejudicial as the trial court instructed the jury that what counsel states during opening statement did not constitute evidence. (TR. 419). More important, the comment was not prejudicial because during closing argument both the prosecutor and defense counsel pointed out that Tim did not testify he observed the appellant strike his mother with the iron. (TR. 1022, 1037).

The trial court's ruling that appellant's claim is both

procedurally barred and without merit is supported by the record.

(IV) Non-Hearing Allegations of Prosecutorial Misconduct

(a) Comment on Krista Mays Observation of the Victim with a Rifle

Appellant next asserts that the trial court erred in failing to order a hearing on additional allegations of prosecutorial misconduct which appear in the trial record. As for the statement in opening that Krista Mays observed Karen Spencer come to the door with a gun, this claim was raised on direct appeal and rejected. Spencer, 645 So. 2d at 383. This Court concluded that the prosecutor's comment about Krista Mays and the rifle simply did not warrant the drastic remedy of a mistrial. This Court noted that "[i]n order for the prosecutor's comments to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." (citations omitted). This Court concluded: "The prosecutor's single comment about the rifle does not meet any of these requirements." Spencer, 645 So. 2d at 383.

As this issue has already been raised and rejected on direct appeal, the trial court properly denied this claim as procedurally barred without a hearing. (PCR-6, 840-41). Moreover, as the trial court sustained any objection to the prosecutor's attempt to elicit

testimony about the victim carrying a rifle, appellant failed to show that any inadmissible testimony was actually heard by the jury. (TR. 851). And, the simple fact that a rifle was kept in the victim's house was clearly relevant and admissible as Timothy retrieved the rifle from his mother's bed and attempted to shoot appellant as he was murdering the victim; unfortunately, the rifle misfired. (TR. 478, 851).

Appellant alleges that the prosecutor made an improper, prejudicial "presentation to the jury of a hearsay statement for which there was no exception." (Appellant's Brief at 41). The prosecutor's statement did not implicate inadmissible hearsay, the observation of Ms. Spencer coming to the door with a gun, was not an out of court statement: It was an observation. While the trial court later sustained an objection to this comment, the observation itself did not constitute hearsay.

(b) Revelation That the Victim Had a Dog

The simple fact that the jury learned that the victim had a dog was not so prejudicial that it deprived appellant of his right to a fair trial. The court below found that this claim was both procedurally barred and without merit. (PCR-6, 842). The prosecutor did not ask if the victim had a dog, but was apparently attempting to show that the crime scene was not tampered with by noting through a witness that the only thing taken out of the house before entry of the crime scene technicians was the victim's dog.

(PCR-6, 842). Appellant's cryptic argument does not indicate how the trial court erred in its analysis below. And, since appellant was not accused of hurting the dog, it cannot be said this revelation was a significant factor in appellant's conviction, particularly since appellant was observed murdering the victim.[2]

(c) Penalty Phase Allegations

Appellant contends that the prosecutors cross-examination of Dr. Burch and Dr. Lipman amounted to a comment on his exercise of the right to remain silent. (Appellant's Brief at 43-44). The Court noted that this claim was procedurally barred. The trial court is correct. Maharaj v. State, 684 So. 2d 726 (Fla. 1996)(Post-conviction relief petitioner's claims which were either raised or could have been raised on direct appeal were properly denied without an evidentiary hearing). In any case, appellant's claims do not require remand for another penalty phase hearing.

The prosecutor's unobjected to cross-examination of Dr. Burch simply pointed out that when appellant made statements to Dr. Burch he was not under oath. And, since Dr. Burch was relating appellant's self-serving statements to the jury, the prosecutor was entitled to point this fact out to the jury. Such questioning did not directly implicate appellant's right to remain silent.

[2]The fact that appellant murdered the victim in front of one of her own sons was much more prejudical to appellant than the simple revelation that the victim had a dog, i.e, the victim also had two sons.

Appellant did not remain silent, he talked to Dr. Burch. And, the prosecutor properly pointed out that cross-examination was a superior method of finding out facts rather than Dr. Burch simply sitting down and listening to the appellant. (P. 182). Finally, the State notes that the prosecutor's cross-examination of Dr. Burch occurred during the penalty phase, not the guilt phase, and thus, any strained interpretation of the prosecutor's examination as a comment on appellant's failure to testify was much less prejudicial to the defense. The jury had already convicted the appellant.

Appellant's complaint regarding Dr. Lipman's testimony is even less worthy of discussion than the prosecutor's examination of Dr. Burch. The prosecutor simply asked Dr. Lipman whether or not he placed appellant under oath when he questioned appellant about his alcohol consumption prior to the murder. Since appellant was introducing his own self-serving statements (hearsay) through use of his own experts, such a comment was, in the State's view, entirely proper. And, since Dr. Lipman ultimately concluded that appellant had a blood alcohol level of 0 at the time he committed the murder, the prosecutor's examination was hardly prejudicial given the somewhat favorable conclusion of Dr. Lipman to the State. Appellant does not even attempt to show how or why the clear procedural bar to this claim should be ignored by this Court.

In Stewart v. State, 620 So. 2d 177, 179 (Fla. 1993), this

Court declined to discuss a much more direct comment on the exercise of the right to remain silent during the penalty phase because the issue was not preserved by a proper objection below. The prosecutor in Stewart argued the following in closing:

> The person who could best tell you why he committed these terrible crimes, he certainly didn't have much to say to you. His testimony was about the briefest of any witnesses that appeared...
>
> ...
>
> Rather than be exposed to what I call the crucible of truth, and that is cross-examination, where you can ferret out what is happening, what the truth is, rather than be exposed to this, the defendant took the easy way out and chose to have his self-serving statements, which we certainly can't cross-examine, come to you through the testimony of his [witnesses].

As to these comments, this Court stated: "As to the prosecutor's subsequent questions concerning Dr. Merin and his comments in closing, Stewart failed to object and the matter is not preserved." Stewart, 620 So. 2d at 179.

The prosecutor's questions on cross-examination in this case are much less susceptible to interpretation as a comment on the right to remain silent than those at issue in Stewart. And, the prosecutor's closing argument in penalty phase did not specifically mention that appellant chose to remain silent.

Finally, appellant complains that the prosecutor misstated a portion of Dr. Lipman's testimony during her penalty phase argument. As for this claim, the trial court ruled below:

The record clearly reflects that Dr. Lipman stated

> several times that Mr. Spencer told him that he did not remember stabbing the victim. (PP T 292; R 356; PP T 307; R 371). However, the prosecutor's actual comment in closing was that "Dusty Spencer gave statements to Dr. Lipman that he stabbed Karen before Tim left." (PP T 327; R 391). (PP T 327; R 391). A fair reading of the transcript and of Mr. Spencer's statement to Dr. Lipman does indicate that Mr. Spencer stabbed Karen Spencer before Timothy left. There is other record evidence that supports this conclusion. It does not appear that the prosecutor stated that Mr. Spencer remembered stabbing Karen Spencer. Regardless of whether the statement was appropriate, the Court finds that, to the extent it was a misstatement, it does not meet the standard of *Spencer v. State*, 645 So.2d at 383. Further, as stated previously, this claim is procedurally barred.

Once again, appellant fails to articulate how the trial court's conclusion that this issue is procedurally barred is incorrect. Kelley v. State, 569 So. 2d 754, 756 (Fla. 1990) (prosecutorial comments are reflected in the record and therefore must be challenged on direct appeal). Nor can appellant's attempt to show prejudice emanating from the prosecutor's brief remark salvage his claim on appeal. The jury was instructed to rely upon their own recollection of the evidence. And, upon close scrutiny, the prosecutor's statement does not even qualify as a misstatement of the evidence.

(d) Cumulative Allegation Of Misconduct

Appellant finally attempts to argue that the cumulative effect of his allegations of prosecutorial misconduct rendered his trial unfair. However, as noted above, appellant's individual allegations of prosecutorial misconduct were almost entirely without merit and procedurally barred. And, under the facts of

this case, where it was not contested that appellant brutally murdered the victim whom he had previously threatened and attacked, there is no possibility of a different outcome based upon the allegedly improper conduct.[3] The trial court properly denied this claim in its entirety below.

Appellant repeatedly claims that the State presented false evidence. Yet, the 'false evidence' allegation was based on the statement made by the prosecutor regarding Timothy observing his mother being struck by appellant with the iron. As discussed above, the prosecutor believed Timothy did observe his mother being struck by appellant with the iron. Moreover, when such testimony did not come to fruition, both the defense and the State pointed it out. The jury was not presented with false evidence in this case. Appellant's personal attack upon the prosecutor in this case is not supported by the record and not well taken.

ISSUE II

WHETHER APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL? (STATED BY APPELLEE).

Appellant asserts that his defense attorneys were deficient and that the alleged deficiencies require remand for a new trial.

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[3]Appellant's citation to Darden v. Wainwright, 477 U.S. 168 (1986) provides no support for his argument on appeal. The prosecutor's argument in this case pales in comparison to the vituperative comments addressed by the Court in Darden. 477 U.S. at 179-181. Nonetheless, given the strength of the State's case and the opportunity for rebuttal, the Darden Court did not find that the comments warranted reversal of the defendant's conviction.

The State disagrees.

A. Standard Of Review

This Court recently summarized the appropriate standard of review in State v. Reichman, 25 Fla. L. Weekly S163, S165 (Fla. February 24, 2000):

> Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. See Rose v. State, 675 So.2d 567, 571 (Fla. 1996). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.

Deference to the circuit judge recognizes the superior position of the trier of fact who has the responsibility of weighing the evidence and determining matters of credibility. Brown v. State, 352 So. 2d 60, 61 (Fla. 4th DCA 1977). And, an appellate court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court." Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)(citing Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955)).

B. Ineffective Assistance Legal Standard

Of course, the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 688 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel, and that the deficient performance prejudiced the defense. The prejudice prong is not

established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 113 S.Ct. 838 (1993). The Defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693. A claim of ineffective assistance fails if either prong is not proven. Kennedy v. State, 547 So. 2d 912 (Fla. 1989).

In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 694. Further, a court deciding an ineffective assistance claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct. Id. at 695. A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight. Id. at 696. "The Supreme Court has recognized that because representation is an art and not a science, [e]ven the best criminal defense attorneys would not defend a particular client in the same way." Waters v. Thomas, 46 F.3d 1506 (11th Cir.)(*en*

banc), cert. denied, 516 U.S. 982 (1995)(citing Strickland, 466 U.S. at 689).

C. Trial Counsel's Performance Was Not Deficient And Did Not Render The Outcome Of The Trial Unfair Or Unreliable

(I) Evidence of Lack of Premeditation

Appellant maintains that trial counsel was ineffective for failing to call three witnesses, Zink, Abrams, and Brachold who might have presented evidence on premeditation. The State notes that collateral counsel failed to specify these witnesses in the motion. In his motion appellant alleged only that witnesses could have been presented to show the turbulent and combative nature of the Spencer's relationship. (PCR-5, 658-59). The trial court granted a hearing on this claim despite the failure to make more specific allegations.[4] At the evidentiary hearing, the defense claim morphed into an attempt to establish appellant told his friends that he planned to go to Mrs. Spencer's residence in order to get the title for his car, in addition to the allegation in the

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[4]The State correctly noted the following in its response to the amended motion:

> Nowhere in his discussion of this issue does Defendant set out just what facts or incidents his witnesses would testify about. The vague and conclusory nature of defendant's allegations do not merit relief because they are insufficient to allow the trial court to examine the specific allegations against the record. (citations omitted).

(PCR-5, 749).

motion that defense counsel failed to present witnesses to show a "turbulent" relationship between the parties.

The trial court found that either trial counsel or Mr. Phillips [the defense investigator] "spoke with Mr. Zink, Mr. Abrams, and Mr. Brachold during the pre-trial investigation of Mr. Spencer's background. (State's Composite Exhibit #5, Defense Exhibit #7, pp. 12-18)." (PCR-6, 848). The trial court found failure to present these witnesses during the guilt phase did not constitute deficient performance. The trial court stated: "Mr. Smallwood testified that trial counsel was mindful of the balance between demonstrating the relationship between Mr. Spencer and Karen Spencer without appearing as if they were trying to justify Mr. Spencer's actions based on her behavior. (EH T 19-20). Mr. Smallwood was also concerned that presenting certain witnesses could lead to other damaging evidence being introduced regarding Mr. Spencer's first marriage and other potentially prejudicial matters in his background." (EH T 65-66)." (PCR-6, 848).

The trial court found that counsel reasonably concluded that he did not have any witnesses who would be substantially helpful and he did not want to "'present witnesses for the sake of presenting witnesses and lose the opportunity to have first and last chance at closing.' (EH T 20-22)." (PCR-6, 848)(quoting trial counsel). Moreover, the trial court concluded that evidence was presented on the poor state of the Spencer marriage through "direct

and cross-examination." (T 451-551 Johnson, 583-84 Elmore, T 925-26 Abrams.)" (PCR-6, 848-49). Consequently, the trial court concluded: "Upon consideration of all Mr. Spencer's arguments regarding the ineffectiveness or deficient nature of trial counsel's presentation of the defense of lack of premeditation, the Court finds that trial counsel's actions were well within the bounds of reasonable and competent representation and far from the levels of ineffectiveness required to overturn a conviction." (PCR-6, 849).

The trial court's ruling is supported by the record and should be upheld on appeal. See Occhicone v. State, 25 Fla. L. Weekly S529 (Fla. 2000)(trial counsel were not ineffective in offering defense of voluntary intoxication through cross-examination of state witnesses, in part, to preclude damaging revelations about the defendant and to preserve first and last closing). The State also notes that much of the evidence offered at the evidentiary hearing would not have been admissible at trial.

As for potential witness Abrams, appellant contends that he could have testified that one time he observed the victim, Karen Spencer, strike the appellant during an argument. However, the defense fails to posit a theory of how this prior "bad act" of the victim would even be admissible during appellant's trial for first degree murder. Appellant made no claim of self-defense, consequently, an attack upon the character of the victim by showing

a remote in time act of violence would not even be admissible.[5] Since such evidence would not have been admissible, counsel cannot be considered ineffective in failing to pursue it. And, as noted by defense counsel below, simply attacking the character of the victim, who was horribly murdered in front of her own son, was a hazardous proposition, at best.

As for Zink's and Brachold's testimony regarding what appellant told him he wanted out of the marriage (Appellant's Brief at 53), appellant's out of court statements constituted hearsay for which no exception applied. (Appellant's Brief at 53). Moreover, Brachold's testimony that he believed the victim was manipulative of the appellant and quick to put him down was also inadmissible hearsay and character evidence. Defense counsel cannot be ineffective for failing to offer inadmissible testimony. As for the statement regarding appellant's intent to go to the marital home to get his car title, part of this statement may have been admissible; the statement of intent to go to the marital home. However, the self-serving statement of purpose for the visit, to get the car title, may not have been admissible over the state's objection.

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[5]As a matter of law, a defendant's testimony, regarding the victim's past acts of violence toward others, is generally admissible when the defendant claims self-defense since the prior acts of violence address the reasonableness of the defendant's claimed apprehension of the victim. State v. Smith, 573 So. 2d 306, 318 (Fla. 1990).

For example, in United States v. Pyron, 113 F.3d 1247 (10th Cir. 1997), the court found no abuse of discretion in failing to admit the defendant's statement of future intent under similar circumstances. The court observed the following:

> Fed.R.Evid. 803(3) allows a declarant's out of court statement not to prove the matter asserted, but to show a future intent of the declarant to perform an act in conformity with the statement, if the occurrence of that act is in issue. United States v. Freeman, 514 F.2d 1184, 1190 (10th Cir. 1975). In other words, statements of intent are admissible to provide a foundation for the declarant's subsequent actions. Id. at 1190.
>
> Mr. Pyron's statements regarding his future intent to raise money and return to Oklahoma would be admissible to prove he in fact, did both of those things. Mr. Pyron does not contest the fact he did neither of those acts. Consequently, the statements do not fit Rule 803(3) to the extent they were offered to show Mr. Pyron performed an act in conformity with his intent.
>
> Second, Mr. Pyron's statements did not express any "intent" as to whether he intended to defraud his investors; he merely expressed his intent to raise more money and to return to Oklahoma. See Tome, 61 F.3d at 1454 (child's statement asking sitter not to let her be taken back to her father inadmissible under Rule 803(3) because statement did not express fear, but merely a desire to remain with her mother). Consequently, the statements do not fit within the parameters of Rule 803(3). We hold because the statements do not fit the confines of Fed.R.Evid. 803(3), the district court did not abuse its discretion in failing to admit them.

See also United States v. Sayakhom, 186 F.3d 928, 937 (9th Cir. 1999)(defendant's attempt to introduce self-serving recording of meeting was not admissible under Rule 803(3), stating: "Sayakom's attempt to introduce statements of her belief (that she was not violating the law) to prove the fact believed (that she was acting in good faith) is improper.").

Appellant's attempt to introduce his self-serving out of court statements that he planned to get the car title to prove his lack of intent to commit first degree murder is improper, even if clothed in a statement of future intent exception. Appellant failed to testify either at trial or the evidentiary hearing that he actually attempted to get the car title, therefore his out of court statement should not be admissible. Appellant failed to act in conformity with his stated intent.

Under appellant's rather expansive hearsay exception, a defendant could get in any amount of inadmissible hearsay by simply couching it in terms of future intent. For example, a first degree murder defendant charged with killing his wife may attempt to introduce statements he made to friends prior to the murder that he simply wanted to see his ex-wife to discuss the state of his marriage and that he did not intend to harm his ex-wife in any way. Under the future intent exception, appellant would argue that since these statements were couched in terms of future acts, everything stated by the defendant to his friends would be admissible in an attempt to negate the intent necessary to establish first degree murder. In the State's view, proper application of the exception would be to admit the statement of intent to see his ex-wife, to show that he did in fact see his ex-wife, the remainder of his statements should be considered self-serving out of court statements, i.e., inadmissible hearsay. Of course, nothing would

prevent a defendant from testifying as to his own intent, but at that point the State would be entitled to cross-examine him and his testimony would not be considered hearsay.

In any case, regardless of the statements' admissibility, there is no reasonable probability of a different outcome if the defense had offered statements to show he intended to see his ex-wife to get the title to his car. Similarly, the trial court held that the jury was well aware of marital difficulties as a result of evidence which was introduced through direct and cross-examination. And, the limited value of the lay witness testimony on the issue of premeditation was not such to outweigh the opportunity for first and last closing. Appellant has not carried his burden of demonstrating that his trial counsel rendered constitutionally defective assistance.

(II) Dissociative State Evidence

Appellant claims that the experts trial defense counsel utilized during the penalty phase of his trial, Drs. Burch and Lipman, should have been utilized during the guilt phase to negate the intent element of first degree murder. Specifically, appellant claims that evidence of appellant's dissociative state should have been presented. (Appellant's Brief at 55). The State disagrees.

The trial court thoroughly addressed this claim below, stating:

> ...At the evidentiary hearing, Dr. Burch and Dr. Lipman both described a dissociative state as a type of amnesia

> or sleepwalking. Dr. Lipman indicated that Mr. Spencer's dissociative state occurred during the murder, not before it. Further, Dr. Burch's early report to trial counsel indicated that she was suspicious of Mr. Spencer's lack of memory. Dr. Lipman testified that Mr. Spencer's dissociative state was only indicated by Mr. Spencer's self-reported lack of memory and that it was not otherwise subject to confirmation. (EH T 251; 254-55). Dr. Burch testified that she could not state with certainty that Mr. Spencer was in a dissociative state at the time of the murder. (EH T 204).
>
> Mr. Smallwood testified that he did not want to present the experts' testimony during the guilt phase because he did not want to open the door for the State to ask questions about what Mr. Spencer may have told them that would have gone to the issue of his guilt or innocence. (Eh T 55; 68; 94). Mr. Smallwood also indicated that the information the experts provided was important to him, and he wanted to present it to the jury, but that he and Mr. Kelly felt that the information would have much more credibility and impact in the penalty phase. (EH T 93). Mr. Smallwood indicated that such information demonstrated that Mr. Spencer's actions were not cold, calculated or premeditated. (EH T 93).
>
> Mr. Kelly testified that he and Mr. Smallwood had discussions about whether or not to use the experts in the guilt phase. (EH T 99). He indicated that they were concerned that other collateral statements might be revealed which would be more harmful than helpful in the guilt phase. (EH T 99-102). Mr. Kelly also indicated that they were concerned that if the experts testified and Mr. Spencer was found guilty, then their effectiveness in the penalty phase would have been lessened. (EH T 100).

(PCR-6, 851-52). The trial court held that trial counsel were not ineffective noting that the quality of this evidence was somewhat questionable and there was no reasonable probability of a different result if counsel had presented evidence of dissociative state during the guilt phase. The trial court's ruling has support in the record and should be affirmed on appeal.

First, the State questions whether or not the dissociative

state evidence would even be admissible during the guilt phase.[6] The primary characteristic of this disorder and the only proof of its existence is appellant's statement that he could not remember inflicting the fatal wounds upon the victim. In Ziegler v. State, 402 So. 2d 365 (Fla. 1981), the Florida Supreme Court held that "[dluring the guilt phase of the trial, testimony regarding the mental state of a defendant in a criminal case is inadmissible in the absence of a plea of not guilty by reason of insanity." 402 So. 2d at 373. This decision was followed in Chestnut v. State, 538 So. 2d 820 (Fla. 1989), where the Court completely rejected any diminished capacity defense short of insanity. The Court, quoting a Fourth District case, noted the following:

> It is our opinion that to allow expert testimony as to mental state in the absence of an insanity plea would confuse and create immaterial issues. If permitted, such experts could explain and justify criminal conduct. As lay people we could guess that almost everyone who commits crimes against society must have some psychiatric or psychological problem.

538 So. 2d at 821 (quoting Tremain v. State, 336 So. 2d 705, 707-08 (Fla. 4th DCA 1976), cert, denied, 348 So. 2d 954 (Fla. 1977)). And, in State v. Bias, 653 So. 2d 380, 382 (Fla. 1995), this Court stated, "[w]e continue to adhere to the rule that expert evidence of diminished capacity is inadmissible on the issue of mens rea."

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[6]The State argued below that dissociative state evidence was nothing more than a type of diminished capacity defense which would not even have been admissible during the guilt phase. (PCR-1, 55-56).

The only offered purpose for the expert testimony in this case is on the issue of *mens rea* in an attempt to reduce first degree murder to second. However, intoxication had little or nothing to do with the opinions of the experts below, as even neuropharmacologist, Dr. Lipman, testified that the effect of alcohol upon appellant's conduct at the time of the crime was "subtle." (PCR-3, 345). While Dr. Lipman testified that appellant was suffering from the lingering effects of alcohol, appellant's blood alcohol level at the time of the murder was estimated to be zero. (PCR-3, 335). Dr. Lipman testified that if called during the guilt phase, he would have testified that "his mind was impaired at the time of the offense and that his ability to think coherently was degraded and that his emotional unbalance was extreme."[7] (PCR-3, 333). Similarly, Dr. Burch testified that appellant's so called altered state of consciousness emanated from Mr. Spencer's personality: "He is someone who is subject to loss of control when under extreme duress." (PCR-2, 291). This is nothing more than testimony to support a diminished capacity defense without a generally recognized limit to an underlying intoxicant or medical condition to support its admission.

While this court has recognized that expert testimony of diminished capacity has been admissible on the issue of intent,

[7]It is the State's position that, as a neuropharmacologist, Lipman is unqualified to render an expert opinion on "emotional unbalance."

such testimony must be linked to a commonly understood medical condition and/or intoxicant. The primary thrust of the expert testimony in this case was not alcohol or any other commonly recognized medical condition, rather, it was appellant's self-serving inability to recall the commission of violent acts (amnesia) and his explosive reaction "under extreme stress or duress or threat." (PCR-2, 266-67). Admission of such testimony in this case would require overturning this Court's prior decisions on diminished capacity and would in essence allow a battle of the experts on every first degree murder case on the issue of the defendant's intent.

Another reason to deny this claim is that presenting the experts at the guilt phase would almost certainly require calling appellant as a witness. The State would no doubt object to the expert's testifying about appellant's self-serving statements which formed the basis for their opinion without appellant taking the stand. As appellant has always chosen not to testify at his trial, sentencing, or post-conviction proceedings, it cannot be said a proper predicate can be laid by the defense for admission of the expert testimony on the guilt phase. See generally Holsworth v State, 522 So. 2d 1297 (Fla. 1988)(expert testimony as **to effect of** intoxicants on a defendant's mind is inadmissible absent some proof of ingestion other than defendant's hearsay statements to the expert); United States v. Palmer, 91 F.3d 156 (9th Cir.

1996)("Finally, if the district court had admitted these declarations, it would in effect have allowed Palmer to testify to his innocence without subjecting himself to cross-examination." (citing Palmer v. Illinois, 484 U.S. 400, 412 (1988)"[E]ven the defendant may not testify without being subjected to cross-examination."); Smithson v. V.M.S. Realty, Inc., 536 So. 2d 260, 262 (Fla. 3d. DCA 1988)(In suit to recover for wrongful death caused by murder and robbery in defendant's theatre, it was error to permit defendant's expert to testify regarding the explanations and motives of those who caused the death, stating: "A witness may not serve merely as a conduit for the presentation of inadmissible evidence."). As the experts relied wholly upon appellant's self-serving claim of amnesia to diagnose a dissociative state, the experts testimony could properly be objected to unless appellant testified first to lay the foundation for the expert testimony.

Assuming for a moment such testimony would even be admissible, appellant has not shown failure to offer this testimony constituted ineffective assistance of counsel. Dr. Burch admitted that her final report to the defense team in November of 1992 indicated that she remained suspicious of appellant's claimed amnesia. (PCR-2, 276). Recognizing the damaging nature of this admission, Dr. Burch claimed that had she been asked to testify during the guilt phase she would have been more prepared and "may have come to the stronger opinion that it was the result of discontrol under a

severe stress and not premeditated at the time of trial had I been asked to testify then." (PCR-2, 285). Nonetheless, the last report submitted to the defense attorneys had Dr. Burch questioning appellant's claimed amnesia. That Dr. Burch's opinion has changed somewhat with the benefit of hindsight is not unusual and does not establish that the trial attorneys were in any way deficient. The change or alteration of her opinion was not based upon any lack of materials furnished by the defense or other alleged deficiency attributable to defense counsel.

The defense attorneys in this case were confronted with ample evidence of goal direct conduct, before, during, and after the offense. Appellant parked the car two blocks away, put on gloves, gained a stealthful entry into the house through the rear sliding glass door, surprised and overpowered the victim, viciously killing her. Also, highly significant, is the testimony of Timothy who established that during the attack appellant was apparently lucid. Even after being struck in the head, appellant spitefully lifted up the helpless victim's dress, telling her to "show your boy your pussy." (TR. 481). Moreover, when Timothy attempted to pull his mother away, appellant pulled a steak knife from his back pocket and threatened Tim. (TR. 492, 547). This confirms that appellant was lucid enough to recognize a threat and act to take control of the situation by pulling a knife.

Finally, as far as counsel apparently made a tactical decision

not to call his experts during the guilt phase, counsel's decision is largely immune from post-conviction challenge. One reason counsel chose not to call his experts was the possibility of damaging revelations the experts might have made. For example, re Dr. Lipman acknowledged a statement appellant made about the "horror of being screwed just because she's got a gash between her legs..." (PCR-3, 332). Counsel was well advised to keep a statement of this damaging nature from the jury.

The trial court's conclusion that "to the extent such information could have been introduced, the Court finds that there is not a reasonable probability that the outcome of this case would have been different[]" is supported by the record and should be affirmed on appeal. (PCR-6, 853). See United States v. Edwards, 819 F.2d 262, 264 (11th Cir. 1987)(controlled and goal directed behavior indicative of absence of uncontrolled mania); Lucas v. State, 613 So. 2d 408, 412 n.4 (Fla. 1992)(defendant's pattern of purposeful behavior showed that he could appreciate the criminality of his conduct and conform it to the requirements of law).

(III) Dr. Rose Report

The trial court below found that Dr. Bowman could not have been impeached with Dr. Rose's report. Further, to the extent counsel failed to present such evidence, there was no reasonable possibility of a different result. (PCR-6, 855). On appeal, counsel argues that "Dr. Rose should have been called by the

defense to rebut the state's case with the fact that Mrs. Spencer, while being treated immediately after the incident, did not mention the iron." (Appellant's Brief at 61). However, the defense did not even seek to call Dr. Rose as a witness at the evidentiary hearing, but merely offered a medical report purportedly authored by the Doctor. Consequently, neither the defense, the state, nor this Court, knows what Dr. Rose would testify to had he been called as a witness at the evidentiary hearing.

The only item offered below was a report or notes purportedly authored by Dr. Rose. The trial court did not believe the report could be used for impeachment purposes and therefore sustained the state's objection. (PCR-2, 140). Presumably, absence of any reference to the iron in the report was supposed to impeach the victim's statement to Dr. Bowman, who testified that the victim did make such a statement during treatment. Even if such a deduction could be made from the report, appellant failed to present any evidence to impeach Dr. Bowman's testimony during the evidentiary hearing. The report of Dr. Rose was hearsay. It would be utter speculation to conclude that the victim was not struck by an iron simply because the report did not mention an iron. Appellant's failure to call Dr. Rose as a witness below renders this claim patently without merit. Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974)(reversible error cannot be predicated on mere conjecture).

(IV) Brick Evidence

Appellant claims that trial counsel was deficient in failing to get bricks tested for DNA results prior to trial. However, the bricks were tested by collateral counsel but the testing rendered an inconclusive result. The trial court properly denied this claim below, stating:

> Mr. Spencer had the bricks in question tested prior to the evidentiary hearing. Mr. Spencer introduced evidence of the test results, which were inconclusive. (Defendant's Exhibit 5). Mr. Spencer presented no other testimony regarding the bricks, nor did he question trial counsel regarding their decision not to have the bricks tested. The Court finds that the failure to test the bricks did not constitute ineffective assistance of counsel. The photographs Mr. Spencer argues should have been introduced were taken several months after the murder. There is no way to confirm, other than through Mr. Spencer's testimony, that Karen Spencer actually caused the scars depicted in the photographs by striking Mr. Spencer with a brick during the murder. The Court finds that trial counsel's failure to introduce the photographs did not constitute ineffective assistance of counsel. Further, the Court finds that had the test results of the blood on the bricks and photographs been presented at trial, there is no reasonable probability that the outcome of this case would have been different.

(PCR-6, 856).

The State can add little to the trial court's order, except to note that appellant did not testify at trial or the evidentiary hearing that he was struck by a brick.[8] And, appellant would not

[8]Appellant's assertion that trial counsel's failure to test the bricks earlier resulted in an inability to gain an accurate reading for DNA testing is also highly speculative. The analysis generally revealed a limited amount suitable for testing. Among the items inhibiting the PCR testing was dirt on the sample, not simply that the DNA sample degrades over time. (DE-5, 2)

be able to admit self-serving testimony through an expert; he would have to testify. As appellant voluntarily chose not to testify at trial or the evidentiary hearing below, appellant's claim that the photographs taken months after the murder should have been admitted is wholly without merit. And, even if photographs of scarring on appellant's arm were admissible, such injuries pale in comparison to the vicious, life ending injuries appellant inflicted on the victim.

(V) Failure to Impeach Timothy Johnson

Appellant next asserts that defense counsel was prejudicially deficient in failing to impeach Timothy Johnson with his deposition testimony. (Appellant's Brief at 64). The offered impeachment related to whether or not Timothy actually observed appellant wearing or using gloves of the type worn on the day of the murder. Appellant's allegation lacks any merit.

The trial court denied this claim below, stating:

> Mr. Spencer offered testimony from Timothy's pretrial deposition that differed from that offered at trial regarding whether Timothy ever saw Mr. Spencer wearing latex gloves for his painting business. (Defendant's Exhibit #2,; T 548-49). However, on direct examination, Timothy testified that the gloves he saw Mr. Spencer wearing were the type both Karen Spencer and Mr. Spencer used for painting. (T 502).
>
> Mr. Smallwood conceded at the evidentiary hearing that he failed to impeach Timothy with his prior testimony. (EH T 43). Upon review of the record, the Court finds that trial counsel's failure to impeach Timothy on this issue does not constitute ineffective assistance of counsel. The Court also finds that there is not a reasonable probability that the outcome would have been different if Timothy had been impeached on this

issue.

(PCR-6, 858).

The trial court's reasoning is sound, supported by the record, and should be upheld on appeal. One fundamental flaw of appellant's argument on appeal is that there was no evidence presented at trial or at the evidentiary hearing below to suggest that appellant simply went to the marital home on the morning of the murder wearing gloves to paint. Thus, whether or not counsel showed the gloves were used in the painting business was an insignificant factor. From both direct and cross-examination of Timothy the jury was made well aware that gloves of the type used by appellant were utilized in the painting business. Moreover, any attempt to contradict or embarrass Timothy on such a minor matter would likely backfire. Appellant brutally murdered Timothy's mother. The jury no doubt would feel sympathy for Timothy's plight and the obvious anguish this young man felt over his inability to prevent his mother's murder at the hands of the appellant.

(VI) Failure to Object to Prosecutorial Misconduct

The lower court found this issue barred from review as appellant sought "to raise matters under the guise of ineffective assistance of counsel that are procedurally barred because they should have been or were raised on direct appeal." (PCR-6, 858). Moreover, the trial court stated that even if such review was

proper, appellant failed to show counsel was ineffective for failing to object to the comments. (PCR-6, 858).

The trial court was correct in finding this issue procedurally barred from review. See Johnson v. Singletary, 695 So. 2d 263, 265 (Fla. 1996)(noting that claims previously raised and addressed are procedurally barred "even if couched in ineffective assistance language."); Sireci v. State, 469 So. 2d 119, 120 (Fla. 1985)("[c]laims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel."). However, if this Court should choose to examine the merits of this claim, the State notes that the prosecutorial comments at issue were addressed above under issue one, *supra.* Rather than brief this issue twice, the State will rely upon the argument made under issue one.

(VII) Alleged Concession of Guilt

Appellant maintains that defense counsel made two improper concessions, one in opening statement and one during closing argument. (Appellant's Brief at 69). During opening statement, defense counsel did state that Johnson would testify he observed Karen being struck by an iron. However, counsel corrected himself on closing and reminded the jury that Timothy Johnson did not state he observed appellant striking Karen with an iron. (TR. 1022, 1037). The State is hard pressed to find any prejudice emanating

from this concession where both defense counsel and the prosecutor told the jury that Timothy Johnson did not actually observe the victim being struck with the iron. (T. 1022, 1037). The evidence did reveal that Ms. Spencer was struck by the iron through her statement to the treating physician and the fact her injuries were consistent with being struck by the iron. And, any concession regarding the iron incident was well founded in the evidence introduced at trial. Moreover, it was part of counsel's strategy to argue that the victim's murder was simply a continuation of the heated domestic dispute that the iron incident represented. (PCR-2, 150). Counsel in no way conceded that appellant attempted to kill the victim by striking her with the iron, arguing that he lacked the intent to kill.

The trial court stated the following in denying the concession of guilt on first degree murder claim:

> A review of Mr. Smallwood's closing argument indicates that Mr. Smallwood stated that Mr. Spencer did not accidentally kill Karen Spencer and that he intended to hit and stab her. The important distinction Mr. Smallwood attempted to make was that Mr. Spencer did not come to Karen Spencer's home with that intent. In essence, trial counsel attempted to emphasize the difference between immediate intent and premeditation. (T 1032).
>
> At the evidentiary hearing, Mr. Smallwood stated that:
>
> > Basically my argument to the jury was this, the evidence that they had before [them] was there as an eyewitness in the son who saw Dusty in the act of hurting his mother and she died as a result of that. And I was not going

> to get up there and say it didn't happen. I couldn't do that. I mean, I would have no credibility. So my goal was to say, yes, these acts did take place, we're not disputing that the acts didn't take place but it was not from a premeditated design...That, in fact, yes, murder may have occurred but it wasn't as the state painted it, premeditated. And I think when you just read that I said over and over and over where's the intent, where's the intent, so that was basically my argument to the jury. (EH T 47-48).
>
> The Court finds that trial counsel's performance was not deficient. Further, the trial court finds that there is not a reasonable probability that the outcome of the trial would have been different if trial counsel had not made this argument.

(PCR-6, 859-60).

The trial court's ruling is legally correct and supported by the record. Defense counsel in no way conceded appellant's guilt to first degree murder, he challenged the only element he could given the eyewitness account of the killing, appellant's intent. By acknowledging the obvious, a killing occurred and appellant did it, he retained some credibility with the jury.

This Court rejected a similar argument in Brown v. State, 755 So. 2d 616 (Fla. 2000), where the defendant argued in postconviction that his counsel failed to act as an advocate and failed to inform him of the trial strategy of conceding guilt. Defense counsel in Brown argued that the State failed to establish premeditated intent but stated that second degree murder had been established: "It most certainly has." 755 So. 2d at 629-30. This Court did not find counsel ineffective, stating:

> ...the record reflects that Chalu did not concede first-degree premeditated or felony murder, but rather, the record supports that Chalu set upon a strategy to do what he reasoned he could do in light of Brown's confession to convince the jury to find Brown guilty of a lesser offense. Faced with the overwhelmingly inculpatory evidence of Brown's confession, Chalu made his informed decision to argue for a lesser conviction in an effort to avoid the death sentence. *See McNeal v. Wainwright*, 722 F.2d 674 (11th Cir. 1984). In this case, we find that Chalu provided full representation to Brown and made reasonable, informed tactical decisions as to his defense. Thus, we find that Chalu did act as an advocate for Brown, who has failed to demonstrate that Chalu's tactical decision to argue for a conviction on a lesser charge constitutes ineffective assistance of counsel under either prong of *Strickland*.

Brown, 755 So. 2d at 630.

In this case, counsel chose the only reasonable strategy available, concede that the underlying acts occurred and that appellant committed them; but argue that the most serious charge, premeditated murder, was not established by the State. Defense counsel argued, in part below:

> Ladies and gentlemen, the state has presented numerous witnesses and they presented a whole lot of evidence. But ladies and gentlemen, when you weigh that evidence, and look at the facts that were elicited that day, the screams, the domestic problems, and the fight, and the fight that didn't occur in just one area, that's not evidence of premeditation, ladies and gentlemen. That's evidence of heat of passion. That's evidence of murder in the second degree.

(TR. 1034).

Contrary to appellant's argument on appeal, defense counsel below did not concede intent. Counsel argued that the murder was the result of a heated domestic dispute and was not premeditated.

See Patton v. State, 25 Fla. L. Weekly S749 (Fla. 2000)(declining to find counsel ineffective where conceded facts were supported by overwhelming evidence and even if counsel had contested these facts there "is no reasonable possibility the jury would have rendered a different verdict."); Harris v. State, 25 Fla. L. Weekly D2247 (Fla. 4th DCA 2000)(defense counsel's concession of guilt to lesser included offenses did not constitute a failure to subject the state's case to meaningful testing so as to warrant a presumption of prejudice on defendant's claim of ineffective assistance of counsel); United States v. Wilkes, 46 F.3d 640, 644 (7th Cir. 1995)(conceding lesser offense to enhance credibility); Parker v. Lockhart, 907 F.2d 859, 861 (8th Cir. 1990)(stipulation that defendant was the shooter in no way prevented argument that he lacked premeditation). And, appellant failed to testify at the evidentiary hearing below that he was not informed of this strategy or that he disagreed with his attorneys' strategy at the time of trial. Appellant did not carry his burden of showing his counsel was either deficient or that the alleged deficiency prejudiced him under the facts of this case.

(VIII) Voir Dire of Juror Lois Noble

With regard to the allegation that voir dire of juror Lois Noble was deficient, the trial court provided an extensive analysis of this issue. The trial court stated: "While it is clear that Ms. Noble was married to an alcoholic whom she characterized as a

deadbeat, there is no indication that she was ever involved in a physically abusive relationship with her ex-husband. As the record indicates, she stated that neither she nor any family member had been a victim of domestic violence. (Defendant's Exhibit 1)." (PCR-6, 862). The court noted that juror Noble was subject to individual voir dire by defense counsel concerning her knowledge of this case and the effect of pretrial publicity. (PCR-6, 862-63). The trial court concluded:

> The Court finds that to the extent trial counsel failed to specifically voir dire Ms. Noble regarding her relationship with her ex-husband, trial counsel's performance was not deficient. There was no indication, based on the statements made by Ms. Noble that there was any abuse related to the relationship. Further, the Court finds that there is not a reasonable probability that the outcome would have been different.

(PCR-6, 863).

Appellant's claim suffers from several defects. First, the juror's responses do not show any bias against the appellant or men in general, just her ex-husband. See Goeders v. Handley, 59 F.3d 73, 75-76 (8th Cir. 1995)(failure to strike a juror requires a showing of actual bias by the juror against the defendant)(citing Smith v. Phillips, 455 U.S. 209, 215-217, 102 S.Ct. 940, 944-46, 71 L.Ed.2d 78 (1981)). And, as her answers did not implicate any domestic violence, juror Noble did not appear in any way biased against the appellant. Failure to conduct additional voir dire under the facts presented in this case does not suggest that trial counsel was in any way deficient. Appellant failed to carry his

burden of establishing deficient performance and prejudice emanating from voir dire of juror Noble.

(IX) Knife Evidence

Appellant next asserts that his trial counsel was ineffective for failing to present evidence from two of appellant's friends that he used to carry a knife. (Appellant's Brief at 73). Appellant claims that this fact would have helped to negate evidence of intent, that is, that he specifically armed himself to confront his ex-wife. Appellant's claim is patently without merit.

The trial court denied this claim below, stating, in part:

> Regardless of trial counsel's strategy, it is clear that testimony indicated Mr. Spencer had a steak knife with serrated edges in his hand, not a pocket knife or a hunting knife. Therefore, the Court finds that testimony that Mr. Spencer regularly carried a hunting knife would have been of little assistance in proving lack of premeditation. The Court finds that trial counsel's strategy to exclude information regarding whether Mr. Spencer normally carried a knife was within the realm of effective representation. Further, to the extent that such information could have been introduced, there is no reasonable probability that the outcome of this case would have been different.

(PCR-6, 854). The State can add little to the trial court's well reasoned analysis. However, the State notes that appellant failed to connect the testimony introduced below to the knife used by appellant to stab the victim.

As for Curtis Zink, he testified that appellant normally carried a knife with a sheath when he lived in the woods. The knife was attached to his belt. (PCR-2, 198). Zink did not

testify as to the appearance of this knife: Whether it was a folding pocket knife or straight bladed knife. Timothy Johnson recalled that appellant pulled what appeared to be a steak knife from his back pocket, not a knife from a sheath. Zink's testimony regarding appellant carrying a knife in a sheath would have little or no relevance on the issue of premeditation.

Brachold was decidedly uncertain as to the type of knife carried by the appellant. Brachold testified: "Well, when you live out in the woods and places like that, yeah, you do, you'd generally carry a hunting knife or a buck knife in your pocket. That's common practice." (DE #7, 9). Brachold testified generally that you would carry a 'filet knife when your [sic] on a boat, but a hunting knife when your [sic] in the woods, sure." (DE #7, 9). Notably, Brachold did not describe any knife that appellant allegedly carried with him all the time.

Interestingly enough, appellant's good friend, Ben Abrams, testified during the evidentiary hearing that he did not recall appellant carrying a knife: "I don't really remember because most of the time when I was around him, it was -- if he did, it was probably on[ly] when we went on the boat." (PCR-2, 218).

Finally, appellant never tied either Brachold's or Zink's testimony to a knife that he normally carried. Without appellant's testimony, it is nothing more than rank speculation to conclude that appellant came to the marital home on the morning of the

murder with a knife he routinely carried. And, any such conclusion is contradicted by the account of the killing appellant gave to Dr. Lipman, where he claimed that he had no idea where the knife came from. (PCR-3, 343-44).

Appellant did not carry his burden of showing deficient performance or resulting prejudice from counsel's failure to present testimony at trial based on the unconnected knife evidence offered at the evidentiary hearing below.

ISSUE III

APPELLANT FAILED TO ESTABLISH HIS DEFENSE ATTORNEYS WERE INEFFECTIVE DURING THE PENALTY PHASE OF HIS TRIAL. (STATED BY APPELLEE).

A. Dissociative State Evidence

Appellant next claims that trial counsel were ineffective for failing to adequately present dissociative state evidence during the penalty phase. At the time of the penalty phase, only Dr. Lipman opined that appellant was somehow in a dissociative state. Now, with the addition of time and hindsight, Dr. Burch would also opine that appellant was in some type of altered consciousness at the time of the murder.

Appellant appears to believe that being struck by the rifle was the trigger for this so-called altered state of consciousness. A claim that the fatal injuries only occurred after this event is contradicted by the evidence. That is, the knife wounds were more than likely inflicted even before Timothy came upon the scene and

struck appellant with the plastic butt of the rifle. The medical examiner testified that cuts on Karen's right hand and arm were defensive wounds and that death was caused by blood loss and two penetrating stab wounds to the heart and lung. Karen also suffered three forceful impacts to the back of the head that were consistent with her head being hit against a concrete wall. Because this impact would have caused Karen to lose consciousness, the medical examiner testified that the defensive wounds had to have occurred before the head trauma. Dr. Anderson testified: "After the head wound, with that much brain trauma, she would not have been conscious and not have been able to put her arm up for the defense wounds, in my opinion, as far as that particular sequence." (TR. 749).

When Timothy came upon the scene his mother did not raise her arms and he observed appellant slap her head against the wall of the house. When Timothy left the area, he thought that his mother was unconscious. (TR. 498, 547). Therefore, given the likely sequence of injuries, the so called dissociative state (appellant's claim of amnesia) cannot emanate from appellant being struck by the rifle. Moreover, the State introduced pieces of the shattered plastic stock and the State encourages this Court to review the lightweight nature of the plastic material. (State's Exhibit 60). The combination of this testimony taken together with that of Dr. Anderson is that the defendant stabbed the victim with a knife

producing defensive wounds on her right arm at some point before Timothy arrived, and, therefore, also before Timothy struck appellant on the head.

While appellant now claims that Dr. Burch was also available to testify as to the defendant's so-called dissociative state, he made no such claim in his post-conviction motion. (PCR-5, 679-80). Indeed, Dr Burch is a rather late convert to appellant's disassociative state theory. Dr. Burch admitted that in her final report to the defense team in November of 1992 she remained suspicious of appellant's claimed amnesia. (PCR-2, 276). Recognizing the damaging nature of this admission, Dr. Burch claimed that had she been asked to testify during the guilt phase she would have been more prepared and "may have come to the stronger opinion that it was the result of discontrol under a severe stress and not premeditated at the time of trial had I been asked to testify then." (PCR-2, 285). Nonetheless, the last report submitted to the defense attorneys had Dr. Burch questioning appellant's claimed amnesia. As noted above, the alteration of her opinion was not based upon any lack of materials furnished by the defense or other alleged deficiency attributable to defense counsel.

In any case, the jury was made well aware from the testimony of Dr. Lipman and Dr. Burch during the penalty phase that appellant claimed not to recall inflicting the fatal injuries. (P. 378-81,

208-209, 356, 371). Thus, the jury was aware of the primary characteristic of this so-called dissociative state and the only evidence of its existence in this case, appellant's claim of amnesia. See Maxwell v. State, 490 So. 2d 927, 932 (Fla. 1986)("The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient"). As noted above, such a claim of amnesia is quite common among people who commit violent or horrendous crimes. The claimed amnesia did not tend to refute the evidence supporting the heinous atrocious and cruel aggravator, particularly in light of appellant's goal directed, purposeful conduct at the time of the murders. Appellant parked his car away from the house, made a stealthful approach at the rear of the house, wore gloves, successfully overpowered the victim, made spiteful comments about the victim at the time of the murder, and successfully left the murder scene.

Since the jury was already exposed at the time of the original trial to appellant's claimed amnesia, dissociative state, and, the experts opinions that both of the statutory mental mitigators applied (P. 177-79, 204-05, 355-56), there is no reason to believe a different result would obtain if only additional emphasis would have been placed on the dissociative state. In fact, this Court found both mental mitigators applied based upon the testimony of the experts presented by trial defense counsel at the time of the

original sentencing proceeding. Once again, appellant has failed to establish either deficient performance or resulting prejudice.

B. Failure To Object To The Prosecutor's Penalty Phase Argument

Appellant next complains that the prosecutor misrepresented testimony taken during the penalty phase. (Appellant's Brief at 79). This claim closely resembles an earlier claim of prosecutorial misconduct. The trial court addressed the merits of this issue as follows:

> ...Mr. Spencer argues that the prosecutor's statement left the jury with the impression that Mr. Spencer has a conscious memory of stabbing the victim. As discussed previously, the prosecutor did not state that Mr. Spencer 'remembered' stabbing the victim, only that he did in fact stab her. The Court finds that this claim is without merit and that trial counsel's performance was not otherwise deficient for failing to object."

(PCR-6, 872).

While the trial court below did not find this claim procedurally barred, any allegation of error surrounding the prosecutor's closing argument appears in the record and should have been raised on direct appeal. Kelley v. State, 569 So. 2d 754, 756 (Fla. 1990)(prosecutorial comments are reflected in the record and therefore must be challenged on direct appeal); Ragsdale v. State, 720 So. 2d 203, 205 n. 1, 2 (Fla. 1998).

ISSUE IV

THE TRIAL COURT PROPERLY RULED THAT APPELLANT FAILED TO ESTABLISH THAT THE STATE WITHELD ANY MATERIAL, EXCULPATORY EVIDENCE. (STATED BY APPELLEE).

Appellant next claims that Bill Anthony would have provided some evidence useful to the defense on the attempted murder charge. Anthony, a reserve Deputy was present with Deputy Weyland when he took the victim's statement. At the evidentiary hearing, Anthony recounted the victim's statement, which included appellant's threat to kill her:

> ...She heard the door rattle or door knob turn, she called out to her son Rodney's name expecting that it was him. And next thing that she heard was Mr. Spencer's voice and he said something to the effect, I'm not quoting, you've messed up our lives, I'm going to kill you.

(PCR-2, 221). Anthony recalled the victim telling him she was struck, but, Anthony testified: "She was hit with something but she did not know with what." (PCR-2, 221). Anthony recalled that he was present with the victim after she was treated in the hospital. (PCR-2, 222). At the time he talked to her, she had a bandage on her head and her "hair was completely stained red with blood, bloodstain." (PCR-2, 224). Deputy Weyland wrote the report of the incident. (PCR-2, 224). Bill Anthony agreed that his name appeared on the Sheriff's Office report of the incident. (PCR-2, 225). Anthony testified that no one from either the State Attorney's Office or the Defense ever talked to him. (PCR-2, 223).

The trial court rejected appellant's Brady claim below,

stating, in part:

> The record reflects that Mr. Anthony's identity had been disclosed to trial counsel prior to trial. Mr. Anthony was identified in Deputy Weyland's police report, Deputy Weyland mentioned his name at his pre-trial deposition, and the State had Mr. Anthony listed as a witness for the penalty phase. At the evidentiary hearing, the prosecutor testified that a copy of Deputy Weyland's report would have been given to trial counsel as a part of discovery. Therefore, there is no indication that the prosecutor suppressed this information.
>
> Further, Mr. Spencer failed to demonstrate how Mr. Anthony possessed evidence favorable to the defense. At the evidentiary hearing, Mr. Anthony indicated that he was with Deputy Weyland when statements were taken and that he could offer no additional information that could not be discovered from Deputy Weyland's report or his testimony. (EH T 132-39). The Court finds that Mr. Spencer has failed to demonstrate a *Brady* violation.

(PCR-6, 876-77).

As the trial court observed, the defense received a report made by Deputy Weyland which mentioned that reserve Deputy Anthony was present. Since the defense had the name of this witness they could have deposed him. The State did not fail to disclose evidence favorable to the defense in its possession. Moreover, it is clear that Anthony's testimony on the whole was not exculpatory, but inculpatory, including recounting appellant's threat to kill the victim and the fact that she suffered apparently severe injuries as a result of appellant's attack. The trial court's ruling is supported by the record and should be affirmed by this Court.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING SEVERAL CLAIMS CONTAINED IN APPELLANT'S MOTION FOR POST-CONVICTION RELIEF. (STATED BY APPELLEE).

A. Standard Of Review On Summary Denial Of Post-Conviction Claims

In Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993), cert. denied, 502 U.S. 834 (1994), this Court observed that "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." However, an evidentiary hearing is not a matter of right, a defendant must present "'apparently substantial meritorious claims'" in order to warrant a hearing. State v. Barber, 301 So. 2d 7, 10 (Fla.), rehearing denied, 701 So. 2d 10 (Fla. 1974)(quoting State v. Weeks, 166 So. 2d 892 (Fla. 1960)).

Both the state and federal courts have not hesitated in approving the summary denial of post-conviction relief where the pleadings and record demonstrate that a hearing is unnecessary. See, e.g., Provenzano v. Singletary, 148 F.3d 1327 (11th Cir. 1998); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Provenzano v. State, 616 So. 2d 428 (Fla. 1993); Atkins v. Singletary, 965 F.2d 952 (11th Cir. 1992); Atkins v. Dugger, 541 So. 2d 1165 (Fla. 1989); Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991); Kennedy v. State, 547 So. 2d 912 (Fla. 1989); Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988); Puiatti v. Dugger, 589 So. 2d 231 (Fla. 1991).

The seminal decision, Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984), explained the deleterious cost to society in the automatic grant of post-conviction inquiry:

> Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."
>
> * * *
>
> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.
>
> (80 L.Ed.2d at 694-95)(emphasis added)

B. The Trial Court Properly Denied Post-Conviction Relief Without A Hearing

(I) General Media Bias, Pretrial Publicity

Appellant appears to argue, with scant citation to the record, that the firestorm of media coverage created a prejudicial atmosphere in the court room and prevented appellant from receiving a fair trial. (Appellant's Brief at 83-86). In his motion,

appellant provided no juror names, no dates, no times for any allegedly improper contact or influence by the media. In fact, the allegations were so general, they did not put the State or trial court on notice as to the nature of the evidence sought to be introduced at the evidentiary hearing. (PCR-5, 622-637). The trial court began its discussion of this allegation by noting the following: "The State argues that the claims made herein are vague and conclusory. The State is correct in its assessment, however a discussion of some of Mr. Spencer's more specific arguments appears below." (PCR-6, 835).

With regard to the effect of publicity during the trial, the trial court held:

> The Court finds that this claim is procedurally barred as it could have been raised on direct appeal. *See Bates v. Dugger,* 604 So.2d 457 (Fla. 1992). Nevertheless, even if properly before this Court, the record indicates that only twenty potential jurors had any recollection of the case. And, after individual voir dire, several were stricken for cause. Of those potential jurors who indicated that they had some recollection of the case from the media, three were seated as jurors: Deborah Lambert, Lois Noble and Linda Wolfe. (R. 901; T 31-34; T 46-55; T 113-118). Each juror indicated that she had no fixed opinion as to Mr. Spencer's guilt or innocence and that she could set aside what she had read or heard and consider the case based on the evidence presented.
>
> Mr. Spencer also argues that protestors and reporters put pressure on the State and created a public bias against him. During the trial, Mr. Spencer claims that protesters and reporters put pressure on the State and created a public bias against him. During the trial, Mr. Spencer claims that protesters packed the courtroom, they spoke to jurors and State Attorneys, and despite a court order, displayed symbols of their solidarity and their cause. Mr. Spencer did not allege what parties had

> contact with jurors or offer any proof of this bare allegation. This claim is procedurally barred and insufficiently pled.
>
> Mr. Spencer also claims that the Court's voir dire was inadequate. Mr. Spencer does not explain why he believes the voir dire was inadequately conducted. The Court finds that this claim could have been raised on direct appeal and it is procedurally barred. Nevertheless, even if this issue was properly before the Court, the record indicates that the Court conducted an adequate voir dire. (T 16-28, 31-124).

(PCR-6, 835-36).

To the extent appellant criticizes counsel's motion for a change of venue as pro forma, a motion was in fact made. That post-conviction counsel believes the motion could have been more comprehensive does not suggest trial counsel was ineffective. And, even if such a motion had been made, there is no reasonable likelihood that such a motion would be successful under the facts of this case. See Meeks v. Moore, 216 F.3d 951, 961 (11th Cir. 2000)(finding no prejudice from counsel's failure to file a motion to change the venue where the defendant "'had not shown that even one juror, prior to hearing the evidence, had formed an opinion that he was guilty.'")(quoting the District Court).

In Patton v. State, 25 Fla. L. Weekly S749 (Fla. 2000), this Court approved summary denial of the defendant's claim that counsel was ineffective for failing to move for a change of venue:

> The court properly summarily denied this claim because Patton failed to argue sufficient facts demonstrating he suffered prejudice due to counsel's failure to request a change of venue. *See Rolling v. State,* 695 So.2d 278, 284-88 (Fla. 1997)(no requirement that venue be changed in a high profile case when the ability to seat an

> impartial jury was demonstrated by individual voir dire). Every first-degree murder case naturally involves some publicity. Here, there were no allegations of extraordinary publicity therefore, this claim was legally insufficient. Moreover, any potential prejudice was cured when the court conducted an individual voir dire which revealed a few jurors had heard something about the case through the media but that none of them remembered many details. All jurors believed they could rely exclusively on the evidence presented at trial to come to a fair decision. Thus, this claim was properly summarily denied.

In this case, appellant failed to demonstrate any unusual difficulty in selecting an impartial jury. He offers nothing but unsupported allegations that the prejudicial atmosphere existing in Orange County precluded him from receiving a fair trial. Summary denial of this claim was appropriate.

(II) Voir Dire Of Jurors Noble and Wolfe

As for the alleged ineffectiveness of counsel for failing to either strike or conduct additional inquiry of juror Sampey, the trial court stated:

> During voir dire, Mr. Sampey indicated that he read the paper each day, but that he did not recall anything about Mr. Spencer's case. (T 178). Trial counsel asked Mr. Sampey to advise the Court if he recalled any further information at a later date so that the Court could inquire as to what influence that might have. (T 178). Mr. Sampey agreed to do so. (T 178). The record also indicates that Mr. Sampey did not raise his hand when asked if he had any specific recollection of the facts in this case as presented by the media. Mr. Sampey was not individually voir dired on this issue. There is no other indication in the record that demonstrates any undue prejudice or influence by Mr. Sampey. (T 139; 160; 172; 198-200; 203; 235).
>
> After he was chosen as a juror, Mr. Sampey advised the Court that he recalled that one of his eighteen employees was a reserve deputy for the Orange County

> Sheriff's Office. (T 350). Upon inquiry, Mr. Sampey indicated that to his knowledge, Patrick Deacon, the reserve deputy, was not involved in this case and Mr. Sampey did not discuss the case with him. (T 350-51). He further indicated that he does tax returns for two deputies, Ralph Groover and Jimmy Watson, as a part of his C.P.A. practice. (T 350-51). Mr. Sampey again indicated that he did not discuss this case with them. (T 351). Finally, Mr. Sampey advised the Court that these professional relationships would in no way affect his ability to be a fair and impartial juror. (T 351-52). This Court finds that trial counsel's performance was not prejudicially deficient and that there is not a reasonable probability that the outcome of the trial would have been different.

(PCR-6, 861).

As for juror Wolfe, the trial court held:

> Mr. Spencer argues that Ms. Wolfe indicated that she had a family member who was beaten up by a group of people and "hit in the head with a brick." The record reflects that Ms. Wolfe indicated that approximately eight years before, her brother was attacked by a group of strangers and hit in the head with a brick while trying to assist a co-worker. (T 116-117). Trial counsel specifically questioned Ms. Wolfe on this issue and she assured him this incident would not affect her ability to participate in this case. (T 116-117). The Court finds that this claim is without merit.

(PCR-6, 863).

The State can add little to the trial court's thorough analysis. However, the State notes that a claim surrounding the adequacy of voir dire is generally presumed a matter within trial strategy. Fox v. Ward, 200 F.3d 1286, 1295 (10th Cir. 2000)("counsel's actions during voir dire are presumed to be matters of trial strategy.")(citing Nguyen v. Reynolds, 131 F.3d 1340, 1349 (10th Cir. 1997)); Teague v. Scott, 60 F.3d 1167, 1172

(5th Cir. 1995)("The attorney's actions during voir dire are considered a matter of trial strategy. A decision regarding trial tactics cannot be the basis for a claim of ineffective assistance of counsel unless counsel's tactics are shown to be so 'ill chosen that it permeates the entire trial with obvious unfairness.'"). As the trial court noted, at least some inquiry was made with regard to the areas post-conviction counsel claims trial counsel was deficient in covering. The record supports the trial court's summary denial of this claim.

(III) Failure to Voir Dire Jurors Regarding Contact With The State

Appellant next asserts the trial court erred in summarily denying his claim that counsel was deficient in failing to voir dire jurors regarding contact with the prosecutors or victim's advocates during trial. (Appellant's Brief at 88-89). The trial court denied this claim, below, stating, in part:

> ...According to the record, the actual events that transpired in each contact were as follows: In the first instance, several jurors said hello to Ms. Sedgwick. She did not respond, but did advise the Court (T. 353). In another incident, at the end of the day, a juror approached State co-counsel Ms. Gawad and advised her that the jury had taken a vote and they like her jacket. She thanked the juror and continued on her way. (T 564-565). Ms. Gawad advised the Court the next morning and trial counsel requested that the Court remind the jurors that they should withhold opinions and comments until after the trial was over. (T 565). The Court again instructed the jurors not to say anything to the lawyers or witnesses involved in the case. (T 566).
>
> Another incident occurred in the morning prior to trial. In that instance, a juror walked into the State

> witness room and said something to Ms. Gawad while she was looking out the window. (T 841). The final incidnet involved a juror who spoke to the victim's advocate for the Orange County Sheriff's Office. This incident was also reported to the Court and the victim's advocate was questioned. (T 353-356). The victim's advocate testified that the extent of the conversation was the juror had told her that the juror brought a sweater instead of a jacket.
>
> Trial counsel did not voir dire the jurors regarding any of these incidents. However, the Court finds that trial counsel's performance was not deficient for failing to voir dire the jurors on this issue and there is not a reasonable probability that the outcome of the trial would have been different if trial counsel had done so.

(PCR-6, 864-65).

The comment appellant considers an indication of bias toward the prosecution was nothing more than an innocuous reference to a sweater worn by the co-counsel for the State. None of the comments at issue involve a comment on the evidence or otherwise mention the merits of the case. As such, there was clearly no need for additional voir dire once the innocent or unremarkable nature of the communication was revealed in open court.

C. Non-Hearing Allegations Of Ineffective Assistance During The Penalty Phase

(I) Impeachment Of Lay Witnesses On Mental State

Appellant next asserts that the trial court erred in summarily denying his claim that the prosecutor impermissibly impeached lay witnesses as to the appellant's mental condition. (Appellant's Brief at 90). The trial court denied this claim below, stating, in part:

> ...Specifically, Mr. Spencer cites to the testimony of Raymond Spencer (PP T 227; R 291), John Marancek (PP T 232; R 296), and Ted Kafalas (PP T 244-45; R 308-9). Mr. Spencer argues that these questions were an improper attempt to cast doubt as to whether Mr. Spencer suffered from any psychological illness.
>
> The opinion of a non-expert witness is admissible to prove the mental condition of another person if the proper predicate has been laid. Each witness testified that he was very familiar with Mr. Spencer and had known him for several years. The Court finds that the examination by the prosecutor was proper and, therefore, trial counsel's performance was not deficient. Thus, this claim is denied.

(PCR-6, 872-73).

Appellant cites no authority for the proposition that the prosecutor's questions of lay witnesses in this case was improper. Indeed, it is clear that if the witnesses are familiar with the defendant and have had an adequate opportunity to observe him as the witnesses did in this case, a lay witness may provide an opinion on the defendant's mental state. See Strausser v. State, 682 So. 2d 539, 541 (Fla. 1996)(no error to permit lay witnesses who knew accused to express opinion concerning the mental condition of the accused when it was based entirely on the personal perception of the witness); The Florida Bar v. Clement, 662 So. 2d 690, 697 (Fla. 1995)("A nonexpert witness may testify to an opinion about mental condition if the witness had an adequate opportunity to observe the matter or conduct about which the witness is testifying.").

(II) Failure To Seek New Penalty Phase Upon Remand

Appellant claims counsel was ineffective in failing to seek a

new penalty phase upon remand by this Court. The trial court found absolutely no merit to this claim below, stating:

> The original opinion and the later review by the Florida Supreme Court describe the remand as being for reconsideration by the judge. *See Spencer v. State*, 645 So.2d 377 (Fla. 1994); *Spencer v. State*, 691 So.2d 1062 (Fla. 1996). Therefore, this claim is specious. Further, Mr. Spencer failed to demonstrate that there was a reasonable probability that trial counsel would have been successful in arguing such a motion, even if one ad been made. This claim is denied.

(PCR-6, 873-74). The trial court's rationale is sound and its decision should be affirmed on appeal.

ISSUE VI

WHETHER THE STATE KNOWINGLY PRESENTED FALSE TESTIMONY VIOLATING APPELLANT'S RIGHT TO DUE PROCESS? (STATED BY APPELLEE).

Once again, appellant raises the same allegations of prosecutorial misconduct, but now characterizes his claim as a Giglio v. United States, 405 U.S. 150 (1972) violation. The trial court correctly held that these claims are barred from review, noting that these claims "could have been raised on direct appeal." (PCR-6, 878).

Again, appellant raises the assertion in opening statement regarding the prosecutor's claim that Timothy Johnson would testify he observed appellant strike the victim with an iron. (Appellant's Brief at 94). And, again, the trial court observed that the prosecutor corrected that statement in her closing argument. Moreover, the court noted that independent evidence supported the

prosecutor's contention that appellant struck the victim with an iron. (PCR-6, 879). Contrary to appellant's contention, the State's evidence that appellant struck the victim with an iron did not rest solely upon a hearsay statement of the victim. The victim's injuries were severe and consistent with having been inflicted by an iron. Timothy observed appellant striking his mother. Immediately after Timothy confronted the appellant, Timothy was chased from the room by an iron wielding appellant Thus, the State presented powerful circumstantial evidence to corroborate the victim's statement to the treating physician.

As for the prosecutor's comment on Dr. Lipman's testimony, the trial court held as follows:

> ...The Court again finds that this is not an instance where the prosecutor presented false testimony. Mr. Spencer argues that the prosecutor's comment left the jury with the impression that Mr. Spencer had a conscious memory of intentionally stabbing his wife and that the prosecutor's statement also served to persuade the jury that Timothy had actually seen Mr. Spencer stab the victim.
>
> The Court finds that this claim does not meet the *Giglio* standard and is otherwise without merit. The prosecutor did not state that Mr. Spencer remembered stabbing Karen Spencer. During the penalty phase, Dr. Lipman testified that Mr. Spencer told him that he stabbed Karen Spencer but that he did not remember doing so. Timothy did not testify that he saw Mr. Spencer stab his mother.

(PCR-6, 879-880).

The prosecutor in this case did not present any false evidence. Appellant has not even established that the prosecutor misrepresented the evidence during her argument to the jury, much

less presented false evidence in violation of his constitutional rights. Appellant would essentially elevate any disagreement over a prosecutor's statement in closing argument into a *Giglio* claim. The trial court correctly determined that appellant's claim lacked any merit.

ISSUE VII

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

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

Even if not barred, the claim should be denied as meritless. The United States Supreme Court has held that "long-recognized and very substantial concerns" justify protecting jury deliberations from intrusive inquiry. Tanner v. United States, 483 U.S. 107, 127 (1986). Federal courts have consistently upheld the federal restrictions on post-trial juror interviews against constitutional challenges. See, United States v. Hooshmand, 931 F.2d 725, 736-737

(11th Cir. 1991); United States v. Griek, 920 F.2d 840, 842-844 (11th Cir. 1991). The reasoning of those cases applies equally well to Florida's rule restricting juror contact when considered in light of Florida's constitutional right of access to the courts, and demonstrates that appellant is not entitled to relief on this issue.

ISSUE VIII

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S CUMULATIVE ERROR ALLEGATION? (STATED BY APPELLEE).

Appellant finally claims that the combination of errors in this case operated to deprive him of a fair trial. The State disagrees.

In any case, this cumulative error claim is contingent upon appellant demonstrating error in at least two of the other claims presented in his motion. For the reasons previously discussed, he has not done so. Thus, this claim must be rejected because none of the allegations demonstrate any error, individually or collectively. Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998)(where claims were either meritless or procedurally barred, there was no cumulative effect to consider); Johnson v. Singletary, 695 So. 2d 263, 267 (Fla. 1996)(no cumulative error where all issues which were not barred were meritless). Moreover, as the trial court noted below, this allegation failed to contain sufficient facts to warrant a hearing, much less warrant post-conviction relief.

CONCLUSION

Based on the foregoing arguments and authorities, the lower court's ruling denying appellant's motion for post-conviction relief should 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 Harry P. Brody, Assistant CCRC and Jeffrey M. Hazen, CCRC-Middle Attorney, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this _____ day of March, 2001.

_____
COUNSEL FOR STATE OF FLORIDA

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that this brief is presented in 12 point Courier New, a font that is not proportionately spaced.

_____
COUNSEL FOR STATE OF FLORIDA