IN THE SUPREME COURT OF FLORIDA

MATTHEW MARSHALL,

Appellant,

vs. Case No. SC00-1186

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR MARTIN COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, MATTHEW MARSHALL, was the defendant in the trial court below and will be referred to herein as “Appellant.” Appellee, the State of Florida, was the plaintiff in the trial court below and will be referred to herein as “the State." Reference to the various pleadings and transcripts will be as follows:

Original trial record - “TR [vol.] [pages]”

Supplemental trial record - “STR [vol.] [pages]”

Postconviction record - “PCR [vol.] [pages]”

Supplemental postconviction record - “SPCR [vol.] [pages]”

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's statement of the case and facts, subject to the additions, deletions, and/or corrections below and in the Argument section of the brief.

In December 1989, a Martin County jury convicted the Appellant of First Degree Murder. The jury then recommended to the trial court that it impose a sentence of life in prison. The trial court overrode the jury's recommendation and imposed the death penalty. This Court affirmed the jury's verdict and the Court's sentence in Marshall v. State, 604 So.2d 799 (Fla. 1992). The court stated the facts of the case as follows:

> Marshall and the victim, Jeffrey Henry, were both incarcerated at the Martin Correction Institute on November 1, 1988, when witnesses heard muffled screams and moans emanating from Henry's cell and observed Marshall exiting the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall reentered the cell, and similar noises were heard. After the cell became quiet, Marshall again emerged with blood on his person. Henry was found dead, lying in his cell facedown with his hands bound behind his back and his sweat pants pulled down around his ankles to restrain his legs. Death was caused by blows to the back of his head.
>
> Marshall was charged with first-degree murder. His defense at trial was that he killed Henry in self-defense. Marshall claimed that Henry was a "muscle man" for several inmates who operated a football pool. When Marshall tried to collect his winnings from the inmates, they told him to get the money from Henry. Marshall claims he entered Henry's cell only to collect his winnings but that Henry refused to pay, and

> that Henry then attacked him, so he fought back.
>
> The jury found Marshall guilty of first-degree murder and recommended a sentence of life imprisonment. The judge rejected the jury's recommendation and imposed a sentence of death, finding in aggravation: (1) that the murder was committed by a person under sentence of imprisonment; (2) that the defendant was previously convicted of violent felonies; (3) that the murder was committed while the defendant was engaged in the commission of or an attempt to commit a burglary; and (4) that the murder was especially heinous, atrocious, and cruel. The judge found in mitigation that the defendant's behavior at trial was acceptable and that the defendant entered prison at a young age. The judge specifically rejected as mitigation that the defendant's older brother influenced him and led him astray to run the streets and break the law, and that his mother caused him to believe he would suffer no negative consequences for his bad behavior. The judge concluded that facts supporting a conclusion that the mitigating circumstances did not outweigh the aggravating circumstances were "so clear and convincing that no reasonable person could differ.

Id. at 709. Later in the opinion, this court addressed the propriety of a jury override in this case:

> In this case, the record contains insufficient evidence to reasonably support the jury's recommendation of life. Marshall's father was unable to attend the trial, but the defense and prosecution stipulated that he would have testified that Marshall did well in school until his early teens when his older brother influenced him to run the streets and break the law; that Marshall's mother did not discipline Marshall and allowed him to believe there would be no consequences for his behavior; and that Marshall's father loved him and

requested a life sentence for his son. The trial court determined these facts were not mitigating, but did find Marshall's behavior at trial as well as his entering prison at a young age to be mitigating. We find no error in the court's assessment of this mitigation and conclude that it does not provide a reasonable basis for the jury's recommendation of life in this case. Even viewing this mitigation in the light most favorable to Marshall, it pales in significance when weighed against the four statutory aggravating circumstances, including Marshall's record of violent felonies consisting of kidnaping, sexual battery, and seven armed robberies.

Furthermore, defense counsel's argument composed largely of a negative characterization of the victim does not provide a reasonable basis for the jury's life recommendation. Moreover, contrary to Marshall's assertion, the facts surrounding the murder do not suggest that the murder was committed in self defense or in a fit of rage. The witnesses heard muffled screams and moans emanating from the victim's cell and observed Marshall leaving the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall reentered the cell and similar noises were again heard. The victim was found lying face down with his hands bound behind his back and his ankles were restrained. The victim received no less than twenty-five separate wounds and blood was sprayed and splattered about the cell. Death was caused by blows to the back of his head. Nothing in these facts supports the notion that Marshall acted in self defense or that he simply killed the victim in the heat of a fight. We thus conclude that the trial court did not abuse its discretion in finding the facts supporting the death sentence to be "so clear and convincing that no reasonable person could differ." See *Tedder*, 322 So.2d at 910.

Finally, we do not find the death sentence disproportionate in this case. The

> facts of this case, including the four strong aggravating circumstances compared to the weak mitigation, render the death sentence appropriate and proportional when compared to other cases. See, e.g., Freeman v. State, 563 So.2d 73 (Fla.1990); Lusk v. State, 446 So.2d 1038 (Fla.1984).
>
> Accordingly, we affirm Marshall's conviction for first-degree murder and the resulting death sentence.

Id.

SUMMARY OF ARGUMENT

Issue I - The trial court properly summarily denied Claim IX as the is no legally sufficient evidence supporting it.

Issue II - Appellant's ineffective assistance of counsel claims, alleging failure to investigate abuse and put on mental health experts was properly denied after evidentiary hearing. There is competent, substantial evidence supporting the trial court's denial.

Issue III - There is competent, substantial evidence supporting the trial court's denial of Appellant's Brady claim after evidentiary hearing.

Issue IV - The trial court properly analyzed the cumulative error.

Issue V- The remaining claims were properly summarily denied.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DENIED AN EVIDENTIARY HEARING ON APPELLANT'S CLAIM OF JUROR MISCONDUCT (Restated).

The trial court did not err by summarily denying Claim IX of Appellant's 3.850 motion, which sought a re-trial based upon alleged juror misconduct. Appellant failed to present any legally sufficient evidence supporting his claims that the jury was biased, that it read extraneous newspaper articles, and that it made hateful racial jokes and remarks at Appellant's expense. The only claim supported by Appellant's affidavits, that the jury decided during the guilt-phase to sentence Appellant to life imprisonment, does not warrant an evidentiary hearing as it inheres in the verdict.

The standard of review for summary denials is that the decision will be affirmed where the law and competent substantial evidence supports the trial court. Diaz v. Dugger, 719 So.2d 856, 868 (Fla. 1998); Lopez v. Singletary, 634 So.2d 1054, 1056 (Fla. 1993). Here, the trial court summarily denied Claim IX on the ground that the motion and records conclusively show that Appellant is not entitled to relief. The trial court

also found that the allegations in the affidavits attached to the 3.850 motion, in support of Claim IX, inhered in the verdict (R 1829). The trial court's decision was correct and must be upheld.

The only support Appellant provided for Claim IX were three affidavits attached to his 3.850 motion. The first affidavit is from Attorney Ronald Smith of Stuart, Florida. (R 1709-10). According to Mr. Smith, a woman whose name he could not remember but who called him regarding her relative (one of Mr. Smith's clients), claimed that she was on Appellant's jury and that she was appalled by the jurors' actions during the trial. The woman told Mr. Smith that: (a) "some jurors decided before the trial was over that Matthew Marshall/[Appellant] was guilty;" (b) "some jurors told [racial] jokes about Matthew Marshall/[Appellant];" (c) "before the end of the first phase of the trial, some jurors had announced that they were going to vote for a guilty verdict and a life sentence because they wanted Matthew Marshall/[Appellant] to go back to prison and kill more black inmates;" and (d) "some jurors did read articles about the trial and talked with each other about the articles they had read" despite the judge's admonitions to the contrary (R 1709-10).

The other two affidavits attached to Appellant's 3.850 motion, in support of Claim IX, are from jurors in Appellant's

case.[1] Pamela Bachmann stated that she was a juror in Appellant's case and that "[d]uring the course of the guilt phase deliberations, there were jurors who did not want to vote for first-degree murder." (R 1712). "There was [also] a concern that there might be a hung jury. A unanimous verdict of guilty of first-degree murder was obtained when it was agreed upon that the jury would vote unanimously for a life sentence." (R 1712). Juror Bachmann noted that some jurors felt the penalty should be death, "however, a unanimous life recommendation was finally made to the judge." (R 1712).

Judy Cunningham, the second juror, agreed, in her affidavit, that she "told the other jurors [during guilt phase deliberations] that [she] did not believe that the state had proven its case beyond a reasonable doubt, . . . [she] was not

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[1] The State moved to strike the two jurors' affidavits and any reference to them from Appellant's 3.850 motion because they were obtained without the trial court's permission. The State's argument was that collateral counsel interviewed five of the twelve jurors without the trial court's permission. The motion was denied (R 1828, SR 1958).

Interestingly, although collateral counsel interviewed five jurors, he attached affidavits from only two. Contrary to Appellant's assertion (IB 7), the trial court did not "enjoin" any further jury interviews. On June 12, 1996, defense counsel filed a Notice of Intent to Interview Jurors, which requires a hearing (R 457-60). The State filed an objection to the notice on June 14, 1996, but defense counsel went ahead and interviewed five of the jurors on April 15, 1996, before any court hearing (R 461-67). A hearing was held on October 21, 1996, at which the trial court noted that it was an ethical violation for defense counsel to interview the jurors without court permission (SR 29-33). Thereafter, defense counsel did not request to interview the jurors.

sure [Appellant] was guilty as charged." (R 1714). Ms. Cunningham "made it clear to other jurors that [she] would not vote for death in this case" and "only compromised [her] true feelings regarding the case because the other jurors did not want a hung jury to result." (R 1714). "[She] voted for first degree murder only when it was agreed that there would be a vote for life recommendation and it would be unanimous." (R 1714).

The three (3) affidavits are legally insufficient to warrant an evidentiary hearing or the granting of a new trial based on Claim IX. Mr. Smith's affidavit is legally insufficient for several reasons. First, it is not based on his first-hand knowledge of the jurors' alleged misconduct, but rather, relays what he was told by an alleged juror. Second, the affidavit fails to provide the name of the alleged juror. Mr. Smith's affidavit states that he cannot recall the woman's name. Importantly, though, the affidavit **does not** state that Mr. Smith cannot recall the name of his client, to whom this alleged juror was related. It is hard to believe that the juror's name could not have been obtained through that client.

The unnamed caller could very well be someone other than a juror, whose purpose was to obtain relief for Appellant. The reality of this possibility must be viewed in light of Appellant's prior escape conviction that is part of the record in this case. (R 2146). In that case, Appellant was at first

appearance in Miami on a criminal charge. An armed gunman, later determined to be his brother, Brindly, appeared in court and held the bailiff hostage while the Appellant escaped from the courthouse. (R 2146). It is not inconceivable that the caller was purposely trying to interject error into this case in an effort to achieve a new trial for Appellant.

It is important to note that the jurors' affidavits **do not support any of the allegations** made in Mr. Smith's affidavit. The jurors' affidavits do not support the allegations that: (a) "some jurors decided before the trial was over that Matthew Marshall/[Appellant] was guilty;" (b) "some jurors told [racial] jokes about Matthew Marshall/[Appellant];" (c) "before the end of the first phase of the trial, some jurors had announced that they were going to vote for a guilty verdict and a life sentence because they wanted Matthew Marshall/[Appellant] to go back to prison and kill more black inmates;" and (d) "some jurors did read articles about the trial and talked with each other about the articles they had read" despite the judge's admonitions to the contrary.

Instead, the two (2) juror affidavits reveal <u>only</u> the subject of their deliberations, i.e., how they were going to vote. As such, they, too, are legally insufficient on their face because jurors are incompetent witnesses to testify about matters which inhere in a verdict. Florida Statute

§90.607(2)(b) states, "[u]pon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment." Matters that "inhere in the verdict" have been defined as "'those which arise during the deliberation process.'" Sconyers v. State, 513 So.2d 1113, 1115 (Fla. 2d DCA 1987). See also Mitchell v. State, 527 So.2d 179, 181 (Fla. 1988). Thus, the statute forbids judicial inquiry into the jurors' emotions, mental processes, mistaken beliefs, or understanding of the applicable law. See Devoney v. State, 717 So.2d 501, 502 (Fla. 1998); State v. Hamilton, 574 So.2d 124 (Fla. 1991).

This Court has described the matters occurring in the jury room that may be inquired into as follows:

> [t]hat affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, as that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the Court; the statements of the witnesses or the pleadings in the

> case; that he was unduly influenced by the statements or otherwise of his fellow-jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast.

Devoney at 502 (citation omitted). "In short, matters that inhere in the verdict are subjective in nature, whereas matters that are extrinsic to the verdict are objective." Id.

Examples of subjective matters that have been held to inhere in the verdict are: (1) discussions during deliberations of a matter adduced during the course of trial, but which the trial court instructed the jury to disregard. Devoney v. State, 717 So.2d 501 (Fla. 1998); (2) a verdict prompted by sympathy for the brain-damaged child plaintiff. Baptist Hosp. v. Maler, 579 So.2d 97 (Fla.1991); (3) discussions of insurance and other matters not introduced into evidence. Orange County v. Piper, 585 So.2d 1182 (Fla. 5th DCA 1991); (4) consideration of a defendant's failure to testify. Sims v. State, 444 So.2d 922, 925 (Fla.1983); (5) placing the burden on the defendant to prove his innocence. Mitchell v. State, 527 So.2d 179, 181 (Fla. 1988); (6) a belief that only statutorily enumerated mitigating factors could be considered. Songer v. State, 463 So.2d 229, 231 (Fla. 1985); and (7) improper influence by the foreman over the other jurors. Darby v. State, 461 So.2d 984, (Fla. 1st DCA 1984).

Here, as already noted, the jurors' affidavits reveal only

how they were going to vote-- information that inheres in the verdict and therefore, cannot support the allegations in Appellant's 3.850 motion. In essence, the jurors' affidavits reveal that the jurors compromised by convicting Appellant of first-degree murder, but unanimously recommending a life sentence. That does not warrant an evidentiary hearing or a new trial and the trial court correctly denied one.

The cases cited by Appellant are inapposite as they involve matters **extrinsic** to the verdicts. Basically, Appellant relies upon two lines of cases-- the first involving racial slurs or comments made by jurors during deliberations. See Powell v. Allstate Ins. Co., 652 So.2d 354, 356 (Fla. 1995)(holding that racial statements made by some of the jurors during deliberations are akin to receipt by jurors of nonrecord information which constitute sufficient "overt acts" to permit trial court inquiry); U.S. v. Heller, 785 F.2d 1524 (11th Cir. 1986)(racial and ethnic slurs by jurors did not inhere in the verdict, nor did the fact that one juror consulted a friend of his to verify information about an accountant's liability regarding a filed tax return); Wright v. CTL Distribution, Inc., 650 So.2d 641, 642 (Fla. 2d DCA 1995)(racial slurs made by jury warranted inquiry).

The second line of cases involves the jury's receipt of information from outside the courtroom (IB 10-11). Neither

situation is present here. Simply put, not one juror in this case has come forward and issued a sworn affidavit asserting that racial or ethnic slurs were made or that jurors read newspapers inside the jury room or received any non-record information. An affidavit by an attorney that an unnamed juror made these allegations to him is hearsay and completely unreliable. The only thing revealed by the jurors' affidavits is the substance of their deliberations, which inheres in the verdict and does not warrant an evidentiary hearing. Consequently, the trial court correctly denied an evidentiary hearing on this claim.

POINT II

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AFTER AN EVIDENTIARY HEARING (Restated).

An evidentiary hearing was held on Appellant's claims that trial counsel was ineffective for failing to investigate possible mitigation evidence to present at the penalty phase and for failing to secure a competent mental health expert to assist in both the guilt and penalty phases.

The standard of review for rulings on motions for postconviction relief following an evidentiary hearing is that "this Court will not 'substitute its judgment for that of the trial court on questions of fact, [ ] the credibility of the witnesses [and] the weight to be given to the evidence by the

trial court,'" as long as the trial court's findings are supported by competent, substantial evidence. Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997). See also Melendez v. State, 718 So. 2d 746 (Fla. 1998);

Ineffectiveness claims are governed by Strickland v. Washington, 466 U.S. 688 (1984), and the two prongs of the test, i.e., deficient performance and prejudice, present mixed questions of law and fact reviewed de novo on appeal. State v. Riechmann, 25 Fla. L. Weekly S 163, 165 (Fla. Feb. 24, 2000) (finding ineffectiveness claims subject to plenary review), corrected opinion, 25 Fla. L. Weekly S 242 (Fla. Mar. 22, 2000); Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999)(recognizing that "under Strickland, both the performance and prejudice prongs are mixed questions of law and fact, with deference to be given only to the lower court's factual findings"). However, while a trial court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review. Cade v. Haley, 222 F.3d 1298, 1302 (11th Cir. 2000).

In order for a defendant to prevail on an ineffective assistance of counsel claim, s/he must prove under Strickland that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability that the

result of the proceeding would have been different.[2] In assessing an allegation of ineffectiveness assistance, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89.

In general, scrutiny of an attorney's performance is highly deferential. Reviewing courts will not second-guess strategic decisions; rather, the attorney's performance is evaluated in light of all the circumstances as they existed at the time of the conduct, and is presumed to have been adequate. Strickland, 466 U.S. at 689-90. Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. Strickland, at 690-91.

At all times, the defendant has the burden of proving that his counsel's representation fell below an objective standard of reasonableness, **and** that he suffered actual and substantial prejudice as a result of the deficient performance. This burden remains on the defendant. Roberts v. Wainwright, 666 F.2d 517, 519 n.3 (11th Cir. 1982). See also Johnston v. Singletary, 162 F.3d 630, 635 (11th Cir. 1998). To demonstrate prejudice, the defendant must show "there is a reasonable probability that, but

[2] The ineffectiveness legal standard that applies to "override" cases is the same standard that applies to any other death penalty case. State v. Bolender, 503 So.2d 1247, 1249 (Fla. 1987).

for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. As applied to the penalty phase, this means a "reasonable probability that the balance of aggravating and mitigating circumstances would have been different." Robinson v. State, 707 So.2d 688, 696 (Fla. 1998), citing Rose v. State, 675 So.2d 567, 570-71 (Fla. 1996). Thus, the defendant must show not only that his counsel's performance was below constitutional standards, but also that he suffered prejudice as a result of such deficient performance. Appellant has failed to meet that burden here.[3]

A. APPELLANT'S COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INVESTIGATE MITIGATING EVIDENCE OF APPELLANT'S ALLEGED CHILDHOOD ABUSE.

Appellant claims that his counsel was ineffective for failing to investigate the non-statutory mitigating evidence that Appellant was allegedly abused as a child by his father and for failing to send an investigator to Liberty City to interview

[3] Appellant argues in Point II, that the trial court erred by basing its ruling on the first prong of Strickland, i.e., the "deficiency" prong. Appellant's argument ignores the fact that in Strickland, the United States Supreme Court clearly invited courts to decide any claim of ineffective assistance on the basis of either prong. "When applying Strickland, we are free to dispose of ineffectiveness claims on either of its two grounds. See Strickland, 466 U.S. at 697. Oats v. Singletary, 141 F.3d 1018, 1023 (11th Cir. 1998); Housel v. Head, 246 F.3d 1326 (11th Cir. 2001) (disposing of ineffectiveness claim based solely on finding that counsel's performance was not deficient).

Appellant's brothers, cousins and other family members.

The State recognizes that defense counsel has a duty to investigate mitigating evidence, but this duty is limited to a reasonable investigation, and reviewing courts must apply "a heavy measure of deference to counsel's judgments." Strickland at 691. In determining whether counsel's performance was deficient, it must first "be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end.... [If not], it must be determined that defendant suffered actual prejudice due to the ineffectiveness of his trial counsel before relief will be granted." Blanco v. Singletary, 943 F.2d 1477, 1500 (11th Cir. 1991). See also Rose 675 So.2d at 571 (relevant factors for inquiry include counsel's failure to investigate and present available mitigating evidence, along with the reasons for not doing so).

There is competent, substantial evidence supporting the trial court's factual finding that defense counsel, Cliff Barnes, conducted a reasonable investigation into Appellant's background which did not uncover any evidence of abuse. The record shows that Mr. Barnes conducted an extensive pre-trial

interview[4] with Appellant, who advised him, in no uncertain terms, that he **was not** abused as a child. (R 2495). To the contrary, Appellant described a normal, healthy childhood and stated that "he was very fortunate to have both parents" and that his parents "always encouraged him to succeed" in life. (R 2495, 2497). According to Appellant, his parents cared about him and motivated him. (R 2497). His discipline was 75% verbal and 25% physical and he did not describe the physical discipline as abusive. (R 2497-98). Mr. Barnes also asked whether Appellant had been abused by anyone else, but Appellant denied any abuse. (R 2498). Mr. Barnes employed a psychiatrist, Dr. Klass, who also asked Appellant about child abuse and Appellant denied that he had been abused. (R 2609).

Appellant gave Mr. Barnes his father's name but didn't have his father's address (R 2492, 2343-44). He told Barnes that his Aunt Barbara (father's sister) would have his father's address and gave her address and telephone number. (R 2492-93, 2343-44). Mr. Barnes spoke with Appellant's father (Appellant's mother died in 1987) who likewise advised that Appellant had a good upbringing and simply chose to run with gangs. (R 2391-93). Mr. Marshall stated that he had worked hard all of his life at one job (Modernage Furniture) and provided the best he

[4] Mr. Barnes had eleven pages (legal size paper, 11x14) of notes from the interview with Appellant (R 2489).

could for his wife and family. (R 2366). His wife was a stay-at-home mother. (R 2496). Mr. Marshall said that Appellant had been led into a life of crime by his older brother Brindley. (R 2366, 2393). He complained that his wife did not discipline their four sons and led them to believe that there would not be any consequences for their actions. (R 2366).

Mr. Barnes attempted to contact Aunt Barbara on several occasions by letter and telephone, but she never responded. (R 2507, 2344-45). Appellant's father told Barnes that his sister Barbara was on drugs and "didn't know whether the sun was shining." (R 2369-70). Regarding other family members, Appellant's father gave Barnes the names of his other sons (Appellant's brothers), but did not know how to get in touch with them because he had disowned them due to their criminal behavior. (R 2392-93). Barnes did not go to Liberty City or send an investigator there because it would have been a fishing expedition--he didn't have any leads warranting a trip to the high-crime area. (R 2361-64). According to Barnes, the problem in this case was that Appellant's version of his idyllic childhood was corroborated by his father, so he didn't have any different to go on. Barnes noted that he reviewed Appellant's pre-sentence investigation reports from his prior crimes and did not see any red flags-- no differing rendition of Appellant's upbringing, nor did Appellant's school or prison records

indicate abuse. (R 2520, 2342, 2510).

The trial court agreed that Mr. Barnes conducted a reasonable investigation which did not uncover any possible abuse mitigation, finding the following facts:

> To prepare for trial Mr. Barnes interviewed [Appellant] and obtained his life history. [Appellant] related he was born July 23, 1964, to married parents who raised him together and that his mother died in 1987. He said he was very fortunate to have both parents and that there was no abuse or neglect in his home. He said his parents disciplined their children 75% by verbal means and 25% by physical means. He described his family as close and loving and said he engaged in athletics as a child and was encouraged to succeed by his parents. He described his standard of living as better than other people living around him. He denied any head injuries or other physical or mental problems and mentioned that he failed the sixth grade. He said he worked for his father while growing up and denied any use of drugs or alcohol. He admitted to engaging in street fights as a juvenile and said he was imprisoned due to a rape conviction that resulted from consensual sex with a female virgin. He said the murder charge was the first time he had been in trouble while in prison. He described himself as low-key and easy to get along with. Mr. Barnes also obtained [Appellant's] school, prison, and mental health records. [Appellant] described his school grades as "beautiful" until his teen years, however, his school records showed failing grades in elementary school.
>
> During an early conference between Mr. Barnes and [Appellant], [Appellant] give [Mr. Barnes] the name and addresses of his Aunt Barbara. Mr. Barnes wrote two separate letters to Aunt Barbara, but she never responded. [Appellant] also told Mr. Barnes how to reach his father, and on June 12,

> 1989, Mr. Barnes contacted Percival Marshall, Sr., [Appellant's] father. The senior Mr. Marshall told Mr. Barnes the names of [Appellant's] brothers, but said he did not know how to find them because he had disowned them due to their bad behavior. He said that [Appellant] had been led into a life of crime by his older brother Brindley. He also said that aunt, Barbara, was on drugs and could not be reached by Mr. Barnes because "she doesn't know if the sun is shining." Mr. Barnes asked Mr. Marshall to come to his son's trial and bring other family members with him, and he gave Mr. Marshall the trial date. He intended to consider calling Mr. Marshall and other family members as witnesses in the sentencing phase of the trial, but Mr. Marshall did not attend the trial, nor did any other family member. Mr. Barnes listed Percival Marshall, Sr., Percival Marshall, Jr., Theodore Marshall, and Brindley Marshall as defense witnesses.

(R 2709-11).

Contrary to Appellant's assertions, the evidence presented at the evidentiary hearing that Appellant was abused as a child was weak and suspect. In support of his "child abuse" claim, Appellant presented the testimony of his three (3) brothers, who are all convicted felons. (R 2113, 2173-74, 2206-07). His older brother, Brindley, helped Appellant escape from a Miami courtroom by pulling a gun on a bailiff. (R 2146). He also presented the testimony of four (4) cousins from the Bahamas who visited for a few weeks each year. Importantly, there is no independent evidence, i.e., police reports, 911 calls, etc. corroborating the father's alleged abusive conduct. Even though

Appellant's brother Percival was supposedly found at school with his back bleeding from marks of child abuse, he was sent home without notification to the police or HRS. (R 2179-80, 2199). Defense counsel reviewed Appellant's school, prison and mental health records but nothing substantiates the abuse charge.

Further, there were numerous exaggerations and/or errors in the family's testimony. For example, the shed with a hard wood floor where the dog slept became a "doghouse." (R 2278-79, 2283). Also, the family members described Appellant as a "good boy" and "sweet kid" at the very age (16) when he was robbing and raping. The family members said that the father stabbed the mother, yet Appellant denied this to Dr. Woods. One cousin said that this type of harsh physical discipline was common in the Bahamas, while another cousin said that it was not. On cousin said that Appellant's mother told her family in the Bahamas that she was being abused by her husband, while another said that she didn't want them to know.

Finally, Appellant reiterated to the neuro-psychiatrist who testified at the evidentiary hearing, Dr. Woods, that he **was not** abused as a child. (R 2037-43, 2044-50). He described an idyllic, fairly solid, middle-class family. (R 1984-85). His description of his father's discipline was that it was stern, but not abusive. (Notes say father's discipline brutal R 1984, check this out). To explain this major discrepancy, the defense

suggests that Appellant's "denial" is a consequence of his bipolar II disorder; however, "denial" is not listed in the DSM IV as a condition of bipolar II disorder. (R 1967-68, 2056-58). Moreover, Appellant's cousin, Jacqueline Laing, testified that Appellant openly talked about his abuse as a child. (R 2304).

In Asay v. State, 769 So.2d 974 (Fla. 2000), the defendant also argued that trial counsel was ineffective for failing to investigate and present nonstatutory mitigation evidence of the defendant's abusive and poverty-stricken childhood. At trial, defense counsel presented nonstatutory mitigation through the defendant's mother that the defendant was affectionate towards her, provided her with financial help in the past, remodeled her house, gave gifts of clothing to other inmates while incarcerated, and acquired his GED while in prison. In addition, during closing arguments, defense counsel emphasized Asay's relative youth at the time of the offense.

At the evidentiary hearing, collateral counsel presented evidence of a childhood where the defendant suffered severe beatings at the hands of his parents, was deprived of food, and at the age of twelve provided sexual favors to men in exchange for money. Trial counsel testified at the evidentiary hearing that he interviewed the defendant and his mother concerning the existence of mitigating circumstances and was not aware of the

extent of the alleged abuse in the 3.850 motion. However, counsel also testified that he knew that there was "some evidence" that the defendant's "childhood had not been a great one" and that there had been problems with defendant's mother leaving her children alone for lengths of time.

Despite counsel's knowledge that there had been some problems, this Court upheld the trial court's finding that defense counsel conducted a reasonable investigation, noting the difficulty he had in obtaining information from the defendant's mother. Similarly, in Jones v. State, 732 So.2d 313 (Fla. 1999), this Court held that defense counsel's investigation was reasonable where he contacted the three family members provided by the defendant, whose testimony would not have been helpful and who refused to help. Instead, defense counsel relied upon the defendant to provide his background, which was substantiated by prison records.

Here Mr. Barnes was forced to rely upon what Appellant and his father told him regarding any alleged abuse. Appellant's father did not mention any alleged abuse and Appellant expressly denied abuse on several occasions. Further, there was nothing in Appellant's school, prison or mental health records which suggested abuse. Just because counsel knew that Appellant did not have the good grades like his father said, did not put him on "notice" of potential abuse and does not mean that his

investigation was not reasonable.

This was not a case where trial counsel did not engage in any investigation. See Jones, at 319. "As the Supreme Court noted in Strickland, 'the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.'" Cherry v. State, 25 Fla. L.Weekly S719 (Fla. Sept. 28, 2000). In Cherry, this Court held that a defendant who failed to provide defense counsel with the names of witnesses who could assist in presenting mitigating evidence, could not later complain that trial counsel's failure to pursue mitigation was unreasonable. See also Strickland, 466 U.S. at 691 ("when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.").

Appellant is likewise barred from making those complaints here. He did not give defense counsel the names of any of the relatives who testified at the evidentiary hearing about the alleged abuse. That lack of information coupled with Appellant's denial of abuse and his father's failure to mention it, supports the trial court's factual finding that Mr. Barnes investigation was reasonable and could not have uncovered the alleged abuse mitigation.

The trial court also correctly found that Mr. Barnes was not

deficient for failing to send an investigator to Liberty City. Appellant did not give Mr. Barnes the names of his brothers or cousins who testified at the evidentiary hearing. Further, Appellant's father told Mr. Barnes that he had disowned his sons and did not know where they were. Mr. Barnes had absolutely no indication that there was any abuse; thus, as he explained he had no leads taking him to Liberty City and any trip there would have been a fishing expedition, which he did not have the time to waste. Even if this Court finds that Mr. Barnes performed deficiently, relief cannot be granted unless the defendant establishes that he suffered actual prejudice due to the ineffectiveness of his trial counsel. "When evaluating claims that counsel was ineffective for failing to present mitigating evidence, this Court has phrased the defendant's burden [in establishing prejudice] as showing that counsel's ineffectiveness 'deprived the defendant of a reliable penalty phase proceeding.'" Asay v. State, 769 So.2d 974, 985 (Fla. 2000).

Prejudice cannot be established here because the penalty proceedings were not rendered unreliable by any deficiency. There is no possibility that this alleged abuse evidence would have outweighed the aggravating circumstances. In fact, as in Asay, this evidence would have opened the door to damaging cross-examination regarding Appellant's violent past. See

Asay, 769 So.2d at 988 (“[w]e have previously recognized that a defendant is not prejudiced by the failure to introduce this type of nonstatutory mitigation when it would have opened the door to testimony of the defendant's violent past), citing Breedlove v. State, 692 So.2d 874, 877-78 (Fla.1997). Here, Appellant’s experts and brothers testified on cross-examination about his prior convictions for rape and armed robbery.

Finally, when examining whether Appellant was prejudiced by the failure of counsel to present this nonstatutory mitigation, the Court must consider the nature of the aggravating and mitigating evidence presented in the penalty phase. The question is whether in light of this additional mitigation evidence it is "reasonably probable, given the nature of the mitigation offered, that this altered picture would have led to the imposition of a life sentence, outweighing the multiple substantial aggravators at issue in this case.” Rutherford v. State, 727 So.2d 216, 226 (Fla. 1998).

Here, the trial court found four (4) aggravating factors: (1) that the capital felony was committed by a person under sentence of imprisonment; (2) that Appellant has nine (9) prior violent felonies; (3) felony-murder (burglary); and (4) HAC. Appellant waived statutory mitigation and proffered the following as non-statutory mitigation: that Appellant’s father, who was unable to attend the trial, would have testified that

Appellant did well in school until his early teens when his older brother influenced him to run the streets and break the law; that Appellant's mother did not discipline him and allowed him to believe there would be no consequences for his behavior; and that Appellant's father loved him and would ask for a life sentence.

The trial court rejected that mitigation but did find Appellant's behavior at trial, as well as his entering prison at a young age to be mitigating. This Court agreed that, even viewing the mitigation in the light most favorable to Appellant, it did not support the jury's recommendation of a life sentence and paled in significance when weighed against the four aggravating factors, which included violent felonies such as kidnapping, sexual battery and seven armed robberies. Marshall v. State, 604 So.2d 799, 806 (Fla. 1992).

In Breedlove v. State, 692 So.2d 874, 877-78 (Fla. 1997), this Court concluded that the aggravating circumstances of prior violent felony, murder committed during the course of a burglary, and HAC overwhelmed the mitigation testimony presented concerning childhood beatings and alcohol abuse. Likewise, in Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997), this Court reasoned that where the trial court found substantial and compelling aggravation, such as commission while under sentence of imprisonment, prior violent felonies, commission during a

burglary, and CCP, there was no reasonable probability that the outcome would have been different had counsel presented additional mitigation evidence of the defendant's abused childhood, history of substance abuse and brain damage.

Applying those cases to the facts at hand, there is no reasonable probability that mitigation evidence about Appellant's allegedly abusive childhood would have led to the imposition of a life sentence by the trial judge. Finally, it is also significant to Appellant's ineffectiveness claim that the jury recommended life imprisonment in this case. A jury's recommendation of life imprisonment is a strong indication of counsel's effectiveness. See Francis v. State, 529 So.2d 670, 672 (Fla. 1988); Lusk v. State, 498 So.2d 902, 905 (Fla. 1986) ('the jury's recommendation cannot be alleged to have been produced by counsel's ineffectiveness"); Buford v. State, 492 So.2d 355, 359 (Fla. 1986).

B. APPELLANT WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO A COMPETENT MENTAL HEALTH EXAMINATION AND HIS COUNSEL WAS NOT INEFFECTIVE BY EMPLOYING DR. KLASS AS A MENTAL HEALTH EXPERT.

Appellant's claim that he was denied his constitutional right to a competent mental health examination when the trial court denied defense counsel's pre-guilt phase motion to appoint an alternative mental health expert (IB 37-40), is procedurally barred for failure to raise it on direct appeal. See Cherry v. State, 25 Fla.L.Weekly S719 (Fla. Sept. 28, 2000)(holding that

the claim of incompetent mental health evaluation is procedurally barred when not raised on direct appeal).

He also claims that trial counsel, Mr. Barnes, was ineffective for failing to properly use the assistance of mental health professionals in violation of Ake v. Oklahoma, 470 U.S. 68 (1985). Mr. Barnes did not present any mental health professional at the guilt or penalty phase of Appellant's trial. He testified that he employed Dr. Klass, a psychiatrist with excellent credentials and significant experience in the area of death penalty mental health mitigation, to evaluate Appellant. (R 2346-47). Dr. Klass was recommended by another Public Defender who had used him successfully on a case. (R 2346-47). Dr. Klass testified that Appellant initially refused to see him and that he had great difficulty conducting the interview. (R 2603-04). Appellant was the most "guarded" of anyone that he's interviewed and was very suspicious. (R 2604). Appellant denied that there were any family problems. (R 2605).

Dr. Klass was primarily retained to determine Appellant's competency to go to trial, but also to find any mitigating evidence. (R 2606-07). The doctor got very little mitigation evidence from Appellant. (R 2607). In determining whether there was statutory mitigation, Dr. Klass reviewed arrest reports and asked Appellant about his family, drug and alcohol history. (R 2607). Dr. Klass rejected statutory mitigation,

finding no evidence to support any of the statutory mitigators. (R 2607-08, 2386). Dr. Klass found that Appellant was not insane and was competent to stand trial. (R 2607-08). Appellant did not show any evidence of active psychosis and denied any head injuries. (R 2605, 2609). The only mitigating thing that Dr. Klass could find was the possibility of a thought disorder, paranoid schizophrenia. (R 2608, 2612).

Mr. Barnes chose to not call Dr. Klass to make that diagnosis because "he would have been blown out of the water" when the jury found out that he had only spent 1 hour with Appellant before coming up with that diagnosis. (R 2357, 2382-83). Mr. Barnes also did not want the details of Appellant's prior rape, attempted rapes and other crimes and bad acts to come out before the jury and judge on cross-examination. (R 2384, 2511-12). Mr. Barnes knew that any information relied upon by Dr. Klass in forming his opinions would be subject to cross-examination. See Jones v. State, 612 So.2d 1370, 1374 (Fla. 1992) (defense expert's reliance on defendant's "background" in diagnosing defendant as having a borderline personality disorder, opened the door for cross-examination by the state in to the specifics of defendant's background); Parker v. State, 476 So.2d 134, 139 (Fla. 1985) (defense expert's testimony that he based his opinion of the defendant's non-violent nature on the defendant's past personal and social

development history, including his prior criminal history, opened the door for cross-examination by the state into the defendant's prior criminal history).

Appellant's prior crimes and bad acts included: that Appellant raped and kidnapped a 13 year-old virgin, by literally dragging her off the streets of Miami to be gang raped; that Appellant, on October 11, 1986, struck another inmate over the head rendering him unconscious; that Appellant, on October 27, 1987, beat and choked an inmate who refused to have sex with Appellant; that Appellant, on December 12, 1987, attempted to rape an inmate by threatening him with a knife; that Appellant, on August 2, 1983, was convicted of grand theft of a motorcycle. The State had not brought out the details of Appellant's prior rapes and other crimes during the guilt or penalty phase and Mr. Barnes did not want to open the door to it. (R 2531).

Because Mr. Barnes was completely dissatisfied with Dr. Klass' evaluation of Appellant, he tried to obtain another mental health expert but the trial court denied his request. In addition to the mental health evaluation by Mr. Barnes obtained Appellant's school, prison, and mental health records for his investigation. The mental health records did not set off a red flag about a mental problem, nor did they reflect any overt symptoms of mental or emotional impairment. (R 2519-20). Mr. Barnes also asked whether Appellant had suffered any head

injuries, whether he had prior involvement with the criminal justice system, whether he had relationship, drug or alcohol abuse, and whether he had any physical or mental problems. (R 2342, 2510, 2500-04). Appellant denied that he suffered any head injuries or that he had any mental problems. (R 2500, 2502). He also denied that there was any family history of mental illness. (R 2503-04).

Mr. Barnes strategy for the penalty phase was to try and find anything good that could be said about Appellant to "humanize" him for the jury. Appellant's father was unable to attend the trial but defense counsel proffered that he would have testified that Appellant did well in school until his early teens when his older brother influenced him to run the streets and break the law; that Appellant's mother did not discipline Appellant and allowed him to believe there would be no consequences for his behavior; and that Appellant's father loved him and requested a life sentence for his son. Marshall v. State, 604 So.2d 799, 806 (Fla. 1992). The trial court rejected that mitigation but did find that Appellant's behavior at trial as well as his entering prison at a young age were mitigating. Id.

In support of his ineffectiveness claim, Appellant offered the testimony of Dr. Woods, a neuro-psychologist and Dr. Latterner, a neuro-psychiatrist, at the 3.850 evidentiary

hearing. As the trial court found, both doctors found that Appellant "has a full-scale IQ of 88, which is two points below 'low-normal.' He also has neuro-cognitive and neuro-psychological deficits." (R 1894-95, 1928). The experts' testimony establishes only that Appellant suffers from bipolar II disorder, but neither actually linked the disease to the commission of the crime. (R 1928, 2024-30). Further, the expert employed by Mr. Barnes, Dr. Klass, did not find any evidence of bipolar II disorder in his evaluation of Appellant. (R 2609). Both Dr. Woods and Dr. Latterner conceded that Appellant is not retarded and does not have organic brain damage. (R 1932, 1938, 2044-50). In fact, on some tests Appellant scored on the level of a second year college student and on others he scored in the 80th percentile. (R 1939). Appellant has the reading comprehension of an 11th grader and did okay on a test for impulse control. The experts' testimony was unreliable because Dr. Woods, the neuropsychologist, based her opinion upon her clinical judgment, not upon hard data. Dr. Klass testified that neuropsychological testing should not be relied upon to diagnose personality disorders. Dr. Woods was willing to opine that Appellant's mother was psychotic, based solely upon his review of her medical records from the time she went to the hospital claiming to be pregnant, even though she had a hysterectomy 13 years earlier. (R 2051-53). Appellant's

mother claimed that she felt “something moving inside of her.” (R 2052). However, it is clear that Appellant’s mother had a history of worms and had only a 6th grade education. (R 2059-62).

The trial court agreed that Mr. Barnes exhausted the possibility of mental health mitigation, and therefore his performance was not deficient, making the following findings of fact:

> [Mr. Barnes] determined that Joel Victor Klass, M.D., had been a “great” defense witness in another case. He obtained a court-ordered appointment of Dr. Klass as an expert to examine [Appellant’s] mental (psychiatric) condition. Mr. Barnes conferred with Dr. Klass and explained that he needed an evaluation of [Appellant] concerning [Appellant’s] competency to stand trial, his sanity at the time of the offense, and any penalty phase mitigators that might exist . . . .
>
> Dr. Klass examined [Appellant] for an hour or less after he reviewed the materials provided by Mr. Barnes. He found [Appellant] to be guarded and reluctant to give information except that everything in life was “o.k.” and that he had no problems. [Appellant] denied any history of family problems or abuse, but did admit that [he] had been in trouble several time sin the past including an assault on a thirteen year-old girl. He did not state he ever had any head injury.
>
> Dr. Klass could not uncover any evidence of an active psychosis and concluded that [Appellant] understood the criminal justice system. He concluded that [Appellant] was neither incompetent nor insane. He also considered potential mitigating

> circumstances and concluded that [Appellant] did not appear to be remorseful and that he had no family or personal history of drug or alcohol abuse. He did feel that [Appellant] was a paranoid schizophrenic.
>
> Mr. Barnes endeavored to contact Dr. Klass after his examination of [Appellant], but Dr. Klass would not return his phone calls. Mr. Barnes was thus unable to talk with him concerning developing mitigating evidence for trial. Dr. Klass sent Mr. Barnes a one-page report which stated that [Appellant] did not have any mental illness.
>
> Mr. Barnes petitioned the court to appoint an additional mental health expert, and the motion was denied. In the order denying the motion, the court ordered Dr. Klass to cooperate with Mr. Barnes, and Dr. Klass thereafter submitted a supplemental report. Mr. Barnes learned at the time that Dr. Klass had diagnosed [Appellant] as a paranoid-schizophrenic . . . .
>
> Because Dr. Klass had only spent one hour interviewing and examining [Appellant], Mr. Barnes decided not to call Dr. Klass to testify at the guilt-innocence phase of the trial so the jury would not learn of the short examination period or the apparent lack of interest he had shown in the defendant's case. He describes his overall experience with Dr. Klass in this case as "atrocious."
>
> [Mr. Barnes] also again elected not to call Dr. Klass [during penalty phase] because this would probably result in cross-examination concerning the rape of the 13 year-old girl, prison rapes by [Appellant] and the short amount of time Dr. Klass had spent examining [Appellant].

(R 2711-15).

The trial court's factual findings are supported by

substantial, competent evidence. Mr. Barnes' representation was not deficient. He employed a psychiatrist with excellent credentials and experience, who came highly recommended by another Assistant Public Defender in the office. Mr. Barnes could not have foreseen that Dr. Klass would have a complete lack of interest in the case and spend only one (1) hour interviewing Appellant. Mr. Barnes tried to obtain another mental health expert but the trial court denied his request. His decision to not call Dr. Klass was reasonable because he was trying to prevent a damaging cross-examination. Whether current counsel would have called Dr. Klass is immaterial, it does not matter what current counsel would have done. See Cherry v. State, 659 So.2d 1069, 1073 (Fla. 1995)(concluding that the standard is not how current counsel would have proceeded in hindsight).

"[T]rial counsel is not obligated to procure and present mental health experts as long as there is a valid reason for not doing so." Jones v. State, 732 So.2d 313, 320 (Fla. 1999). Where trial counsel conducts a reasonable investigation of mental health mitigation prior to trial and then makes a strategic decision to not present it, this Court affirms the decision as not deficient. Asay v. State, 769 So.2d 974, 985 (Fla. 2000). In Jones, the defendant was examined prior to trial by a mental health expert who gave an unfavorable

diagnosis. This Court held that defense counsel conducted a reasonable investigation, which was not rendered incompetent merely because the defendant secures more favorable mental expert testimony for his 3.850 evidentiary hearing. Similarly, in Rutherford v. State, 727 So.2d 216 (Fla. 1998), this Court agreed that defense counsel was not ineffective for making a strategic decision to not present possible mental mitigation, of which he was aware, in order to attempt to "humanize" the defendant for the jury. "Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected." Id. at 223 (citations omitted). In so finding, this Court relied upon the fact that neither expert connected the defendant's personality disorder with the crime itself.

Likewise, here, Mr. Barnes conducted a reasonable investigation into Appellant's mental health and made a strategic decision to not have the expert testify based upon his lack of interest, the short amount of time he spent interviewing the Appellant and to prevent damaging information from coming out on cross-examination. Further, neither Dr. Latterner nor Dr. Woods connected Appellant's bipolar II disorder with the murder. The fact that Drs. Woods and Latterner have a more palatable diagnosis, bipolar II disorder, does not render the initial diagnosis incompetent. See Rose v. State, 617 So.2d

291, 295 (Fla. 1993)(rejecting claim that initial findings of mental health experts was deficient simply because defendant obtains a different diagnosis now); Provenzano v. Dugger, 561 So.2d 546 (Fla. 1991)(finding no basis for relief by mere fact that defendant has found expert who can offer more favorable testimony).

Further, after reviewing the new information relied upon by Woods and Latterner, Dr. Klass' opinion was that Appellant was a sociopath (R 2611), which is not a mitigating circumstance. (R 2611). See Van Poyck v. State, 694 So.2d 686 (Fla. 1997); Ferguson v. State, 593 So.2d 508 (Fla. 1992); Carter v. State, 576 So.2d 1291, 1292 (Fla. 1989). His opinion is based on the records he reviewed before the evidentiary hearing, which were not available to him before he interviewed Appellant. (R 2613). Dr. Klass explained that there are certain criteria for making the diagnosis which are present in the materials provided to him; such as, comments that he didn't have feelings for others, cruelty, violent law-breaking, repeated offenses, no evidence of remorse, no empathy. (R 2634). It was also significant to his opinion that Appellant is a sociopath that his crimes in prison were sexually motivated. (R 2634).

As such, defense counsel's failure to call Dr. Klass as a witness cannot be deemed deficient. See Remeta v. Dugger, 622 So.2d 452, 455 (Fla. 1993)(finding that sentencing process was

not fundamentally unfair since the original mental health expert's testimony would not have been significantly different irrespective of the new information); Johnston v. Dugger, 583 So.2d 657, 660 (Fla. 1991)(upholding rejection of new mental health evaluations based on unwavering opinion of original doctor as well as evidence to contradict new evaluations).

Finally, even if this Court finds that Mr. Barnes performed deficiently, relief cannot be granted because Appellant has failed to establish actual prejudice. There is no possibility that the testimony regarding Appellant having bipolar II disorder would have outweighed the aggravating circumstances. It must also be remembered that the jury recommended life, which is a strong indication of counsel's effectiveness.

POINT III

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S BRADY CLAIM AFTER AN EVIDENTIARY HEARING (Restated).

An evidentiary hearing was held on Appellant's claim that the State withheld exculpatory information, during the guilt phase, in violation of Brady and knowingly presented false testimony in violation of Giglio.[5]

As noted under Point II, the standard of review for rulings on motions for postconviction relief following an evidentiary

[5] Brady v. Maryland, 373 U.S. 83 (1967) and Giglio v. U.S., 150 U.S. 150 (1972).

hearing is that "this Court will not 'substitute its judgment for that of the trial court on questions of fact, [ ] the credibility of the witnesses [and] the weight to be given to the evidence by the trial court,'" as long as the trial court's findings are supported by competent substantial evidence. Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997). See also Melendez v. State, 718 So. 2d 746 (Fla. 1998). Thus, while a trial court's ultimate conclusions of law are subject to plenary review, the underlying findings of fact are subject only to clear error review. Cade v. Haley, 222 F.3d 1298, 1302 (11th Cir. 2000).

Appellant's Brady and Giglio claims allege that the State withheld impeachment evidence; specifically, that Assistant State Attorney John Spiller, Martin Correctional Inspector Howard Riggins, and Department of Corrections Officer Ed Sobach promised inmates/witnesses George Mendoza and David Marshall (no relation to the Appellant), who are cellmates, that they would remain housed together in the prison system if they testified. Only George Mendoza testified at trial. At the outset, the State notes that this case cannot involve a Giglio claim because George Mendoza testified that the statement he gave to investigators right after the incident, as well as his testimony at the grand jury, during deposition and during trial was all true. (R 22430-32). Thus, there was no knowing presentation of

false testimony.

Turning to the Brady violation, it is clear that in order to prove a Brady violation, a defendant must show[6]:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991) (quoting

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[6] In Way v. State, 760 So. 2d 903, 910 (2000), this Court quoted Strickler v. Greene, 527 U.S. 263 (1999) stating:

> There are three components of a true Brady violation: [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.
>
> Strickler, 119 S.Ct. at 1948.

However, in order for evidence to be deemed “suppressed”, it is only reasonable for the defendant to prove he neither had the evidence nor was able to discover it through due diligence. If the defendant had the evidence, it could hardly be considered suppressed. In fact, in Way this Court recognized that where the evidence was available equally to the defense and State or that the defense was aware of the evidence and could have obtained it, the evidence had not been suppressed. Way, 760 So. 2d at 911. See, Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000) (reasoning that “[a]lthough the "due diligence" requirement is absent from the Supreme Court's most recent formulation of the Brady test, it continues to follow that a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.”).

United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989)). See, Strickler v. Greene, 119 S.Ct. 1936, 1948 (1999); U.S. v. Starrett, 55 F.3d 1525, 1555 (11th Cir. 1995); Jones v. State, 709 So. 2d 512, 519 (Fla. 1998). "[F]avorable evidence is material and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 435 (1995). Evidence has not been suppressed, and therefore, "'[t]here is no Brady violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence.'" Freeman v. State, 761 So. 2d 1055, 1061-62 (Fla. 2000) (quoting Provenzano v, State, 616 So. 2d 428, 430 (Fla. 1993).

Prejudice is shown by the suppression of exculpatory, material evidence, that is where "there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." Stickler, 119 S. Ct. at 1952. "Reasonable probability" is "a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985) (plurality); Kyles, 514 U.S. at 435. When pleading a Brady claim, a petitioner must show that counsel did

not possess the evidence and could not have obtained it with due diligence, **and** the prosecution suppressed the favorable, material evidence.

There is substantial, competent evidence supporting the trial court's ruling that there was no Brady violation in this case. All three of the state actors who allegedly made this promise to Mendoza and Marshall, i.e., Department of Corrections Officer Ed Sobach, Inspector Riggins and Assistant State Attorney Spiller, denied making any such promise at the evidentiary hearing and were not aware of anyone else making such a promise. (R 2474, 2557, 2580). Officer Sobach noted that he expressly asked them whether there statements were free and voluntary and they said "yes." (R 2475).

He had contact with Kerry Flack regarding these two inmates about a year prior to the evidentiary hearing. (R 2476). He thought they had angered someone by their efforts to stay together and that's why they were split up; he was concerned that it might be retaliation. (R 2477, 2480). He was prompted to go speak to her by a phone call from an attorney representing Marshall. (R 2481). He never told Kerry Flack that these inmates had been promised to be kept together. (R 2477). Riggins testified that it was not unusual for inmates to request to be kept together. (R 2562).

Sobach, Spiller and Riggins agreed that Mendoza and Marshall

were reluctant to testify because they feared retribution and were concerned for their safety. (R 2473, 2579). Mr. Spiller testified that Mendoza and Marshall twice requested to remain housed together for their safety. (R 2579). Spiller told them that he could not make that promise, that he had no authority to do that and that he wasn't going to risk his case by making their testimony dependent upon any promises. (T 2580-81). Importantly, Mendoza and Marshall were impeached at the evidentiary hearing with letters they had written to Mr. Spiller wherein they acknowledged that they understood that the State could not make them any promises but requested to remain housed together. (R 2433-36, 2456-57). As such, there was competent, substantial evidence supporting the fact that the State was not in possession of any exculpatory evidence. Further, it was not proven that this was "new" impeachment material that the defendant did not possess and could not have obtained with reasonable diligence. Mendoza testified at trial that he wrote a letter to Inspector Riggins thanking him for stopping a transfer of him to another facility and telling him that he wished to remain housed with David Marshall. (p. 2197, 2217, trial transcript). Thus, defense counsel was on notice about this information.

Finally, the record establishes that even if the allegation had been proven at the evidentiary hearing, there is no

reasonable probability of a different outcome in this case. First, the record establishes that the State's guilt phase case rested primarily on witness Frank Calabria and this allegation has nothing to do with him. Second, the jury heard Mendoza's testimony about wanting to remain housed with Marshall and the fact that he thanked Inspector Riggins for stopping a transfer of him to another facility. Third, it is not likely that the jury would have completely dismissed Mendoza's testimony if it heard about a promise of two inmates being kept together for security purposes. The jury would have understood that for security purposes the two inmates had to remain housed together.

POINT IV

THE TRIAL COURT CONDUCTED AN ADEQUATE CUMULATIVE ERROR ANALYSIS (Restated).

Appellant claims that his trial was unfair due to the errors pointed out here and on direct appeal which rendered the trial and sentencing results unreliable. Because the State maintains that the individual claims either are without merit, *a fortiori,* Pooler has suffered no cumulative effect which invalidates his sentence. See Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984) (reasoning defendant's "novel, though not convincing, argument that all nineteen points should be viewed as a pattern which could not be seen until after the trial, we hold that all but two of the points raised either were, or could have been,

presented at trial or on direct appeal. Therefore, they are not cognizable under rule 3.850"), sentence vacated on other grounds, 524 So. 2d 419 (Fla. 1988). There is no merit to the proposition that but for the alleged errors, a different result would have been obtained at trial.

POINT V

THE TRIAL COURT CORRECTLY DENIED AN EVIDENTIARY HEARING ON APPELLANT'S REMAINING CLAIMS (Restated).

The trial court did not err by summarily denying the remaining claims in Appellant's 3.850 motion. The standard of review for summary denials is that the decision will be affirmed where the law and competent substantial evidence supports the trial court. Diaz v. Dugger, 719 So.2d 856, 868 (Fla. 1998); Lopez v. Singletary, 634 So.2d 1054, 1056 (Fla. 1993). "[A] defendant is entitled to an evidentiary hearing on a postconviction motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient." Freeman v. State, 761 So.2d 1055, 1061 (Fla. 2000). An evidentiary hearing is also not warranted if the court states its rationale for summarily denying the claim in its order. Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993).

Appellant argues that the trial court erred by summarily denying Claims I, V, XXI, XXII, XXVI and XXVII, on the ground

that the motion and records in the case conclusively show that Appellant is not entitled to relief. (R 1829). Appellant also argues that the trial court erred by summarily denying the remaining claims on the ground that they are procedurally barred. (R 1829). The State's first argument is that Appellant is barred from raising Claims I, II, V, VI, VII, VII, X, XII, XIII, XIV, XVI, XVIII, XIX, XX, XXI, XXII, XXIV XXVI, and XXVII because he failed to brief any argument on those claims. In Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990), this Court rejected an attempt to raise a claim without briefing the issue, noting:

> Duest also seeks to raise eleven other claims by simply referring to arguments presented in his motion for postconviction relief. The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.

Id. at 851-52. Similarly, here, Appellant's attempt to raise these claims without briefing must be rejected. Nonetheless, the State will demonstrate that each claim was correctly summarily denied. The State also notes that there are several grounds supporting the summary denial of each claim; thus, if one applies that was not mentioned by the trial court, its decision must still be affirmed on the ground of being "right for the wrong reason." See Caso v. State, 524 So. 2d 422, 424

(Fla. 1988) (determining that "[a] conclusion of decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it").

The trial court properly denied Claim I without an evidentiary hearing. Claim I asserts that state agencies are withholding public records in violation of Chapter 119, Florida Statutes. The claim is legally insufficient as it fails to allege what documents are being withheld and/or how they affect the validity of his judgment and sentence. Prior to requiring Appellant to file his present Motion for Postconviction Relief, the trial court conducted and completed extensive proceedings to ensure compliance with Florida's public records law. Accordingly, this request is not only legally insufficient but also is not a proper ground for postconviction relief and was correctly summarily denied.

In Claim V (IB 76), Appellant asked that the ethical rule relating to juror interviews be found unconstitutional. It was also properly summarily denied as facially insufficient. First, Appellant has no standing to challenge a rule of professional conduct that was promulgated by this Court and that applies only to his attorneys. Second, his challenge is based upon speculation regarding what jurors might say if defense counsel were allowed unfettered access to jurors. Third, Appellant's

collateral counsel obviously felt unimpeded by this ethical rule, since they interviewed Appellant's jurors without the trial court's permission, citing to the ethical rule for authority. Therefore, summary denial of this claim was also proper.

In Claim XXI (IB 76), Appellant alleges that his trial counsel was ineffective for failing to move for a change of venue. Appellant acknowledges that the trial court questioned the venire about pretrial publicity, but faults the trial court for denying defense counsel's motion to sequester the individual jurors who had been exposed to publicity. Nowhere in this claim, however, does Appellant show that the trial court could not seat an impartial jury because of the publicity. Nor does he point to any juror who sat who had been prejudiced by the publicity.

In fact, Appellant does not allege any prejudice whatsoever from trial counsel's failure to move for a change a venue or from the trial court's failure to grant sequestered voir dire. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not

conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant."). Therefore, this claim is legally insufficient on its face. See Caso, at 424 (determining that "[a] conclusion of decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it.").

Moreover, Claim XXI (IB 76), is conclusively refuted by the record. The trial court undertook extensive procedures to weed out jurors who were tainted by pretrial publicity. The court granted the defense motion for individual voir dire. On page 192 of the record the court ruled:

> The motion for individual sequestration of jurors is granted to this extent, that is, the Court will examine jurors out of the presence of the panel of potential jurors if one of three things happens: the juror indicates some prior knowledge of the case, the juror requests to be examined out of the presence of the other jurors or the juror expresses concern about the death penalty law. Otherwise the motion is denied.

The trial court did conduct individual voir dire when called for under this procedure. This process produced a fair and impartial jury. Appellant had failed to allege, much less show otherwise. As such, an evidentiary hearing is not required.

In Claim XXII, Appellant contends that he would have been "clearly prejudiced had" jurors seen that he was shackled during his trial. Given his failure to allege that any jurors did, in

fact, see him in shackles, this claim is facially insufficient. Moreover, this claim is procedurally barred since he could have raised it on direct appeal. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) ("Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal."). Regardless, the record reveals that prior to selection of the jury defense counsel objected to the Defendant being shackled, and the trial court ordered the shackles removed. (Trial transcript 224). The trial court also stated for the record that there would be no shackles seen by the jury, but noted that there could be no prejudice because the jury would know that the defendant was presently a prisoner due to the nature of the case. As such, this claim was also properly denied without an evidentiary hearing.

In Claim XXVI (IB 76), Appellant alleges that his collateral counsel is rendering ineffective assistance of counsel because their office is underfunded. As a result, Appellant asks for an indefinite period of time in which to be allowed to amend the Motion for Post Conviction Relief. This Court has held that "claims of ineffective assistant of postconviction counsel do not present a valid basis for relief." Lambrix v. State, 696 So.2d 247, 248 (Fla. 1996). Therefore, the trial court properly denied this claim without an evidentiary hearing.

In Claim XXVII (IB 76), Appellant argues that he has newly discovered evidence to show that death in Florida's electric chair would constitute cruel and unusual punishment. This claim is made prematurely in the post conviction process. Further, this Court has rejected this claim based on the same newly discovered evidence. Remeta v. State, 710 So.2d 543 (Fla. 1998); Jones v. State, 701 So.2d 76, 80 (Fla. 1997); Buenoano v. State, 565 So.2d 309 (Fla. 1990). The trial court properly denied this claim without a hearing.

In Claim II, Appellant alleges that he was denied effective assistance of trial and/or appellate counsel and full review by this Court because the record on appeal contains omissions, and is thus unreliable. This claim is not a proper ground for postconviction relief. Florida Rule of Criminal Procedure 3.850 states that, "[t]his rule does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of judgment and sentence."

This Court based its decision in this case on the record below, which sufficed for the purpose of direct appeal. Appellant's claim directly addresses an appellate issue, not a ground for postconviction relief. Further, ineffectiveness of appellate counsel is not a ground for postconviction relief under rule 3.850. A claim for relief predicated on ineffective

assistance of appellate counsel can be granted only by habeas corpus in the appellate court. Smith v. State, 400 So.2d 956 (Fla.1981). Finally, Appellant's claim is facially insufficient because he has failed to show any errors that occurred during those proceedings that were omitted from the record on appeal. Cf. Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla. 1994); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993); Turner v. Dugger, 614 So. 2d 1075, 1079-80 (Fla. 1992).

Claim IV was likewise properly denied without an evidentiary hearing. Appellant claims that counsel was ineffective for failing to advise the trial court that its inquiry regarding waiving statutory mitigation was defective under Faretta v. California, 422 U.S. 806 (1975). To begin with, it is clear that Appellant did not waive the presentation of mitigating evidence; thus warranting a Koon inquiry. Instead, all Appellant stated was that he did not have any evidence to present on the statutory mitigators, except for the "catch-all" which he specifically asked for. Collateral counsel tries to negate the impact of the Defendant's personal waiver of statutory mitigation by claiming error by the trial court. The claim is procedurally barred. Error by the trial court, if any exists, could have been raised on appeal. Maharaj v. State, 684 So.2d 726, 728 (Fla.1996); Johnson v. Singletary, 695 So.2d 263, 265 (Fla.1996); Robinson v. State, 707 So.2d 688 (Fla. 1998).

In a real Faretta situation, i.e., where a trial court denies a defendant the right to waive trial counsel, no objection is necessary by the Defendant's attorney; the matter is subject to direct appeal. See Brooks v. State, 703 So.2d 504 (Fla. 1st DCA 1997).

To overcome the procedural bar, Appellant recasts the claim as one of ineffective assistance of counsel. But doing so is improper. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) ("Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal."). Finally, this claim is meritless: Marshall has presented no authority to support his claim that a full-blown Faretta inquiry is necessary when the Defendant seeks to waive statutory mitigation. None exists. Therefore, the trial court properly denied this claim without an evidentiary hearing.

In Claim VI, Appellant challenges the trial court's order allowing witnesses to testify anonymously at his trial. In a single sentence, he also claims that counsel was ineffective "to the extent that he failed to object or effectively argue" this issue. However, trial counsel did, in fact, object to this procedure and Appellant raised it on direct appeal:

> Marshall first claims that the court erred in permitting an inmate to testify identified only by number, not by name. The court instituted this procedure in an effort

> to protect the identity of the witness, who feared reprisals from the inmate population for becoming a “snitch” by testifying for the State. Marshall argues that his right to cross-examination was infringed and that the jury was allowed to infer that he personally posed a threat to the witness because the jury was never apprised of the reason for the witness's anonymity. The record reveals that the court stated that it would not offer a curative instruction on its own initiative but that it would entertain a request by the defense; defense counsel declined. Because the defense was affirmatively presented with the opportunity to request a curative instruction and chose not to do so, Marshall cannot now complain that the jury was never informed of the reason for the number procedure.
>
> Furthermore, the defense always knew the true name and identity of this witness, and therefore the fact that the witness testified as "Number 29" did not hamper cross-examination or the defense's ability to investigate the background of the witness. Cf. Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968) (right to cross-examination significantly infringed where defense was not provided name or address of witness). **Contrary to Marshall's assertions, we do not find the jury was led to believe that a threat of reprisal from Marshall was the reason for the witness testifying anonymously.** Cf. Ponticelli v. State, 593 So.2d 483 (Fla.1991) (fear of reprisal from general inmate population unlikely to imply witness feared reprisal from defendant). We therefore find Marshall is not entitled to relief on this issue.

Marshall v. State, 604 So.2d 799, 802-3 (Fla. 1992) (emphasis added).

This claim is procedurally barred. Robinson v. State, 707

So.2d 688, 700 (Fla. 1998) (finding argument regarding jury instruction on weighing testimony procedurally barred since issue was raised and rejected on direct appeal). The trial court correctly denied it without an evidentiary hearing.

In Claim VII, Appellant alleges ineffective assistance of counsel for failing to object to prosecutorial misconduct in opening statement. Despite counsel's failure to object, Appellant raised this issue on direct appeal:

> Finally, we reject Marshall's claim that the prosecutor made comments vouching for the credibility of state witnesses during his opening statement that were so prejudicial as to require a new trial. These comments included the State's assertion that the State had overcome great obstacles in getting inmates to "truthfully tell what has occurred," and that inmates operate under a "code of silence" but that they have "a residual core of humanity." The record shows that the defense neither objected nor requested a curative instruction nor moved for mistrial. Because these remarks do not constitute fundamental error, this issue is not cognizable in this appeal.

Marshall v. State, 604 So.2d 799, 805 (Fla. 1992).

Despite Appellant's attempt to recast this claim as one of ineffective assistance of counsel, it nevertheless remains procedurally barred. As this Court said in Medina v. State, 573 So.2d 293, 295 (Fla. 1990), "it is inappropriate to use a different argument to relitigate the same issue." See also Valle v. State, 705 So.2d 1331 (Fla. 1997) (finding claim that

counsel was ineffective for failing to object to alleged prosecutorial misconduct procedurally barred and an improper attempt to recast barred claim as one of ineffectiveness); Robinson v. State, 707 So.2d 688, 697-98 n.17 (Fla. 1998) (same).

Regardless, this Court found on direct appeal that the State's comments were not fundamentally erroneous, i.e., that they did not vitiate the entire proceedings. As a result, Appellant cannot prove under Strickland that he was prejudiced by these same comments, i.e., that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Cf. White v. State, 559 So.2d 1097 (Fla. 1990) (finding no prejudice from counsel's failure to object where court had rejected fundamental error challenge on direct appeal).

Finally, even were this claim not procedurally barred, the record conclusively refutes it. First, the State's main inmate witness, Frank Calabria, whom the State called last, was no longer incarcerated. Therefore, any comment regarding how difficult it is to get inmates to testify because of their incarceration status did not apply to him.

Second, Calabria, whose testimony appears at p. 2420 (trial transcript), established the State's case. He testified as follows: Calabria heard loud muffled noises from the air shaft

connecting to victim's cell below. He immediately got up, went downstairs and saw a towel over the window of the victim's cell. He saw the Defendant leave the cell after the noises stopped. The Defendant was naked from waist up and sweating. Calabria saw blood on Defendant's arms, chest and hands. He saw the Defendant stop at a pile of linen that was sitting on the floor and pick up a blue state-issue jacket. He saw the Defendant leave the sallyport. He later saw the Defendant re-enter the victim's cell and close the door immediately behind him. Again, Calabria heard loud moaning noises for four to five minutes which he recognized to be the voice of the victim. After five minutes it became quiet, and he saw the Defendant come out of the cell and close the door immediately behind him. Again Calabria saw blood on the Defendant. The Defendant went to the sallyport, crouched down, and snuck out once again. No other state witness provided this amount of detail.

The record, specifically the comments complained of at p. 1590 and the testimony of Frank Calabria at p. 2420, conclusively refutes the Defendant's claim. Therefore, the trial court properly denied Appellant's claim without an evidentiary hearing.

In Claim VIII, Appellant argues that the "felony murder" aggravating factor is unconstitutional because it creates an "automatic" aggravator upon a conviction for first-degree murder

based on a felony murder theory. The record reflects that trial counsel filed a motion to declare this aggravating factor unconstitutional, and this Court denied it. R. 179. Then, Marshall raised this issue on direct appeal, and this court denied it. Marshall v. State, 604 So.2d 799, 805 n.5 (Fla. 1992). Therefore, this claim is procedurally barred. Medina v. State, 573 So.2d 293, 295 (Fla. 1990).

To the extent Marshall claims in a single conclusory sentence that trial counsel was ineffective for failing to raise this claim, "it is inappropriate to use a different argument to relitigate the same issue." Id. Regardless, trial counsel did challenge this aggravator. Thus, he cannot be deemed ineffective. As a result, the trial court properly denied the claim without an evidentiary hearing.

In Claim X, Marshall complains about the State's closing argument wherein the prosecutor stated, "By his crime upon Jeffrey Henry we now know that even the prisoners in the State of Florida cannot be safe with that man in their presence." Marshall contends that the State argued Marshall's future dangerousness as nonstatutory aggravation. This claim is procedurally barred, however, since Marshall could have raised it on direct appeal. See Medina v. State, 573 So.2d 293, 295 (Fla. 1990). To the extent Marshall alleges ineffective assistance of counsel to overcome the bar, this is improper.

Id. He may not recast a barred claim as one of ineffectiveness of counsel. Id.

Regardless, the State's comment was not improper. It related to the aggravating circumstance of a murder being committed by a person under sentence of imprisonment. Also, the comment was made to a jury who recommended a life sentence. Even if the comment were improper and trial counsel failed to object, no prejudice can be shown.

Collateral counsel also claims that the trial court, by referencing Defendant's prior escape conviction in its sentencing order, based his sentence of death on a consideration of future dangerousness. The trial court's sentencing order, however, shows that it considered the Defendant's prior escape as an additional prior violent felony. As stated above, the prior escape involved the Defendant's brother showing up in a Miami courtroom with a gun to free the Defendant. This issue was raised and litigated on appeal. With regard to this issue the Florida Supreme stated:

> Turning to the penalty phase, Marshall first alleges numerous errors in the judge's sentencing order that require a new penalty phase. We agree that the trial court erred in its consideration of a prior conviction for escape. Defense counsel had expressly waived the mitigating circumstance of no significant prior criminal history, and a conviction for escape does not qualify as a statutory aggravating factor of "another capital felony or of a felony involving the use or threat of violence" under section

> 921.141(5)(b), Florida Statutes (1987). Lewis v. State, 398 So.2d 432, 438 (Fla.1981). However, in light of Marshall's other nine prior violent felony convictions, we find the error harmless beyond a reasonable doubt.

Marshall v. State, 604 So.2d 799, 805 (Fla. 1992). Therefore, this claim is procedurally barred. A motion for post conviction relief is not a forum to relitigate appellate issues. Medina, 573 So.2d at 295.

In Claim XII, Appellant complains that this Court failed to properly evaluate the mitigation in this case. In this claim, collateral counsel proceeds to reargue for a life sentence. The trial court has no ability to question this Court's review of Appellant's sentence; thus, it was not a proper claim for post conviction relief. Hardwick v. Dugger, 648 So. 2d 100, 103 (Fla. 1994) ("[T]he trial court has no authority to review the actions of [the Florida Supreme] Court."); Maharaj v. State, 684 So.2d 726, 728 (Fla.1996); Johnson v. Singletary, 695 So.2d 263, 265 (Fla.1996); Robinson v. State, 707 So.2d 688 (Fla. 1998).

In Claim XIII, Appellant complains that this Court improperly applied the heinous, atrocious or cruel aggravating factor. This claim was raised on appeal:

> Marshall next argues that the trial court erred in finding the murder to be heinous, atrocious, or cruel. The record shows that Marshall attacked the victim twice, and that the victim was at least partially conscious during the second attack. He was struck six times on the back

> of the head, and witnesses heard him plead for mercy. We find this circumstance supported by the evidence beyond a reasonable doubt.

Marshall v. State, 604 So.2d 799,805 (Fla. 1992). Therefore, it is procedurally barred.

In Claim XIV, Appellant alleges that the trial court's instructions to the jury improperly shifted the burden to him to prove that death was not an appropriate sentence. This claim is procedurally barred since Appellant could have raised it on appeal. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) ("Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal."). To overcome the bar, Appellant claims that trial counsel was ineffective for failing to raise this issue in the trial court. It is improper, however, to recast a barred claim as ineffective assistance of counsel. Id. Regardless, counsel cannot be ineffective for failing to raise a nonmeritorious claim. See Chandler v. Dugger, 634 So. 2d 1066, 1067 (Fla. 1994). This Court has repeatedly rejected similar claims by other defendants. E.g., Brown v. State, 565 So. 2d 304, 308 (Fla. 1990) ("Contrary to Brown's contention, we do not find that, on their totality, the standard instructions impermissibly put any particular burden of proof on capital defendants.").

In Claim XV, Appellant once again seeks to reargue the

merits of whether an override was appropriate in this case. This claim is procedurally barred. Robinson v. State, 707 So.2d 688 (Fla. 1998); Maharaj v. State, 684 So.2d 726, 728 (Fla.1996); Johnson v. Singletary, 695 So.2d 263, 265 (Fla.1996).

In Claim XVI, Appellant claims that the trial court rendered defense counsel ineffective when it failed to grant his motion for a larger jury venire. This is an appellate issue couched in language of ineffective assistance of counsel. As such, it is procedurally barred. Robinson v. State, 707 So.2d 688 (Fla. 1998); Maharaj v. State, 684 So.2d 726, 728 (Fla.1996); Johnson v. Singletary, 695 So.2d 263, 265 (Fla.1996).

In Claim XVIII, Appellant argues that he is innocent of first-degree murder since the record shows that he committed this murder in self-defense. This claim does not allege any newly discovered evidence; it simply reargues the trial evidence. As such it is procedurally barred. Robinson v. State, 707 So.2d 688 (Fla. 1998); Maharaj v. State, 684 So.2d 726, 728 (Fla.1996); Johnson v. Singletary, 695 So.2d 263, 265 (Fla.1996).

Also in this claim, Marshall argues that he is innocent of the death penalty. To support this claim, he contends that his "heinous, atrocious, or cruel" instruction is unconstitutional, that the "felony murder" aggravating factor, standing alone,

cannot support a death sentence, and that his sentence is disproportionate to those of other defendants under similar circumstances. His claims regarding the HAC instruction and the "felony murder" aggravator is procedurally barred since he should have raised these issues on appeal. Pope v. State, 702 So.2d 221 (Fla. 1997) (finding constitutional challenge to HAC instruction procedurally barred unless specific objection is made at trial on that ground and pursued on appeal); Harvey v. Dugger, 656 So.2d 1253, 1258 (Fla. 1995). As for the proportionality of his sentence, this too is procedurally barred since he raised this issue on appeal: "Finally, we do not find the death sentence disproportionate in this case. The facts of this case, including the four strong aggravating circumstances compared to the weak mitigation, render the death sentence appropriate and proportional when compared to other cases. Accordingly, we affirm Marshall's conviction for first-degree murder and the resulting death sentence." Marshall v. State, 604 So.2d 799, 806 (Fla. 1992) (citations omitted).

In claim XIX, Appellant claims that his death sentence is based on unconstitutional prior convictions and that trial counsel was ineffective for failing to litigate this claim. He does not support this claim, however, with any specific allegations. He claims that he is unable to do so because collateral counsel has insufficient funds to investigate this

claim. This claim is therefore conclusory and facially insufficient. Knight v. State, 394 So.2d 997, 1001 (Fla. 1981).

In Claim XX, Appellant alleges that Florida's death penalty statute, section 921.141, is unconstitutional. This claim is procedurally barred. It was raised by trial counsel and litigated on direct appeal: "We reject Marshall's claims that the death penalty statute and the aggravating circumstances are unconstitutional." Marshall v. State, 604 So.2d 799, 805 n.5 (Fla. 1992).

In Claim XXIV, Appellant alleges that charging him with both premeditated and first-degree felony murder violated his constitutional rights. He concedes that he raised this claim on direct appeal. It is therefore procedurally barred. To overcome the bar, Marshall claims that recent case law authorizes reconsideration of this claim. Specifically, he urges that the issue must be re-addressed in light of Schad v. Arizona, 501 U.S. 624 (1991). Schad does not change the law in this area. Schad does not warrant readdressing this issue. In Schad, the United States Supreme Court was presented with two questions: whether a first-degree murder conviction under jury instructions that did not require agreement on whether the defendant was guilty of premeditated murder or felony murder is unconstitutional, and whether the principle recognized in Beck v. Alabama, 447 U.S. 625 (1980), entitles a defendant to

instructions on all offenses that are lesser than and included within a capital offense as charged. The Court answered each question in the negative.

Marshall seeks access to Grand Jury testimony to determine which theory the Grand Jury relied upon. This request is unnecessary and improper.

Appellant's last claim, Claim XXV, alleges that Appellant is "insane" and cannot be executed. Appellant conceded in his 3.850 motion that this issue is not ripe and the claim was properly summarily denied.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State requests that this Honorable Court **AFFIRM** the trial court's order denying Appellant's motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was sent by United States mail, postage prepaid, to MELISSA MINSK DONOHO, Special Asst. CCRC-South, Office of the CCRC-South, 101 N.E. 3d Avenue, Suite 400, Fort Lauderdale, Fl. 33301, this 29th day of May, 2001

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DEBRA RESCIGNO
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