**IN THE SUPREME COURT OF FLORIDA**

**RANDALL SCOTT JONES,**

**Appellant,**

**vs.** **CASE NO. SC00-1492**

**STATE OF FLORIDA,**

**Appellee.**

**_____/**

**ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR PUTNAM COUNTY, FLORIDA**

# ANSWER BRIEF OF THE APPELLEE

**ROBERT A. BUTTERWORTH**
**ATTORNEY GENERAL**

**CAROL M. DITTMAR**
**Assistant Attorney General**
**Florida Bar No. 0503843**
**2002 North Lois Avenue, Suite 700**
**Tampa, Florida 33607-2366**
**(813) 801-0600**
**FAX (813) 356-1292**

**COUNSEL FOR APPELLEE**

## TABLE OF CONTENTS

## TABLE OF CITATIONS

## STATEMENT OF THE CASE AND FACTS

The facts of this case are summarized in this Court's opinion in Jones' direct appeal, Jones v. State, 569 So. 2d 1234 (Fla. 1990):

> During the evening of July 26, 1987, Jones and his codefendant, Chris Reesh, went target shooting with a 30-30-caliber rifle near Rodman Dam in Putnam County. Jones's car became stuck in the sand pits. At about midnight, they flagged down a fisherman who was leaving the area and asked if he could pull them out. The fisherman indicated that he could not but told them to seek help from the driver of a Chevrolet pickup truck parked in the parking lot. Inside the cab of the pickup Matthew Paul Brock and Kelly Lynn Perry were sleeping.
>
> Between 12:30 and 1:30 a.m., a twelve-year-old boy who was camping at the Rodman Dam Campground awoke to the sound of three gunshots fired in rapid succession. Later that morning, a Rodman Dam concession worker noticed cigarette packets, broken glass, and blood in the parking lot. She followed a trail of blood and drag marks across the parking lot for about 160 yards to a wooded area where she discovered Brock's body lying in the underbrush. She called the Putnam County Sheriff's Office. During the search of the area, deputies discovered Perry's partially clothed body about twenty-five feet deeper into the underbrush.
>
> At trial, Dr. Bonofacia Flora, a forensic pathologist, testified that Brock died instantly from two wounds to the head from a high-powered rifle. Perry died from a single shot to the forehead, also caused by a high-powered rifle.
>
> Matthew Brock's brother and sister-in-law testified to having seen the victim's pickup, while in Jones's possession, parked at a convenience store in Green Cove Springs at approximately 7 a.m. on July 27. They observed bullet holes in the windshield and

a 30-30-caliber rifle inside. Richard Brock confronted Jones, who was a stranger to him, and asked him where he got the truck. Jones told him he had just purchased the truck for $4,000 and drove away.

On August 16, Jones was arrested in Kosciusko, Mississippi, by the Mississippi Highway Patrol for possession of a stolen motor vehicle. The next day, Detective David Stout and Lieutenant Chris Hord of the Putnam County Sheriff's Office interviewed Jones in Mississippi. Lieutenant Hord testified that after advising Jones of his *Miranda* rights, Jones gave a statement implicating himself at the scene but blaming Reesh for having shot both victims. Jones admitted driving the pickup to Mississippi, where he planned to get rid of it. In addition to signing a waiver-of-rights form, Jones also signed a consent to search the trailer in which he had been living at the Lighthouse Children's Home in Mississippi. In the trailer, Detective Stout recovered pay stubs from Perry's employer in Palatka bearing her fingerprint. A calendar bearing Perry's name was also recovered from the bottom of a nearby dumpster.

On August 20, Jones was transported from Mississippi to Florida. Lieutenant Hord testified that at the outset of the trip, he reminded Jones that his *Miranda* rights were still in effect. Jones then volunteered a second statement which was reduced to writing and signed after their arrival at the Putnam County jail. In this statement, Jones admitted that his earlier statement was true, except that he had reversed his and Reesh's roles in the murder.

The state's case was completed with the testimony of Rhonda Morrell, who was Jones's ex-fiancee. She testified that Jones had told her that he had taken her father's rifle for target shooting and that "he had shot those two people. He didn't remember doing it, but he had done it." She also testified that Jones had told her that he had pawned the rifle, and she identified Jones's signature on a pawn ticket dated

> August 19, 1987. The rifle was retrieved from a Jacksonville gun and pawn shop.
>
> Jones offered no evidence during the guilt phase. The jury returned guilty verdicts on all charges.
>
> During the penalty phase, Jones presented the testimony of Dr. Harry Krop, a forensic psychologist, who diagnosed Jones as having a borderline personality disorder. He testified that Jones's stepmother described Jones as "almost like an animal." At the age of eleven, Jones was hospitalized for three weeks for psychiatric treatment. He was diagnosed as a borderline schizophrenic due to his difficulty dealing with reality and his environment. After his release from the hospital, a court adjudicated Jones dependent, later delinquent, and finally referred him to a children's home.

569 So. 2d at 1235-36 (footnote omitted). Following the trial, the jury recommended, and the court imposed, two death sentences for the murders of Brock and Perry. On appeal, this Court found that the following penalty phase errors warranted a new sentencing proceeding: the giving of a jury instruction on the heinous, atrocious, or cruel aggravating factor; the admission of improper testimony by the victims' relatives; the jury's inability to consider the potential sentence of imprisonment; and the introduction of evidence of lack of remorse. 569 So. 2d at 1240.

Prior to the resentencing, a hearing was held on a motion filed by the State requesting that a psychological expert

examine Jones, which the trial court denied (RS. V1/57-84).[1] After the judge announced that he was denying the State's motion, the prosecutor asked if he should prepare an order, or if the court would be preparing its own (RS. V1/79). The judge advised that the prosecutor could prepare the order, and run it by defense counsel (RS. V1/79). The prosecutor indicated that he would prepare a proposed order for consideration (RS. V1/79).

The resentencing proceeding was held in March, 1991. Once again, Dr. Harry Krop, a clinical psychologist, testified for the defense as to mitigation. Krop had conducted evaluations of 425 first degree murder defendants, and had testified in about 35 to 40 of their cases (RS. V5/810, 814). Krop had seen Jones on four occasions: October 27, 1987; March 8, 1988; February 20, 1991; and March 6, 1991 (RS. V5/816). Krop explained his interview process, getting as much history as possible and conducting a mental status exam (RS. V5/817). In addition, in this case, Krop performed extensive testing, including intellectual, neurological, and personality testing (RS.

[1]References to the record from Jones' resentencing appeal, Florida Supreme Court Case No. 78,160, will be cited as "RS." followed by the appropriate volume and page number; references to the record in this postconviction proceeding, Florida Supreme Court Case No. SC00-1492, will be cited as "PC." followed by the appropriate volume and page number.

V5/817). He tested Jones on two of the four times they met; the other two times were primarily interviews (RS. V5/817-818).

Dr. Krop noted that he was fortunate in this case to have had a great deal of background material to review (RS. V5/818). He had been given some background information before he first met Jones, and then had been provided with a lot of additional materials at a later time (RS. V5/818). He recalled having reviewed documented psychological records, jail records, school records from elementary through high school, juvenile and HRS records, psychological reports from Dr. Cosma and Dr. Rodriguez, records from Morton Plant psychiatric facility where Jones had been admitted on two different occasions, investigative reports relating to the murders, a neurological report, a presentence investigation, administrative military records (although he noted that he was not able to get any military psychological records), depositions, and the entire trial transcript (RS. V5/818-820). In addition, Krop stated that although family members were unfortunately not available to speak with him, he did interview several people familiar with Jones' background, including Ashley Jeter from Rodeheaver Boys Ranch; Judy Watson, a teacher; and Captain Miller from the Palatka Police Department (RS. V5/818-819). Moreover, Krop felt comfortable relying on the self-history which Jones provided because there were records

documenting Jones' mental history and reports by his father, step-mother, and mental health experts; Krop had talked to a former teacher and others that had known Jones; the psychological testing revealed that Jones' validity scales were normal; and Jones had not denied his culpability, but had admitted his involvement from the beginning, which was unusual for someone charged with a crime such as this (RS. V5/823-825). According to Krop, there were no significant discrepancies between Jones' verbal report and the other factual information which Krop had access to, so Krop did not believe that Jones' self-report was particularly self-serving (RS. V5/825).

Dr. Krop offered extensive details about Jones' background and childhood. Jones' parents were divorced when he was young, and he lived with his mother until he was five years old (RS. V5/826). There were no records from that time, and Jones only remembered being alone a lot and out on the street unsupervised (RS. V5/826-827). Jones came to live with his father at five or six and, according to the father and step-mother, Jones was very primitive and animalistic; he had no table manners, no social skills, was not potty-trained, and had difficulty getting along with his peers and with other people in general (RS. V5/827-828). He would throw his food, then eat too much and throw up (RS. V5/828).

Although his behavior improved somewhat as he learned more appropriate social skills, he continued to exhibit problems, and his parents took him to a psychiatrist when he was eleven (RS. V5/828). He was diagnosed with a schizophrenic reaction to childhood and hospitalized at a psychiatric facility for three weeks; about a month or so after his release, he was hospitalized again (RS. V5/829). He was then treated on an outpatient basis, but continued to have problems (RS. V5/829). Jones was sent to live at Lighthouse Children's Home in Alabama, a religious oriented home for behavior problems, for about a year and a half from 1981 to 1983 (RS. V5/829). Six months after he returned home, his family still could not deal with him, and he was sent to Rodeheaver Boys Ranch in January, 1984 (RS. V5/829). He was released from the boys ranch on April 24, 1986, with the idea that it would be in his best interest to join the military, which he did (RS. V5/829-830). He had graduated from high school and had done well enough academically to join the military (RS. V5/830). Krop noted that Jones was never really successful at anything except school (RS. V5/830). He did not do well in the military; he had adjustment difficulties, and saw a mental health professional four or five times (RS. V5/831). He was given an honorable discharge under general conditions, which is less than satisfactory adjustment,

and was released from the military on May 1, 1987 (RS. V5/831, 834).

Jones moved to Clearwater and worked for several weeks, but then returned to Palatka in order to get back together with his girlfriend (RS. V5/834-835). He got a job where his girlfriend worked at Wal-Mart, but was asked to leave for fraternizing with other employees (RS. V5/835). He was unemployed from that time until committing these murders in July (RS. V5/835). His relationship with his girlfriend was unstable; they talked about marriage, but his girlfriend's mother committed suicide and the girlfriend broke off their engagement a few weeks before the murders (RS. V5/835). In addition, his father died after an extended illness in January, 1987, which contributed to Jones' depression as well as his decision to leave the military, as that was something that his father had wanted him to do (RS. V5/836).

Dr. Krop testified that Jones had an average to above-average IQ, was not insane or incompetent, and was not substantially impaired beyond appreciating the criminality of his actions or in his ability to follow the law; although Jones suffered an emotional disturbance, Krop would not characterize it as "extreme" (RS. V5/820-822, 849-853). However, Jones had suffered depression and mood swings all of his life (RS.

V5/822). Krop would not diagnosis ongoing depression as it seemed this was a situational thing, depending upon the particular stressors in Jones' environment, but clinical indicators of depression had been described by various people, including mental health professionals, since Jones was eleven years old (RS. V5/822). Krop was aware of prior diagnoses of borderline schizophrenic syndrome of adolescence and borderline personality disorder; Krop had diagnosed borderline personality disorder himself prior to reviewing these records, so the records were merely independent corroboration of Krop's diagnosis (RS. V5/832). On cross-examination, Krop denied having sufficient data to diagnose antisocial personality disorder; although Krop was aware of incidents where Jones exhibited antisocial behavior, there was not a sufficient pattern of antisocial behavior, and Jones had not been diagnosed with a conduct disorder as a child, so Krop did not believe an antisocial diagnosis was appropriate (RS. V5/867, 878-896). Krop acknowledged that getting caught doing the type of things that Jones had done as a child can lead to depression, but he felt in this case that depression was more likely a cause than an effect of Jones' behavior (RS. V5/879).

Dr. Krop identified a number of nonstatutory mitigating circumstances which he felt applied in this case: Jones'

emotionally deprived and neglectful early environment; the ongoing emotional disturbance of borderline personality disorder, resulting in impaired judgment and impaired coping skills to deal with stress and rejection; acute depression at the time of the offense; an ability to be rehabilitated; and the fact that Jones would be a good prisoner in general population (RS. V5/854-855). According to Krop, the first few years of Jones' life set a pattern, and despite therapy and a supportive family after age five or six, Jones was never able to compensate for his early deprivations; this is what led to the development of his borderline personality disorder (RS. V5/854). Krop believed that Jones was a good candidate for rehabilitation because he was a bright individual who had accepted responsibility for his actions, he had been described as a model inmate, he was still young, and he had no significant history of alcohol or drug-related problems (RS. V5/847-848).

Although Dr. Krop did not believe that Jones was in a state of psychosis at the time of the murders, he noted that one characteristic of borderline personality disorder is that the person is capable of regressing or deteriorating into a more severe type of mental disorder, such as psychosis; psychosis may be exhibited when the person is under great stress (RS. V5/838-839, 904). Another characteristic is that the person may

exhibit rage reactions and antisocial behavior short of psychosis but out of proportion to the situation; Krop believed that this was what had happened here (RS. V5/841, 904). Krop noted that Jones had four major "stressors" in the preceding months, from his father's death, his failure in the military, his breakup with his girlfriend, and the instability in his residence and employment (RS. V5/836-837). Jones was hypersensitive to rejection, and had been rejected his whole life; when Jones asked a passer-by at the dam for help with his truck, he was turned down again (RS. V5/842-843). Jones had even made a comment at the time about never being turned down again (RS. V5/842). Thus, Krop explained, although there was no rational explanation or justification for the murders, in Jones' distorted perception he could justify his actions in his own mind, because the innocent victims were part of a world that had rejected him (RS. V5/844-846).

At the close of the proceedings, the jury recommended death sentences for both murders by a vote of ten to two (RS. V2/226-227). The trial court subsequently imposed two death sentences, finding in aggravation 1) prior violent felony convictions (based on the contemporaneous offenses) and 2) committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (RS. V2/253-255, 261-263). As

to Brock's murder, the court also found that it was committed during an armed robbery and for pecuniary gain as a single aggravator (RS. V2/253-254). As to Perry's murder, the court found that it was committed during a burglary of a conveyance (RS. V2/261-262). The court found that no statutory mitigators had been established, but considered nonstatutory mitigating evidence as to Jones' childhood, his suffering a disorder that impairs his coping skills, and his capacity for rehabilitation (RS. V2/255-258, 263-266). However, the court concluded that this evidence presented little mitigation value, and determined that the aggravating factors clearly outweighed any statutory or nonstatutory mitigating factors (RS. V2/258, 266).

This Court affirmed the death sentences. Jones v. State, 612 So. 2d 1370 (Fla. 1992), cert. denied, 510 U.S. 836 (1993). Jones filed a number of postconviction motions, the last on November 10, 1997 (PC. V1/1-54, 82-179; V2/292-432). A Huff hearing was held on January 23, 1998 (PC. V4/626-696), and the court thereafter granted an evidentiary hearing on Claim 29 (alleging that Jones was denied an individualized sentencing because the prosecutor wrote the sentencing orders), and summarily denied the other claims (PC. V3/505-507).

The evidentiary hearing was held on February 1, 2000 (PC.

V3/532, 535-595).[2] Three witnesses were presented. Richard Whitson had been the prosecutor at Jones' resentencing in 1991 (PC. V3/541). Whitson reviewed a document marked "Judgment and Sentence" (Ex. 2; PC. VEx/14-22) and observed that a handwritten word in the margin could have been his (PC. V3/542-543). Whitson stated expressly that he did not draft the order and he had no recollection of how he actually got it, but noted that it would not be unusual for Judge Perry to send draft orders to each side of the case and ask for comments (PC. V3/545-546, 550). Although Whitson was not positive that he had reviewed and marked the draft, he thought he had, and his recognition of the word "wrong" caused him to conclude there was a "high likelihood" that he had the chance to see the order before it ended up in final form (PC. V3/546, 550).

Pamela Koller was a law clerk for several Putnam County judges, including Judge Perry, from 1989 through 1992 (PC. V3/552-553). She recalled that Judge Perry presided over several capital trials during that time, including Jones, Steven Cheshire, and Richard Randolph (PC. V3/553). Although she did not specifically recall preparing the sentencing order in this case, that was one of her duties as law clerk and she "certainly

---

[2]The transcript from this hearing incorrectly reflects that the hearing was held on February 1, ***1999***.

would have been" involved (PC. V3/553-554). She acknowledged that she probably would have used the 1988 sentencing orders as a template or starting point in drafting the 1991 orders (PC. V3/554). Koller identified a document, Ex. 4 (PC. VEx/33-41), as one that appeared to have come from her computer (PC. V3/555). She recognized the type face and observed that the handwritten marks were hers (PC. V3/555). She did not recall having sent a draft of the order to the State Attorney's Office (PC. V3/556).

Robert McLeod had been the prosecutor at Jones' initial 1987 trial (PC. V3/560). He testified that he drafted the sentencing order, Ex. 5 (PC. VEx/42-45), and had it typed at the State Attorney's Office (PC. V3/562). He would not have drafted it unless requested to do so by the court, and would not have received guidance by the court as to the substance of the order, but would have drafted it based upon what was perceived as the evidence from the sentencing hearing (PC. V3/563). He thought he had also drafted the sentencing order in the Colina case, which he also tried before Judge Perry; he recalled the judge asking him to prepare a proposed sentencing order, but he was not sure if it was in this case, or Colina, or both (PC. V3/563). By 1991, McLeod was in private practice and he had nothing to do with Jones' resentencing (PC. V3/566).

Based on the testimony presented, the court below concluded that Judge Perry and his law clerk drafted the resentencing orders, and that no ex parte contact between the judge or judicial staff and the State or defense had occurred (PC. V3/606-607). Thus, the court ruled that this postconviction claim had no merit, and denied Jones' motion (PC. V3/605-607). This appeal follows.

## SUMMARY OF THE ARGUMENT

I. The trial court did not err in denying Jones' postconviction claim regarding the prosecutor's alleged drafting of the sentencing orders. The evidentiary hearing explored the circumstances of this claim and the court concluded that no improper ex parte contact had occurred and that the sentencing order was prepared by Judge Perry and his law clerk. These factual findings are supported by the evidence. The judge below applied the correct law to the facts as found, and his denial of the issue should not be disturbed.

II. The trial court did not err in summarily denying Jones' other factual claims. Jones' claims in this issue were factually insufficient and/or procedurally barred, and were properly denied without a hearing.

III. The trial court's ruling of a procedural bar as to the other issues raised in the postconviction motion was correct. These issues all could and should have been presented on direct appeal. This Court has repeatedly recognized that such claims are not cognizable in a motion for postconviction relief, and no error has been identified in the summary denial of these claims.

## ARGUMENT

## ISSUE I

**WHETHER THE LOWER COURT ERRED IN DENYING JONES' DUE PROCESS CLAIM FOLLOWING THE EVIDENTIARY HEARING.**

Jones initially contests the denial of his due process claim which was subjected to an evidentiary hearing below. This claim asserted that Jones was denied his right to an individualized sentencing determination and a reasoned weighing of aggravating and mitigating circumstances when the trial court delegated its responsibility to prepare the sentencing order to the prosecutor. As part of this claim, Jones alleged that the trial judge engaged in an improper ex parte communication with the State. However, a review of the testimony presented at the evidentiary hearing supports the court's conclusions below that no ex parte contact occurred and that the resentencing judge did not abandon any of his constitutional or statutory responsibilities in imposing the death sentences on Jones.

The standard of review to be applied to a trial court's ruling on a postconviction motion following an evidentiary hearing recognizes that as long as the trial court's findings are supported by competent substantial evidence, a reviewing court will not substitute its judgment for that of the trial court on questions of fact, the credibility of the witnesses, or

the weight to be given to the evidence by the trial court. Melendez v. State, 718 So. 2d 746 (Fla. 1998); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997). Where, as here, the trial court correctly applied the law to supported factual findings, the lower court's ruling must be upheld.

**A. Delegation of Sentencing Authority**

The evidentiary hearing below was granted on Jones' claim that the trial court improperly delegated responsibility for the drafting of the sentencing order to the prosecutor. However, at the hearing, the judge's law clerk testified that she was responsible for drafting the order (PC. V3/553, 555). The prosecutor also testified that, although he believed that he may have reviewed a draft order, he did not prepare the order (PC. V3/545). The trial court's order denying relief on this issue noted this testimony from the law clerk and the prosecutor and that it had not been refuted (PC. V3/606). The court concluded that "neither the trial judge nor his law clerk had any ex parte communications with either the State or the Defense in the drafting of the 1991 re-sentencing order," and therefore Jones' claim as to this issue was without merit (PC. V3/606-07).

Jones asserts that the court below erred in concluding that the circumstances regarding the drafting of the sentencing

orders from the initial 1988 trial were not relevant to the claim of error concerning the drafting of the 1991 resentencing orders. He suggests that the circumstances of the 1988 orders must be considered because the resentencing prosecutor admitted that he may have reviewed a draft sentencing order in 1991 and because some portions of the 1988 orders were incorporated into the 1991 resentencing orders. According to Jones, the fact that the trial judge improperly delegated this responsibility to the State in 1988, in the absence of any evidence to the contrary, demonstrates that the same practice occurred in 1991.

First of all, there was "evidence to the contrary," since the prosecutor testified that he did not draft the 1991 orders (PC. V3/545). Furthermore, Jones' argument misconstrues the burden of proof at a postconviction evidentiary hearing. It was not up to the State to prove at the hearing below that no impropriety occurred in 1991; it was up to Jones to establish the alleged error. Certainly the obvious differences by the judge between 1988 and 1991 -- the fact that in 1988 he had the State prepare the order, and in 1991 he had his law clerk prepare the order -- weighs heavily against any presumption that Judge Perry improperly delegated this responsibility to the State in 1991. Additionally, Jones' concern that parts of the 1988 orders were incorporated into the final 1991 orders is

unjustified; as the judge below noted, the similarities in the orders can be explained by the fact that the same facts and issues were involved in both cases. More importantly, there are significant differences between the 1988 and 1991 orders, and, for that matter, between the draft 1991 orders submitted at the hearing below and the final 1991 orders which were signed and filed in the record (compare, Ex. 1-5 [PC. VEx/1-45], with RS. V2/252-267).

For example, in 1988, the two sentencing orders were identical except for the victims' names. In those orders, the judge applied the pecuniary gain and CCP aggravating factors, and expressly rejected the HAC factor. The court considered and rejected the statutory mitigating factors of no significant criminal history, extreme mental disturbance, and age; it also rejected any nonstatutory mitigation, commenting only briefly on Dr. Krop's diagnosis of a borderline personality disorder. The 1991 orders, on the other hand, offer different findings with regard to the separate victims. The aggravating factors discussed are prior violent felony convictions, CCP, and (as to Brock) during the course of a robbery combined with pecuniary gain, and (as to Perry) during the course of a burglary. The statutory mitigating factors addressed are substantial impairment, extreme disturbance, and age. A much more extensive

discussion of the nonstatutory mitigation provided by Dr. Krop is included and such mitigation is specifically found and weighed. Thus, it is obvious that the two sets of orders are not even similar as to the particular aggravating, statutory mitigating, and nonstatutory mitigating factors addressed. And although, for example, the finding of CCP is similar with regard to both the 1988 and 1991 orders, the language and discussion of this factor is different, with entire paragraphs deleted from the 1988 orders and other paragraphs added to the 1991 orders on this factor alone.

There are also significant differences between the draft 1991 orders admitted at the hearing below and the final 1991 orders filed by the court. For example, the final orders include language in the pecuniary gain aggravator found as to Brock's murder acknowledging that it must be taken in conjunction with the during the course of the robbery aggravator; this language was not included in the drafts. In the discussions on CCP, the draft orders include some language from the 1988 orders which is deleted from the final versions; in addition, the final version includes a discussion about Krop's testimony that Jones regarded the victims as part of a world that had rejected him, language which is not included in either of the drafts provided. As to the mitigation, the final

orders included language noting that even if the rejected statutory mitigation had been proven, it would only be entitled to little weight and would not outweigh the aggravating factors; this language is not included in the drafts. Perhaps most significant, the nonstatutory mitigation which is given no weight in the draft orders is found and given little weight in the final versions. Substantial differences in the discussions of Jones' capacity for rehabilitation are also apparent. These differences between the 1991 drafts and the final 1991 orders clearly demonstrate that the judge carefully considered the final product and provided the individualized weighing of aggravating and mitigating circumstances required. See, Morton v. State, 26 Fla. L. Weekly S429 (Fla. June 28, 2001) (rejecting argument that death penalty was unlawfully imposed because the trial judge adopted a majority of the findings from the original sentencing judge's order, noting that the differences between the two orders demonstrated the necessary independent weighing).

Jones insists that relief is necessary because the draft orders were found in the possession of the State Attorney's Office. Although prosecutor Whitson suggested that it was not unusual for Judge Perry to provide proposed orders to both sides of a case for their review, Jones attempts to refute this

possibility by alleging that testimony from Howard Pearl in an unrelated case demonstrates that did not happen here. It must be noted that Jones' reliance on Pearl's testimony in an unrelated case is sorely misplaced and should be stricken from his brief (see, Appellant's Initial Brief, p. 15, n. 5). Such testimony is not part of the record in this case and was not offered for consideration to the judge below. The State disputes the representations and characterizations of Pearl's testimony as offered; if Jones thinks this testimony is necessary for consideration in this case, he should move this Court to supplement the record.

It is apparent that Jones cannot establish a due process violation herein without speculation that what happened in this case in 1988 reoccurred in 1991, on top of speculation that Pearl's testimony in the Randolph case refutes the possibility that Judge Perry sent proposed orders to both parties for their review in 1991, as suggested by Richard Whitson's testimony. Clearly, postconviction relief cannot be granted based on speculation. Maharaj v. State, 25 Fla. L. Weekly S1097, 1099 (Fla. Nov. 30, 2000).

Curiously, Jones seems to suggest that relief is warranted in this case even if Judge Perry delegated the responsibility to his law clerk to draft the sentencing orders (Appellant's

Initial Brief, p. 20). Yet there was no evidence below which suggested that Pamela Koller drafted these orders without the necessary input from the judge. Neither due process nor the statutory requirement that the judge prepare an order sentencing a defendant to death is implicated merely because a law clerk assists with the actual drafting of the order, and Jones has offered no authority to compel the granting of relief on these facts.

In Card v. State, 652 So. 2d 344, 345-46 (Fla. 1995), this Court addressed a claim that the prosecutor had prepared a sentencing order for the judge pursuant to an ex parte communication. This Court noted that, if the allegations of impropriety were proven, the question presented was whether the defendant was deprived of an independent weighing of the aggravating and mitigation factors. This question was to be resolved through consideration of the nature of the contact between the judge and the prosecutor, when the judge was provided the order, and when copies of the order were given to the defendant. See also, State v. Riechmann, 25 Fla. L. Weekly S163, S165 (Fla. 2000) (upholding trial court's award of a new sentencing proceeding on this issue, where there was no evidence that the trial judge specifically determined the aggravating or mitigating circumstances that applied). In the instant case, no

evidence of any contact between the judge and the prosecutor was presented; no evidence as to when the judge received the order was presented; and no evidence as to when copies of the order were provided to the defendant was presented. On these facts, denial of this claim was proper.

Finally, Jones is also mistaken in his assertion that the proper relief in this case, had impropriety been established, is the imposition of a life sentence pursuant to Van Royal v. State, 497 So. 2d 625 (Fla. 1986). This assertion is refuted by Patterson v. State, 513 So. 2d 1257, 1261-63 (Fla. 1987). In Patterson, after reviewing the statutory requirement for an independent judicial determination as to the weighing of aggravating and mitigating circumstances, this Court held that "Van Royal does not require us to impose a life sentence under the circumstances of this case, where we have received an erroneous sentencing order as part of the record on appeal." Similarly, any erroneous order filed in the instant case would not compel the imposition of a life sentence; Jones has offered no relevant authority for a life sentence under these circumstances.

Jones has failed to demonstrate that he was denied an individual, judicial determination as to the weighing of the aggravating and mitigating circumstances in this case, and

therefore his claim was properly denied.

**B. Ex Parte Contact**

Jones offers as a secondary issue to this claim that his constitutional rights were violated by an improper ex parte communication between the trial court and the State regarding the drafting of the sentencing order. At the hearing below, no direct evidence of any such communication was presented; both prosecutor Whitson and clerk Koller testified that they had no recollection of any such contact (PC. V3/550, 556). The court below expressly found that "neither the trial judge nor his law clerk had any ex parte communications with either the State or the Defense in the drafting of the 1991 re-sentencing order" (PC. V3/606-607).

According to Jones, there was significant record evidence of such improper communication in 1991, even without regard to the undisputed impropriety which occurred in 1988. Jones then recites Koller's testimony as to her inability to explain why a draft of the sentencing order from her computer was found in the state attorney's file, as well as the testimony of the prosecutor on resentencing acknowledging a likelihood that he reviewed the 1991 resentencing orders. However, Jones ignores the perfectly innocent explanation -- that it was not unusual

for Judge Perry to provide proposed orders to both sides in a case -- offered by Richard Whitson (PC. V3/550).

Unfortunately, since both Judge Perry and Howard Pearl died prior to the hearing, there can be no affirmative evidence on this point either way. In the absence of such evidence, Jones improperly speculates that defense counsel had no knowledge of any communication which may have occurred between the court staff and the prosecutor. Postconviction relief cannot be premised on such speculation. Maharaj, 25 Fla. L. Weekly at S1099. Since Jones' claim of an improper ex parte communication was not proven factually, this Court must affirm the lower court's rejection of this issue.

## ISSUE II

**WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING OTHER FACTUAL CLAIMS.**

Jones next asserts that the trial court erred in summarily denying other claims which allegedly should have been subject to evidentiary development at a hearing. Although trial courts are encouraged to have evidentiary hearings on postconviction motions, if the motion lacks substantial factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied. Steinhorst v. State, 498 So. 2d 414, 414-415 (Fla. 1986); Porter v. State, 478 So. 2d 33 (Fla. 1985). A hearing is only warranted on an ineffective assistance of counsel claim where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrate a deficiency in performance that prejudiced the defendant. LeCroy v. Dugger, 727 So. 2d 236, 239 (Fla. 1998); Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995); Jackson v. Dugger, 633 So. 2d 1051, 1055 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076, 1079 (Fla. 1992); Roberts v. State, 568 So. 2d 1255, 1256-1260 (Fla. 1990), cert. denied, 515 U.S. 1133 (1995); Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). Jones had the burden of establishing a prima facie case of a legally valid claim in order to receive an evidentiary hearing. Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000). Since the

postconviction claims addressed below did not render Jones' convictions or sentences vulnerable to collateral attack, for the reasons that follow, the trial court properly denied these claims without an evidentiary hearing.

A trial court's summary denial of a motion to vacate must be affirmed where the court properly applied the law and competent substantial evidence supports its findings. Diaz v. Dugger, 719 So. 2d 865, 868 (Fla. 1998), cert. denied, 526 U.S. 1100 (1999). This Court must accept the factual allegations in the motion to the extent they are not refuted by the record, and the summary denial must be upheld if the claims are facially invalid or conclusively refuted by the record. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999).

**A. Ineffective Assistance of Counsel at Resentencing**

Jones claims that his attorney rendered ineffective assistance of counsel during his resentencing proceeding. In Strickland v. Washington, 466 U.S. 668, 689 (1984), the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that

counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. 466 U.S. at 687, 695; 705 So. 2d at 1333; 675 So. 2d at 569. A proper analysis requires that counsel's performance be reviewed with a spirit of deference; there is a strong presumption that counsel's conduct was reasonable. 466 U.S. at 689.

In this sub-issue, Jones alleges that his attorney was deficient for failing to investigate and present additional mitigation evidence regarding his difficult background and dysfunctional family life; for failing to provide his mental health expert with the necessary history and records; and for failing to object to the trial court's refusal to give a jury instruction on the mitigating factor of "extreme mental or emotional distress." Jones' argument on this sub-issue is basically a recitation of the allegations concerning his family

and background, with a preliminary comment as to the standard of review and a conclusory suggestion of prejudice asserting that "Had counsel performed effectively ... Mr. Jones would not now be facing execution" (Appellant's Initial Brief, p. 48).

Jones' brief fails to mention that much of the information he provides in postconviction was presented to his resentencing jury through the testimony of Dr. Krop. Notably, Dr. Krop testified at the resentencing about Jones living with his mother at a young age, and acting like a primitive animal when his father and step-mother gained custody when Jones was five or six (RS. V5/826-828). He noted Jones had been admitted to a psychiatric facility when he was eleven, and diagnosed with a schizophrenic syndrome and borderline personality disorder (RS. V5/828, 832). He noted Jones was sent to live at a children's home in Alabama and later to the Rodeheaver Boys Ranch in Palatka (RS. V5/829). Krop discussed Jones' ongoing depression, his father's death, his failure in the military, and his relationship with his girlfriend (RS. V5/831, 834-836).

The only new information revealed in the postconviction motion concerned additional facts about Jones' life with his mother prior to age five, and about hardships that Jones' mother faced in her life. Sometime after Jones' trial and resentencing, his sister had hired a private investigator to locate Jones, and discovered him on Florida's death row (PC.

V2/330). Although the sister's reappearance in Jones' life may provide some mitigation which was not presented to his jury, the failure to present this information is obviously not attributable to any deficiency on the part of defense counsel, since the sister was clearly not available to Jones at the time of trial or resentencing. Furthermore, the information she provides, according to the motion, does not add significantly to the mitigating evidence which was presented to Jones' jury through Dr. Krop. Therefore, these allegations did not compel an evidentiary hearing.

The claim that counsel failed to provide necessary information to Dr. Krop was insufficient by its failure to allege what information was not provided or what affect the information may have had on Krop's conclusions. This claim is also refuted by Krop's testimony outlining the extensive background materials which he reviewed, including school records, jail records, psychological records and reports, military records, juvenile and HRS records, investigative records, and trial testimony (RS. V5/818-820). Krop also interviewed several individuals that were familiar with Jones' background, and commented that Jones' family was unfortunately not available for him to interview (RS. V5/818-819). Thus, no hearing was warranted on this claim.

Jones does not attempt to explain how his counsel's alleged

failure to object to the trial court's refusal to give a jury instruction on extreme disturbance could have been either deficient or prejudicial. In fact, counsel did request the instruction, and the denial of the instruction was specifically upheld by this Court in Jones' appeal. Jones, 612 So. 2d at 1375.

Clearly, his claim in this regard is factually insufficient. See, LeCroy, 727 So. 2d at 239 (noting defendant's burden to allege *specific facts* which are not conclusively rebutted by the record and which demonstrate a deficiency on the part of counsel that was detrimental to the defendant). The trial court's summary denial of this claim was proper.

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

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

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

In light of the testimony that was presented at the resentencing, the newly proffered evidence is not compelling. This is not a case where the postconviction motion revealed substantial mitigation that had not been presented at trial.

In order to establish prejudice to demonstrate a Sixth Amendment violation in a penalty phase proceeding, a defendant must show that, but for the alleged errors, the sentencer would have weighed the balance of the aggravating and mitigating factors and found that the circumstances did not warrant the death penalty. Strickland, 466 U.S. at 694. The aggravating

factors found in this case were: prior violent felony convictions; cold, calculated, premeditated; and during the course of other felonies. This was a senseless, brutal double murder committed in order to obtain the victim's truck. Jones has not and cannot meet the standard required to prove that his resentencing attorney was ineffective when the facts to support the aggravating factors are compared to the purported mitigation now argued by collateral counsel.

The investigation and presentation of mitigating evidence in this case was well within the realm of constitutionally adequate assistance of counsel. Trial counsel conducted a reasonable investigation, presented appropriate penalty phase evidence, and forcefully argued for the jury to recommend sparing Jones's life. There is no prejudicially deficient performance shown in the allegations regarding the way Jones was represented at the his resentencing. This Court must affirm the ruling below because claims which are facially invalid or conclusively refuted by the record are properly summarily denied. Freeman, 761 So. 2d at 1061; Peede, 748 So. 2d at 257.

**B. Denial of Motion to Dismiss Counsel Due to Conflict**

Jones' next claim attacks the summary denial of his assertion that he was denied his rights to counsel, equal protection, and due process by his trial counsel's conflicts of

interest. Jones fails to explain why an evidentiary hearing would be necessary where these conflict issues were thoroughly litigated at the time of the resentencing and on appeal. Jones, 612 So. 2d at 1372-73. Since the conflict issue was rejected on direct appeal, this claim is procedurally barred and was properly summarily denied. Mann v. State, 770 So. 2d 1158, 1164, n. 2 (Fla. 2000); Cherry, 659 So. 2d at 1072.

### C. Ineffective Assistance of Counsel Due to the Concession of Guilt in Closing Argument

Jones also offers an allegation of ineffective assistance of counsel premised on his trial attorney's strategy of admitting that Jones was the person to have killed the victims in this case. Jones relies on Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000), to assert that this strategy automatically entitled him to an evidentiary hearing on this claim. Jones claims that his attorney did not discuss this strategy with him and that, on these facts, ineffectiveness is established per se and no prejudice need be proven.

As Jones explains, counsel's concession of Jones' identity as the killer in this case occurred during his closing argument to the jury. This is an important distinction from Nixon, where counsel conceded guilt in opening statement, prior to having subjected the State's case to adversarial testing. Recently, this Court recognized that a concession of guilt in closing

argument is an acceptable strategy that does not require a defendant's consent. In Atwater v. State, 26 Fla. L. Weekly S395 (Fla. June 7, 2001), this Court addressed and rejected all of the arguments currently advanced by Jones in this sub-issue:

> In claim 1 of his motion for postconviction relief, Atwater argues that during closing arguments, his counsel forcefully argued in favor of second-degree murder, displayed gruesome crime scene photographs to the jury, argued the crime was one of malice, and rejected any consideration of manslaughter because the facts supported a more serious offense. Defense counsel's actions, Atwater argues, were more like those of a prosecutor than a defense attorney. Atwater states that he did not consent to defense counsel's strategy to concede guilt to any crime. He argues that conceding guilt is equivalent to a guilty plea, and defense counsel was required under Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000), to secure Atwater's explicit consent before making any concession to any element of the crime charged, even if the concession was to a lesser included offense.
>
> ...
>
> Not all decisions of counsel are reviewable under Strickland as constituting ineffective assistance of counsel. "[A]ny specific discretionary or judgmental act or position of trial counsel, whether tactical or strategic, on an inquiry as to effectiveness of counsel" will not be considered under Strickland. McNeal v. State, 409 So. 2d 528, 529 (Fla. 5th DCA 1982). Sometimes concession of guilt to some of the prosecutor's claims is good trial strategy and within defense counsel's discretion in order to gain credibility and acceptance of the jury.
>
> ...
>
> In seeking federal habeas corpus relief, McNeal again alleged that his trial counsel

improperly conceded guilt without his consent. The Eleventh Circuit agreed that defense counsel's decision to concede guilt to a lesser charge was a tactical decision and not reviewable as an ineffective assistance of counsel claim. "In view of the overwhelming evidence against McNeal, including a tape recording of his confession to the shooting, the strategy of trial counsel was proper and would not amount to a constitutional violation." McNeal v. Wainwright, 722 F.2d 674, 676 (11th Cir. 1984). The Eleventh Circuit distinguished McNeal from a situation where defense counsel concedes guilt to the offense charged and makes a plea for leniency. The latter situation requires a client's consent. The former is counsel's strategy that may bind a client even when made without consultation. See McNeal, 722 F.2d at 677 (citing Thomas v. Zant, 697 F.2d 977, 987 (11th Cir. 1983)).

...

In light of the evidence against Atwater, defense counsel properly attempted to maintain credibility with the jury by being candid as to the weight of the evidence. Faced with the prospect of a guilty verdict for first-degree murder and in light of the State's evidence, defense counsel's concession, which was made only in rebuttal to the State's closing argument, was reasonable and does not amount to a constitutional violation. The concession was made to a lesser crime than charged, during rebuttal closing argument, and after a meaningful adversarial testing of the State's case. See, e.g., Brown v. State, 755 So. 2d 616 (Fla. 2000) (holding that concession of guilt of lesser offense did not require defendant's consent and was proper strategy in attempt to avoid death sentence in light of overwhelming evidence).

...

Even if defense counsel had denied that Atwater was guilty of any crime, there is no reasonable possibility that the jury would

> have reached a different conclusion given the evidence against him. See Patton v. State, 25 Fla. L. Weekly S749 (Fla. Sept. 28, 2000) (finding the facts counsel conceded were supported by overwhelming evidence and even if counsel had denied these facts, there was no reasonable possibility the jury would have rendered a different verdict). Therefore, the trial court properly denied Atwater's claim that defense counsel was ineffective for making certain concessions without Atwater's consent.

26 Fla. L. Weekly at S396-397. Atwater expressly rejected the argument presented herein that the concession of guilt as to some elements of this offense, on these facts, amounted to a lack of counsel altogether, resulting in a presumption of unreliability as in United States v. Cronic, 466 U.S. 648 (1984). In the instant case as well, overwhelming evidence established Jones' identity as the killer, and the concession of identity did not occur until counsel had forcefully subjected the State's case to an adversarial testing. Therefore, counsel's adoption of this reasonable strategy did not provide a basis for a finding of ineffectiveness or compel an evidentiary hearing on this claim.

**D. Violation of Ake v. Oklahoma**

Jones also claims that he was denied his right to adequate mental health assistance as guaranteed under Ake v. Oklahoma, 470 U.S. 68 (1985). Although the heading of this issue asserts

that Jones was "denied requested experts," his claim as pled merely repeats his assertion that his attorney failed to provide his expert, Dr. Krop, with necessary documents, or to prepare Dr. Krop for testifying. According to Jones, Dr. Krop did not interview lay witnesses that knew about Jones' life, and if he had been properly prepared, Krop should have found the statutory mental mitigators to apply. Furthermore, Jones asserts that counsel was ineffective for failing to use Dr. Krop's testimony in the guilt phase to support a defense of second-degree murder.

Jones' allegations are clearly insufficient to warrant any relief. Jones does not identify any particular information which was not known to Dr. Krop, and does not attempt to explain how any such information could have made a difference. He offers no specific facts to support his conclusion that Dr. Krop was not prepared and did not provide adequate assistance. See, Occhicone v. State, 768 So. 2d 1037, 1050, n. 10 (Fla. 2000) (claim that counsel were ineffective for failing to provide mental health experts with background information without merit because Occhicone did not allege what information counsel failed to provide).

As noted previously, Dr. Krop testified extensively at trial about Jones' childhood and background; Jones has not identified any errors or omissions in the background testimony given by Krop at trial. Furthermore, he has not alleged how the

provision of any additional background information would have affected Krop's opinions at the time of trial. Jones' failure to allege any information which should have been, but was not, provided to the expert precludes the granting of relief in this issue. He has simply not provided sufficient facts to have warranted an evidentiary hearing. He has not identified any specific deficiency with regard to his mental health evaluation or with Dr. Krop's conclusions. He has not cited any relevant mental health evidence which was available at the time but not considered by his expert. Jones does not even claim that a new expert could offer additional, favorable mental health testimony, but even if he did, such would not be a sufficient basis for relief. Engle v. Dugger, 576 So. 2d 696, 700-01 (Fla. 1991) ("This is not a case ... in which a history of mental retardation and psychiatric hospitalizations had been overlooked"); Correll v. State, 558 So. 2d 422, 426 (Fla. 1990); Hill v. Dugger, 556 So. 2d 1385, 1388 (Fla. 1990), cert. denied, 116 S. Ct. 196 (1995); Stano v. State, 520 So. 2d 278, 281 (Fla. 1988) ("That Stano has now found experts whose opinions may be more favorable to him is of little consequence").

Mental health evaluations may be considered constitutionally inadequate so as to warrant a new sentencing hearing where the mental health expert ignored "clear indications" of either mental retardation or organic brain damage. Rose v. State, 617

So. 2d 291, 295 (Fla.), cert. denied, 510 U.S. 903 (1993); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). In order to obtain an evidentiary hearing on this claim, Jones must have alleged more than the conclusory argument presented in his motion. Engle, 576 So. 2d at 702. Since he has failed to specifically identify any inadequacies in his mental health examination, or to otherwise show that his mental health assistance was constitutionally ineffective, this claim was properly summarily denied.

In addition, the facts which Jones asserts are refuted by the transcript of Dr. Krop's testimony. Krop stated that he had reviewed a great deal of background information, and had interviewed witnesses familiar with Jones' background (RS. V5/818-819). He had conducted extensive testing of Jones, both before the initial trial and again prior to the resentencing (RS. V5/816-818). He related information about Jones' prior mental health history, including his hospitalizations as a child and the diagnoses of schizophrenic syndrome in adolescence and borderline personality disorder, all of which he found to be consistent with his own conclusions (RS. V5/829, 832). Since the record demonstrates that Krop performed all the essential tasks required by Ake, including an extensive evaluation with neurological testing, reviewing numerous documents, interviewing individuals familiar with Jones' background, and considering

Jones' extensive psychiatric history, the request for an evidentiary hearing on this issue was properly denied. See, Mann v. State, 770 So. 2d 1158, 1164 (Fla. 2000) (hearing on this claim properly denied where record reflected that Mann's expert performed the essential tasks required).

Jones' assertion that counsel should have used Dr. Krop during the guilt phase to support a defense of second-degree murder is similarly insufficient. Jones does not explain how this testimony would be admissible. See, Chestnut v. State, 538 So. 2d 820 (Fla. 1989) (evidence of diminished mental capacity short of insanity inadmissible to establish lack of premeditation). Jones does not allege any facts from Krop's testimony, or any other opinion, suggesting that Krop would have testified that Jones was not capable of premeditation. Krop's testimony does not address premeditation, and does not offer any basis for consideration of this claim. Absent some indication that Krop would have supported the defense theory, there was no reason for an evidentiary hearing to explore this issue.

Once again, Jones' claim in this regard is factually insufficient. LeCroy, 727 So. 2d at 239; Jackson, 633 So. 2d at 1054. This Court must affirm the ruling below because claims which are facially invalid or conclusively refuted by the record are properly summarily denied. Freeman, 761 So. 2d at 1061; Peede, 748 So. 2d at 257. On the facts of this case, the trial

court's summary denial of this claim was proper.

### E. Ineffective Assistance of Counsel at Guilt Phase

Jones' next claim is a myriad of conclusory statements asserting counsel's alleged failure to adequately litigate the motions to suppress statements and evidence. Jones characterizes his arrest and extradition as illegal but makes no showing of any impropriety as to his custody. He criticizes counsel for failing to explore potential mental health issues which, he asserts, would have established his particular mental and emotional difficulties that drove him to "confess all," rendering the post-arrest waiver of his rights invalid.

Jones once again fails to provide any particular basis for relief. He does not attempt to identify any possible police misconduct in his arrest, extradition, or custodial interrogation. The fact that mental problems may have contributed to his willingness to waive his right to remain silent would not be a reason to suppress his statements. See, Colorado v. Connelly, 479 U.S. 157 (1986). His repeated assertions that counsel should have presented Dr. Krop as a guilt phase witness and should not have conceded guilt in his closing argument have been addressed elsewhere, and clearly do not compel any relief. His claims that counsel did not adequately cross examine witnesses and failed to secure a DNA

expert are also insufficient, since neither the witnesses nor the advantage of having a DNA expert are even generally identified. Such conclusory allegations cannot serve as a basis for an evidentiary hearing. Kennedy, 547 So. 2d at 913.

Once again, although he faults counsel for allegedly failing to investigate, he characteristically fails to offer any information or evidence that could have been discovered had additional investigation been undertaken. His failure to allege specific facts or to suggest how the outcome of his trial could have been affected had the case been tried differently establishes that again no claim worthy of an evidentiary hearing has been presented. As in Ragsdale v. State, 720 So. 2d 203, 208 (Fla. 1998), "[Jones] has provided insufficient facts as to what would have been introduced or how the outcome would have been different had counsel acted otherwise" to obtain an evidentiary hearing. Thus, the court below properly summarily denied his allegation of guilt phase ineffective assistance of counsel.

Once again, his claim in this regard is factually insufficient. See, LeCroy, 727 So. 2d at 239 (noting defendant's burden to allege *specific facts* which are not conclusively rebutted by the record and which demonstrate a deficiency on the part of counsel that was detrimental to the defendant). The trial court's summary denial of this claim was

proper.

**F. State Withheld Material, Exculpatory Evidence**

Jones also claims that the trial court should have granted an evidentiary hearing on his assertion of a violation of Brady v. Maryland, 373 U.S. 83 (1963). He alleges that witness interview notes which would have revealed a witness recounting a rumor that Jones "does drugs" and is "always high" and "frequently drunk" should have been disclosed to the defense prior to trial. According to Jones, if his jury had heard of his history of drug abuse and the effect of his substance abuse on his mental illness, he would not have been sentenced to death.

Jones' does not identify the particular witness that allegedly provided this information to law enforcement. However, it is clear that information about Jones' drug use, if true, would have been known by Jones prior to trial. Of course, if the witness was only repeating rumors of drug use that were not true, such information would be neither relevant nor material. If Jones did in fact use drugs, this information would have been known to him and therefore not the basis of a true Brady claim. See, Occhicone, 768 So. 2d at 1042 (Brady claim properly summarily denied where defendant knew of evidence allegedly withheld). On these facts, summary denial was

appropriate.

### G. Cumulative Error

Jones also asserts that the court below should have permitted his claim of cumulative error to be litigated at the evidentiary hearing. This Court has routinely found this claim to be procedurally barred in postconviction proceedings. See, Owen v. State, 773 So. 2d 510, 515 (Fla. 2000). Furthermore, since no showing of constitutional error has been made with regard to any of the claims currently or previously presented, no relief is warranted. In the absence of any demonstrated errors, this claim must be rejected as meritless. Downs v. State, 740 So. 2d 506, 509, n. 5, (Fla. 1999); Mendyk v. State, 592 So. 2d 1076, 1081 (Fla. 1992).

### H. Ineffective Assistance of Counsel for Failure to Object to Prosecutorial Misconduct

Jones also asserts that he should have been granted an evidentiary hearing on his claim of prosecutorial misconduct, because it included an allegation that his trial counsel was ineffective for failing to object. It is facially apparent that this claim is an improper attempt to recast a procedurally barred direct appeal issue into a claim of ineffective assistance of counsel, and therefore summary denial was appropriate. See, Robinson v. State, 707 So. 2d 688, 699 (Fla.

1998). Even if considered, however, the claim did not warrant an evidentiary hearing.

Jones cites two instances of alleged impropriety: the prosecutor asking potential jurors during voir dire if they could vote for a death sentence if the aggravating circumstances "required or called for" it, and the prosecutor's explanation, in closing argument, of the existence of aggravating factors. Jones' assertion that the prosecutor, in these instances, inferred that the penalty determination was a counting rather than a weighing process is clearly refuted by the record. The transcript reflects that the jury was repeatedly and correctly instructed on the law and on their obligation to weigh any aggravating factors against any mitigating factors. The judge and both attorneys consistently reminded the jury of the proper legal analysis. Nothing in any of the comments by the prosecutor suggests any other process. Since there is no showing of prosecutorial misconduct, defense counsel could not be deemed ineffective for failing to object. Thus, the court below properly summarily denied this claim.

## I. Ineffective Assistance of Counsel for Failing to Object to Consideration of Improper Victim Impact Evidence

Jones next claims that his trial attorney should have objected to the judge's consideration of improper victim impact evidence, and that this allegation warranted an evidentiary

hearing below. He relies on a presentence investigation which included a statement by one of the victims' mother indicating her opinion that Jones should receive the death sentence. Once again, this is an issue which could have been raised on direct appeal, and Jones cannot avoid the application of a procedural bar by recasting the claim as one of ineffective assistance of counsel. Robinson, 707 So. 2d at 699. In addition, Jones does not identify any support for his claim that the trial court considered this statement in the PSI when sentencing Jones to death. The lack of specific facts to support this claim renders it facially insufficient, and the court below properly denied the claim without a hearing.

In conclusion, all of the issues summarily denied by the court below were properly resolved. No evidentiary hearing was warranted on any of the claims presented in this issue, and therefore this Court must affirm the denial of postconviction relief as to these claims.

## ISSUE III

**WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING OTHER LEGAL CLAIMS AS PROCEDURALLY BARRED.**

Jones' final issue challenges the finding of a procedural bar as to a number of other claims presented in his postconviction motion. The law is well established that these claims, all of which could and should have been raised on direct appeal, are clearly procedurally barred. In fact, Jones does not even attempt to demonstrate that the lower court's rulings were erroneous, but repeatedly asks this Court to reconsider prior opinions, overrule precedent, and grant relief. No reasonable basis for doing so has been offered.

Because these issues are not cognizable in postconviction and therefore not properly before this Court, no standard of review is applicable.

Case law amply supports the summary rejection of these claims. Sub-issues A., B., D., E., and F. all present allegations of jury instruction error. Any such errors would obviously be reflected in the trial transcript and therefore available for consideration as classic direct appeal issues. Owen v. State, 773 So. 2d 510, 515, n. 11 (Fla. 2000); Occhicone, 768 So. 2d at 1050, n. 3; Gorham v. State, 521 So. 2d 1067, 1070 (Fla. 1988). Sub-issue C. asserts that the trial court failed to find mitigation, also an obvious direct appeal

issue. Mann, 770 So. 2d at 1164, n. 2; Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995). Sub-issue G. asserts that the death penalty sentencing statute is unconstitutional, a claim which this Court has repeatedly rejected as barred in postconviction as well as meritless. Owen, 773 So. 2d at 515, n. 11; Mann, 770 So. 2d at 1164, n. 2. Sub-issue H. alleges that Jones' sentence improperly rests on an automatic aggravating factor, during the course of a felony, which again has been repeatedly rejected as both barred and without merit. Sireci v. State, 773 So. 2d 34, 45 n. 11 (Fla. 2000); Hudson v. State, 708 So. 2d 256, 262 (Fla. 1998). This Court must affirm the summary denial of each of these claims.

## CONCLUSION

Based on the foregoing arguments and authorities, the denial of postconviction relief should be affirmed.

Respectfully submitted,

**ROBERT A. BUTTERWORTH**
**ATTORNEY GENERAL**


**CAROL M. DITTMAR**
Assistant Attorney General
Florida Bar No. 0503843
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 801-0600
FAX (813) 356-1292
**COUNSEL FOR APPELLEE**


## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert T. Strain, Assistant CCRC and April Haughey, Assistant CCRC, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this _____ day of July, 2001.

## CERTIFICATE OF TYPE SIZE AND STYLE

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

**COUNSEL FOR APPELLEE**