IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2248

HARRY FRANKLIN PHILLIPS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On January 6, 1983, Defendant was charged by indictment, in case no. 83-435, with the First Degree Murder of Bjorn Thomas Svenson, with a firearm, which was alleged to have occurred on August 31, 1982. (D.A.R. 1)[1] On December 16, 1983, Defendant was found guilty as charged. (D.A.R. 277) On the same day, the penalty phase began before the jury. On that day, the jury recommended by a vote of 7 to 5 that Defendant be sentenced to death. (D.A.R. 1068-1069) On February 1, 1984, the trial court followed the jury's recommendation and sentenced the defendant to death for the First Degree Murder of Bjorn Thomas Svenson. (D.A.R. 3)

Defendant appealed his convictions and sentences to this court, raising the following five issues:

I.
THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ELICIT TESTIMONY CONCERNING COLLATERAL UNCHARGED CRIMES.

II.
THE PREJUDICIAL COMMENTS ELICITED BY THE STATE DEPRIVED THE DEFENDANT OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL.

III.
THE TRIAL COURT ERRED IN REFUSING TO GIVE THE ALIBI INSTRUCTION REQUESTED BY APPELLANT.

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[1] The symbols "D.A.R." and "D.A.T." will refer to record on appeal and transcript of proceeding from Defendant's direct appeal, Florida Supreme Court Case No. 64,883, respectively.

IV.

THE COURT ERRONEOUSLY FOUND THE KILLING TO HAVE BEEN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

V.

THE TRIAL COURT IMPROPERLY FOUND THE HOMICIDE TO HAVE BEEN COMMITTED IN A COLD, CALCULATING AND PREMEDITATED MANNER.

On August 20, 1985, this Court affirmed Defendant's conviction and sentence. *Phillips v. State*, 476 So. 2d 194 (Fla. 1985). Rehearing was denied on October 28, 1985. In affirming Defendant's conviction and sentence, this Court outlined the facts of the case as follows:

> In the evening of August 31, 1982, witnesses heard several rounds of gunfire in the vicinity of the Parole and Probation building in Miami. An investigation revealed the body of Bjorn Thomas Svenson, a parole supervisor, in the parole building parking lot. Svenson was the victim of multiple gunshot wounds. There apparently were no eyewitnesses to the homicide.
>
> As parole supervisor, the victim had responsibility over several probation officers in charge of appellant's parole. The record indicates that for approximately two years prior to the murder, the victim and appellant had repeated encounters regarding appellant's unauthorized contact with a probation officer. On each occasion, the victim advised appellant to stay away from his employees and the parole building unless making an authorized visit. After one incident, based on testimony of the victim and two of his probation officers, appellant's parole was revoked and he was returned to prison for approximately twenty months.
>
> On August 24, 1982, several rounds of gunfire were shot through the front window of a home occupied by the two probation officers who had testified against appellant. Neither was injured in the incident, for which appellant was subsequently charged.
>
> Following the victim's murder, appellant was incarcerated for parole violations. Testimony of several inmates indicated that appellant told them he had killed a parole officer. Appellant was thereafter

indicted for first-degree murder.

* * * *

> The trial court found four statutory aggravating circumstances applicable in sentencing appellant to death: the murder was committed while appellant was under a sentence of imprisonment, appellant was previously convicted of another felony involving the use of violence, the murder was especially heinous, atrocious or cruel, and was committed in a cold, calculated and premeditated manner.

Id. at 195-96.

On November 4, 1987, Defendant filed a petition for writ of habeas corpus in this Court raising one claim:

> COMMENTS BY THE COURT AND PROSECUTOR THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTING IN [DEFENDANT'S] SENTENCE OF DEATH DIMINISHED THE JURORS' SENSE OF RESPONSIBILITY FOR THE CAPITAL SENTENCING TASK THAT THEY WERE TO PERFORM, AND HAD AN EFFECT ON THE JURY, IN VIOLATION OF CALDWELL V. MISSISSIPPI, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court denied the petition, finding the claim to be procedurally barred. *Phillips v. Dugger*, 515 So. 2d 227 (Fla. 1987).

The same day that he filed the petition for writ of habeas corpus in this Court, Defendant also filed a motion for post conviction relief in the trial court. This motion raised ten claims:

> CLAIM I
> THE STATE'S DELIBERATE USE OF FALSE AND MISLEADING TESTIMONY, AND THE INTENTIONAL WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE, VIOLATED [DEFENDANT'S] RIGHTS

UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM II

THE STATE'S UNCONSTITUTIONAL USE OF JAILHOUSE INFORMANTS TO OBTAIN STATEMENTS IN VIOLATION OF [DEFENDANT'S] FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM III

[DEFENDANT] WAS DEPRIVED OF AN INDIVIDUALIZED SENTENCING DETERMINATION, BECAUSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE OF HIS CAPITAL TRIAL.

CLAIM IV

[DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE HE STOOD A CRIMINAL TRIAL ALTHOUGH HE WAS NOT LEGALLY COMPETENT, AND COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY ALLOWING AN INCOMPETENT CLIENT TO STAND TRIAL.

CLAIM V

COMMENTS BY THE COURT AND PROSECUTOR THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTED IN [DEFENDANT'S] SENTENCE OF DEATH, DIMINISHED THE JURORS' SENSE OF RESPONSIBILITY FOR THE CAPITAL SENTENCING TASK THAT THEY WERE TO PERFORM, AND HAD AN EFFECT ON THE JURY IN VIOLATION OF CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VI

THE INCONSISTENT JURY INSTRUCTIONS THAT A VERDICT OF LIFE IMPRISONMENT MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE CONSTITUTIONALLY UNACCEPTABLE RISK THAT DEATH MAY HAVE BEEN IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND [DEFENDANT'S] SENTENCE OF DEATH THUS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VII

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING REINFORCED BY THE PROSECUTOR'S SIMILAR BURDEN-SHIFTING COMMENTS ON SUMMATION, DEPRIVED [DEFENDANT] OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION, AND HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM VIII

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, AND

WAS PREJUDICED BY COUNSEL'S IGNORANCE OF THE LAW THROUGHOUT THE PROCEEDINGS IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM IX

[DEFENDANT] WAS DENIED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WHEN THE TRIAL COURT CONDUCTED CRITICAL PROCEEDINGS ALTHOUGH [DEFENDANT] WAS INVOLUNTARILY ABSENT.

CLAIM X

[DEFENDANT'S] SENTENCE OF DEATH WAS BASED UPON UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTIONS AND THUS VIOLATES THE EIGHT AND FOURTEENTH AMENDMENTS.

(PCR1. 89-190)[2] The lower court granted a stay of execution and held an evidentiary hearing. (PCR1. 882) By order dated February 13, 1989, the lower court denied the motion. (PCR1. 8691-8702)

Defendant appealed the denial of this motion to this Court, raising eight issues:

I.

[DEFENDANT] WAS DEPRIVED OF AN INDIVIDUALIZED AND RELIABLE SENTENCING DETERMINATION, BECAUSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE OF THESE CAPITAL PROCEEDINGS.

II.

THE STATE'S DELIBERATE USE OF FALSE AND MISLEADING TESTIMONY, AND THE INTENTIONAL WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE, VIOLATED [DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

III.

THE STATE'S UNCONSTITUTIONAL USE OF JAILHOUSE INFORMANTS TO OBTAIN STATEMENTS IN VIOLATION OF

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[2] The symbol "PCR1." will refer to the record on appeal from the denial of Defendant's first motion for post conviction relief, Florida Supreme Court Case No. 75,598.

[DEFENDANT'S] FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

IV.

[DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE HE STOOD A CRIMINAL TRIAL ALTHOUGH HE WAS NOT LEGALLY COMPETENT, AND COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY ALLOWING AN INCOMPETENT CLIENT TO STAND TRIAL.

V.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, AND WAS PREJUDICED BY COUNSEL'S IGNORANCE OF THE LAW, IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

VI.

COMMENTS BY THE COURT AND PROSECUTOR THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTED IN [DEFENDANT'S] SENTENCE OF DEATH, DIMINISHED THE JURORS' SENSE OF RESPONSIBILITY FOR THE CAPITAL SENTENCING TASK THAT THEY WERE TO PERFORM, AND HAD AN EFFECT ON THE JURY IN VIOLATION OF CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENTS AND TRIAL AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO ASSERT THAT CLAIM.

VII.

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING REINFORCED BY THE PROSECUTOR'S SIMILAR BURDEN-SHIFTING COMMENTS ON SUMMATION, DEPRIVED [DEFENDANT] OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION, AND HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND TRIAL COUNSEL INEFFECTIVELY FAILED TO LITIGATE THE CLAIM.

VIII.

THE INCONSISTENT JURY INSTRUCTIONS THAT A VERDICT OF LIFE IMPRISONMENT MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE CONSTITUTIONALLY

> UNACCEPTABLE RISK THAT DEATH MAY HAVE BEEN IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND [DEFENDANT'S] SENTENCE OF DEATH THUS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS, AND TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THIS REGARD.

On September 24, 1992, this Court affirmed the denial of the post conviction motion with regard to the guilt phase issues but reversed it regarding the penalty phase. ***Phillips v. State***, 608 So. 2d 778 (Fla. 1992). This Court found that counsel had been ineffective at the penalty phase by failing to investigate and present evidence regarding Defendant's family background and his mental state. ***Id.*** at 782-83. As such, this Court ordered that a new penalty phase trial. ***Id.***

On April 4, 1994, the resentencing proceedings began before a new jury. Following the presentation of evidence, on April 8, 1994, the jury recommended a sentence of death, by a vote of seven to five. (RST. 812)[3] The trial court again followed the jury's recommendation, as well as independently reviewed the evidence presented, and sentenced the defendant to death. (RSSR. 174-181) The trial judge found the following four (4) aggravating factors: 1) under sentence of imprisonment; 2) two

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[3] The symbols "RSR." and "RST." will refer to the record on appeal and transcript of proceedings from the appeal after resentencing, Florida Supreme Court Case No. 83,731. The symbol "RSSR." will refer to the supplemental record on appeal from that proceeding.

prior violent felony convictions; 3) disruption or hindrance of the lawful exercise of any government function; and, 4) murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (RSSR. 174-81) The trial judge did not find any statutory mitigating factors. (RSSR. 182-88) Defendant's "low intelligence, his poor family background, his abusive childhood, including his lack of proper guidance from his father," were accepted as nonstatutory mitigating circumstances, but were given "little weight." (RSSR. 189, 187)

Defendant again appealed to this Court, raising six issues:

> I.
> [DEFENDANT'S] TRIAL COURT SENTENCING VIOLATED FLORIDA LAW, THIS COURT'S STANDARDS AND THE CONSTITUTIONAL REQUIREMENTS OF A MEANINGFUL, INDEPENDENT JUDICIAL DETERMINATION OF SENTENCE.
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> II.
> THIS JURY WAS MISHANDLED BY THE JUDGE AND IMPROPERLY INFLUENCED TO RETURN A VERDICT, IN CONTRAVENTION OF FLORIDA LAW AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
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> III.
> THE DISRUPT OR HINDER GOVERNMENT FUNCTION AGGRAVATOR WAS IMPROPERLY AND OVERBROADLY SUBMITTED TO THE JURY AND FOUND BY THE COURT.
>
> IV.
> THE PROSECUTOR MADE BAD ACTS, INCLUDING UNCHARGED MATTERS, A FOCUS OF THIS RESENTENCING AND INTRODUCED PREJUDICIAL AND UNNECESSARY OVERKILL EVIDENCE ABOUT GUILT, INCLUDING EXTENSIVE HEARSAY AND OTHERWISE UNRELIABLE EVIDENCE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND THIS COURT'S STANDARDS.

V.

THE PROSECUTOR WAS UNCONSTITUTIONALLY ALLOWED TO STRIKE AN AFRICAN-AMERICAN JUROR FROM THE PANEL.

VI.

THE COLD, CALCULATED, PREMEDITATED AGGRAVATOR CANNOT BE CONSTITUTIONALLY NARROWED AND WAS IMPROPERLY EMPLOYED.

On September 25, 1997, this Court affirmed Defendant's sentence. *Phillips v. State*, 705 So. 2d 1320 (Fla. 1997).

On October 14, 1998, the Office of the Attorney General sent its Notices of Affirmance to the Office of the State Attorney for the Eleventh Judicial and the Department of Corrections, pursuant to Fla. R. Crim. P. 3.852(d)(1). (PCR2-SR. 262-65)[4,5] On November 3, 1998, the State Attorney sent its Notice of Affirmance to the Miami-Dade Police Department. (PCR2-SR. 164-65) The State Attorney's Notice of Affirmance was served on CCRC-South. (PCR2-SR. 164-64)

On December 24, 1998, the Department of Corrections sent its Notice of Compliance. (PCR2-SR. 266-27) On January 15, 1999, the Department of Corrections sent its Notice of Delivery of Exempt

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[4] The symbols "PCR2." and "PCR2-SR." will refer to the record on appeal and supplemental record on appeal from this proceeding.

[5] The State's Notice of Affirmance, the Notice of Compliance and the original shell Motion to Vacate Judgment of Sentence were not included in the record on appeal. The State moved to supplement the record with these documents on August 6, 2001, but has not received a supplemental record. As such, the page numbers for these documents is an estimate.

Public Records. (PCR2-SR. 171-73) On January 19, 1999, the State Attorney filed its Notice of Compliance and its Notice of Delivery of Exempt Public Records. (PCR2-SR. 1, 167-70) Again, the State Attorney's documents were served on CCRC-South. (PCR2-SR. 1, 167-70) On February 10, 1999, the Miami-Dade Police Department filed its Notice of Compliance and served it on CCRC-South. (PCR2-SR. 2-5)

On April 5, 1999, Kenneth Malnik of CCRC-South filed a Notice of Appearance. (PCR2-SR. 184) On September 13, 1999, Defendant filed a shell motion for post conviction relief. (PCR2-SR. 268-313) In this motion, Defendant asserted that it was "unknown at this time whether the attorney general has directed the agencies" to provide public records to the repository and "whether the agencies have complied." (PCR2-SR. 271) Defendant also alleged that he had received no notices of compliance. (PCR2-SR. 280).

On September 15, 1999, the State noticed a status conference on Defendant's Motion for September 23, 1999. (PCR2-SR. 186) At the September 23, 1999 hearing, Neil Dupree claimed that he had filed a notice of loss of designated counsel for Defendant and asserted that substitute counsel would be available in November. (PCR2. 310) The State responded that it had never received a notice of loss of designated counsel. (PCR2. 313)

The State also took issue with the claim in the shell motion that there was no public records compliance, as all of the notices regarding public records had been filed and all of the public records had been transmitted to the repository. (PCR2. 310-12) Defendant responded that he had no notice that the agencies had complied. (PCR2. 312-13) The State pointed out that the notices of compliance from the State Attorney and the Miami-Dade Police Department had been served on CCRC-South. (PCR2. 313)

The lower court then inquired what Defendant had done to assign someone to Defendant's case. (PCR2. 313) Dupree responded that he had been diligently attempting to fill the vacancy at CCRC-South since counsel had resigned in July and August of 1999. (PCR2. 313-14) The lower court then inquired regarding what had been done on Defendant's case since the denial of certiorari in October 1998. (PCR2. 314) Dupree replied that CCRC-South was unaware that records had been filed with the repository, that he had filed a blanket request for all documents at the repository regarding all of CCRC-South's client in February 1999, and that he had received no response from the repository. (PCR2. 314-17) Dupree stated that when no response was received, Defendant simply awaited delivery of the records and took no further action. (PCR2. 317) Based on this, the lower

court found that CCRC-South had delayed the filing of the Rule 3.850 motion by not moving to compel or taking other action to pursue the public records. (PCR2. 317-18) The lower court also informed Dupree that if he did not have an assistant to assign to the case, he should personally handle it. (PCR2. 317)

The lower court then set the date for a "final hearing" on Defendant's post conviction motion for January 6, 2000. A discussion then ensued regarding the meaning of the words "final hearing:"

> [The State:] When you say final -- this is what is a Hoff [sic] hearing. When you say final hearing, I'm assuming, that is the hearing, what the perimeters will the evidentiary hearing be if there is --
> THE COURT: If there is an evidentiary hearing. I don't expect you to have a hearing. On that day, I'm going to thin out the heard [sic] and this is not a hearing. This is not a hearing.
> [Defendant:] What you're saying, it's a Hoff [sic] hearing.
> THE COURT: Yes. When I say final hearing.

(PCR2. 318)

The lower court then gave Defendant until December 2, 1999, to file a final amended motion for post conviction relief. (PCR2. 319-20) In setting the date, the lower court informed CCRC-South that in the future it should file motions to compel if it did not receive public records in a timely fashion. (PCR2. 319) Defendant then alleged that he had not been dilatory in seeking the public records. (PCR2. 319) The lower court

responded:

> I'm sorry. If I have a case and I send in notice and I want documents, if I'm seriously interested in prosecuting a Rule Three and not hoping to delay it, if I file a document in February and I get nothing back in March, I'm in court in March saying they are not sending me the courtesy of a response. If I don't get anything back in April, May, June, July, August and I come to court in September, there is something here and it appears that you don't want to prosecute a Rule Three, from the appearance you are carrying, to wait as long as you can to stretch this out and if you have a problem I expect you to bring it to my attention immediately not eight months, where it takes.

(PCR2. 319-20)

On November 10, 1999, Defendant's present counsel filed a Notice of Appearance, Motion for Rehearing and Request for Status Conference. (PCR2-SR. 142-56) In this pleading, Defendant asserted that new counsel had just been assigned to his case, when William Hennis was promoted to lead counsel with CCRC-South. (PCR2-SR. 142-56) Defendant asked the lower court to reconsider the filing deadline for his final amended motion for post conviction relief, asserting that he did not have sufficient time to review the records regarding this matter and that he had other matters that needed counsel's attention. (PCR2-SR. 142-56)

On November 17, 1999, the lower court held a hearing on this motion, at which Defendant asserted that his counsel had just been promoted and assigned to this matter. (PCR2. 322-25) The

lower court indicated that it was denying the motion because it had already found that Defendant was “intentionally and deliberately delaying this procedure.” (PCR2. 325) The lower court reiterated that it had set a deadline and had previously told Defendant that the deadline was to be followed regardless of who was assigned to the case. (PCR2. 325)

Defendant then asserted that he had received records from the repository on October 19, 1999, and October 27, 1999. (PCR2. 326) Defendant requested 90 days to review the records and amend his motion for post conviction relief. (PCR2. 326-27) The lower court informed Defendant that it was not extending the deadline because Defendant had caused himself to be in this situation by not pursuing public records in a timely fashion. (PCR2. 327)

Defendant then requested 30 days to do requests for additional public records. (PCR2. 327-28) Defendant also asked that the lower court to review the exempt materials from the State Attorney’s Office and the Department of Corrections. (PCR2. 328) The lower court ordered the State to get the exempt records transported from the repository and stated that if it decided that any exemptions were improperly claimed, it would allow Defendant to amend based on those documents. (PCR2. 329) However, the lower court refused to extend the time for filing of the final amended motion for post conviction relief because

it found that Defendant had intentionally delayed the pursuit of public records as a matter of strategy. (PCR2. 329) Defendant objected to this ruling because the attorney who was presently representing him was not the attorney who caused the delay. (PCR2. 329-30) The lower court acknowledged that the new attorney had not caused the delay but stated:

> [Y]our office can't get out from the situation they put themselves in by changing a lawyer in the case. You can't have someone there delay the proceedings and when sanctions are imposed, well, I'm swapping the lawyer and I didn't do anything wrong.

(PCR2. 330)

On November 29, 1999, Defendant moved to disqualify the lower court. (PCR2-SR. 10-18) In this motion, Defendant alleged that Judge Ferrer was biased against his counsel because he had found that CCRC-South had deliberately delayed the proceedings at both the September 23, 1999 status conference and at the November 17, 1999 hearing. (PCR2-SR. 10-18) He also asserted that the lower court had referred to the public records proceedings as a joke. (PCR2-SR. 10-18)

On December 1, 1999, the lower court entered an order requiring the repository to deliver the exempt materials to it. (PCR2-SR. 207-08) On December 2, 1999, Defendant filed his amended motion for post conviction relief, raising 24 claims:

CLAIM I

[DEFENDANT] IS BEING DENIED HIS RIGHT TO EFFECTIVE

REPRESENTATION BY THE LACK OF FUNDING AVAILABLE TO FULLY INVESTIGATE AND PREPARE HIS POSTCONVICTION PLEADING, UNDERSTAFFING, AND THE UNPRECEDENTED WORKLOAD ON PRESENT COUNSEL AND STAFF, IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND IN VIOLATION OF SPALDING V. DUGGER.

CLAIM II

[DEFENDANT] IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., AND FLA. R. CRIM. P. 3.852, [DEFENDANT] CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

CLAIM III

[DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH, AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE THAT WAS MATERIAL AND EXCULPATORY IN NATURE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING OF THE EVIDENCE AT RESENTENCING.

CLAIM IV

[DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WERE VIOLATED BY COUNSEL'S INEFFECTIVENESS DURING VOIR DIRE WHETHER DUE TO COUNSEL'S DEFICIENCIES OR BEING RENDERED INEFFECTIVE BY STATE ACTION.

CLAIM V

[DEFENDANT] WAS DENIED HIS RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND MENTAL HEALTH EXPERTS AT HIS RESENTENCING, WHEN CRITICAL INFORMATION REGARDING [DEFENDANT'S] MENTAL STATE WAS NOT PROVIDED TO THE

JURY OR JUDGE, ALL IN VIOLATION OF [DEFENDANT'S] RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

CLAIM VI

[DEFENDANT'S] WAS DENIED HIS RIGHTS UNDER AKE V. OKLAHOMA AT THE PENALTY PHASE OF HIS CAPITAL TRIAL WHEN COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND FAILED TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO THE MENTAL HEALTH CONSULTANT IN VIOLATION OF [DEFENDANT'S] RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

CLAIM VII

[DEFENDANT'S] RESENTENCING WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM VIII

[DEFENDANT] IS INNOCENT OF THE DEATH PENALTY. [DEFENDANT] WAS SENTENCED TO DEATH IN VIOLATION OF THE EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM IX

[DEFENDANT] WAS ABSENT FROM CRITICAL STAGES OF THE TRIAL IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM X

[DEFENDANT'S] SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO [DEFENDANT] TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING [DEFENDANT]. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THESE ERRORS.

CLAIM XI

[DEFENDANT'S] DEATH SENTENCE IS FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO THE STATE'S INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENTS UPON NON-STATUTORY AGGRAVATING FACTORS. DEFENSE COUNSEL'S FAILURE TO OBJECT OR ARGUE EFFECTIVELY CONSTITUTED INEFFECTIVE ASSISTANCE.

CLAIM XII

[DEFENDANT'S] SENTENCING JURY WAS MISLED BY COMMENTS, QUESTIONS, AND INSTRUCTIONS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY OBJECTING.

CLAIM XIII

[DEFENDANT] IS BEING DENIED HIS FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING [DEFENDANT'S] ATTORNEYS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

CLAIM XIV

[DEFENDANT] WAS DENIED HIS RIGHTS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE STATE ATTORNEY OVERBROADLY AND VAGUELY ARGUED AGGRAVATING CIRCUMSTANCES IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, SOCHER V. FLORIDA, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER.

CLAIM XV

[DEFENDANT] IS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT.

CLAIM XVI

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

CLAIM XVII

[DEFENDANT'S] EIGHTH AMENDMENT RIGHT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND AND/OR CONSIDER THE MITIGATING CIRCUMSTANCES SET OUT CLEARLY IN THE RECORD. TO THE EXTENT, TRIAL COUNSEL FAILED TO KNOW THE LAW, FAILED TO ARGUE EFFECTIVELY, AND/OR FAILED TO OBJECT, TRIAL COUNSEL WAS INEFFECTIVE.

CLAIM XVIII

THE TRIAL COURT'S SENTENCING ORDER DOES NOT REFLECT AN INDEPENDENT WEIGHING OR REASONED JUDGMENT, CONTRARY TO FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XIX

[DEFENDANT] WAS DENIED A PROPER DIRECT APPEAL OF HIS CONVICTION AND DEATH SENTENCE, CONTRARY TO FLORIDA LAW AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, DUE TO OMISSIONS IN THE RECORD. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THIS REGARD.

CLAIM XX

THE JURY AND JUDGE WERE PROVIDED WITH AND RELIED UPON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN SENTENCING [DEFENDANT] TO DEATH IN VIOLATION OF JOHNSON v. MISSISSIPPI, 108 S. CT. 1981 (1988), AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XXI

[DEFENDANT] IS INSANE TO BE EXECUTED.

CLAIM XXII

AT SENTENCING THE COURT ERRED IN REFUSING TO INSTRUCT [DEFENDANT'S] JURY THAT MERCY TOWARDS [DEFENDANT] WAS A PROPER CONSIDERATION IN PENALTY PHASE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XXIII

[DEFENDANT] WAS DENIED HIS RIGHT TO A FAIR PROCEEDING BEFORE AN IMPARTIAL JUDGE IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. THE IMPROPER CONDUCT OF JUDGE SNYDER AT HIS RESENTENCING

> CREATED A BIAS IN FAVOR OF THE STATE AND RENDERED RULINGS CONTRARY TO LAW.
>
> CLAIM XXIV
>
> [DEFENDANT] WAS DENIED HIS RIGHT TO A FAIR PROCEEDING BEFORE AN IMPARTIAL JUDGE DURING THE INSTANT POSTCONVICTION PROCEEDINGS IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. THE IMPROPER CONDUCT OF JUDGE FERRER CREATED A BIAS IN FAVOR OF THE STATE, RENDERED RULINGS CONTRARY TO THE LAW, AND HAS SET UP A CONFLICT BETWEEN UNDERSIGNED COUNSEL (CCRC-SOUTH AND MR. HENNIS) AND [DEFENDANT].

(PCR2. 29-141)

That same day, Defendant also filed a Motion for Leave of Court to Interview Jurors, claiming that he believed that juror misconduct had occurred from his review of the record. (PCR2-SR. 204-05) Defendant's attorney also filed a motion to withdraw due to conflict of interest. (PCR2-SR. 254-57) In this motion, counsel asserted that he could not competently represent Defendant given the time constraints. (PCR2-SR. 254-57)

On December 20, 1999, the State responded to Defendant's Motion to Disqualify the lower court. (PCR2-SR. 19-26) The State asserted that the motion was untimely as the statements at the November 17, 1999 hearing were merely a reiteration of the rulings from the September 23, 1999 status conference, which had occurred more than 10 days before the motion was filed. (PCR2-SR. 19-26) The State also contended that the lower court's comments did not demonstrate prejudice against Defendant or his attorney and were merely adverse rulings. (PCR2-SR. 19-26)

On December 31, 1999, the State filed its response to Defendant's motion for post conviction relief. (PCR2. 145-219) The State asserted that Claims VII, VIII, IX, X, XI, XII, XIII, XIV, XVI, XVII, XVIII, XIX, XX, and XXII were procedurally barred because they could have been, should have been or were raised on direct appeal. The State argued that Claims I, II, IV XV and XXIV were without merit. With regard to Claim III, the State contended that the motion was facially insufficient because Defendant had not alleged what evidence the State had purportedly withheld. The State asserted that Claims V and VI were refuted by the record because counsel had consulted mental health experts and presented their testimony regarding Defendant's alleged mental retardation and alleged organic brain damage. With regard to Claim XXI, the State agreed that the claim was not ripe.

On January 4, 2000, the lower court held a hearing on Defendant's motion to disqualify and his counsel's motion to withdraw. (PCR2. 332-40) The lower court denied both Defendant's motions. (PCR2. 334, 335) The lower court then set a hearing for January 6, 1999, to review the exempt materials and set a *Huff* hearing for February 4, 2000. (PCR2. 336-38) On January 6, 2000, the lower court entered written orders denying these motions. (PCR2-SR. 27-28)

On January 6, 2000, Defendant filed a petition for writ of prohibition, dated January 5, 2000, in this Court, seeking the disqualification of Judge Ferrer. Defendant again asserted that Judge Ferrer's rulings that he had deliberately delayed the public records process evidenced bias against him. He also realleged that Judge Ferrer had call the public records proceedings a joke. Finally, Defendant asserted that since Judge Ferrer had found Defendant's actions dilatory, he was predisposed to deny Defendant's motion for post conviction relief.

Also on January 6, 2000, the lower court held a hearing on the exempt public records and reserved ruling. Because Defendant had filed the petition for writ of prohibition, the lower court rescheduled the *Huff* hearing for February 25, 2000.

On January 7, 2000, this Court requested a response from the State to the prohibition petition. In its response, the State contended that the motion to disqualify was properly denied because it was untimely and based solely upon adverse ruling of the lower court. On January 27, 2000, this Court denied the Petition. *Phillips v. State*, 751 So. 2d 1253 (Fla. 2000).

On January 18, 2000, Defendant filed a reply to the State's response to his motion for post conviction relief. (PCR2. 220-26) In this pleading, Defendant asserted that his counsel was

ineffective for not conducting even more investigation into his mental state and not presenting this additional information.

On February 25, 2000, the lower court conducted a *Huff* hearing in this matter. (PCR2. 212-14) At the beginning of the hearing, the lower court indicated that it had reviewed the exempt materials in camera and found that they were, in fact, exempt. (PCR2-SR. 214-15) The State then noted that the Department of Corrections had provided Defendant with a copy of his medical records on January 26, 2000. (PCR2-SR. 216) The State asserted that they had not previously been provided because Defendant had not previously executed a consent to the release of this information. (PCR2-SR. 216)

Defendant then renewed his objection to proceeding under the time limits set by the lower court. (PCR2-SR. 217-18) Defendant requested a continuing objection to the lower court's alleged refusal to permit Defendant to file affidavits for additional public records. (PCR2-SR. 219) The lower court indicated that it had not refused to permit Defendant to file affidavits for additional public records; it had merely refused to provide Defendant with additional time to do so. (PCR2-SR. 219-21)

Defendant then argued that he was entitled to an evidentiary hearing because resentencing counsel had not presented Defendant's employer, who had testified at the prior post

conviction evidentiary hearing, and his attorneys from the first trial. (PCR2-SR. 221-27)) Defendant also asserted that resentencing counsel should have done additional investigation regarding the mitigation that was presented at the prior evidentiary hearing. (PCR2-SR. 221-27) Defendant alleged that he had demonstrated prejudice because the jury recommended death and the resentencing order rejected the statutory mental mitigators. (PCR2-SR. 221-27)

Defendant next asserted that he could not specifically plead Claim XIII because he could not interview the jurors. (PCR2-SR. 227) He also alleged that claims of ineffective assistance of counsel in order to avoid procedurally bars were proper. (PCR2-SR. 227-28) Specifically, Defendant alleged that his claims regarding the alleged *Spencer* violation and the use of the State's sentencing memorandum in formulation the sentencing order should not be barred. (PCR2-SR. 228-30)

The State responded that all of the evidence that Defendant claims should have been present was, in fact, presented. (PCR2-SR. 230-32, 237-40) The State asserted that original trial counsel would not have had any mitigating evidence to present. (PCR2-SR. 237) The State then explained that the reason a procedural bar cannot be avoided by claiming ineffective assistance is that if the claim rose to the level of fundamental

error, it would have been considered on direct appeal despite the lack of preservation. (PCR2-SR. 232-35)

Defendant responded that his original counsel could have testified that they did not think Defendant was bright. (PCR2-SR. 241-44) He also alleged that his counsel should have presented a neurologist to confirm that he was brain damaged and a specialist in mental retardation to say that he was retarded. (PCR2-SR. 241-44)

The lower court then inquired if Defendant was withdrawing his claim regarding electrocution. (PCR2-SR. 236) Defendant responded that he was not withdrawing the claim but was orally amending to include lethal injection. (PCR2-SR. 236) The State responded that the lethal injection claim was meritless as well. (PCR2-SR. 236-37)

On August 28, 2000, the lower court issued its written order denying the amended motion. (PCR2. 142-44) The lower court found that claims 7 through 20, 22 and 23 were procedurally barred because they could have been, should have been or were raised on direct appeal. (PCR2. 142-44) It also found that claims 9, 10, 13, 15, 17, 18, 20, and 22 were without merit. The lower court considered claims 1 through 6, 15, 16, 20, 21, 23 and 24 to be insufficiently plead. (PCR2. 142-44) With regard to claims 5 and 6, the lower court noted that “the record is replete with

evidence that trial court acknowledged the Defendant's low IQ, abusive childhood, inadequate parental guidance and poor family background as non-statutory mitigating circumstances." (PCR2. 142)

On September 12, 2000, Defendant moved for rehearing, alleging that lower improperly denied his claim of ineffective assistance of resentencing counsel because he had two new experts who would testify that Defendant was mentally retarded and organically brain damaged and because the resentencing court had found the two experts who testified at resentencing to be less credible than the State's experts. (PCR2-SR. 30-38) He also asserted that the claim was sufficiently pled. (PCR2-SR. 30-38) Finally, Defendant alleged that Defendant had been found unconscious in his cell in May 2000, and may have suffered a closed head injury. (PCR2-SR. 30-38) As such, Defendant filed an affidavit seeking Defendant's prison medical records since January 26, 2000, the date on which they were last produced to Defendant. (PCR2-SR. 39-41)

On September 15, 2000, the State noticed Defendant's motion for rehearing and request for additional public records for hearing on October 5, 2000. (PCR2-SR. 43) However on September 26, 2000, the lower court entered a written order denying the motion for rehearing. (PCR2-SR. 43)

This appeal follows.

SUMMARY OF THE ARGUMENT

The claim of ineffective assistance was properly denied, as the record reflects that counsel investigated and presented this evidence. The claim regarding the retardation statute is not properly before this Court because it was not raised below. Moreover, the statute does not apply to Defendant.

The claims regarding the public records issues, the withdraw of counsel and the disqualification of lower court were properly denied because Defendant did not use due diligence in seeking the records and this did not provide a basis for withdraw or disqualification.

The claims regarding the jury were properly denied as procedurally barred and without merit. The same is true of the claims regarding the jury instructions and the State's comments and introduction of evidence.

Defendant is not innocent of the death penalty. The claim that Defendant is insane to be executed is not ripe. The claim regarding the prior convictions and the claim that Defendant was denied his right to be present were properly denied as procedurally barred and without merit. The claim of cumulative error was properly denied because the underlying claims were procedurally barred and without merit.

ARGUMENT

I. THE LOWER COURT PROPERLY SUMMARILY DENIED THE CLAIM OF INEFFECTIVE ASSISTANCE.

Defendant first asserts that the lower court improperly summarily denied his claim that his counsel was ineffective during his 1994 resentencing. Defendant asserts that he should have been given an evidentiary hearing on his claims that counsel was ineffective for failing to investigate and present evidence that Defendant was mentally retarded and brain damaged and for failing to see that the experts he did present did adequate evaluations. However, the lower court properly denied these claims because counsel did investigate and present the evidence Defendant claims should have been presented and experts did do proper evaluations.

In order to prove a claim of ineffective assistance of counsel, Defendant must demonstrate both that counsel's performance was deficient, and that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendant of a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668 (1984).

Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and a fair

assessment of performance of a criminal defense attorney:

> requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that criminal defense counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 694-695.

Further, strategic choices made by a criminal defense counsel after thorough investigation of law and facts relevant to plausible options are "virtually unchallengeable." They may only be overturned if they were "so patently unreasonable that no competent attorney would have chosen it." *Haliburton v. State*, 691 So. 2d 466, 471 (Fla. 1997)(quoting *Palmes v. Wainwright*, 725 F.2d 1511, 1521 (11th Cir. 1984)(quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983))).

Even if a criminal defendant shows that particular errors of defense counsel were unreasonable, the defendant must show that they actually had an adverse effect on the defense in order to establish ineffective assistance of counsel. The test for prejudice requires the defendant to show that, but for counsel's

unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*.

Prior to resentencing, Defendant asked the trial court to appoint Drs. Toomer and Carbonell as his experts, which the trial court did. (RST. 18-20) Defendant subsequently indicated that he was having trouble with Dr. Carbonell because she was ill. (RST. 25) The trial court suggested that Defendant use a different doctor. (RST. 25) Defendant indicated that he would try to find another doctor but wished to keep Dr. Carbonell at that time. (RST. 25-26) Later, Defendant indicated that Dr. Carbonell was willing to reevaluate Defendant and be redeposed. (RST. 35-36) However, Defendant had scheduled this to occur during the middle of trial, and the State objected to the lateness of this reevaluation. (RST. 36) Defendant suggested that a brief continuance would alleviate the scheduling conflict, but the trial court refused to grant a continuance. (RST. 36-37) Defendant then agreed to have Dr. Carbonell conduct her evaluation sooner. (RST. 37-38)

On the day resentencing commenced, Defendant moved for a continuance because Dr. Carbonell was unavailable. (RST. 47) However, the parties agreed to have Dr. Carbonell testify at a time certain, alleviating the need for a continuance. (RST. 47)

The next day, Defendant indicated that he would be introducing either Dr. Carbonell's testimony telephonically or having her prior testimony read because her testimony had not changed. (RST. 237) Counsel later indicated that Defendant had agreed to use Dr. Carbonell's prior testimony instead of her telephonic testimony. (RST. 239-40) The trial court informed Defendant of this agreement, and Defendant indicated that he was in agreement with it. (RST. 344)

Dr. Joyce Carbonell testified that she evaluated Defendant. (RSSR. 3-11) In doing so, she interviewed Defendant for 4½ hours and reviewed his prison records, personnel records, his parole records, his school records, his jail records, his attorney's file, testimony and depositions, police reports and affidavits from his family, friends and a school teacher. (RSSR. 12-13) She also personally spoke to one of Defendant's teachers. (RSSR. 12) She also administered the WAIS-R, the Wide Range Achievement test, Level 2 Revised (WRAT-R-2), the Peabody Individual Achievement Test (PIAT), the Rorschach test, the Wechsler Memory Scale, the Canter Background Interference procedure for the Bender Gestalt and the MMPI. (RSSR. 12-14)

On the WAIS-R, Defendant has scored 75 full scale, 75 verbal and 77 performance. (RSSR. 15) This score placed Defendant in the borderline range. (RSSR. 16) On the WRAT-R-2, Defendant

scored 53 on arithmetic, 75 on reading recognition and 88 on spelling. (RSSR. 17) The score on arithmetic was lower than expected for his IQ level, the reading score on consistent with the IQ level and the spelling score was higher. (RSSR. 17) Dr. Carbonell stated that Defendant's reading of "word power" from the Reader's Digest explained his higher spelling score. (RSSR. 17-18) On the PIAT, Defendant scored at the 3.8 grade level in reading comprehension and mathematics, the 8.1 grade level in recognition, the 8.0 grade level in spelling and the 9.4 grade level in general information. (RSSR. 18) Dr. Carbonell found these scores consistent with his performance on the WAIS-R and the WRAT-R-2. (RSSR. 18-19)

Dr. Carbonell stated that she used the Canter Background Interference procedure for the Bender Gestalt because it improved her ability to screen for brain damage. (RSSR. 20) Defendant performed badly on this test, in the brain damaged range. (RSSR. 21) However, Dr. Carbonell could not say that this was not the result of Defendant's low IQ. (RSSR. 21) Defendant also performed badly on the Rorschach test, which Dr. Carbonell found consistent with Defendant's IQ score and indicative of social isolation and being withdrawn. (RSSR. 21-22) On the Memory Scale, Defendant did well in the portions of the test concerning personal information, current events and rote memory

but worse on prose passages and visual reproduction. (RSSR. 23)

On the MMPI, Defendant's scores were valid, consistent with being from a lower socioeconomic background and showed depression. (RSSR. 24-26) The MMPI results also indicated that Defendant was isolated, alienated, inadequately socialized and passive-aggressive. (RSSR. 26-27) Defendant scored slightly above average on the psychopathic scale, which Dr. Carbonell found consistent with family and legal problems. (RSSR. 28-29) Defendant also had high scores on the paranoia and psychasthenia scales, which indicated that he was anxious and did not get pleasure out of life. (RSSR. 29-30)

From review of Defendant's prison records, Dr. Carbonell stated that Defendant had previously scored a 73 on the Revised Beta IQ test and that his IQ had ranged between 73 and 83. (RSSR. 32, 41) Defendant's school records showed that he had received C's, D's and a couple of F's. (RSSR. 32-33, 43-46) Dr. Carbonell found that her testing was consistent with the social history of Defendant as being withdrawn, socially isolated and passive-aggressive. (RSSR. 33) Dr. Carbonell found that Defendant had intellectual deficits and was schizoid. (RSSR. 33-34) Dr. Carbonell believed that these problems would impair Defendant's ability to interact with the world around him. (RSSR. 34-35) Dr. Carbonell did not believed that Defendant had

much ability to express himself. (RSSR. 35)

Dr. Carbonell stated that Defendant had a history of being beaten as a child and that he was shot in the face and lost consciousness as a result of falling thereafter. (RSSR. 36) Dr. Carbonell stated that these injuries may have caused brain damage. (RSSR. 36) However, Dr. Carbonell could not definitively state that Defendant was brain damaged because of his IQ level. (RSSR. 36) Dr. Carbonell stated that Defendant's problems were lifelong but got worse after the shooting. (RSSR. 38)

Dr. Carbonell believed that Defendant was very passive and easily led. (RSSR. 38-39) She found this consistent with the history provided by Defendant's family, friends and teacher. (RSSR. 39) Dr. Carbonell explained that Defendant's prison records showed that he was amiable, well-behaved and having a good attitude at times and that he was difficult and causing problems at other times. (RSSR. 39-40) Dr. Carbonell stated that this was consistent with Defendant being passive, not being able to interact with the world effectively, getting frustrated and acting out. (RSSR. 40-41)

Dr. Carbonell believed that the abuse and abandonment by his father, together with his mother's lack of supervision and his intellectual deficit cause Defendant to have personality problems and to withdraw. (RSSR. 48-53) Dr. Carbonell claimed

that Defendant's passivity and his inability to cope caused Defendant to be unable to communicate. (RSSR. 53-54)

When asked if Defendant qualified as retarded, Dr. Carbonell stated that he did not score in the retarded range. (RSSR. 58) However, Dr. Carbonell explained that retardation depends on three factors, (1) subaverage intelligence, (2) onset in the development stage and (3) deficits in adaptive functioning. (RSSR. 57-59) Dr. Carbonell believed that Defendant's problems had onset in the development stage and that he did not have problems in adaptive functioning because of his passivity. (RSSR. 58-59) As such, she did find that Defendant was intellectually impaired. (RSSR. 59)

Dr. Carbonell did not think Defendant was ever capable of planning or had ever planned anything. (RSSR. 87-88) Dr. Carbonell did think that Defendant was educatable. (RSSR. 89-90) Dr. Carbonell believed that Defendant deficits in intellectual functioning, he difficulty in achievement and his history of being a loner and withdrawn should be considered mitigating. (RSSR. 97) Dr. Carbonell also believed that both statutory mental mitigators were applicable to Defendant. (RSSR. 102-04) She based this opinion on her claim that Defendant behaves passively and then acts out and her claim that Defendant did not have the intellectual ability to understand what was required of

him. (RSSR. 103-04) She also claimed that CCP was inapplicable because Defendant allegedly could not plan. (RSSR. 105)

Dr. Carbonell did not believe that Drs. Haber and Miller had not conducted professional adequate evaluations because they did not consider background information and did not do enough testing. (RSSR. 106-17) As such, Dr. Carbonell disagreed with their reports and felt that they were unreliable. (RSSR. 117-19)

Dr. Carbonell admitted on cross that her findings with regard to Defendant's passivity did not correspond with Defendant's assertion of innocence. (RSSR. 123) Dr. Carbonell thought that Defendant probably had brain damage. (RSSR. 128-29) Dr. Carbonell stated that Defendant was not schizophrenic or psychotic. (RSSR. 129) Dr. Carbonell stated that Defendant functioned "at the level of many retarded people." (RSSR. 129) Dr. Carbonell admitted that retardation generally required an IQ score less than 70 but stated that such scores had a margin of error of plus or minus 5 and that retardation was not based solely on IQ. (RSSR. 130, 168-70)

Dr. Carbonell admitted that her definition of assertive behavior required that the behavior not infringe on the rights on others and that she would not classify behavior that infringed on the rights of others as aggressive. (RSSR. 135) Dr. Carbonell insisted that Defendant was honest when he stated that

he did not know that he could be sentenced to death even though he was in the courtroom during the extensive voir dire on the subject. (RSSR. 139-44)

Dr. Carbonell did not believe that the Bro White letter demonstrated that Defendant appreciated that the named individuals were State witnesses and that he was intending to harm them and their families. (RSSR. 144-48) Instead, she felt the letter showed that he was angry and distressed and that the letter was primitive. (RSSR. 148) She believed that the portion of the letter indicating that the individuals that would be "handled accordingly" merely showed that Defendant was angry and lashing out in a totally useless way. (RSSR. 150) She believed the same of the threat against the witnesses' families. (RSSR. 151)

Dr. Carbonell also discounted the alibi notes because Defendant never wrote in the notes to call his attorney, give him this alibi and testify to it at trial. (RSSR. 152-56) Moreover, she felt the content of the alibi was too simple. (RSSR. 152-56)

Dr. Jethro Toomer testified that he evaluated Defendant in 1988 and again in 1994. (RST. 594-97) Dr. Toomer met with Defendant for 3 to 3½ hours in 1988 and for an hour in 1994. (RST. 597-99) During his interview, Dr. Toomer gave Defendant

the revised Beta IQ test, the Carlson Psychological Survey, the Rorschach test, the Bender Gestalt Design test and the verbal reasoning portion of the WAIS. (RST. 602-03) In preparing to testify, Dr. Toomer had also reviewed affidavits from Defendant's family, friends, teachers and coworkers, his school records, his DOC records, his personnel file, documents used during his interviews with Defendant, Defendant's trial attorney's file and the transcript of his prior testimony and of the original trial. (RST. 598, 603-05) Dr. Toomer stated that he reviewed the affidavits and records in order to corroborate the history provided by Defendant. (RST. 600-01)

Dr. Toomer stated that he used the Revised Beta IQ test because it was not dependent on acquired information. (RST. 605-06) Defendant score 76, which was in the borderline range. (RST. 606) Dr. Toomer also noted that Defendant's prison records reflected a Revised Beta of 73 from 1984. (RST. 622) Dr. Toomer stated that the range for mental retardation was 70 to 75 and that IQ scores had a margin of error of plus or minus 5. (RST. 607) As a result, Dr. Toomer stated that Defendant's IQ could be between 81, above the borderline range, and 71, in the retarded range. (RST. 607) Dr. Toomer stated that he was not saying that Defendant was retarded. (RST. 607)

Dr. Toomer stated that the Bender Gestalt Design test was

a screening test. (RST. 608) It consists for copying a drawing, and the different variation from the original drawing are considered indicative of certain mental problems. (RST. 608-10) Dr. Toomer believed that Defendant's performance on this test was indicative of organic brain damage and of someone who was depressed and timid. (RST. 610) Dr. Toomer found the indication of depression and timidness consistent with his observations of Defendant. (RST. 610) Dr. Toomer stated that the indication of brain damage did not necessarily mean that Defendant was brain damaged; it merely indicated the neuropsychological testing was necessary. (RST. 611)

Dr. Toomer stated that he only gave the verbal reasoning portion of the WAIS because the WAIS relied too heavily on acquired knowledge and was culturally bias. (RST. 611-13) The verbal reasoning portion is used to evaluate the individual's ability to reason abstractly. (RST. 613) According to Dr. Toomer, the test showed that Defendant's reasoning was very concrete. (RST. 614)

Dr. Toomer stated that the Carlson Psychological Survey tested personality and overall functioning and was normalized against individuals who had been charged with crimes. (RST. 615) Defendant's results were in the 5th percentile for substance abuse, the 55th percentile for thought disturbances, the 16th

percentile for antisocial tendencies and the 90th percentile for self depreciation. (RST. 617-18) This indicated that Defendant did not abuse drugs or alcohol, had intellectual deficits, was not antisocial and had low self esteem. (RST. 617-18) Dr. Toomer found the self esteem score consistent with Defendant's background and records. (RST. 618)

The Rorschach test involves showing a picture and asking the subject to create a story about the picture. (RST. 619-21) Dr. Toomer admitted that the test had been criticized for its culture bias but that it was valid for estimating intelligence because people with higher intelligence create more detailed stories. (RST. 621) Defendant was not very responsive on this test, and Dr. Toomer found that indicative of having low intelligence and being withdrawn and depressed. (RST. 621-22)

Based on the totality of his evaluation, Dr. Toomer felt that Defendant had deficits in intellectual and emotional functioning and mental status. (RST. 622) He found that Defendant's intellectual functioning was "borderline or slightly higher." (RST. 623) Dr. Toomer opined that Defendant was incapable of forming the mental state necessary for CCP because his intellectual deficits prevented him from engaging in long range planning and from weighing the consequences of his actions. (RST. 624-25) He also believed that both statutory

mental mitigators were applicable to Defendant because Defendant has a lifelong intellectual deficit and history of being withdrawn. (RST. 630-32) He felt that Defendant suffered from a "developmental disorder," which cause a lifelong impairment of his "social interpretaion [sic] skills" and his intellectual functioning. (RST. 632)

Dr. Toomer did not felt that Drs. Miller and Haber produced accurate findings regarding Defendant. (RST. 626-27) He felt that they relied too heavily on self report and contaminated one another's evaluations because they were conducted concurrently. (RST. 627-28) He also felt that Dr. Haber used the Bender test inaccurately. (RST. 627) Dr. Toomer believed that one expert could not rely upon another expert's raw data without a great deal of additional information regarding how the raw data was developed. (RST. 628-29) As such, Dr. Toomer did not believe it was acceptable for one expert to rely on the raw data of another with speaking to that other expert. (RST. 629)

On cross examination, Dr. Toomer admitted that he had testified on mitigation and insanity a number of time but always for the defense. (RST. 636-37) The only issue upon which he had ever testified for the State was competency. (RST. 637)

Dr. Toomer admitted that he had not found Defendant to be retarded, psychotic or schizophrenic. (RST. 639) He had found

that Defendant might have some mild organic brain damage. (RST. 639-40) Dr. Toomer admitted that people under long term incarceration were frequently depressed, but did not feel that the fact that Defendant had been incarcerated almost continually since 1962 was the cause of his depression. (RST. 641-42) When asked if Defendant's criminal history and history of problems during incarceration demonstrated that Defendant was antisocial, Dr. Toomer stated that his family's description of Defendant as helpful, caring and concerned indicated that he was not antisocial. (RST. 643-45)

Dr. Toomer admitted that he had previously described the graze wound to Defendant's head a very severe head wound because Defendant's family had claimed that he was incoherent, that he was released from the hospital because he could not paid and that he had severe headaches thereafter.[6] (RST. 645-46) Dr. Toomer stated that the reason why Defendant's sibling had become productive members of society and Defendant had become a criminal was that people react differently. (RST. 647) However, he admitted that the difference could be a matter of choice. (RST. 647) Dr. Toomer claimed that the reason Defendant

[6] During resentencing, Defendant's mother and sister described the injury as a grazing wound and stated that Defendant was treated and released from the hospital. (RST. 539, 568)

repeatedly failed to follow the instructions of his parole officers was that the disobedience was a release of feeling brought on by doing things that Defendant did not want to do to feel accepted. (RST. 648-49)

When the State informed Dr. Toomer of the facts of the crime and inquired how Dr. Toomer could say that Defendant could not plan, Dr. Toomer claimed that "just because you see behavior and that behavior appears to look as if the person plans it out and what have you it doesn't mean that it's necessarily the case." (RST. 652) Dr. Toomer claimed that the fact that Defendant had been capable of conforming his conduct to the rules of the job did not mean that he could conform his conduct to the requirements of law because his abilities vacillated. (RST. 653)

Dr. Toomer admitted that he had seen the Bro White letter in which Defendant informed a fellow inmate to be careful of certain individuals, including certain witnesses against him, because they were informants and stated that he had provided the names of the witnesses against him to people in prison and the address of their families to someone who was not incarcerated so that they could be handled accordingly. (RST. 653-55, RSR. 239) Dr. Toomer felt that the letter could have been written by a retarded person because of spelling and grammatical errors. (RST. 656-57) Dr. Toomer also felt that the letter was

indicative of Defendant's depression. (RST. 657) Dr. Toomer did not perceive the letter as stating that Defendant planned to have the witnesses against him and their families killed even though the letter included the line "I hate like hell to do that but the innocent must suffer" immediately after the comment about providing the witnesses' families' address to a "source on the outside world." (RST. 657) Dr. Toomer felt that this phrase was misused and was indicative of Defendant's intellectual deficits. (RST. 657) Dr. Toomer claimed that the letter could mean anything and that he would need more information about what was happening to Defendant when he wrote the letter to provide an interpretation. (RST. 658-59)

Dr. Toomer admitted that Defendant was capable of having written the alibi notes because he was not retarded and his alleged intellectual deficits merely prevented him from considering consequences, weighing alternatives and behaving appropriately. (RST. 660-61) However, Dr. Toomer refused to interpret the notes as attempting to fabricate a false alibi to avoid conviction and punishment. (RST. 661-62)

As can be seen by the foregoing, counsel did present evidence regarding his alleged mental retardation and brain damage. In fact, Dr. Carbonell did her best to claim that Defendant was retarded, despite his IQ scores being consistently

above that level by claiming that the scores should not be considered in isolation and that the numbers should be considered as ranges. Further, both Drs. Carbonell and Toomer believed that Defendant was probable brain damaged, and Dr. Carbonell did perform the neuropsychological tests that Dr. Toomer recommended. Moreover, both Drs. Carbonell and Toomer were given access to extensive background materials regarding Defendant and tested him extensively. The mere fact that their opinion were rejected does not demonstrate that counsel was ineffective. *Teffeteller v. Dugger*, 734 So. 2d 1009, 1020 (Fla. 1999). Instead, the failure to prevail is more consistent with the fact that Drs. Haber and Miller's opinion that Defendant's intelligence was between average and borderline (RST. 493, 509-10, 694-99) and that Defendant was not brain damaged (RST. 484-85, 702) were more consistent with abilities that Defendant demonstrated in committing this crime and in his actions thereafter. The fact that Defendant now has new experts does not indicate that his counsel was ineffective, where counsel did investigate and present evidence on these issues. *See Cherry v. State*, 781 So. 2d 1040, 1052 (Fla. 1999); *Rose v. State*, 617 So. 2d 291, 295 (Fla. 1993). As such, this claim should be denied.

In order to buttress his claims of ineffective assistance of counsel, Defendant asserts that the trial court's sentencing

order relied upon the State's sentencing memorandum, that hearsay testimony was improperly admitted, that Defendant was restricted for presenting evidence to rebut this testimony and that the trial court improperly rejected his claims of mitigation. However, the claims regarding the preparation of the sentencing order and the admission of the hearsay testimony were raised and rejected on the direct appeal from resentencing. *Phillips v. State*, 705 So. 2d 1320 (Fla. 1997). The claim regarding the rejection of mitigation could have and should have been raised on direct appeal. *Arbelaez v. State*, 775 So. 2d 909, 915 (Fla. 2000). Moreover, the claim regarding the hearsay testimony and its rebuttal are meritless, as argued in Claim I of the Response to the Petition for Writ of Habeas Corpus, Case no. SC01-1460. As such, these claims are all procedurally barred. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). Thus, they do not enter into the cumulative error analysis. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999). The claim should be denied.

II. THE CLAIM REGARDING THE RETARDATION STATUTE IS NOT PROPERLY BEFORE THIS COURT AND IS WITHOUT MERIT.

Defendant next contends that recently enacted statute prohibiting the execution of the mentally retarded should apply to him. However, this issue is not properly before this Court

because it was not raised below. Moreover, the new statute, by its own terms, would not apply here.

Defendant did not assert that the retardation statute should have been applied to him in the lower court. In order for a claim to be properly presented in a post conviction appeal, it must first have been presented to the lower court in the post conviction motion. *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988)(post conviction claim raised for first time on appeal and never presented to the circuit court was procedurally barred on appeal). As such, this claim is not properly before this Court and should be denied.

Even if the claim was properly before this Court, it should still be denied. It is axiomatic that the full, plain intent of the legislation must be implemented, unless that implementation is unconstitutional.[7] An integral part of §921.137, Fla. Stat. (2001), is its prospective-only provision. Defendant's attack on the prospective-only provision mistakenly ignores the plain-intent principle, as well as the obvious omission of a severability clause in the statute. The provision plainly states: "This section does not apply to a defendant who was

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[7] *See, e.g, State v. Rife*, 26 Fla. L. Weekly S226 (Fla. Apr. 12, 2001) ("Unless the legislature acts in an unconstitutional manner, courts must permit the legislature to legislate. And unless the legislation is vague, the courts must apply the law **as enacted by the legislature**").

sentenced to death prior to the effective date of this act," §921.137(8). Here, Defendant was sentenced on April 20, 1994, years before the enactment of the new statute. Moreover, the new statute expressly limits its application to cases in which "mental retardation" is determined "in accordance with" its requirements. *See* §921.137(2). These requirements include presentencing notification, a hearing before the judge before sentence is pronounced, Defendant demonstrating by clear and convincing evidence that he is retarded and specific findings from the trial court on this issue. The fact that these provisions cannot be followed retroactively would necessitate striking down the entire statute and any reliance Defendant places upon it if, for any reason, the prospective-only provision falls or otherwise is ineffective. However, given these safeguards and limitations, the prospective-only provision should be given the full force and effect of its plain language.

Even if the statute could be read as applying to Defendant, he would still not be entitled to relief. As noted, Defendant bears the burden of showing that he is mentally retarded, as defined by the statute by clear and convincing evidence. This definition requires that Defendant show that he has:

> significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period

> from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

§921.137, Fla. Stat. (2001). While the legislative history of this statute notes that the Department of Children and Families has yet to make rules regarding the standardized tests to be used, it notes that the department general uses the Stanford-Binet and Wechsler Series of tests and that “[i]n practice two or more standard deviations from these tests means that the person has a IQ of 70 or less.” Senate Staff Analysis on CS/SB 238 at 3 (Feb. 14, 2001). Here, Defendant’s IQ scores have consistently been above 70. This is, in part, what led 3 of the 4 experts who testified at resentencing, including the 2 found credible by the trial court, to state that Defendant was not retarded. Moreover, Dr. Carbonell’s finding that Defendant had difficult in adaptive functioning was based on his alleged passivity. (RSSR. 58-59) However, the finding of passivity was based on Dr. Carbonell’s definition of being passive, which required that the aggressive behavior not violate other peoples’ rights. (RSSR. 135) Not only was this finding contradicted by

the aggressive behavior in which Defendant had engaged, but this finding also ignored the fact that Defendant had been capable of holding a job and caring for himself. Moreover, none of the other experts found difficult in adaptive behavior. As such, this statute would not apply to Defendant even if Defendant had raised the claim below and he had been sentenced after the statute took effect. This claim should be denied.

III. DEFENDANT WAIVED HIS RIGHT TO SEEK PUBLIC RECORDS, AND THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING HIS COUNSEL'S MOTION TO WITHDRAW AND HIS MOTION TO DISQUALIFY THE LOWER COURT.

Defendant appears to contend that the lower court improperly denied his claim regarding public records disclosure, his counsel's motion to withdraw and his motion to disqualify the lower court. However, these issues were properly denied as procedurally barred and meritless.

With regard to the public records issue, Defendant asserts that the lower court refused to allow him to request additional public records or to file affidavits concerning additional public records. However, the lower court did not do so; the lower court merely refused to extend the time for the filing of Defendant's motion for post conviction relief. (PCR2-SR. 219-21)

Moreover, the denial of additional time was proper. At the time, §119.19(10), Fla. Stat. (1999), and Fla. R. Crim. P.

3.852(j)(1999), provided that the defendants were responsible for everything regarding the copying of records from the repository. Under Fla. R. Crim. P. 3.852(g), a defendant must file any additional requests for public records within 90 days of his counsel's appearance. To order production of additional records under Fla. R. Crim. P. 3.852(i), a defendant must show that his counsel "made a timely and diligent search of the records repository."

Here, the State and its agencies sent their public records to the repository in a timely fashion. (PCR2-SR. 1, 2-5, 164-65, 167-70, 171-73, 266-67) The State Attorney's office and the Miami-Dade Police Department even served their notices of compliance upon Defendant. (PCR2-SR. 1, 2-5, 167-70) CCRC-South filed a notice of appearance on behalf of Defendant on April 5, 1999. (PCR2-SR. 184) Defendant filed no requests for additional public records until after his motion had been denied. Defendant's only attempt to review the records that had been sent to the repository prior to the filing of his shell motion was to send a blanket request to the repository for all records for clients of CCRC-South. (PCR2. 314-17) When the repository did not response, Defendant, by his own admission, did nothing. (PCR2. 317) This Court has repeatedly held that defendants bear the burden of diligently pursuing their public records requests

in the trial court or they are waived. *E.g.*, *Cook v. State*, 26 Fla. L. Weekly S424, S426 (Fla. Jun. 28, 2001); *Thompson v. State*, 759 So. 2d 650, 658 (Fla. 2000); *Gaskin v. State*, 737 So. 2d 509, 518 (Fla. 1999); *Lopez v. Singletary*, 634 So. 2d 1054, 1058 (Fla. 1993). Under these circumstances, the lower court properly denied Defendant additional time to pursue public records and would have properly denied any requests for additional public records.

With regard to the motion to withdraw, the lower court did not abuse its discretion in denying this motion.[8] The gravamen of counsel's motion to withdraw was that he allegedly could not competently represent Defendant because of the time constraints. (PCR2-SR. 254-57) Despite the claimed inability to proceed, counsel was capable of filing a 97-page motion for post conviction relief concurrent with the filing of this motion. (PCR2. 29-125) In connection with the motion, counsel has averred that he had Defendant evaluated by two new mental health professional. (PCR2-SR. 30-31) Moreover, it must be remember that Defendant had already litigated one post conviction motion. *See Phillips v. State*, 608 So. 2d 778 (Fla. 1992). As

[8] The denial of a motion to withdraw is reviewed for an abuse of discretion. *See Trease v. State*, 768 So. 2d 1050, 1054 n.3 (Fla. 2000); *Jones v. State*, 748 So. 2d 1012, 1028 (Fla. 1999).

demonstrated by the evidence presented at the hearing on that motion, Defendant's background and mental state had been investigated. *Id.* As part of that proceeding, Defendant was provided with access to the public records regarding his case. In a letter dated September 27, 1999, counsel indicated that he had received these records from the attorney who had represented Defendant during his prior post conviction proceeding and on the resentencing appeal "in the last several months." (PCR2. 132) Given the motion counsel did file, his ability to have Defendant evaluated, his possession of the materials from prior counsel and the fact that the time constraints were the result of Defendant's deliberate delay, the lower court did not abuse its discretion in denying the motion to withdraw.

Moreover, granting the motion to withdraw would only endorse the tactic of delaying capital post conviction proceedings. As noted above, the State and its agencies sent their public records to the repository on a timely basis. The State Attorney's Office and the investigating police agency sent notices of compliance to counsel, indicating that the records had been sent. Yet, counsel took no action to review these records in a timely basis.

Instead, counsel waited until approximately 2½ weeks before the year deadline for filing his motion for post conviction

relief in the lower court before filing a shell motion, stating that the lack of public records prevented the filing of a complete motion. Even then, Defendant did not ask for a hearing on the public records issue. When the State set this matter for status conference, Defendant was still unprepared to discuss the public records issues. Instead, Defendant asserted that the attorney assigned to his case has left the employment of CCRC-South, a fact that Defendant had not brought to the attention of the lower court. Even after the lower court granted Defendant an approximately 60 day extension to file his final motion for post conviction relief, informed Dupree that no further extension would be granted, told Dupree to handle the matter himself if he did not have another attorney to assign to the case, and Dupree acknowledged that he had the records associated with the first motion for post conviction relief, Defendant filed no requests for public records or took any other action in the lower court. Instead, counsel again waited until approximately 2 weeks before the motion was due and requested more time. Even after that request was denied, Defendant waited until the day his final motion was due to move to withdraw. Given this history of delay, permitting counsel to withdraw would simply render the 1 year deadline for filing post conviction motions meaningless and sanction endless delays in capital post conviction proceedings.

Under these circumstances, the lower court did not abuse its discretion in denying the motion to withdraw.

With regard to the motion to disqualify the lower court, Defendant bases this claim on a statement from the September 13, 1999 hearing, the lower court's conduct during status conferences and the *Huff* hearing and the lower court's issuance of an order denying Defendant's motion for rehearing before a hearing. However, Defendant only moved to recuse the lower court below based on his finding at the status conference that Defendant had deliberately delayed the proceedings by his failure to seek public records in a diligent manner. As such, Defendant waived any right to seek the lower court's recusal on the other listed grounds. Fla. R. Jud. Admin. 2.160(e)(motion to disqualify must be filed within 10 days of discovery of facts underlying motion); *Asay v. State*, 769 So. 2d 974, 981 (Fla. 2000)(additional bases for disqualification that were not raised in lower court not properly before court on post conviction appeal; *Rivera v. State*, 717 So. 2d 477, 480-82 & n.3 (Fla. 1998)(ground for disqualification not asserted in timely motion "forever waived"); *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988)(post conviction claim raised for first time on appeal and never presented to the circuit court was procedurally barred on appeal).

As to the one ground for disqualification that was not waived, the lower court did not abuse its discretion in denying[9] the motion to disqualify on this basis. The gravamen of this claim is that the lower court found that Defendant was deliberately delaying the proceedings by failing to seek public records in a timely manner. However, Defendant did not move for disqualification on this basis in a timely manner. The lower court initially found that Defendant was attempting to deliberately delay the post conviction proceeding by not diligently seeking public records at the September 13, 1999. (PCR2. 314-20) At the November 17, 1999 hearing, the lower court simply reiterated its prior ruling. (PCR2. 322-30) Defendant did not move to recuse the lower court until November 29, 1999. (PCR2-SR. 10-18) As this motion was filed more than ten days after the lower court initially found that Defendant was deliberately delaying the proceedings, this ground for disqualification was waived. Fla. R. Jud. Admin. 2.160(e); *Rivera*, 717 So. 2d at 480-82 & n.3.

Moreover, this Court has held that such a ruling does not provide a legally sufficient basis for disqualification of a judge. *Correll v. State*, 698 So. 2d 522, 524-25 (Fla. 1997); *see*

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[9] Motions for disqualification are reviewed for an abuse of discretion. *See Arbelaez v. State*, 775 So. 2d 909, 916 (Fla. 2000).

also Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998)(statements that claims were "bogus," "a sham" and "nothing but abject whining" not sufficient to require disqualification). As such, the lower court did not abuse its discretion in denying the motion for disqualification on this ground.

Even if the remaining grounds had not been waived, the lower court would still have not been required to disqualify itself. When the comment from September 13, 1999 hearing, upon which Defendant relies, is read in context, it does not show that the lower court had prejudged the case. Instead, the quote was merely a clarification that the "final" hearing that the lower court had just set was a *Huff* hearing and that the parties were not expected to be prepared for an evidentiary hearing on that date. (PCR2. 318) As such, the lower court would not have abused its discretion in denying a motion to disqualify based on this comment had one been filed. *See Asay v. State*, 769 So. 2d 974, 979-81 (Fla. 2000).

Defendant does not assert what actions or comments from the *Huff* hearing allegedly evidenced the lower court's bias or prejudice against him. The record reflects that the lower court did no more than rule on pending motion and listen to argument. (PCR2-SR. 212-46) As such, denial of a motion to disqualify on this basis would not have been an abuse of discretion if it had

been raised. *Asay*; *Barwick v. State*, 660 So. 2d 685, 691-92 (Fla. 1995)(adverse ruling do not form a legally sufficient basis for a motion to disqualify).

Defendant also does not explain how the lower court's entry of an order denying Defendant's motion for rehearing prior to the date on which the State had noticed the motion for hearing evidenced the lower court's bias or prejudice against him. Aside from the request for public records, the motion for rehearing, on its face, simply reargued matters that had been presented to the lower court in Defendant's motion for post conviction relief, in his reply to the State's response and at the *Huff* hearing. (PCR2-SR. 30-38) Such reargument was improper in a motion for rehearing. Fla. R. App. P. 9.330("The motion shall not re-argue the merits of the court's order."); *Parker v. Baker*, 499 So. 2d 843 (Fla. 2d DCA 1986); *see also Lawyers Title Ins. Corp. v. Reitzes*, 631 So. 2d 1100 (Fla. 4th DCA 1993); *Snell v. State*, 522 So. 2d 407 (Fla. 5th DCA 1988). Moreover, Defendant points to no authority for the proposition that the lower court was required to have a hearing on his motion for rehearing.

As to the public records request, Defendant was seeking medical records related to alleged injuries that Defendant had sustained in May 2000, months after the *Huff* hearing in this

matter. (PCR2-SR. 36-41) While Defendant asserts that this request was "reasonably calculated to lead to the discovery of admissible evidence," he does not explain why that would be true, considering that the records were not requested until after the lower court had denied his motion for post conviction relief. *See Cook v. State*, 26 Fla. L. Weekly S424, S426 (Fla. Jun. 28, 2001)(not proper to raise new issues in motion for rehearing after motion was denied); *Beasley v. State*, 774 So. 2d 649, 673 (Fla. 2000)(refusal to consider affect on Defendant's mental state of events occurring after the crime proper); *Carter v. State*, 706 So. 2d 873, 875 (Fla. 1997)(defendant's competency only at issue in post conviction proceedings when there are factual issues, "the development or resolution of which require the defendant's input."); *see also Herrera v. Collins*, 506 U.S. 390, 405-06 (1993)("[T]he issue of sanity [to be executed] is properly considered in proximity to the execution."). Under these circumstances, Defendant has not shown that the lower court evidenced prejudice and bias sufficient to warrant its recusal because it ruled on his motion for rehearing without holding a hearing. *See Barwick v. State*, 660 So. 2d 685, 691-92 (Fla. 1995)(denial of motion for appointment of experts without a hearing or filing of memoranda did not "raise the question of whether the trial judge should be disqualified.") As such, the

lower court would not have abused its discretion in denying a motion for recusal had one been filed.

IV. DEFENDANT'S CLAIMS REGARDING THE JURY WERE PROPERLY DENIED AS PROCEDURALLY BARRED AND MERITLESS.

Defendant next complains about a number of separate and distinct issues regarding the jury at his resentencing. First, Defendant contends that his counsel was ineffective during voir dire because he did not exercise available peremptory challenges against certain jurors. Next, he asserts that certain instructions and comments to the jury violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Defendant then objects to the instruction on CCP. He also asserts that informing the jury that it could not consider mercy or sympathy was improper. Finally, he alleges that the lower court erred in denying his request to interview the jurors. However, the lower court properly denied all of these claims as they are procedurally barred and meritless.

With regard to the claim of ineffective assistance at voir dire, Defendant alleged that his counsel was ineffective for not utilizing all of his peremptory challenges. However, there is no right to have one's attorney use all of the available peremptory challenges. In fact, when a peremptory challenge is lost, a defendant must show that the resulting jury was impartial to

obtain relief because such challenges are merely "a means to achieve the end of an impartial jury." *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988). Here, Defendant does not allege that the jury was impartial. As such, counsel cannot be deemed ineffective for failing to do so. *See Muhammad v. State*, 426 So. 2d 533, 538 (Fla. 1982) (there is no "deficient conduct," where a claim is based upon rights which are not established at the time of trial).

Further, had counsel used his 2 remaining peremptory challenges[10] to excuse Mr. Finney, Mr. Melendez or Ms. Howard, the resulting jury would have been less favorable to Defendant. Defendant would have been forced to accept Ms. Joseph, Ms. Abreu or Mr. Capote.

Ms. Howard indicated that her father had been convicted of possession of a stolen car and drug charges. (RST. 95) She also stated that her brother was a police officer but that would have no bearing on this case. (RST. 172-73)

Mr. Finney indicated that he had been the victim of a residential burglary and was unhappy with the police. (RST. 97) He explained that the police had found the culprit but that he

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[10] While Defendant originally had 3 peremptory challenges remaining, the State withdrew its *Neil* objection to his challenge to Mr. Reyes. (RST. 224-25) As such, Defendant only had two remaining challenges when the jury was sat.

was not notified. (RST. 135) Mr. Finney stated that he would not allow the racial profile of death row inmates to color his decision in this case nor would he allow his views of the justice system to affect him. (RST. 136-37) He agreed to judge the case on its individual merits. (RST. 138) Mr. Finney stated that he was strongly opposed to the death penalty but was willing to follow the law. (RST. 138) Mr. Finney wanted to serve on a jury. (RST. 181-82) Being faced with the possibility of recommending the death penalty made Mr. Finney realize that life was precious. (RST. 182)

Mr. Melendez wanted to serve on a jury because it was part of the duty of being a citizen. (RST. 184) He stated that he would adhere to his own view of the evidence and not be swayed by the other jurors. (RST. 185-86)

Ms. Joseph testified that her husband was a police corporal. (RST. 108) She had a daughter who was taking pre-law cases in college. (RST. 108) She stated that she would not allow the fact that her husband was a police officer to affect her. (RST. 162)

Ms. Abreu was a receptionist at a law firm. (RST. 108) The firm did some criminal work. (RST. 163) She stated that the death penalty was “the only way to go” in some cases. (RST. 164)

Mr. Capote stated that his wife had been mugged and that the case was still pending. (RST. 164) Mr. Capote has a brother and

a cousin who were police officer but stated that it would not affect his decision. (RST. 174-75) Under these circumstances, not excusing Mr. Finney, Mr. Melendez or Ms. Howard cannot be deemed ineffective. The lower court properly denied this claim.

With regard to the *Caldwell* claim, this issue is procedurally barred because it could have and should have been raised on direct appeal. *Oats v. Dugger*, 638 So. 2d 20, 21 & n.1 (Fla. 1994). The same is true of issues regarding comments by the State. *Robinson v. State*, 707 So. 2d 688, 697-99 (Fla. 1998). As such, the lower court properly denied this claim.

Moreover, this claim is meritless. "To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989). The Florida Supreme Court has recognized that the jury's penalty phase decision is merely advisory and that the judge does make the final sentencing decision. *Combs v. State*, 525 So. 2d 853, 855-58 (Fla. 1988).

Here, the trial court properly informed the jury that it recommendation was merely advisory and that the judge made the final sentencing decision. (RST. 242, 786-96, RSR. 366-86) In fact, during voir dire and immediately before opening statements, the trial court emphasized that the its

recommendation would be given great weight and that it could only override the jury's recommendation in rare circumstances. (RST. 64, 242) Defendant places great emphasis on a quote from page 787 of the resentencing transcript, which begins, "It's not your duty to advise the Court." However, this appears to be nothing more than a transcription error. The written jury instructions properly reflect that "it is **now** your duty to advise the Court." (RSR. 367) Moreover, the instructions, as a whole, informed the jury that it was its duty to recommend a sentence. (RST. 787-96) As such, this claims was properly denied as meritless. *Higginbotham v. State*, 19 So. 2d 829, 830 (Fla. 1944)("[A] single instruction cannot be considered alone, but must be considered in light of ***all*** other instructions bearing upon the subject, and if, when so considered, the law appears to have been fairly presented to the jury, the assignment on the instruction must fail.")(emphasis added); *see also Esty v. State*, 642 So. 2d 1074, 1080 (Fla. 1994).

To buttress this claim, Defendant also relies upon the fact that the trial court reinstructed the jury regarding the voting procedures. However, Defendant raised this claim on appeal from the resentencing. Initial Brief of Appellant, Case No. 83,731, at 80-89. This Court rejected it as without merit. *Phillips v. State*, 705 So. 2d 1320, 1322 (Fla. 1997). As such, any attempt

to reargue this claim was properly denied by the lower court. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

With regard to the instruction on CCP, issues regarding jury instructions could have and should have been raised on direct appeal. *Jackson v. State*, 648 So. 2d 85, 90 (Fla. 1994). As such, the lower properly denied this claim as procedurally barred.

Even if the claim was not procedurally barred, the lower court would still have properly rejected this claim. On the resentencing appeal, this Court stated, in resolving a claim that CCP was always unconstitutional, that "even though [Defendant's] resentencing occurred prior to this Court's decision in *Jackson*, the jury was given a proper narrowing instruction consistent with that decision." *Phillips*, 705 So. 2d at 1323.

In *Jackson*, this Court address the effect of *Espinosa v. Florida*, 505 U.S. 1079 (1992), the case upon which Defendant's present claim in based, on the CCP instruction. This Court found that the prior standard jury instruction on CCP was unconstitutionally vague and mandated the use of a new instruction. *Jackson*, 648 So. 2d at 89 n.8. Here, the jury was instructed on CCP in accordance with this new instruction, as this Court held. (RST. 787-88) As the proper limiting

instruction on CCP was given, the lower court properly denied this claim as meritless.

With regard to the claim about the jury instruction on sympathy, this issue could have and should have been raised on direct appeal. *Van Poyck v. State*, 694 So. 2d 686, 698-99 & n.8 (Fla. 1997). As such, the lower court properly denied the claim as procedurally barred.

Even if the claim was not procedurally barred, the lower court would still have properly denied it as meritless. In *Saffle v. Parks*, 494 U.S. 484 (1990), the Court rejected a similar claim, finding that mere sympathy was not a mitigating factor. In doing so, the Court stated:

> It is no doubt constitutionally permissible, if not constitutionally required, for the State to insist that "the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence." Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant. It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary.

Id. at 492-93 (citations omitted). This Court has adopted to

reasoning of *Parks* to reject this claim previously. *See Zack v. State*, 753 So. 2d 9, 23-24 (Fla. 2000). As such, the lower court properly denied this claim as meritless.

With regard to the claim regarding juror interviews, this Court has repeatedly held that this is a claim that could have and should have been raised on direct appeal. *Young v. State*, 739 So. 2d 553, 555 n.5 (Fla. 1999); *Ragsdale v. State*, 720 So. 2d 203, 204-05 n.1 & 2 (Fla. 1998).

V. DEFENDANT'S CLAIMS REGARDING BURDEN SHIFTING WERE PROPERLY DENIED AS PROCEDURALLY BARRED AND WITHOUT MERIT.

Defendant next asserts that his sentence is invalid because of comments by the State regarding the weighing process. He also asserts that the jury instructions unconstitutionally shifted the burden to him to show that death was not appropriate. However, these claims were properly denied as they are procedurally barred and without merit.

Claims that the jury instructions shifted the burden of proof and claims regarding comments by the State are claims that could have and should have been raised on direct appeal. *Owen v. State*, 773 So. 2d 510, 515 n.11 (Fla. 2000); *Asay v. State*, 769 So. 2d 974, 989 (Fla. 2000); *Demps v. Dugger*, 714 So. 2d 365 (Fla. 1998); *Robinson v. State*, 707 So. 2d 688, 697-99 (Fla. 1998). As such, the lower court properly denied these claims as

procedurally barred.

Moreover, the courts have repeatedly rejected the claim that the instruction improperly shifts the burden of proof. *Walton v. Arizona*, 497 U.S. 639, 649-51 (1990); *San Martin v. State*, 705 So. 2d 1337, 1350 (Fla. 1997); *Kennedy v. State*, 455 So. 2d 351 (Fla. 1984). As such, the claim was properly summarily denied.

VI. DEFENDANT'S CLAIM REGARDING NONSTATUTORY AGGRAVATION IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Defendant next asserts that his sentence is invalid because of comments made by the State during resentencing. Specifically, Defendant asserts that the State raised nonstatutory aggravation when it observed that Defendant's siblings had not engaged in criminal behavior despite being raised in the same environment, when it commented about Defendant's prior life sentence and when it used evidence of Defendant's actions while on parole. However, this claim was properly summarily denied ,as it is procedurally barred and without merit.

Issues regarding comments by the State and introduction of evidence are issues that could have and should have been raised on direct appeal. *Atkins v. Dugger*, 541 So. 2d 1165, 1166 n. 1 (Fla. 1989)(claim of non-statutory aggravation in sentencing was procedurally barred as it was either raised or should have been raised on direct appeal). In fact, Defendant did claim on his

resentencing appeal that these comments were improper. Initial Brief of Appellant, Case No. 83,731. This Court rejected this claim as procedurally barred or without merit. *Phillips v. State*, 705 So. 2d 1320, 1321 (Fla. 1997). As such, this claim was properly denied as procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). Moreover, couching the claim in terms of ineffective assistance of counsel does not lift the bar. *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990). Additionally, Defendant did not assert that the introduction of evidence regarding Defendant's actions while on parole raised improper nonstatutory aggravation in the trial court. As such, the claim regarding this evidence is not properly before this Court. *Cook v. State*, 26 Fla. L. Weekly S424, S426 (Fla. Jun. 28, 2001).

Even if the claim was not procedurally barred, the lower court would still have properly denied the claim as meritless. With regard to the comparison between Defendant and his siblings, this comment did not refer to nonstatutory aggravation. Instead, the comment was made in the context of the rebuttal of Defendant's mitigation. Defendant had claimed as mitigation that he was raised in poverty by an abusive, alcoholic father. In response, the State pointed out that

Defendant's siblings had been raised in the same environment and had not turned to lives of crime and that his upbringing did not cause Defendant to become a killer. (RST. 749) In this context, the comment was not improper. *See Jones v. State*, 652 So. 2d 346, 352 (Fla. 1995)(comparing defendant to President Ford and Justice Thomas to rebut defendant's claimed mitigation that he was not raised by biological parents not improper). As such, the lower court properly denied this claim.

With regard to the alleged comment on future dangerousness, the prosecutor stated during closing argument:

> If life meant life, you and I would not be in this courtroom today talking about this case. We would be trying a burglary case in another courtroom. We would be doing something else if life meant life and Tom Svenson would not be laying in that parking lot in 1982.

(RST. 744) This comment was based on the fact that Defendant was sentenced to life imprisonment for the 1973 robbery on April 30, 1974. (RSR. 175) Had Defendant actually been required to serve that sentence in full, he would not have been able to commit this crime. Under these circumstances, this comment was proper. *Parker v. State*, 456 So. 2d 436, 443 (Fla. 1984)(comment that if life meant life, the victim would still be alive proper, where evidence showed that defendant had been sentenced to life in 1967, had escaped and had committed two more murders). As such,

the lower court properly denied this claim as meritless.

With regard to the admission of evidence of Defendant's activities while on parole, this evidence was properly admitted. One of the aggravating factors found in this case was that Defendant committed this murder to disrupt or hinder a governmental function. The basis for this aggravator was that Svenson was a supervisor of Defendant's parole officers, that Svenson had testified against Defendant during a prior parole violation hearing, that Svenson had recently warned Defendant that continuation of certain actions he had taken would again result in violation of Defendant's parole and that Defendant killed Svenson to prevent him from again revoking Defendant's parole. On resentencing appeal, this Court relied on this very evidence in finding that the hinder governmental function aggravator had been proven. *Phillips*, 705 So. 2d at 1322-23. Under these circumstances, the trial court properly permitted the State to use a chart outlining Defendant's history while on parole as a demonstrative aid during opening statement. As such, the lower court properly denied this claim.

VII. DEFENDANT'S CLAIM THAT HE IS INNOCENT OF THE DEATH PENALTY WAS PROPERLY DENIED.

Defendant next asserts that he is innocent of the death penalty. However, this claim is devoid of merit and was properly

denied.

To prove a claim of actual innocence of the death penalty, a defendant must show "based on the evidence proffered plus all record evidence, a fair probability that a rational fact finder would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." *Sawyer v. Whitley*, 505 U.S. 333, 346 (1992)(quoting *Sawyer v. Whitley*, 945 F.2d 812 (5th Cir. 1991)). The Court further noted that "the 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error." *Id.* at 347. In applying this test to Florida's sentencing law, the Eleventh Circuit stated:

> a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates all of the aggravating factors found to be present by the sentencing body. That is, but for the constitutional error, the sentencing body could not have found any aggravating factors and thus petitioner was ineligible for the death penalty.

Johnson v. Singletary, 938 F.2d 1166, 1183 (11th Cir. 1991)(en banc). This formulation was cited with approval in *Sawyer*.

Sawyer, 505 U.S. at 347 & n.15.

Here, the trial court relied upon four aggravating factors in sentencing Defendant to death: Prior violent felonies, under a sentence of imprisonment, hinder a governmental function and CCP. As noted in Issue IX, *infra*, Defendant's claim with regard to the prior violent felony aggravator is meritless. Because his argument with regard to the under a sentence of imprisonment aggravator is premised on the validity of his challenge to the prior violent felonies, it is also without merit. As these two aggravators are valid, Defendant has failed to show that he is innocent of the death penalty, and the claim was properly denied. *Johnson*, 938 F.2d at 1183.

Moreover, Defendant's claim with regard to CCP and hinder governmental function relies upon his assertion that his counsel was ineffective for failing to present evidence regarding his mental state that was in fact presented at his resentencing and rejected. *See* Issue I, *supra*. As such, this claim was properly summarily denied. *Johnson*, 938 F.2d at 1183.

VIII. THE CLAIM THAT DEFENDANT IS INSANE TO BE EXECUTED IS NOT RIPE.

Defendant next asserts that he is insane to be executed. However, this claim cannot be raised until an execution is imminent. *See Herrera v. Collins*, 506 U.S. 390, 405-06 (1993)("[T]he issue of sanity [to be executed] is properly considered in proximity to the execution."); *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997)(same), *aff'd*, 523 U.S. 637 (1998). Here, Defendant's execution is not imminent; no warrant had been issued for his execution, and no date has been set. As such, this claim is not ripe for adjudication at this juncture and was properly summarily denied.

Further, pursuant to Fla. R. Crim. P. 3.811(c), Defendant cannot raise this issue in this Court until he has properly raised the issue with the Governor pursuant to §922.07, Fla. Stat. (1999). Defendant has not alleged that he has followed this procedure. Thus, the claim is again premature and was properly summarily rejected.

IX. DEFENDANT'S *JOHNSON V. MISSISSIPPI*, 486 U.S. 578 (1988), CLAIM WAS PROPERLY DENIED.

Defendant next asserts that the consideration of his prior convictions at sentencing violated *Johnson v. Mississippi*, 486 U.S. 578 (1988). However, the lower court properly denied this claim because it is procedurally barred, insufficiently pled and

without merit.

Claims that a death sentence is invalid because of the alleged invalidity of prior violent felonies are procedurally barred because they could have and should have been raised on direct appeal. *Eutzy v. State*, 541 So. 2d 1143, 1146 (Fla. 1989); *Bundy v. State*, 538 So. 2d 445, 447 (Fla. 1989). As this claim was not raised on direct appeal, the lower court properly found that it was procedurally barred.

Even if the claim was not procedurally barred, it was still properly denied as legally insufficient. In order to state a legally sufficient claim that *Johnson v. Mississippi*, 486 U.S. 578 (1988), was violated, a defendant must show that the prior conviction upon which the prior violent felony aggravator was based has been vacated. *Buenoano v. State*, 708 So. 2d 941, 952 (Fla. 1998); *Stano v. State*, 708 So. 2d 271, 275-76 (Fla. 1998); *Henderson v. State*, 617 So. 2d 313, 316 (Fla. 1993); *Tafero v. State*, 561 So. 2d 557, 559 (Fla. 1990); *Eutzy*, 541 So. 2d at 1146; *Bundy*, 538 So. 2d at 447. On resentencing, the lower court relied on Defendant's two prior convictions: armed robbery in Eleventh Judicial Circuit Case No. 73-2480B and assault with intend to commit first degree murder in Eleventh Judicial

Circuit Case No. 62-6140C.[11] (RSSR. 174-89) Defendant has not alleged that either of these convictions have been vacated. In fact, he had not even alleged that any post conviction proceedings have been filed. Instead, Defendant merely alleged that the impact of his alleged mental retardation and brain damage on his "competency at the time of the previously adjudicated convictions was never considered by the jury or trial court." (PCR2. 111) As such, the lower court properly denied this claim as insufficiently plead.

Moreover, this claim is meritless. Defendant's 1973 conviction became final in 1975. *Phillips v. State*, 311 So. 2d 200 (Fla. 3d DCA 1975). Defendant's prior post conviction attacks to this conviction have been rejected. *Phillips v. Wainwright*, 562 F.2d 1259 (5th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978); *Phillips v. State*, 372 So. 2d 167 (Fla. 3d DCA 1979); *State ex. rel Phillips v. Wainwright*, 344 So. 2d 344 (Fla. 1977). Defendant's 1962 conviction has also been final for more than 30 years, and post conviction relief regarding it has also been denied. *Phillips v. Wainwright*, 225 So. 2d 909 (Fla.

[11] Prior to opening statements at resentencing, Defendant objected to the introduction of certified copies regarding Defendant's 1962 conviction on the grounds that documents did not have a place where Defendant's fingerprint had been placed on them. (RST. 235-36) The trial court overruled this objection. (RST. 236-37)

1969). Defendant's present claim that these convictions are invalid is based on evidence that was presented both in his 1988 evidentiary hearing in this case and his 1994 resentencing. As such, any attempt to seek post conviction relief at this late day would properly be summarily denied as time barred and successive. *Mills v. State*, 684 So. 2d 801, 804-05 (Fla. 1996)(Defendant's second 3.850 must be filed within the application time period under Fla. R. Crim. P. 3.850 after discovery of factual basis for claim); *Bolender v. State*, 658 So. 2d 82 (Fla. 1995)(same). Under these circumstances, Defendant's claim that use of these prior convictions violated *Johnson* was properly denied as meritless. *Stano*, 708 So. 2d at 275; *Eutzy*, 541 So. 2d at 1146.

X. DEFENDANT'S CLAIM REGARDING ALLEGED VIOLATIONS OF HIS RIGHT TO BE PRESENT IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Defendant next asserts that he was denied his right to be present during unrecorded bench conference and sidebars. However, the lower court properly denied this claim, as it is procedurally barred and without merit.

A claim that a defendant was denied his right to be present is a claim that could have and should have been raised on direct appeal. *Rutherford v. Moore*, 774 So. 2d 637, 647 (Fla. 2000); *Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994). Claims that

could have and should have been raised on direct appeal are procedurally barred in post conviction proceedings. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). As such, the lower court properly found that this claim was procedurally barred.

Even if the claim was not procedurally barred, the lower court still properly denied the claim, as it is meritless. In *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934), the Court recognized that a defendant had a due process right to be present when "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." The Court further opined that "when presence would be useless, or the benefit but a shadow," no violation of the right to be present is shown. *Id.* at 106-07. The Court also held that the right to be present could be lost "by consent or at times even by misconduct." *Id.* at 106. This Court has recognized that a defendant does not have a right to be present at bench conferences where purely legal issues are discuss. *Rutherford*, 774 So. 2d at 647; *Harwick*, 648 So. 2d at 105.

Here, the majority of the sidebar conferences referred to by Defendant, which were in fact recorded, concerned purely legal matters. Defendant asked that a preliminary instruction be

read to the jury, and the request was granted. (RST. 241) Defendant objected to the introduction of evidence to regarding his attempt falsify an alibi and the exclusion of his rebuttal of this evidence. (RST. 398-99, 404, 447-48) Defendant objected to the introduction of evidence regarding the evaluation of him by the State's experts. (RST. 487-88) Defendant objected to the introduction of evidence regarding his refusal to meet with the State's expert without his attorney present. (RST. 491-92) As these bench conferences only addressed purely legal issues, Defendant's right to be present was not violated, and the lower court properly denied this claim as meritless. *Rutherford*, 774 So. 2d at 647; *Harwick*, 648 So. 2d at 105.

With regard to the four remaining bench conferences cited by Defendant, which were not recorded, Defendant did not allege below, PCR2. 70-71, and does not allege in this Court, Amended Initial Brief of Appellant at 75, what occurred during these conference or how his presence would have affected anything during them.[12] Moreover, Defendant was present in the courtroom

[12] In fact, it appears from the record that these conferences may have referred to nothing more than scheduling and housekeeping issues. For example, at the conclusion of proceedings on day, the trial court informed the jury that it would take a recess the following morning at 9:00 a.m. so that it could attend to other matters. (RST. 665) The following morning at approximately 9:00 a.m., the trial court conducted an unrecorded bench conference, following which the trial court recessed the proceedings for an hour. (RST. 706) As this recess

during trial and did not object or express a desire to be present at these bench conferences.[13] Under these circumstances, Defendant was not entitled to post conviction relief, and the lower court's denial was proper. *See Hardwick*, 648 So. 2d at 105.

XI. THE CLAIM OF CUMULATIVE ERROR WAS PROPERLY DENIED.

Defendant finally asserts that the lower court improperly denied his claim based on cumulative error. However, where the individual errors alleged are either procedurally barred or without merit, the claim of cumulative error also fails. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999). As seen above, Defendant's individual claims are all procedurally barred or without merit. As such, the lower court properly denied the claim of cumulative error.

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occurred during the middle of Dr. Haber's testimony, it appears that the trial court was merely consulting the attorneys about the scheduling of the recess. *See also* RST. 574 (unrecorded sidebar before Defendant introduced 4 pages of prior testimony of Samuel Ford, after which a lunch recess occurred at 12:20p.m.); RST. 376 (unrecorded bench conference immediately after the State indicated that housekeeping need to be done); RST. 363 (unrecorded sidebar after introduction of numerous non-consecutively numbered exhibits).

[13] Defendant has not raised a claim of ineffective assistance of trial counsel for failing to object to Defendant's absence. (PCR2. 70-71, Amended Initial Brief of Appellant at 75)

CONCLUSION

For the foregoing reasons, the denial of the motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to William M. Hennis, III, Assistant CCRC, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this 4th day of September, 2001.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

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