IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-99

JUAN DAVID RODRIGUEZ,

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

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 19

ARGUMENT 25

I. THE LOWER COURT PROPERLY DENIED DEFENDANT A NEW PENALTY PHASE AFTER THE EVIDENTIARY HEARING FOR HIS 3.850 MOTION. 25

A. THE LOWER COURT PROPERLY FOUND COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT MENTAL HEALTH MITIGATION. 25

B. DR. HABER'S EVALUATION WAS NOT CONSTITUTIONALLY INADEQUATE 37

C. DEFENDANT SUFFERED NO PREJUDICE FROM COUNSEL'S FAILURE TO PRESENT AT PENALTY PHASE THE TESTIMONY OF SUBSEQUENT EXPERT. 39

II. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S NON-MENTAL HEALTH PENALTY PHASE CLAIM. 46

III. THE LOWER COURT PROPERLY DENIED DEFENDANT'S GUILT PHASE ISSUES 52

A. DEFENDANT'S BRADY ISSUE IS WITHOUT MERIT. . . . 52

B. COUNSEL WAS NOT INEFFECTIVE DURING PENALTY PHASE FOR FAILING TO INVESTIGATE AND PREPARE FOR TRIAL, REQUEST A SEVERANCE, OR FAILING TO OBJECT TO IDENTIFICATION TESTIMONY OR THE EXPERT INSTRUCTION 57

IV. THE LOWER COURT PROPERLY DENIED DEFENDANT'S PUBLIC RECORDS CLAIMS. 71

V. DEFENDANT'S CLAIM THAT JUDGE CARNEY WAS BIASED AGAINST DEFENDANT IS WITHOUT AND SHOULD HAVE BEEN DISQUALIFIED IS MERITLESS AND SHOULD BE DENIED. 75

A. ALLEGATIONS PERTAINING TO JUDGE CARNEY'S ALLEGED BIAS DURING DEFENDANT'S TRIAL ARE WITHOUT MERIT. 75

B. ALLEGATIONS PERTAINING TO JUDGE CARNEY'S BIAS ON POST-CONVICTION ARE WITHOUT MERIT. 79

VI. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CLAIMS PERTAINING TO THE JURY INSTRUCTIONS. . . . 83

VII. DEFENDANT'S CLAIM REGARDING ALLEGED PROSECUTORIAL MISCONDUCT IS PROCEDURALLY BARRED, NON-MERITORIOUS AND WAS CORRECTLY DENIED BY THE LOWER COURT. 86

VIII. THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIM THAT FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL. 87

IX. DEFENDANT'S CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ENSURE COMPLETE RECORD OF TRIAL TRANSCRIPTS IS WITHOUT MERIT. 87

X. DEFENDANT'S CLAIM REGARDING JUROR INTERVIEWS AND JUROR MISCONDUCT IS PROCEDURALLY BARRED. 88

XI. DEFENDANT'S CLAIM REGARDING IMPERMISSIBLE VICTIM IMPACT TESTIMONY IS PROCEDURALLY BARRED AND NON-MERITORIOUS. 89

XII. DEFENDANT'S CUMULATIVE ERROR ARGUMENT IS PROCEDURALLY BARRED AND WITHOUT MERIT. . . 90

CONCLUSION 92

CERTIFICATE OF SERVICE 92

TABLE OF AUTHORITIES

Adams v. State,

456 So. 2d 888 (Fla. 1988) 56

Agan v. State,
560 So. 2d 222 (Fla. 1990) 51

Allen v. State,
662 So. 2d 323 (Fla. 1995) 91

Arango v. State,
411 So. 2d 172 (Fla. 1982) 84

Arbelaez v. State,
25 Fla. L. Weekly S586 (Fla. July 13, 2000) 80

Blanco v. Wainwright,
507 So. 2d 1377 (Fla. 1987) 57,83
87

Bolender v. Singletary,
16 F.3d 1547 (11th Cir. 1994) 48

Brady v. Maryland,
373 U.S. 83 (1963) 21, 52

Breedlove v. Singletary,
595 So. 2d 8 (Fla. 1991) 84

Breedlove v. State,
692 So. 2d 874 (Fla. 1997) 49

Brown v. Pate,
577 So. 2d 645 (Fla. 1st DCA 1991) 78

Brown v. State,
502 So. 2d 979 (Fla. 1st DCA 1987) 65

Bryan v. State,
641 So. 2d 61 (Fla. 1994) 83,85

Buenoano v. Dugger,
559 So. 2d 1116 (Fla. 1990) 49,89

Buenoano v. State,
708 So. 2d 941 (Fla. 1998) 51

Caldwell v. Mississippi,
472 U.S. 320 (1985) 84

Card v. Dugger,
911 F.2d 1494 (11th Cir. 1990) 84

Card v. State,
497 So. 2d 1169 (Fla. 1986) 57

Cave v. State,
529 So. 2d 293 (Fla. 1988) 50

Chandler v. State,
634 So. 2d 1066 (Fla. 1994) 83,85

Cherry v. State,
25 Fla. L. Weekly S719 (Fla. Sept. 28, 2000) 31,36
48

Combs v. State,
525 So. 2d 853 (Fla. 1988) 85

Correll v. Dugger,
558 So. 2d 422 (Fla. 1990) 50

Craig v. State,
685 So. 2d 1224 (Fla. 1996) 22

Davis v. Singletary,
119 F.3d 1471 (11th Cir. 1997) 85

Deaton v. Dugger,
635 So. 2d 4 (Fla. 1993) 31,32

Delap v. State,
350 So. 2d 462 (Fla. 1977) 89

Demps v. State,
515 So. 2d 196 (Fla. 1987) 51

Downs v. State,
740 So. 2d 506 (Fla. 1999) 67

Dragovich v. State,
492 So. 2d 350 (Fla. 1986) 76,77

Dugger v. Adams,
489 U.S. 401 (1989) 85

Ellis v. State,
622 So. 2d 991 (Fla. 1993) 65

Engle v. Dugger,
576 So. 2d 696 (Fla. 1991) 57

Francis v. Barton,
581 So. 2d 583 (Fla. 1991) 67,83
84,88

Francis v. Dugger,
908 F.2d 696 (11th Cir. 1990) 49

Freeman v. State,
25 Fla. L. Weekly S451 (Fla. June 8, 2000) 86

Gilliam v. State,
582 So. 2d 610 (Fla. 1991) 76

Griffin v. State,
639 So. 2d 966 (Fla. 1994) 65

Groover v. Singletary,
656 So. 2d 424 (Fla. 1995) 84

Haliburton v. State,
691 So. 2d 466 (Fla. 1997) 21

Harris v. P.S. Mortgage and Investment Corp.,
558 So. 2d 430 (Fla. 3d DCA 1990) 80

Henderson v. State,
522 So. 2d 835 (Fla. 1988) 57

Hildwin v. Dugger,
654 So. 107 (Fla.), cert. denied, 469 U.S. 1098 (1984) . 84

Hildwin v. Dugger,
654 So. 2d 107 (Fla.), cert. denied, 516 U.S. 965 (1995) . 22

Hill v. Lockhart,
474 U.S. 52 (1985) 21

Hodges v. State,
619 So. 2d 272 (Fla. 1993) 83

James v. State,
453 So. 2d 786 (Fla.), cert. denied, 469 U.S. 1098 (1984) 55

Johnson v. State,
393 So. 2d 1069 (Fla. 1980) 67

Johnson v. State,
769 So. 2d 990 (Fla. 2000) 73

Johnston v. Dugger,
583 So. 2d 657 (Fla. 1991) 56

Kennedy v. State,
455 So. 2d 351 (Fla. 1984) 84

Kight v. Dugger,
574 So. 2d 1066 (Fla. 1990) 76,83

Kokal v. Dugger,
718 So. 2d 138 (Fla. 1998) 84

Lambrix v. State,
641 So. 2d 847 (Fla. 1994) 83,85

Livingston v. State,
565 So. 2d 1288 (Fla. 1988) 65

Marek v. Singletary,
62 F.3d 1295 (11th Cir. 1995) 50

Meadows v. State,
534 So. 2d 1233 (Fla. 4th DCA 1988) 65

Melendez v. State,
612 So. 2d 1366 (Fla. 1992) 52

Mendyk v. State,
592 So. 2d 1076 (Fla. 1992) 49,52

Mills v. State,
684 So. 2d 801 (Fla. 1996) 79

Mobil v. Trask,
463 So. 2d 389 (Fla. 1st DCA 1985) 78

Nassetta v. Kaplan,
557 So. 2d 919 (Fla. 4th DCA 1990) 78,80

Nateman v. Greenbaum,
582 SO. 2d 643 (Fla. 3d DCA 1991) 78

Oates v. State,
619 So. 2d 23 (Fla. 4th DCA 1993) 78

Oats v. Dugger,
638 So. 2d 20 (Fla. 1994) 35,48

Payne v. Tennessee,
111 S. Ct. 2597 (1991) 91

Provenzano v. Dugger,
561 So. 2d 541 (Fla. 1990) 37,57

Provenzano v. State,
616 So. 2d 428 (Fla. 1993) 52

Ragsdale v. State,
720 So. 2d 203 (Fla. 1998) 91,93

Ramirez v. State,
651 So. 2d 1164 (Fla. 1995) 67

Rivera v. State,
717 So. 2d 477 (Fla. 1998) 77

Roberts v. State,
568 So. 2d 1255 (Fla. 1990) 55

Rodriguez v. Florida,
510 U.S. 830 (1993) 7

Rodriguez v. State,
609 So. 2d 493 (Fla. 1992) 4,6
28,49
63,87
88,91

Rose v. State,
601 So. 2d 1181 (Fla. 1992) 80

Rose v. State,
617 So. 2d 291 (Fla. 1993) 83,86

Routly v. State,
590 So. 2d 397 (Fla. 1991) 22,53

San Martin v. State,
705 So. 2d 1337 (Fla. 1997) 84

Shere v. State,
579 So. 2d 86 (Fla. 1991) 90

Smith v. State,
445 So. 2d 323 (Fla. 1983),
cert. denied, 467 U.S. 1220 (1984) 34,46

Stephens v. State,
748 So. 2d 1028 (Fla. 1999.) 22

Strickland v. Washington,
466 U.S. 668 (1984) 20, 58

Teffeteller v. Dugger,
734 So. 2d 1009 (Fla. 1999) 66,76
77

Thompkins v. Dugger,
549 So. 2d 1370 (Fla. 1989) 49

Thompson v. State,
759 So. 2d 650 (Fla. 2000) 76

Times v. Ake,
660 So. 2d 255 (Fla. 1995) 72

Turner v. Dugger,
614 So. 2d 1075 (Fla. 1992) 37

United States v. Bailey,
123 F.3d 1381 (11th Cir. 1997) 22,54

United States v. Lochmondy,
890 F.2d 817 (6th Cir. 1989) 22,54

United States v. Michael,
17 F.3d 1383 (11th Cir. 1994) 22,54

Walton v. Arizona,
497 U.S. 639 (1990) 84

Williams v. State,
553 So. 2d 309 (Fla. 1st DCA 1989) 93

Windom v. State,
656 So. 2d 432 (Fla.1995) 67,92

Wuornos v. State,
644 So. 2d 1012 (Fla. 1994) 88

Zeigler v. State,
632 So. 2d 48 (Fla. 1993) 51

INTRODUCTION

The parties will be referred to as they stood in the Court below. The symbol "D.A.R." will refer to the record from the direct appeal, which includes the trial transcripts. The symbol "D.A.R.S." will refer to the supplemental record from the direct appeal, which includes transcripts. The symbols "R." and "T." will refer to the record and transcripts from the Rule 3.850 proceeding, respectively. The symbol "S.R." will refer to the supplemental record on appeal. The symbol "S.T." will refer to the supplemental transcripts from the Rule 3.850 proceeding.

STATEMENT OF THE CASE AND FACTS

On May 3, 1989, Defendant was charged by indictment with the first degree murder, armed robbery, conspiracy to commit a

felony, attempted armed robbery, armed burglary with an assault, aggravated assault, and attempted murder in the first degree.(D.A.R. 7).

Defendant's trial commenced on January 23, 1990. (D.A.R. 310). The jury returned a verdict of guilty on all counts and recommended a death sentence by a vote of twelve to zero. (D.A.R. 1693-96, 1886). The trial court followed the jury's unanimous recommendation of a sentence of death. (D.A.R. 1760-64). Defendant appealed his convictions and sentences, raising the following issues, verbatim:

ARGUMENT I.

> THE TRIAL COURT ERRED IN COMPELLING THE DEFENDANT TO PROCEED WITHOUT THE PRESENCE OF A CRUCIAL DEFENSE WITNESS AND IN FAILING TO PERMIT THE DEFENDANT TO INTRODUCE INTO EVIDENCE THAT DULY SUBPOENAED WITNESSES' PRIOR DEPOSITION TESTIMONY, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW, HIS RIGHT TO COMPULSORY PROCESS, AND HIS ABILITY TO PRESENT A DEFENSE IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ARGUMENT II.

> THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY CONDUCTING A JOINT TRIAL OF THE DEFENDANT FOR THE FIRST DEGREE MURDER OF ABELARDO SALADRIGAS WITH ENTIRELY UNRELATED CHARGES SURROUNDING THE ARMED BURGLARY OF THE RALPH LIEVA DWELLING THE FOLLOWING DAY, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ARGUMENT III.

THE TRIAL COURT ERRED IN PERMITTING THE SISTER-IN-LAW OF THE HOMICIDE VICTIM TO OFFER IDENTIFICATION TESTIMONY OF THE VICTIM, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ARGUMENT IV.

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE INTO EVIDENCE EXTRAORDINARY AMOUNTS OF HEARSAY TESTIMONY TO BOLSTER THE TESTIMONY OF ITS CHIEF PROSECUTION CO-DEFENDANT WITNESS, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND HIS RIGHT OF CONFRONTATION GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ARGUMENT IV.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND EQUAL PROTECTION WHILE IMPOSING A DISPROPORTIONAL, CRUEL AND UNUSUAL, PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The imposition of the Death Penalty Against Juan David Rodriguez Constitutes a Disproportional and Constitutionally Impermissible Application of Capital Punishment.

B. The Prosecutor’s Improper Comments On the Defendant’s Demeanor Off the Witness Stand During the Advisory Sentencing Proceedings Rendered Those Proceedings Constitutionally Unfair and Vitiate the Jury’s Death Penalty Recommendation.

C. The Trial Court's Determination As Justification For the Imposition of the Death Penalty That the Capital Felony Was Especially Heinous, Atrocious, or Cruel was Erroneous Where Such an Aggravating Circumstance Was Neither Proved Beyond a Reasonable Doubt, Nor Appropriate Under the Circumstances of This Case.

D. The Trial Court's Sentencing Order is Deficient as a Matter of Law and Reflects That the Trial Court Failed to Consider the Existence and Applicability of Various Statutory and Nonstatutory Mitigating Circumstances.

E. The Trial Court Erred in Considering the Impassioned Plea of a Family Member Which Was Tantamount to a "Impact Statement" Thereby Denying the Defendant the Individualized Sentencing and Reasoned Decision Making to Which He Was Entitled Under the Eighth and Fourteenth Amendments.

F. The Death Penalty in Florida is Unconstitutional on Its Face and As Applied to Defendant Rodriguez.

On October 8, 1992, the Court affirmed Defendant's convictions sentences, including the sentence of death. *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992). In affirming Defendant's convictions and sentence of death, the Court outlined the facts of the case as follows:

> According to his testimony at trial, on April 22, 1988, Ramon Fernandez was introduced to the defendant at a bail bondman's office by Carlos Sponsa. Sponsa asked Fernandez to give the bondsman the

title to his car for a few hours, so Rodriguez could go get some money to pay his bail. Fernandez complied with the request; however, Rodriguez never returned with the money.

On May 13, 1988, Fernandez met with Sponsa and Defendant and asked Rodriguez to pay the bondsman so his car would be returned. Rodriguez told Fernandez and Sponsa that he knew where he could get the money and told them to follow him. The two followed Rodriguez, who drove a blue Mazda, to a shopping center. According to Fernandez, Rodriguez went to the door of an auto parts store in the shopping center and talked to a man inside. Rodriguez then came over to their vehicle and told Fernandez and Sponsa to wait in front while he drove around to the back of the shopping center to wait for the owner of the auto parts store. Instead of waiting in the car, Fernandez went up some stairs to the other end of the shopping center, where he saw the owner exit the store through the front door carrying a briefcase. The owner, Abelardo Saladrigas, began walking to the back of the shopping center. When Fernandez could no longer see Saladrigas, he heard two shots. As Fernandez was coming down the stairs, he heard a third shot and then saw Rodriguez chasing the victim with a gun in one hand and the victim's briefcase in the other. Rodriguez was yelling, "Give me the watch; give me the watch." The victim ran behind a car where Rodriguez shot him a fourth time, grabbed the victim's watch and ran to the Mazda.

* * *

Rodriguez explained that he shot Saladrigas first in the leg and then in the stomach because the victim would not surrender his briefcase and watch. After being shot, the victim threw the briefcase at Rodriguez and

began screaming. Rodriguez shot him again in an attempt to get the watch. After the victim ran behind a car, Rodriguez shot him the final time and took the watch.

There was also testimony from another witness that pleas of "Don't do this to me, please" were heard coming from the back parking lot prior to the shots being fired.

* * *

According to Fernandez, the day after the murder, he, the defendant, and several other young men went to a residence intending to invade it and rob the occupants who according to Sponsa had large amounts of drugs and cash. Fernandez and two of the men went in one vehicle; Rodriguez and the other two went in a separate vehicle. Fernandez and the two men who rode with him went to the door. When a man answered, the three attempted to push their way in. However, when the man's wife brought him a gun, the three ran from the house. The attempted robbery victim shot at the three and one of them returned fire. Although Fernandez was carrying the murder victim's revolver during the attempted home invasion, he did not fire it. Fernandez dropped the revolver on the front lawn while fleeing.

Sergio Valdez, a participant in the attempted home invasion, who rode to the scene with the defendant, also testified. Valdez' account of the attempted home invasion was generally consistent with that of Fernandez. He explained that he, Rodriguez, and another man circled the residence while the other three men went to the door. According to Valdez, Rodriguez told him it was their job to tie up the people in the house and search for money and drugs after the others gained entry. Valdez also testified that while in route to the

> residence, Rodriguez admitted that he "had done a job" at an auto parts store the day before, and that he had stolen a thousand dollars and the Rolex watch he was wearing from the victim.

Rodriguez, 609 So. 2d at 496-97. Rehearing was denied on January 7, 1993. Defendant filed a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on October 4, 1993. *Rodriguez v. Florida*, 510 U.S. 830 (1993).

On August 10, 1997, Defendant filed a third amended motion for post conviction relief, (R. 1862-2054) raising the following thirty claims for relief, verbatim:

CLAIM I

> ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. RODRIGUEZ'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. MR. RODRIGUEZ CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED THE PUBLIC RECORDS MATERIALS AND BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

CLAIM II

> MR. RODRIGUEZ 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 WHICH WAS MATERIAL AND

EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

CLAIM III

MR. RODRIGUEZ WAS DENIED HIS RIGHTS UNDER *AKE V. OKLAHOMA* AT THE GUILT AND PENALTY PHASES 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 CONSULTANTS, ALL IN VIOLATION OF MR. RODRIGUEZ'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 IV

MR. RODRIGUEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE A DEFENSE OR CHALLENGE THE STATE'S CASE. COUNSEL WAS INEFFECTIVE DURING VOIR DIRE. COUNSEL FAILED TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

CLAIM V

MR. RODRIGUEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE DURING THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, MR. RODRIGUEZ'S

CONVICTION AND DEATH SENTENCE ARE UNRELIABLE.

CLAIM VI

MR. RODRIGUEZ WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT PHASE OF MR. RODRIGUEZ'S TRIAL AND WHEN THE JURY WAS ALLOWED TO RELY ON IMPROPERLY ADMITTED EVIDENCE. AS A RESULT, MR. RODRIGUEZ WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JURY'S GUILT VERDICT.

CLAIM VII

MR. RODRIGUEZ IS INNOCENT OF THE DEATH PENALTY.

CLAIM VIII

MR. RODRIGUEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE ADDITIONAL MITIGATING EVIDENCE AND FAILED ADEQUATELY CHALLENGE THE STATE'S CASE AS WELL AS TO PRESENT EVIDENCE IN SUPPORT OF THE MITIGATING CIRCUMSTANCES. COUNSEL FAILED TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

CLAIM IX

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY

OF THE STATUTE WAS NOT CURED IN MR. RODRIGUEZ'S CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE NARROWING CONSTRUCTIONS. AS A RESULT, MR. RODRIGUEZ'S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED NOW IN LIGHT OF NEW FLORIDA LAW, *ESPINOSA V. FLORIDA* AND *RICHMOND V. LEWIS*. COUNSEL WAS INEFFECTIVE IN THE PENALTY PHASE FOR FAILING TO OBJECT TO THE FACIALLY VAGUE STATUTE AND FOR FAILING TO ADVISE THE TRIAL COURT OF ADEQUATE NARROWING CONSTRUCTIONS OF THE APPLICABLE AGGRAVATING CIRCUMSTANCES.

CLAIM X

THE TRIAL COURT OVERBROADLY AND VAGUELY INSTRUCTED MR. RODRIGUEZ' JURY ON THE PREVIOUS CONVICTION OF A VIOLENT FELONY AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF *ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER*, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XI

THE TRIAL COURT OVERBROADLY AND VAGUELY INSTRUCTED MR. RODRIGUEZ' JURY ON THE MURDER FOR THE PURPOSES OF PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF *ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER*, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XII

THE TRIAL COURT OVERBROADLY AND VAGUELY INSTRUCTED MR. RODRIGUEZ' JURY ON THE CRIME COMMITTED WHILE ENGAGED IN THE COMMISSION OF A ROBBERY AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF *ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER*, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XIII

THE TRIAL COURT OVERBROADLY AND VAGUELY INSTRUCTED MR. RODRIGUEZ' JURY ON THE HEINOUS, ATROCIOUS, AND CRUEL AGGRAVATING FACTOR, IN VIOLATION OF *ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER*, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XIV

MR. RODRIGUEZ WAS DENIED A RELIABLE SENTENCING WHEN HIS JURY WAS IMPROPERLY INSTRUCTED THAT ONE SINGLE ACT SUPPORTED TWO SEPARATE AGGRAVATING FACTORS IN VIOLATION *ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER*, AND THE EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THESE INSTRUCTIONS DURING MR. RODRIGUEZ'S PENALTY PHASE AND SENTENCING.

CLAIM XV

MR. RODRIGUEZ'S SENTENCING JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XVI

MR. RODRIGUEZ'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. RODRIGUEZ TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. RODRIGUEZ TO DEATH. FAILURE TO OBJECT OR ARGUE EFFECTIVELY RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.

CLAIM XVII

MR. RODRIGUEZ'S SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION *STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER*, AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM XVIII

MR. RODRIGUEZ WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE REFUSED AND FAILED TO FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XIX

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. RODRIGUEZ'S CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XX

THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENT, THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS AND THE SENTENCING COURT'S RELIANCE ON THESE NON-STATUTORY AGGRAVATING FACTORS RENDERED MR. RODRIGUEZ'S CONVICTION AND RESULTING DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XXI

INEFFECTIVE ASSISTANCE OF COUNSEL AND THE PROSECUTOR'S IMPROPER CONDUCT AND ARGUMENT RENDERED MR. RODRIGUEZ'S CONVICTION AND RESULTANT DEATH SENTENCE FUNDAMENTALLY

UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XXII

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, AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT.

CLAIM XXIII

MR. RODRIGUEZ WAS DENIED HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, WHEN THE PROSECUTOR IMPERMISSIBLY SUGGESTED TO THE JURY THE LAW REQUIRED THAT IT RECOMMEND A SENTENCE OF DEATH.

CLAIM XXIV

MR. RODRIGUEZ WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENT OF CONVICTION AND A PROPER APPEAL FROM HIS SENTENCE OF DEATH IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AR. 5, SEC. 3(b)(1) OF THE FLORIDA CONSTITUTION AND FLORIDA STATUTES ANNOTATED, SEC. 921.141(4), DUE TO OMISSIONS IN THE RECORD.

CLAIM XXV

THE RULES PROHIBITING MR. RODRIGUEZ'S ATTORNEYS FROM INTERVIEWING JURORS TO DETERMINE IF CAUSE EXISTS TO DETERMINE IF RELIEF IS APPROPRIATE DUE TO JUROR MISCONDUCT VIOLATE EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE

FLORIDA CONSTITUTION.

CLAIM XXVI

JUROR MISCONDUCT OCCURRED IN THE GUILT AND PENALTY PHASE OF MR. RODRIGUEZ'S TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM XXVII

MR. RODRIGUEZ'S TRIAL COURT PROCEEDINGS WERE 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 XXVIII

MR. RODRIGUEZ WAS DENIED HIS RIGHT TO A FAIR TRIAL AND SENTENCING BEFORE AN IMPARTIAL JUDGE AND JURY IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES AND THOSE PARALLEL PROVISIONS WITHIN THE CONSTITUTION OF THE STATE OF FLORIDA; BY THE IMPROPER CONDUCT OF JUDGE CARNEY WHO CREATED A BIAS IN FAVOR OF THE STATE AND RENDERED RULINGS CONTRARY TO THE LAW. COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING OR MOVING FOR A MISTRIAL.

CLAIM XXIX

MR. RODRIGUEZ DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF ANY RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS WERE VIOLATED WHEN HIS PURPORTED STATEMENTS WERE IMPROPERLY ADMITTED INTO EVIDENCE.

CLAIM XXX

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT EXECUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES MR. RODRIGUEZ'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE FLORIDA CONSTITUTION.

Following a *Huff* hearing, the lower court granted an evidentiary hearing with respect to claims III and VIII as each claim related to Defendant's alleged mental retardation and denied Defendant's remaining claims(T., vol. 6, pg. 382). At the evidentiary hearing, Defendant's counsel presented the testimony of Dr. Ruth Latterner, a psychologist who testified regarding Defendant's alleged mental retardation, and Defendant's trial attorney, Scott Kalish. (T., vol. 10, pg. 474-525, 526-65). Dr. Latterner testified that Defendant was within the mentally retarded range of cognition and exhibiting characteristics of brain damage. (T., vol. 10, pg. 448). Mr. Kalish testified that he had been practicing criminal law since 1973 and prior to his representation of Defendant, had tried more than a hundred criminal cases. (T., vol. 10, pg. 537, 545). In addition to working as a clerk for a federal judge, Mr. Kalish had also represented countless defendants in federal and state court and was fluent in Spanish. (T., vol. 10, pg. 546). Mr. Kalish testified that he reviewed the report by Dr. Haber, the court

appointed expert at trial. (T., vol. 10, pg. 555). In rendering an expert opinion, Dr. Leonard Haber had considered Defendant's extensive criminal history, which included trafficking and federal offenses, as well as escape. Thus, Mr. Kalish made a strategic decision regarding the impact of presenting the testimony of Dr. Haber, which would expose Defendant's history to the jury. (T., vol. 10, pg. 557):

> Q: If Dr. Haber was not called as a witness, he found out the drug past or escape past?
>
> A: Correct.
>
> Q: If called as a witness, there was drug trafficking in the past, and a conviction, and a Federal institution?
>
> A: Assuming I have that advance ruling, correct.
>
> Q: And the merchant marines?
>
> A: Yes.
>
> Q: And that was a strategic decision that you decided the upside of Dr. Haber was outweighed by the downside of the jury finding out about his position as a drug trafficker and convict and escape –
>
> A: I didn't have from Dr. Haber that Mr. Rodriguez, when I hear mentally retarded, I didn't have that at all.
>
> All I had was basically nothing on one side, and a bad past on the other side.
>
> (T., vol. 10, pg. 557-558).

As Dr. Haber did not offer any statutory mitigators but presented a substantial risk of exposing Defendant's criminal past, defense

counsel's opted to forgo presenting Dr. Haber's testimony. (T., vol. 10, pg. 557). Furthermore, defense counsel testified that Defendant had not been cooperative with regard to marshaling family members' testimony or with Dr. Haber's evaluation for mitigation purposes during the penalty phase. (T., vol. 10, pg. 557).

Dr. Haber testified at the evidentiary hearing, opining that Defendant was not retarded and gave no indication of having been under extreme emotional duress at the time of the offense. (T. vol. 12, 643, 624-25, 651). Dr. Haber further testified that even if Defendant had an I.Q. in the retarded range, he would have to exhibit problems with adaptive functioning in order to be classified as retarded. (T. vol. 12, 626). State also presented several witnesses who had observed Defendant while incarcerated and testified that Defendant spoke clear and concise English, exhibited no special problems, utilized the law library facilities and had no problems managing his canteen account. (R. 2723). The lower court found that State's witnesses had shown that Defendant was "alert, oriented and was not determined to meet the criteria for mental retardation because he does not manifest impairment in at least two of the areas set forth in the DSM IV." (R. 2723). In an order dated November 23, 1999, the lower court denied Defendant's motions to vacate judgment and

sentence. (R. 2726).

Defendant appealed the denial of motion for post-conviction relief.

SUMMARY OF THE ARGUMENT

The lower court properly denied Defendant's claim that counsel was ineffective for failing to properly investigate mental health mitigation, as counsel did investigate possible mental health mitigation and evidence established Defendant was not retarded nor under extreme emotional duress at the time of the offense and was competent to proceed to trial.

The lower court properly denied Defendant's claims pertaining to the alleged mitigating circumstances of his background and upbringing in Cuba. Defendant did not show that defense counsel was deficient for failing to procure alleged witnesses from Cuba or how such testimony had a reasonable probability of effecting a different result at Defendant's trial. Moreover, Defendant was given the opportunity at an evidentiary hearing and did not present any alleged witnesses from Cuba to testify regarding Defendant's alleged retardation and background.

The lower court properly denied Defendant's claims pertaining to ineffective assistance of counsel at the guilt phase because counsel was not ineffective for failing to pursue non-meritorious claims, counsel did challenge the State's theory of the case, and Defendant failed to plead sufficient allegations for a *Brady* claim.

The lower court properly denied Defendant's public records

claims, as Defendant received all existing public records responsive to his timely requests. Defendant was not prejudiced by the loss of documents that were determined to be non- public record.

The lower court properly denied Defendant's claim to disqualify judge, as Defendant did not plead allegations sufficient for a motion to disqualify and Defendant's motion was untimely and procedurally barred.

The lower court properly denied Defendant's claims pertaining to instructions on aggravating circumstances and burden shifting, where such claims were procedurally barred and without merit.

The lower court properly denied Defendant's claim of ineffective assistance for failing to object to prosecutorial misconduct because this claim was largely litigated on direct appeal and therefore procedurally barred. Additionally, claims of prosecutorial misconduct not raised on direct appeal could have and should have been raised on direct appeal, and are likewise procedurally barred.

The lower court properly denied Defendant's claim that the death penalty is unconstitutional where Defendant specifically raised this claim on appeal and this Court rejected such claim. Accordingly, this claim is procedurally barred and without merit.

The lower court properly denied Defendant's claim pertaining to omissions in the transcript, as the missing transcripts were known at the time of the appeal and could have or should have been raised on direct appeal. Accordingly, this issue is procedurally barred.

The lower court properly denied Defendant's claim concerning the prohibition against juror interviews, as this claim could have or should have been raised on direct appeal and, therefore, is procedurally barred.

The lower court properly denied Defendant's claim that impermissible victim impact was considered in his sentence of death. This claim was raised on direct appeal and rejected, and is therefore procedurally barred.

The lower court properly denied Defendant's claim that due to cumulative errors Defendant was denied a fair trial because this claim was insufficiently pled and involved issues that could have or should have been raised on direct appeal and were therefore procedurally barred.

STANDARDS OF REVIEW

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, the result of the proceeding would have been different, or, alternatively stated, whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. *Hill v. Lockhart*, 474 U.S. 52 (1985).

In order to show a *Brady*[1] violation, Defendant must prove:

> (1) that the State possessed evidence favorable to him; (2) that he did not possess the favorable evidence nor could he obtain it with any reasonable diligence; (3) that the State suppressed the favorable evidence; and (4) that had the evidence been disclosed to [defendant], a reasonable probability exists that the outcome of the proceedings would have been different.

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla.), *cert. denied*, 516 U.S. 965 (1995). Further, in order to demonstrate a perjured testimony claim, Defendant must show:

> (1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material.

Craig v. State, 685 So. 2d 1224, 1226 (Fla. 1996); *see also Routly v. State*, 590 So. 2d 397 (Fla. 1991). "[M]ere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony." *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989); *see also United States v. Bailey*, 123 F.3d 1381, 1395-96 (11th Cir. 1997)(proof of perjury requires more than showing of mere memory lapse, unintentional error or oversight); *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994)(conflicts in testimony are insufficient to show perjury).

With regard to a lower court's findings at evidentiary hearings on post-conviction, both the performance and prejudice prongs under *Strickland* are mixed questions of law and fact and deference on appeal is given to the lower court's factual findings. Stephens v. State, 748 So. 2d 1028 (Fla. 1999.). "We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of facts." *Id*. at 1034.

ARGUMENT

I. THE LOWER COURT PROPERLY DENIED DEFENDANT A NEW PENALTY PHASE AFTER THE EVIDENTIARY HEARING FOR HIS 3.850 MOTION.

A. THE LOWER COURT PROPERLY FOUND COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT MENTAL HEALTH MITIGATION.

Defendant's contention that counsel was ineffective for failing to investigate and present additional mitigation evidence was properly denied by the lower court. Although Defendant asserts that counsel should have investigated and presented expert testimony concerning (1) Defendant's alleged mental retardation, (2)state of extreme mental duress at the time of the incident, and (3)inability to appreciate the criminality of his conduct or conform it to the law, the record indicates that Defendant was not retarded, insane, or under emotional duress at the time of his murder. Moreover, the record establishes that defense counsel did, in fact investigate and present all appropriate and applicable mitigation.

Defendant predicates his claim on defense counsel's failure to order further neuropsychological evaluation when he believed Defendant to be "not very intelligent." (Initial Brief of Appellant, pg. 5). In fact, Dr. Haber, the court appointed expert, recommended further neurological examination fo Defendant

due to the possibility of organic brain syndrome. (T., vol. 12, pg. 623). Pursuant to Dr. Haber's suggestion of further examination, Defendant was examined on March 22, 1990, by Dr. Noble J. David, a neurologist from the University of Miami's School of Medicine, Department of Neurology. (D.A.R. 253). Dr. David found Defendant's speech, hearing and sight to be normal, his arms and legs were strong and capable, his gait and stature were normal, as were the optic fundi and cranial nerves. Defendant's motor, sensory and reflex examinations all revealed no abnormalities. Dr. David found nothing to suggest brain damage, concluding that Defendant's neurological examination was entirely within normal limits. (R. 253, 274, 1740). However, due to Defendant's self-report of a fall after a horse-riding accident, Dr. Noble recommended that an electroencephalogram (EEG) be conducted. (R. 253, 274, 1740). Accordingly, on March 26, 1990, Dr. Cosimo Ajmme-Marsan, from the Department of Neurology, conducted the EEG on Defendant. Dr. Ajmme-Marsan found the results to be normal. (R. 253, 274, 1740).

Dr. Haber, who had extensive experience dealing with the mentally retarded, opined at the evidentiary hearing that Defendant is "clearly not mentally retarded." (T., vol. 12, pg. 643):

> Q: Have you come into contact with people who have a range of retardation problems?

A: Yes, sir, all the way from beginning or mild, down to the most extreme category, known as profound mental retardation. I have conducted those examinations in a variety of settings, including many of them in the last several years here at Landmark and other institutions and group hotels for the mentally retarded.

* * *

A: In my work as a school psychologist, I did psychiatry examinations. I did my work in the New York City public school system. And my private practice since 1965 in the State of Florida, 38 years of going on, almost 40 years now, I have had numerous opportunities to evaluate persons who are or who allegedly are mentally retarded.

Q: Now, although there was no formal intelligence testing of the defendant in this case, did he present to you, based upon your experience, as being mentally retarded?

A: No, he did not, no.

Q: And if he had given any indicia of being mentally retarded, would you have recommended further testing, or conducted it?

A: I would have either done it myself, or recommended a comprehensive intellectual and adaptive function evaluation I have done myself numerous times.

(T., vol. 12, pg. 624-5).

Additionally, Dr. Haber testified that based upon his examination of Defendant and review of the case, there was no information that "would indicate...that at the time of the homicide, that the defendant was under extreme emotional distress." (T., vol. 12, pg. 651). Dr. Haber's review of the case included two separate

psychological interviews of Defendant, a mental status examination, the Bender-Gestalt visual motor test, Bender-Gestalt recall test, and a review of all the materials pertinent to Defendant's criminal case. (R.457). Furthermore, despite Defendant's contention that Dr. Haber's opinion "swayed dramatically" from the time of his deposition to the time of Defendant's evidentiary hearing (Initial Brief of Appellant, pg. 6), a comparison of Dr. Haber's testimony from both events clearly establishes that Dr. Haber's opinion, in fact, remained consistent.

In his deposition prior to Defendant's sentencing, Dr. Haber testified that Defendant was alert, oriented, serious, responsive and verbal. (R. 460). Dr. Haber opined at his deposition that Defendant had the mental faculties, alertness, intelligence to be able to understand what he was doing. (R. 474-5, 481). As he reiterated at the evidentiary hearing, Dr. Haber testified during his deposition that Defendant gave no indication of mental disorder or insanity:

> What I'm saying is I don't have any significant history of major mental disorder as one would need to find under Florida law for insanity, nor do I have any significant history of treatment for mental disorder. . . .
>
> * * *
>
> Well, I learned that he was basically cooperative, even if he wasn't totally informative. His eye contact

> was good. Orientated as to time, place person. His memory appeared to be accurate; although, at time it was vague and spotty. He was productive able to process information, able to comprehend the questions and give responsive answers. He was goal orientated. He did not display tangential traits. He showed not loosening of associations, reference paranoia or any other indications of significant mental disorder, and he had adequate fund of general information showing an awareness of world events, what is going on. He seems to be alert and reasonably intelligent.
>
> (R. 473, 480).

While careful to not to misrepresent an exact evaluation of Defendant's formal I.Q. level, Dr. Haber tendered a professional opinion that Defendant's mental and cognitive functioning was sufficient and that he was certainly not retarded:

> I am able to confirm he can write because this is a sample of handwriting which I asked for, and he said he was able to read, but I confirmed the writing. I would not want to give an estimate as to his intelligence because I know the right way to do that is to administer a formal intelligence test which given some time could be done.
>
> I am satisfied that he has sufficient alertness and sufficient intelligence that I regard him to be competent to proceed with trial at this state and to have the mental faculties to be able to understand what he is doing, and that is as far as I would go to say he has ability. I wouldn't want to guess as to how much he is. He may be less or below average intelligence.
>
> (R. 474).

Moreover, the record refutes Defendant's claim on post-conviction that he is retarded. A psychological evaluation of Defendant conducted on September 3, 1984, indicated he had an average I.Q. and described Defendant as confident and manipulative (T. vol.

12, 641). Prior to his convictions in the instant case, Defendant passed both the written and practical exam for his Florida's driver license, was able to drive a car, and had obtained a chauffeur's license. (R. 486). Furthermore, not only did Defendant plan, organize a number of people's participation in, and execute the murder of Mr. Saladrigas, as well as the separate home invasion robbery the following day, but made threats against the principle witnesses who testified against him at trial. *Rodriguez*, 609 So. 2d at 495-497. Certainly, master-minding separate criminal episodes involving numerous parties conflicts with Defendant's post-conviction theory of alleged mental retardation.

Defendant further contends that counsel was ineffective because he failed to retain Dr. Haber until after the guilt phase of his trial. Indeed, the record reflects that defense counsel filed a motion to appoint an expert for Defendant's penalty phase issues on February 7, 1990. (D.A.R. 221-27, 228-29). However, defense counsel had more than a month to prepare for the penalty phase proceedings, which were held on March 1, 1990. (D.A.R. 1771). Defense counsel's actions concerning whether to present Dr. Haber's testimony during the penalty phase proceedings were the result of a reasonable strategic decision. At the sentencing hearing before the jury, the defense counsel sought to prohibit

the State from asking Dr. Haber about Defendant's prior convictions and criminal history during cross-examination. (D.A.R. 1777-78). The trial court ruled that the State could cross-examine Dr. Haber on whether he took into account Defendant's prior felony convictions. (D.A.R. 1782-83). As defense counsel later recalled at the evidentiary hearing, the potential negative impact of Defendant's extensive criminal history outweighed the questionable benefit of Dr. Haber's testimony concerning Defendant's possibly low average intelligence:

> Q: Now, in deciding whether you wanted to all Dr. Haber to testify, did you go over in your mind how it would come out on cross-examination of Dr. Haber?
>
> A: My recollection is he had a past. After Dr. Haber, I believe I had an advance ruling from the Court that would allow Dr. Haber to go into the past –
>
> Q: If Dr. Haber, in part of his clinical test which found his opinion for possible organic brain syndrome and possible low average IQ the defendant disclosed his criminal history to him, and that was an important thing in your decision making?
>
> A: That would be a factor I would have to weigh–
>
> * * *
>
> Q: If Dr. Haber was not called as a witness, he found out the drug past or escape past?
>
> A: Correct.
>
> Q: If called as a witness, there was drug trafficking

in the past, and a conviction, and a Federal Institution?

A: Assuming I have that advance ruling, correct.

Q: And the Merchant Marines?

A: Yes.

Q: And that was a strategic decision that you decided the upside of Dr. Haber was outweighed by the downside of the jury finding out about his position as a drug trafficker and convict and escape–

A: I didn't have from Dr. Haber that Mr. Rodriguez, when I hear mentally retarded, I didn't have that at all. All I had was basically nothing on one side, and a bad past on the other side....

(T., vol. 10, 556-57).

Indeed, Dr. Haber testified that he would have found the statutory mitigating circumstances if he had reason to believe that Defendant was so mentally anguished as to have his judgment or cognitive processes impaired or was so drugged by alcohol or other toxic substances as to not have full cognizance of what he was doing, or if he was so emotionally disturbed as to be out of contact with reality. (R. 471-2). Dr. Haber found that Defendant's reported drug use was insufficient to form the basis for mitigation. (R. 476). He further opined that although there may have been some indication of organic dysfunction, there was no indication of anything to trigger it at the time of the offense, such that it would qualify as a mitigating factor. (R.

477, 499). Thus, defense counsel did, in fact, investigate potential mental mitigators. Defense counsel was not deficient for strategically deciding to forgo Dr. Haber's testimony, which offered little or no mitigation evidence, in order to prevent the State from cross-examining Dr. Haber regarding Defendant's criminal history. *See Cherry v. State*, 25 Fla. L. Weekly S719 (Fla. Sept. 28, 2000)(where defense counsel did not call the mental health expert or any other witnesses during penalty phase, this Court held counsel's actions reasonable because the "defense eliminated the State's ability to cross-examine" the expert regarding his report, including the defendant's criminal history). Defense counsel did present Defendant's wife at the penalty phase as mitigation and argued forcefully that Defendant had been a non-violent, loving husband and father. (D.A.R. 1817, 1869-70).

Thus, Defendant's reliance upon *Deaton v. Dugger*, 635 So. 2d 4 (Fla. 1993), is misplaced. In *Deaton*, clear evidence was presented that defense counsel had not investigated mitigating evidence. The defense counsel in *Deaton* testified at an evidentiary hearing that he did not speak with his client regarding the extant documentation of his abuse as a child and had prepared for the penalty phase only "overnight or the next day, couple of days." *Id*. at 9. Accordingly, this Court held

that "counsel's shortcomings were sufficiently serious to have deprived Deaton of a reliable penalty phase proceeding." *Id*. In the instant case, defense counsel did explore possible mental mitigation and a series of follow-up neurological tests were performed on Defendant to that end. Additionally, defense counsel requested and received a continuance of Defendant's sentencing to properly prepare. (D.A.R. 230-31).

While Defendant contends that "the scope of the evidentiary hearing was severely limited so that no evidence of non-statutory mitigation from family members, teachers, or cultural experts was admitted," (Initial Brief of Appellant, pg. 7), the record clearly refutes that the evidentiary hearing was limited in such a manner. (T., vol. 6, pg. 383). In fact, at the conclusion of the *Huff* hearing, the lower court discussed with counsel for the State and CCRC how Defendant's family members and other witnesses in Cuba may be accommodated:

> The Court: I guess we should say it this way in terms of the Huff decision. The claims that will be allowed in the evidentiary hearing will be Claims III and VIII as they relate together having to do with the mental retardation in the penalty phase only. How much time do you think that will take.
>
> State: We're talking about Claim VIII so we're also talking about –
>
> The Court: Claim III and Claim VIII are related.

State: But VIII is a little bit more –-we have to bring the family members to testify about his past and all of that stuff.

The Court: Yes.

* * *

The Court: I have been down this road before and the best way to do this is to video in Cuba.

The State: We have to make all of those arrangements. That takes, as I noted from Chavez, it takes a little bit of time to do that the cost, obviously have to be paid through CCRC and that's something I can't tell you, I'm sure they can't tell us either when they are going to have money to do that.

(T., vol.6, pg. 383-4).

Despite further discussion regarding the time frame and best method to secure testimony of witnesses in Cuba at the *Huff* hearing, Defendant apparently abandoned marshaling such witnesses together and instead relied exclusively upon his expert, Dr. Latterner.

At the evidentiary hearing, defense counsel testified that he did not pursue witnesses in Cuba for Defendant's penalty phase because he did not believe it would be possible due to the political climate at the time of Defendant's trial. (T., vol. 10, pg. 538). Similarly, the lower court denied this claim, stating in its order "in the two years prior to the trial Mr. Kalish would not have been permitted entry to Cuba anyway." (R.

2724). Indeed, despite complaints that defense counsel was ineffective in failing to secure mitigation witnesses in Cuba during the penalty phase, Defendant did not fare better at producing the alleged witnesses at his evidentiary hearing. Defendant has failed to show what defense counsel should have done differently to secure such alleged witnesses during his penalty phase or that such witnesses exist. *See Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983), *cert. denied*, 467 U.S. 1220 (1984)(burden on defendant to prove claim).

Finally, Defendant argues that defense counsel was ineffective for failing to investigate Defendant's allegedly outlandish conduct during trial and that had counsel provided a plausible explanation for Defendant's sleeping during his penalty phase, the jury would have reached a different sentencing recommendation. However, the record reflects that, in fact, defense counsel did provide a plausible explanation, offering that Defendant was merely concentrating on what the interpreter was saying and concurrently moved for a mistrial. (D.A.R. 1856). Indeed, based on defense counsel's objection, the trial court curatively instructed: "Let the record reflect the defendant was sitting in his chair with his eyes closed. Whether he was sleeping or not is up to the jury to decide." (D.A.R. 1857).

As defense counsel did extensively investigate mitigation

evidence and presented mitigation evidence testimony at the penalty phase, counsel was not ineffective. As such, the lower court properly denied this claim.

B. DR. HABER'S EVALUATION WAS NOT CONSTITUTIONALLY INADEQUATE.

Defendant's claim that Dr. Haber's evaluation of Defendant was inadequate was also properly denied. The fact that counsel may not have given Dr. Haber additional information about Defendant's background is insufficient to establish the Dr. Haber's evaluation was inadequate. In *Oats v. Dugger,* 638 So. 2d 20 (Fla. 1994), this Court found that a claim for ineffective assistance is not established where "new facts and opinions which cause the original experts to equivocate about their original opinions have not been established by substantial, material evidence." Moreover, in the instant case, Defendant did not even call Dr. Haber at the evidentiary hearing to establish that Dr. Haber's opinion had changed since Defendant's sentencing, nor did Defendant establish what substantial material evidence existed that would have changed Dr. Haber's original mental evaluation of Defendant. In fact, the State called Dr. Haber to testify that his opinion of Defendant had not changed.

Although Defendant claims that Dr. Haber was not made aware of Defendant's allegedly unfortunate early life in Cuba, the

record establishes that Dr. Haber had been provided some of the information related to Defendant's history in Cuba, including Defendant's four year tenure in a Cuban prison for deserting the Merchant Marines and Defendant's migration to the United States via the 1979 Mariel Boatlift. (D.A.R. 266-270). More importantly, Dr. Haber's review of the case included three separate psychological interviews of Defendant, a mental status examination, the Bender-Gestalt visual motor test, Bender-Gestalt recall test, and a review of all the materials pertinent to Defendant's criminal case. (R.457). There is no reasonable probability that additional information regarding the circumstances of Defendant's childhood in Cuba would have affected Dr. Haber's assessment of Defendant as not retarded, insane or under extreme mental distress at the time of the incident. Furthermore, as Defendant refused to cooperate with Dr. Haber in providing further information related to his life in Cuba, Dr. Haber cannot be deemed inadequate for failing to consider such information in his assessment of Defendant. *See Cherry v. State*, 25 Fla. L. Weekly S719 (Fla. Sept. 28, 2000).

The mere fact that Defendant has now secured what he feels would be more favorable expert opinions is in insufficient basis for relief when counsel retained an expert prior to sentencing and provided such expert with the opportunity to interview

Defendant and review Defendant's records. *See Turner v. Dugger*, 614 So. 2d 1075,1079 (Fla. 1992); *Provenzano v. Dugger*, 561 So. 2d 541, 546 (Fla. 1990). As such, the lower court properly denied this claim.

C. DEFENDANT SUFFERED NO PREJUDICE FROM COUNSEL'S FAILURE TO PRESENT AT PENALTY PHASE THE TESTIMONY OF SUBSEQUENT EXPERT.

Not only has Defendant failed to establish that defense counsel was deficient for failing to explore mental health mitigation or for opting not to present the testimony of Dr. Haber, Defendant cannot show that he suffered any prejudice. There is no reasonable probability that the outcome of Defendant sentencing proceeding would have been different if Dr. Latterner had testified that Defendant was retarded and under extreme emotional duress at the time of the incident when there exists overwhelming evidence to the contrary.

Dr. Latterner concluded that Defendant was retarded based exclusively on an I.Q. test she conducted. (T., vol. 10, pg. 466). However, Dr. Latterner conceded that the Diagnostic and Statistical Manual IV (DSM IV), which is used by psychologists and psychiatrists including herself to diagnose mental deficiencies and disorders, defines a mentally retarded person as someone with an I.Q. less than 70, onset before 18 years of age

and significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, social skills, use of community resources, self-direction, functional skills, work, leisure, health, and safety. (T., vol. 10 pg. 468-7, 469, 489-91). Dr. Latterner further testified that Defendant's non-verbal social skills functioned at a higher level than his I.Q. denoted. (T., vol. 10 pg. 478). Furthermore, Dr. Latterner agreed that an individual's adaptive functioning in the areas defined by DSM IV could be determined by the testimony of people who had the opportunity to observe the individual:

> Q: In fact, all of these things that are listed, you know, adaptive functions are things that can be determined by the testimony of people who are around the defendant in the pertinent time period, correct?
>
> A: Yes.
>
> (T., vol. 10 pg. 485).

Within the context of the adaptive functioning portion of the DSM IV definition of mental retardation, Dr. Latterner could not reconcile various aspects of Defendant's past with her assessment that Defendant was retarded:

> Q: Would it surprise you to learn that he was assistant houseman over at the Dade County Jail?
>
> A: I don't think I understand what it is, but I suppose it wouldn't surprise me. I'm not sure I understand how one arrives at that.
>
> * * *

Q: Are you familiar with the defendant's employment history?

A: To a limited extent.

Q: You know then that he has been employed in the past?

A: Yes.

Q: Correct. Are you aware of the job that he had, a management position at Marlin's Restaurant?

* * *

A: I believe that was contained in the P.S.I., counsel. I wouldn't dispute that.

(T., vol. 10 pg. 502-03).

More importantly, Dr. Latterner could not reconcile her assessment of Defendant as mentally retarded with the criminal history in his file which she reviewed, which included desertion from the Merchant Marines to emigrate to Spain, drug trafficking, and the control and management of the co-defendants in the instant case. (T., vol. 10 pg. 503, 500, 492).

Dr. Haber, on the other hand, testified at the evidentiary hearing that such actions by Defendant were not consistent with mental retardation:

Q: Assume that this defendant earlier in his life has been in the Merchant Marines in Cuba, and had decided that he no longer wanted to be in the Merchant Marines in Cuba, and conveniently he presented himself to the embassy in Spain, in an attempt to extricate himself from the Merchant Marines. Would that be the kind of behavior that you would expect if the person were mentally

retarded.

A: It would not ordinarily, no.

* * *

Q: Are you aware from your review of the terms included in the federal and state pre-sentence investigations at the defendant's prior convictions where he did use false names false dates of birth?

A: Dates of birth, yes, I believe there are about three or four.

Q: Is that the level of sophistication that you would expect or not expect in person who is mentally retarded?

A: I would not expect it.

* * *

Q: Are you familiar with the fact that the defendant threatened witnesses, according to sworn testimony?

A: Yes.

Q: And encouraged other witnesses to make up stories, to discredit witnesses who were testifying against him?

A: Yes.

Q: Is that consistent or inconsistent with a person who is mentally retarded?

A: Its clearly inconsistent.

Q: Do you know what a houseman is in jail?

A: Yes.

Q: Is it consistent or inconsistent with person mentally retarded to be one of the one or two

people in the cell environment containing many inmates, where he essentially is in charge of the cell.

A: It's inconsistent. Any task that requires any independent judgment is inconsistent with mental deficiency.

(T., vol. 12 pg. 631, 637-8, 639-40).

In addition to Dr. Haber's assessment of Defendant's mental functioning, ample testimony was adduced at the evidentiary hearing regarding Defendant's actions and behavior in prison. The Administrative Sergeant of Defendant's death row facility, Mike Young, testified that he interacts with Defendant on a daily basis and observed Defendant reading in English, exhibit above average verbal communication skills, excellent hygiene over himself and his cell, and competent management of his canteen account. (T., vol. 12, 569-573). Lisa Wiley, a psychological specialist at Defendant's correctional facility, testified that she met with Defendant on more than several occasions and testified that Defendant received treatment for depression but never exhibited difficulties with any of the adaptive behaviors required for mental retardation under DSM IV. (T., vol. 12 pg. 602-3). Thus, Dr. Latterner's facile diagnosis of Defendant's mental retardation was clearly rebutted by other testimony and record evidence. As the lower court noted in its order denying Defendant's 3.850 motion:

> Dr. Haber provided an ample and thorough evaluation of the defendant. The defendant's claim that the testimony of Dr. Latterner overcomes his conclusions are nothing short of absurd. Dr. Latterner's opinion leaves much to be desired. First her diagnosis is incompatible with the facts of the crimes and is not even consistent with the DSM IV. No doubt the defendant has a low IQ, but a low IQ does not mean mental retardation. For a valid diagnosis of mental retardation under DSM IV there must also be deficits in the defendant's adaptive functioning. All the evidence points to no deficits. Additionally, there was no evidence at all that the defendant had any memory impairments or problem of impulsivity. Not only was Dr. Haber's opinion not inadequate but it is completely supported by the evidence. A conclusion by a new expert that is different is interesting but pales in an analysis of available facts and standards.
>
> (R. 2724).

Similarly, no evidence was presented at the evidentiary hearing supporting Defendant's contention that he was under severe emotional distress at the time of the incident other than Dr. Latterner's unsupported opinion to the contrary. Dr. Haber testified that he was not aware of "reliable information that would indicate...that at the time of the homicide...defendant was under extreme emotional distress," nor that the crime was one of passion, but rather that the crime appeared "to have been planned, thought out, and implemented in some direction." (T., vol.,12, pg. 651). Conversely, Dr. Latterner mysteriously offered that Defendant's mental state was:

> Less than insanity, but more than the emotions of the average man, however inflamed, if that's an appropriate response because that is clearer psychologically than

the legal definition.

(T., vol. 12, pg. 460).

However, further cross-examined, Dr. Latterner admitted:

Q: You didn't ask him whether he was forced to commit the crime.

A: No.

Q: You didn't ask him whether he was under duress?

A: No.

Q: And you had no information that he was, correct?

A: Correct.

(T., vol. 12, pg. 514).

In view of the total lack of support in the record for Dr. Latterner's bald assertions that Defendant was retarded and/or under extreme emotional duress at the time of the incident, there simply exists no reasonable probability that the jury would have reached a different sentencing recommendation had Dr. Latterner's testimony been presented. As such, the lower court correctly denied this claim.

II. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S NON-MENTAL HEALTH PENALTY PHASE CLAIM.

Defendant alleges that counsel was ineffective for failing to investigate and present witness testimony from Cuba concerning the allegedly harsh conditions and unfortunate circumstances of

his childhood in Cuba. Specifically, Defendant alleges that he came from a poor family in Cuba; that his mother drank alcohol when she was pregnant with him; that his family lived next door to toxic chemicals; that his father was mentally slow and behaved strangely; that other members of his family had mental illnesses; when his parents separated, he moved with his mother and two siblings to his maternal grandmother's home where he was abused by his great-grandmother, uncle and grandfather; that his family and teacher considered him "retarded" and "nervous" and that he was called "stupid" by other children; that he could not handle simple household chores; that his suffered poor oral and addition skills and was virtually incapable of writing; that he suffered head injuries that made him slow and stupid; that at age nine, he was sent to a work camp/school; that he was imprisoned in Cuba for abandoning the Merchant Marines; that his wife, Marlene never loved him but stayed with him because he was a good worker; that he was irrationally jealous and would threaten to kill himself; and that he met people in South Florida who introduced him to drugs, that he used cocaine, and that he was a follower.

Defendant cannot establish that defense counsel was ineffective for failing to secure mitigation testimony from witnesses in Cuba, as he has failed to show that defense counsel's actions fell below a reasonable standard. As the

lower court held in its order: “Mr. Kalish is further faulted for not investigating defendant’s family history in Cuba. This is not well taken on two counts; First, the defendant would not talk to Mr. Kalish about his family in Cuba, and second, in the two years prior to the trial Mr. Kalish would not have been permitted to Cuba anyway.” (R. 2724). Thus, Mr. Kalish cannot be deemed deficient for failing to do what could not be done during the prevailing political conditions existing at the time of Defendant’s trial. In fact, Defendant failed to present any witnesses at his evidentiary hearing from Cuba to testify regarding Defendant’s alleged mental retardation mitigation evidence, despite the fact that the lower court indicated a willingness to consider this evidence during the *Huff* hearing. As such, Defendant did not carry his burder on this claim. *Smith v. State*, 445 So. 2d 323, *cert. denied*, 467 U.S. 1220 (1984). Accordingly, this claim was properly denied.

Moreover, the record reflects that much of the information that was relevant to determining Defendant’s mental status was known to counsel and the mental health experts. Prior to sentencing, Dr. Haber interviewed Defendant on two separate occasions. In these interviews, Defendant reported that he was born in San German, Cuba on June 26, 1956. He stated that he came to the United States in 1979 via the Mariel Boatlift.

Defendant reported no serious medical problems, but that he had once fallen off a horse. Defendant also told Dr. Haber that he had only completed the first grade in Cuba, and that he had to work after that. Defendant stated that he had been a self-employed house painter for eight years. Defendant told Dr. Haber that he married in 1978 and had a two-year-old son. Additionally, Defendant stated he served in the Merchant Marines, that he had been admitted for one day to a psychiatric hospital in Havana, and that he was admitted in 1980 to Jackson Memorial Hospital, and in 1983 to a prison hospital in Washington D.C. for his two alleged suicide attempts. Defendant told Dr. Haber of seven prior arrests, including an arrest and imprisonment for 4 ½ years for federal cocaine trafficking and an arrest and 4 year prison term for deserting the Merchant Marines. Defendant stated that he did not use alcohol but had used cocaine from 1981-84, but had last used it in March of 1988. (D.A.R. 266-70). As Dr. Haber had much of the relevant information at the time he formed his opinion of Defendant's mental functioning, there is no reasonable probability that his opinion would have differed had the Defendant told Dr. Haber of the additional facts he now raises on post-conviction. *Oats v. Dugger,* 638 So. 2d 20 (1994). Furthermore, as defense counsel testified at the evidentiary hearing, Dr. Haber did not learn about the additional information

because of Defendant's own lack of cooperation:

> Q: But his lack of cooperation was one factor that led to Dr. Haber's evaluation?
>
> A: Yes.
>
> (T., vol. 10, pg. 555).

To the extent that Dr. Haber did not learn information pertaining to Defendant's allegedly unfortunate childhood in Cuba, it was due to Defendant's failure to cooperate. Thus, Defendant cannot seek relief on post-conviction on this basis. *See Cherry v. State*, 25 Fla. L. Weekly S719 (Fla. Sept. 28, 2000).

Furthermore, as Defendant was thirty-two years old when he participated in the robbery and murder of Abelardo Saladrigas, evidence of a deprived and abusive childhood would have been given little mitigating weight. *See Bolender v. Singletary*, 16 F. 3d 1547, 1561 (11th Cir. 1994); *Francis v. Dugger,* 908 F. 2d 696, 703 (11th Cir. 1990). In light of the aggravating factors found in the present case,[2] it is clear that even if the evidence of Defendant's background had been introduced, there is no reasonable probability that the results of the sentencing proceeding would have been different. In *Thompkins v. Dugger*,

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[2] The trial court found the following aggravating factors: (1) prior conviction of violent felony; (2) the murder was committed during a robbery and for financial gain; and (3) the murder was heinous, atrocious, and cruel. *Rodriguez* 609 So. 2d at 497.

549 So. 2d 1370, 1373 (Fla. 1989), this Court found:

> The trial judge, when imposing the death penalty, found three aggravating circumstances: previous conviction of a violent felony; murder committed during an attempt to commit a sexual battery; and that the murder was especially heinous, atrocious, or cruel. The previous felony convictions consisted of two prior rapes at knife point. Thompkins alleges that there were extenuating circumstances which would mitigate this aggravating factor. He further submits that additional mitigating evidence existed and should have been presented at trial. This mitigation included an abused childhood and an addiction to drugs and alcohol. The trial court found this evidence would not have affected the penalty in light of the crime and the nature of the aggravating circumstances. We affirm the trial court's finding that the second prong of the Strickland test has not been satisfied.

See also Breedlove v. State, 692 So. 2d 874 (Fla. 1997); *Mendyk v. State*, 592 So. 2d 1076 (Fla. 1992); *Buenoano v. Dugger*, 559 So. 2d 1116 (Fla. 1990); *Correll v. Dugger*, 558 So. 2d 422 (Fla. 1990); *Cave v. State*, 529 So. 2d 293 (Fla. 1988); and *Marek v. Singletary*, 62 F. 3d 1295, 1300 (11th Cir. 1995). Thus, the lower court properly denied this claim.

Defendant also claims counsel was ineffective for failing to retain a cultural expert, but has failed to proffer how such an expert's testimony would be relevant in this case. Appellant emigrated to Miami from Cuba. Miami, especially the Cuban community, does not lack familiarity, language or cultural norms or values for persons emigrating from Cuba. Defendant has failed to demonstrate how there exists a reasonable probability that the

failure to have such an expert would have affected the outcome of the trial or sentencing proceeding. As such, the lower court correctly denied this claim.

C. DEFENDANT'S SENTENCING ORDER CLAIM IS PROCEDURALLY BARRED AND SHOULD BE DENIED.

Finally, Defendant contends that counsel was ineffective for failing to object to a sentencing order that allegedly was drafted by the State and signed by the trial judge. However, Defendant never raised this allegation in his motion for post-conviction relief but instead *ore tenus* raised the allegation for the first time at the *Huff* hearing. (T., vol. 6, 337). As Defendant had been in possession of the State Attorney Office's files for nearly two years prior to the Defendant's *Huff* hearing that contained the alleged unsigned sentencing order prepared by the State (T., vol. 6, 337-38), this allegation is untimely and procedurally barred. *See Buenoano v. State*, 708 So. 2d 941 (Fla. 1998); *Zeigler v. State*, 632 So. 2d 48 (Fla. 1993); *Agan v. State*, 560 So. 2d 222 (Fla. 1990); *Demps v. State*, 515 So. 2d 196 (Fla. 1987). Accordingly, the lower court properly denied.

III. THE LOWER COURT PROPERLY DENIED DEFENDANT'S GUILT PHASE ISSUES

A. DEFENDANT'S BRADY ISSUE IS WITHOUT MERIT

Defendant claims that the State violated *Brady v. Maryland*,

373 U.S. 373 83 (1963), by withholding exculpatory evidence that allegedly showed another person, "Tata," was the organizer and perpetrator of the crimes. To prevail on this claim, Defendant must establish that the State possessed evidence favorable to the defense, that the defense did not possess and could not have obtained through the exercise of reasonable diligence, and that had the evidence been disclosed there is a reasonable probability that the result of the trial would have been different. *Maharaj v. State,* 25 Fla. L. Weekly S1097 (Fla. Nov. 30, 2000); *Provenzano v. State*, 616 So. 2d 428 (Fla. 1993); *Melendez v. State*, 612 So. 2d 1366 (Fla. 1992); *Mendyk v. State*, 592 So. 2d 1076 (Fla. 1992).

Defendant cannot even make the requisite showing that he did not possess the alleged exculpatory evidence prior to trial or could not have done so through the exercise of due diligence. To support his claim, Defendant states only that the State withheld information that Tata was the person who planned and perpetrated the crimes and that Tata was "in cahoots" with an associate of the victim, who knew the victim's routine; that Tata was a member of a sophisticated and well-organized professional gang that planned, organized, and executed crimes; that Ramon Fernandez, i.e., "Pipo," was not worthy of belief, and other impeachment material. These are conclusory allegations without specific

facts pled.

Defendant has not shown that any of this information was not already known or could not have been known by Defendant. Even by his own admission during his post-arrest interview with the police, he was present during the planning of the home invasion and the discussion concerning the murder of Mr. Saladrigas the previous day. (D.A.R. 1512-13). Additionally, Myrta Montalvo looked at a photo line-up containing a picture of Carlos Ponce (a.k.a. "Tata"). And defense counsel heavily focused his closing on Tata's participation in the offenses, arguing:

> But getting back to the events of the case, Santiago Velez was seen with Tata. Where was Tata? Was Tata sitting in a Bronco, according to Ramon Fernandez? Remember, Tata got to the Auto Parts. . .
>
> * * *
>
> Ramon has told us that Tata stayed in the Bronco. Over here is a picture that he parked the Bronco out here in the parking lot and was sitting in the Bronco the whole time while the person in the green shirt – and I will get to him in a moment – the person in the green shirt went to the door of the Center Auto Parts Store.
>
> But we know that is a lie also because Mirta Montalvo told us that she saw Tata, this person, and he wasn't sitting in a Bronco. He was across the street at the Texaco gas station, looking over at Mirta's Cafeteria and at the Center Auto Parts Store.
>
> * * *
>
> This man has been selected by this little gang of teenagers, including Tata who has never been arrested as their scapegoat.

(D.A.R. 1602, 1605-06, 1622).

Moreover, Defendant does not specifically state what information was withheld. He does not state who the associate of the victim was that Tata was allegedly in cahoots with. Without knowing what specific information was allegedly withheld, the State cannot respond to the allegations. Accordingly, as this claim is insufficiently pled, the lower court correctly summarily denied it.

Defendant next asserts that the State knowingly presented perjured testimony from Ramon Fernandez at trial. In order to prove this claim, Defendant was required to show: "(1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material." *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991). To demonstrate perjury, a defendant must show more than mere inconsistencies. *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989); *see also United States v. Bailey*, 123 F.3d 1381, 1395-96 (11th Cir. 1997)(proof of perjury requires more than showing of mere memory lapse, unintentional error or oversight); *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994)(conflicts in testimony are insufficient to show perjury). Here, Defendant merely alleges that "the State presented testimony it knew or should have known was false, and used that testimony to convict

[Defendant].” Defendant has not even alleged a sufficient claim because Defendant does not even claim that the State knew that Mr. Fernandez’s testimony was false. Furthermore, nothing in the record supports Defendant’s contention. Other witnesses who testified at trial were consistent with Mr. Fernandez’s testimony:

> Sergio Valdez, a participant in the attempted home invasion, who rode to the scene with the defendant, also testified. Valdez' account of the attempted home invasion was generally consistent with that of Fernandez. He explained that he, Rodriguez, and another man circled the residence while the other three men went to the door. According to Valdez, Rodriguez told him it was their job to tie up the people in the house and search for money and drugs after the others gained entry. Valdez also testified that while in route to the residence, Rodriguez admitted that he "had done a job" at an auto parts store the day before, and that he had stolen a thousand dollars and the Rolex watch he was wearing from the victim.
>
> *Rodriguez v. State*, 609 SO. 2d 493, 497 (Fla. 1992).

Additionally, Jose Arzola, an employee of the murder victim, identified Defendant in court:

> Although Rodriguez's appearance had changed, Arzola made an in-court identification of him. Arzola further testified that he had seen Rodriguez at the shopping center on two or three occasions prior to the murder, standing on the side of the stairwell next to the entrance to the auto parts store.

Id. at 496.

As such, Defendant did not show that the State had any way of being aware of the allegedly false testimony by Mr. Fernandez, and no *Brady* violation was demonstrated. *See Roberts v. State*, 568 So. 2d 1255, 1260 (Fla. 1990); *James v. State*, 453 So. 2d 786 (Fla.), cert. denied, 469 U.S. 1098 (1984).

B. COUNSEL WAS NOT INEFFECTIVE DURING PENALTY PHASE FOR FAILING TO INVESTIGATE AND PREPARE FOR TRIAL, REQUEST A SEVERANCE, OR FAILING TO OBJECT TO IDENTIFICATION TESTIMONY OR THE EXPERT INSTRUCTION.

Defendant contends that counsel was ineffective for failing to provide adequate expert investigation of Defendant's mental condition and competency to stand trial. However, the record refutes Defendant's contention. Indeed, Dr. Haber examined Defendant and determined that he was able to write, read and possessed sufficient intelligence to be competent to proceed to trial. (R. 474-75). Furthermore, through the evaluation of Dr. David and the results of EEG, it was determined that there were no neurological abnormalities. Defendant has not proffered any opinion from a specific mental health expert who was available to testify at the time of trial, which disputes Dr. Haber's finding of competency to stand trial. Even Dr. Latterner, the expert

presented at the evidentiary hearing who testified regarding Defendant's alleged mental retardation, did not state Defendant had been incompetent to stand trial.

The fact that Defendant closed his eyes and appeared to fall asleep during closing argument does not show that he was incompetent to stand trial. If his behavior had been such an indication, then it is a claim that should have been raised on direct appeal and as such, is procedurally barred. *See Johnston v. Dugger*, 583 So. 2d 657 (Fla. 1991); *Adams v. State*, 456 So. 2d 888 (Fla. 1988). The record clearly establishes that Defendant was competent to stand trial, in that he had sufficient ability at the time of trial to consult with his lawyer with a reasonable degree of rational understanding and had a rational and factual understanding of the proceedings against him. As defense counsel testified at the evidentiary hearing, Defendant consulted with counsel during regular visits prior to trial and was a willing participant in such conversations with his counsel. (T., vol. 10, 548-49). Dr. Haber, who evaluated Defendant after trial when the alleged inappropriate behavior had occurred, found Defendant to be competent. As such, this claim was refuted by the record and properly denied by the lower court. *See Engle v. Dugger*, 576 So. 2d 696 (Fla. 1991); s*ee also Provenzano v. Dugger*, 561 So. 2d 541 (Fla. 1990); *Henderson v. State*, 522 So. 2d 835 (Fla. 1988);

Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987); *Card v. State*, 497 So. 2d 1169 (Fla. 1986).

Defendant also contends that counsel was ineffective for inadequate preparation of Defendant's case for failing to list an essential defense witness, Jose Montalvo, and procure the appearance of Mr. Montalvo for Defendant's trial. However, counsel's actions were clearly not so deficient or prejudicial such that they resulted in a reasonable likelihood that the outcome of the trial would be different.

First, the fact that counsel failed to list Mr. Montalvo as a witness would not have prevented the defense from calling him at trial, as long as the State had the opportunity to depose Mr. Montalvo prior to his testimony. (D.A.R. 1326). Thus, defense counsel's failure to list Mr. Montalvo as a witness he expected to call would not necessarily preclude defense counsel from calling him.

Secondly, counsel did, in fact, subpoena Mr. Montalvo for the trial which was scheduled to begin on January 20, 1990.[3] (D.A.R. 173). When defense counsel sought to obtain his presence on January 29, 1990, Mr. Montalvo had left town, erroneously

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[3] The record indicates that the subpoena was a "standby" subpoena commonly used where counsel does not know the exact date that the witness will be called to testify due to various variables at trial. (D.A.R. 173).

believing that he was not needed because he had not been called by January 28, 1990. (D.A.R. 216). Defense counsel requested a short continuance in order to attempt to find Mr. Montalvo and secure his testimony for trial. (D.A.R. 1325). The trial court gave defense counsel until the following day. (D.A.R. 1326). The next day, defense counsel informed the court that he was unable to obtain Mr. Montalvo's presence and that Mr. Montalvo's wife and daughter were both unable to locate him. (D.A.R. 1431, 1437-39). Thus, counsel's efforts to procure Mr. Montalvo's testimony for Defendant's trial were within "the wide range of competence demanded of attorneys in criminal cases." *Strickland v. Washington*, 466 U.S. 687 (1984).

Moreover, even if counsel's performance had been deficient, it was not prejudicial. Detective Castillo testified at the hearing on Defendant's motion for new trial that he had interviewed Mr. Montalvo, who worked at a cafeteria near the victim's auto parts store, a few days after the murder. (D.A.R. 1711-12). During the interview, Detective Castillo specifically questioned Mr. Montalvo regarding any statements the victim made after being shot. (D.A.R. 1711). According to Mr. Montalvo, he was waiting with the victim for Fire and Rescue to arrive and had asked the victim if he knew who had shot him. (D.A.R. 1711-12). The victim nodded but was bleeding from the mouth so Mr. Montalvo

had told the victim not to speak anymore. (D.A.R. 1711-12). Detective Castillo further inquired of Mr. Montalvo if the victim had given any description of his assailants, and Mr. Montalvo answered Detective Castillo that the victim had not.(D.A.R. 1711-12). Furthermore, the prosecutor testified at the hearing that he had interviewed Mr. Montalvo shortly after the crime and that his notes also indicated that Mr. Montalvo had asked the victim if he knew who shot him but had told the victim not to speak anymore as he was bleeding. (D.A.R. 294-96). Indeed, the prosecutor's notes of his interview with Mr. Montalvo were placed into evidence (D.A.R. 294-96).

In July of 1989, defense counsel deposed Mr. Montalvo (D.A.R. 151-71), who had been listed on the State's discovery list as someone having knowledge of he offense. In the deposition, Mr. Montalvo stated that he asked the victim who did it and the victim said "a little fat one," and later "a fat one." (D.A.R. 158). However, he also testified that he had trouble remembering what happened because it was so long ago and was presently going through many personal troubles. (D.A.R. 163).

Thus, had Mr. Montalvo testified at trial, he most likely would have testified as to what he initially told police and the prosecution., i.e., that the victim gave him no description of his assailants. Thus, the defense would have been left with only

the impeachment of Mr. Montalvo by his statement in his deposition. Even if Mr. Montalvo had testified consistently with his deposition, he would have been impeached by Detective Castillo. Furthermore, such testimony would have been contradicted or inconsistent with: that of Officer Jans, who testified that when paramedics were treating the victim, the victim said the man who shot him was tall and thin; Defendant's confessions to Sergio Valdez and Francisco Reyes; Jose Arzola's positive identification of Defendant as the man who came to the door of the auto parts store just prior to the murder; and the eye witness testimony of Ramon Fernandez. (D.A.R. 1101, 1049-51, 798, 673-690). Additionally, Defendant had admitted he knew of the murder and home invasion and that he had a desperate need for money to satisfy the bondsman and release Mr. Fernandez's Corvette. (D.A.R. 1245-49). Within the context of all such incriminating evidence, there is no reasonable probability that even with Mr. Montalvo's testimony, the results of the trial would have been different. As such, the lower court properly denied this claim.

Additionally, Defendant alleges that counsel was ineffective for failing to adequately inform Defendant of the State's plea offer and for failing to discover that Defendant was incapable of understanding the nature and consequences of the offer. However,

the record establishes that the State informed the trial court that a plea to seond degree murder with a life sentence of imprisonment, with a three-year minimum mandatory sentence, to run concurrently with any sentence he would receive for his federal probation violation, as well as state probation violations, had been offered. (D.A.R. 306-07). Defense counsel stated that he had communicated the plea offer to Defendant and that Defendant had refuse the plea offer. (D.A.R. 307). Defendant then stated that he had refused the plea because he did not commit the murder. (D.A.R. 307). In response to Defendant's remark, the trial court advised Defendant that he "was playing with his life," to which Defendant replied "exactly." (D.A.R. 308). Thus, clearly Defendant understood the ramifications of the plea offer. Furthermore, Defendant's understanding of the plea offer is corroborated by Dr. Haber's deposition, in which Dr. Haber testified that Defendant said he had discussed the plea offer with his attorney but declined it because he did not commit the crime and that he would rather be dead than go to prison. (R. 482). As Defendant demonstrated that he was not incapable of understanding the nature and consequences of the plea and that the record establishes that defense counsel indeed discussed it with him, this claim was properly denied.

Similarly, Defendant's claim that defense counsel was

ineffective for failing to challenge the State's theory that Defendant planned the robberies was properly denied. This claim is clearly refuted by the record. Defendant predicates this claim on defense counsel's failure to present evidence challenging mental capacity to plan and execute the crimes. However, Defendant was adamant at trial that he did not participate in the crimes at all, not that he was merely a follower of others in the commission of the crimes. Additionally, defense counsel forcefully attempted to impeach the state's witnesses and weaken the State's case by cross-examination of Ramon Fernandez, highlighting inconsistencies in Mr. Fernandez's prior statements to police, and emphasizing Mr. Fernandez's plea agreement with prosecution. (D.A.R. 731, 744, 753,762. 766-67, 774). Additionally, defense counsel aggressively cross-examined other important State witnesses. Defense counsel challenged the State's theory that Defendant had planned the robberies by trying to show that Defendant did not participate. The fact that counsel was ultimately unsuccessful does not establish ineffectiveness.

Defendant also alleges that counsel was ineffective for failing to request a severance of the homicide with offenses stemming from a home invasion robbery and shooting. This claim is without merit, as the two offenses were "connected acts or

transactions" within the meaning of Fla. R. Crim. P. 3.150. Additionally, to the extent that Defendant raised the issue of severance on direct appeal, it is procedurally barred. *See Rodriguez* 609 So. 2d at 499.

The evidence established that at the time of the crimes, Defendant was in desperate need of money to pay his bondsman and obtain the release of Ramon Fernandez and that Defendant was trying to evade both of them. (D.A.R. 667, 671-73, 690). On May 13, 1988, Defendant, accompanied by "Tata" and Mr. Fernandez acting as lookouts, robbed and killed Abelardo Saladrigas. (D.A.R. 673-690). During the robbery, Defendant stole Mr. Saladrigas' Rolex watch and .38 caliber revolver, which would later intimately connect him to the home invasion the next day. (D.A.R. 688, 691-92). After the shooting at Mr. Saladrigas' auto parts store, Defendant, Tata and Mr. Fernandez went to a cafeteria owned by Tata's father and split the money while Defendant kept the Rolex and stored the .38 caliber revolver at the cafeteria. (D.A.R. 691-92).

The next morning Mr. Fernandez met Defendant at the same cafeteria and then drove to a meeting with the other participants at an Amoco station. From the Amoco station, Defendant rode in a car with Sergio Valdez and Lazaro Hernandez to the house of the subject home invasion. During the drive, Defendant discussed his

plans for the home invasion about to take place, as well as his robbery of Mr. Saladrigas the previous day, stating he had shot an old man at the auto parts store and taken his Rolex watch, which Defendant was wearing at the time. (D.A.R. 1049-51).

At the Amoco station, Mr. Fernandez had been given the same .38 caliber revolver that Defendant had taken from the murder victim the previous day. (D.A.R. 711). As he fled, Mr. Fernandez dropped the .38 caliber revolver at the scene of the home invasion where it was recovered by police. (D.A.R. 713). When Defendant was later arrested and interviewed by police, he admitted being present during the planning of the home invasion and discussion about the preceding murder of Mr. Saladrigas. (D.A.R. 1512-1513).

The home invasion robbery and robbery and murder of Mr. Saladrigas were inextricably intertwined in numerous material aspects: the revolver Defendant took from Mr. Saladrigas was later used and recovered at the scene of the succeeding home invasion robbery; both crimes involved common co-participants; Defendant wore the Rolex watch he referenced as having shot an old man for during the robbery of the auto parts store when Defendant planned the home invasion robbery the following day; and the close timing and geographic proximity of both crimes. Accordingly, the two offenses were clearly connected acts or

transactions. *See Livingston v. State*, 565 So. 2d 1288, 1290 (Fla. 1988)(defendant stole firearm during burglary and used it eight hours later in robbery-murder, wherein this Court held burglary and murder were connected in "episodic sense."). Where there exists a "meaningful relationship" between the charges, it is permissible to try them together. *See Bateson v. State*, 25 Fla. L. Weekly D1387, 1388 (Fla. 4th DCA June 7, 2000)(citing *Ellis v. State*, 622 So. 2d 991 (Fla. 1993)). The events of May 13, and May 14, 1988, involving the robbery and murder of Mr. Saladrigas and the home invasion robbery are so intimately linked that they are indeed one continuing episode. *See also Meadows v. State*, 534 So. 2d 1233 (Fla. 4th DCA 1988); *Brown v. State*, 502 So. 2d 979 (Fla. 1st DCA 1987).[4]

As such, defense counsel cannot "be deemed ineffective for failing to prevail on a meritless issue." *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999). Therefore, the lower court was correct in denying this claim.

Nor was counsel ineffective for failing to object to Lupe

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[4] The evidence of the home invasion robbery would be admissible in the trial for Defendant's murder of Mr. Saladrigas as inseparable crimes evidence, see e.g. Griffin v. State, 639 So. 2d 966 (Fla. 1994). Additionally, if Defendant had been tried for the home invasion robbery prior to the homicide, Defendant's convictions on the three counts would still have been admissible as an aggravating circumstance.

Saladrigas' testimony identifying the victim through a Florida driver license. While members of a deceased's family usually may not testify for purposes of identification of the victim when other witnesses are available, Lupe Saladrigas was the victim's sister-in-law. A sister-in-law is not a family member for purposes of this rule, as a sister-in-law is a relative of the spouse. "In-laws" are not accorded the same legal rights as blood relatives. Furthermore, when Ms. Saladrigas identified the victim's picture, there is not indication in the record that she broke down or became hysterical. (D.A.R. 615-616). Ms. Saladrigas' testimony was necessary for purposes other than victim identification, including that the victim wore a Rolex watch, carried money in his briefcase, and most importantly the victim's statement to her immediately after he was shot. Thus, her testimony, identifying the victim, did not prejudice Defendant such that there is a reasonable likelihood the outcome of the proceedings would have been different had she not testified on this issue. As such, the lower court properly denied this claim.

Defendant also contends that the standard jury instructions with respect to consideration of expert testimony were erroneous, and defense counsel was ineffective for failing to object to said instructions. Any alleged error pertaining to jury instructions

given during Defendant's trial could have or should have raised on direct appeal. As such, the issue regarding jury instruction on consideration of expert testimony is procedurally barred. *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991).

Furthermore, such a claim is insufficient as a matter of law, as the failure to object to instructions that have been upheld and not invalidated by the Florida Supreme Court does not establish deficient conduct within the meaning of *Strickland v. Washington*. *Downs v. State*, 740 So. 2d 506, 517-518 (Fla. 1999); *Harvey v. Dugger*, 656 So. 2d at 1258. Moreover, the State would note that *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995), and *Johnson v. State,* 393 So. 2d 1069 (Fla. 1980), relied upon by Defendant, do not involve jury instructions on expert testimony, and in no way invalidate the standard jury instructions, complained of herein, which are still in effect.

As such, this claim was properly denied by the lower court.

C. DEFENDANT'S *AKE* CLAIM IS WITHOUT MERIT AND WAS PROPERLY DENIED.

Defendant contends that counsel was ineffective during the guilt phase for failing to secure an adequate mental health expert for Defendant pursuant to *Ake v. Oklahoma*. However, as previously discussed, pursuant to defense counsel's request, the trial court appointed Dr. Haber to examine Defendant and Dr.

Haber found Defendant competent to proceed to trial. (T., vol. 12, pg. 643, 651). Dr. Haber, who examined Defendant prior to sentencing, found that Defendant was not mentally retarded or exhibited any signs of having been under extreme emotional distress at the time of the offense. At Dr. Haber's behest, Dr. David and Dr. Ajmme-Marsan performed follow-up neurological examinations of Defendant and opined that there was no indication of brain damage. (D.A.R. 253, 274, 1740). Rather, Dr. Haber found Defendant to be alert, oriented and possessed of sufficient intelligence to be able to understand what he was doing. (R. 474-75, 481). As the record supports that Defendant was competent to proceed to trial, not retarded or under extreme emotional duress, Defendant cannot establish that Defendant was prejudiced by counsel's failure to retain Dr. Haber during the penalty phase. Indeed, due to the possibility that Dr. Haber would be opened to cross-examination regarding Defendant's damaging and extensive criminal history, defense counsel made a strategic decision to not present Dr. Haber's testimony during the penalty phase. (T., vol. 10, 556-57). Similarly, had Dr. Haber been retained prior to the commencement of Defendant's guilt phase, he would not have been subject to the same damaging cross-examination and Defendant cannot show a reasonable probability that the result of his guilt phase proceeding would

have been different. *Strickland*. As such, the lower court properly denied this claim.

IV. THE LOWER COURT PROPERLY DENIED DEFENDANT'S PUBLIC RECORDS CLAIMS.

Defendant contends that he has been substantially prejudiced by the failure of various agencies to comply with his public records requests. Specifically, he claims that the Dade County State Attorney's Office withheld voluminous records, that numerous non-public records from the Dade County State Attorney's Office have been lost, and he has not received documents responsive to his supplemental records requests.

On February 9, 1995, Assistant State Attorney, Penny Brill, sent CCRC counsel a letter advising Defendant's public records had been located and were available for copying. (R. 100). On March 6, 1995, the State Attorney's Office sent copies of the public records to CCRC, as requested. (R. 106). Defendant was advised on January 2, 1996, that two of the six felony case files pertaining to a co-defendant Carlos Ponce, Tata were unlocateable. (T., vol. 4, 255). The State Attorney's Office record custodian, Luis Nieves, testified that diligent search was made for the files, including a search of the records vault, inquiry of staff, and search of several offices; however, the two files were not found. (T., vol. 4, 255). As the records no longer exist, they could not be disclosed.

The other documents from State Attorney's Office that Defendant complains were improperly denied him are documents that

the lower court reviewed in camera and determined not to be public records. (S.R. 6). However, after viewing the documents the lower court lost the records. At the hearing on December 6, 1996, Judge Carney stated the documents consisted of more than 10 pages of hand-written notes, which upon his conclusion of the examination of the documents, he had re-sealed for the clerk but could not remember whether he handed to the clerk or his secretary and that he had searched his office and could not find the documents. (T., vol. 4, 285-88). As the documents were not public record, their loss poses no prejudice.

Defendant next complains that he did not receive records responsive to his supplemental public records requests filed on May 22, 1997. The supplemental public record requests were served on the following agencies: Department of Highway Safety and Motor Vehicles, Clerk of the Dade County Circuit Court, the Florida Department of Law Enforcement, the Metro Dade Police Department, the City of Miami Police Department, the Department of Corrections, and the Dade County State Attorney's Office. The requests pertained to numerous individuals whom Defendant failed to show were unknown or could not have been known at the time of any of the earlier requests or how such persons were relevant to his post-conviction proceeding. See Fla. R. Crim. P. 3.852(m) & (n).

In response to these requests, the Dade County State Attorney's Office filed Notice of Filings on June 3, 1997, attaching copies of letters indicating compliance with the requests. (R. 1481-97). On June 20, 1997, the City of Miami Police Department filed an objection and request for protective order. (R. 1548-49). On July 21, 1997, the Department of Corrections filed a Notice of Compliance and Objection. (R. 1608-49). On July 10, 15, and 25, 1997, the Florida Department of Law Enforcement filed responses and objections to the requests. (R. 1564-99, 1601-03, 1656-62). On July 1, 1997, the Department of Highway Safety and Motor Vehicles filed an Objection and Motion for Protective Order. (R. 1557-59). On July 18, 1997, the Clerk of the Dade County Circuit Court filed responses. On July 25, 1997, the Metro Dade Police Department filed its responses indicating its compliance. (R.1650-51). On August 20, 1997, Defendant filed a motion to compel alleging that the following agencies had not complied with the most recent public records requests: the Clerk of the Dade County Circuit Court,[5] The City of Miami Police Department, the Florida Highway Patrol, and the Metro Dade Police Department. (R. 2055-60).

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[5] It should be noted that clerks of circuit court are not subject to the Public Records Act, pursuant to *Times v. Ake*, 660 So. 2d 255 (Fla. 1995); thus, the Clerk of the Dade County Circuit Court had not duty to comply with Defendant's request.

Defendant never set his motion to compel for hearing. Rather, he complains that the lower court "refused to hear the August 20, 1997 Motion to Compel" at Defendant's Huff hearing on March 13, 1998. (Initial Brief of Appellant, pg. 80). On March 13, 1998, at the *Huff* hearing on Defendant's Third Amended Motion to Vacate Judgment and Conviction, Defendant filed a Motion to Disqualify, Defendant's Notice of Inability to Proceed, and a Fourth Amended Motion to Vacate Judgement and Conviction and Sentences with Special Leave to Amend. (T., vol. 6, 335-36). CCRC counsel then advised the lower court that he could proceed on the Third Amended Motion to Vacate Judgment and Conviction. (T., vol. 6, 351). While the lower court denied Defendant's Motion to Disqualify and Fourth Amended Motion to Vacate Judgment and Conviction as untimely, neither Defendant nor the Court addressed Defendant's August 20, 1997, Motion to Compel. However, Defendant bears the burden of diligently pursuing his motions and setting same for hearing. *See Johnson v. State*, 769 So. 2d 990 (Fla. 2000); *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000).

Finally, Defendant complains that he was denied the opportunity to file a Fourth Amended Motion to Vacate Judgment and Conviction at the *Huff* hearing on his Third Amended Motion to Vacate Judgment and Conviction. The lower court correctly denied

Defendant's ore tenus motion to file his fourth amended motion, as it was grossly untimely and merely calculated to further protract litigation. (T., vol. 6, pg. 351).

As such, this claim should be denied.

V. DEFENDANT'S CLAIM THAT JUDGE CARNEY WAS BIASED AGAINST DEFENDANT IS WITHOUT AND SHOULD HAVE BEEN DISQUALIFIED IS MERITLESS AND SHOULD BE DENIED.

Defendant contends that Defendant has been denied his rights to due process because Judge Carney allegedly exhibited obvious prejudice and bias against him both during trial and on post-conviction. Defendant further alleges that to the extent defense counsel failed to object to Judge Carney's evident bias, Defendant received ineffective assistance.

A. ALLEGATIONS PERTAINING TO JUDGE CARNEY'S ALLEGED BIAS DURING DEFENDANT'S TRIAL ARE WITHOUT MERIT.

Defendant alleges the following basis for his allegation that Judge Carney was biased against Defendant at trial: (1) Judge Carney sustained the State's objections to defense counsel's questions about "Tata," thereby hamstringing Defendant from presenting an effective defense; (2) Judge Carney made "snide remarks" designed to "belittle defense counsel;" (3) at a co-defendant's sentencing, Judge Carney called Defendant a "rare, despicable person;" and (4) Judge Carney signed a sentencing

order allegedly prepared by the State after *ex parte* communication that occurred off the record. However, the State submits that these alleged incidents were known at trial, and as such, would be a claim that could or should have been raised on direct appeal, and is therefore not properly raised in a motion for post-conviction relief. Defendant cannot avoid the procedural bar by raising it as a claim of ineffective assistance of counsel. *See Kight v. Dugger*, 574 So. 2d 1066 (Fla. 1990).

Even if the claim were not barred, it is well-settled in Florida, that "adverse ruling is not a legally sufficient ground to disqualify the trial judge." *See Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000); *Dragovich v. State*, 492 So. 2d 350, 352 (Fla. 1986); *Gilliam v. State*, 582 So. 2d 610 (Fla. 1991). Thus, Judge Carney's mere sustaining of the State's objections is a legally insufficient basis for Defendant's motion for disqualification. Accordingly, defense counsel cannot be deemed to deficient for failing to raise a pursue a meritless claim. *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999). Therefore, the lower court was correct in denying this claim.

Secondly, Defendant contends that Judge Carney was biased because he made snide remarks to defense counsel. However, a review of the record of both instances refutes such contention. Judge Carney said "it was ridiculous" when defense counsel

objected to having a photo line-up go to the jury during its deliberation on the basis that the photo line-up contained a picture of Defendant when the witness had not identified Defendant or Tata but identified someone else whom she believed to be Tata. (D.A.R. 1410). With regard to the second instance of alleged bias, Judge Carney merely reprimanded defense counsel for bickering with the court after the court had made its ruling. (D.A.R. 1417). The record reveals that Judge Carney was, at most, equally impatient at times with both counsel. Moreover, both instances that Defendant complains evidence Judge Carney's bias against Defendant were conferences outside the presence of the jury. (D.A.R. 1410, 1417). A motion to disqualify "must be well-founded and contain facts germane to the judge's undue bias, prejudice, or sympathy." Rivera v. State, 717 So. 2d 477, 480-81 (Fla. 1998)(quoting Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992). A motion for disqualification must be denied unless the moving party shows a well-founded fear that he will not receive a fair trial or hearing. *Dragovich v. State*, 492 So. 2d 350, 352 (Fla. 1986). As such, the instances cited by Defendant are insufficient to form the basis of a motion for disqualification. Accordingly, defense counsel cannot be deemed to deficient for failing to raise a pursue a meritless claim. *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999).

Defendant also claims that Judge Carney was biased against him when he referred to Defendant as a "rare, despicable person" during the sentencing hearing of a co-defendant. However, Defendant concedes that the alleged comment by Judge Carney occurred after Defendant's capital trial and thus, after the trial court had heard all the evidence in Defendant's case. As such, it is permissible for Judge Carney to reach conclusions regarding the merciless and despicable nature of Defendant's crimes. Moreover, disqualification may not be predicated upon the alleged improper tone and demeanor of the trial judge. Comments of judges do not establish a per se basis for disqualification. *Oates v. State*, 619 So. 2d 23 (Fla. 4th DCA 1993), *rev. denied*, 629 So. 2d 134 (Fla. 1993); *Nateman v. Greenbaum*, 582 SO. 2d 643 (Fla. 3d DCA 1991), *rev. denied,* 591 So. 2d 183 (Fla. 1991); *Brown v. Pate*, 577 So. 2d 645, (Fla. 1st DCA 1991); *Nassetta v. Kaplan*, 557 So. 2d 919 (Fla. 4th DCA 1990); *Mobil v. Trask*, 463 So. 2d 389 (Fla. 1st DCA 1985), *rev. denied*, 476 So. 2d 674 (Fla. 1985). Furthermore, as Defendant's trial had concluded prior to Judge Carney's alleged comment, defense counsel would have no remedy in a motion to recuse the trial judge based on such comment, as the trial was, in fact, over.

Additionally, Defendant alleges that Judge Carney's bias against Defendant is illustrated by his sentencing order that

alleged was prepared by the State after *ex parte* communication. Defendant never raised this allegation in his motion for post-conviction relief but instead *ore tenus* raised the allegation for the first time at Defendant's *Huff* hearing. (T., vol. 6, 337). As Defendant had been in possession of the State Attorney Office's files for nearly two years prior to the Defendant's *Huff* hearing that contained the alleged unsigned sentencing order prepared by the State, the basis for a motion to disqualify was certainly untimely. (T., vol. 6, 337-38). *Mills v. State,* 684 So. 2d 801, 804-05 (Fla. 1996). Accordingly, without addressing the merits of Defendant's motion, Judge Carney properly denied the motion to disqualify. (T., vol. 6, 351).

As such, claims related counsel's alleged failure to object to Judge Carney's alleged bias against Defendant during his trial and sentencing are meritless and should be denied.

B. ALLEGATIONS PERTAINING TO JUDGE CARNEY'S BIAS ON POST-CONVICTION ARE WITHOUT MERIT.

Defendant contends that Judge Carney has exhibited bias and prejudice against Defendant on post-conviction by: (1) engaging in *ex parte* communications with the State concerning the scheduling of hearings; (2) releasing witnesses who did not possess any public records pertinent to Defendant's case from appearing at Defendant's December 6, 1996, public record hearing;

(3) and allegedly engaging in ex parte communication with the State concerning public records from the State to be reviewed *in camera*.

Defendant's claim that Judge Carney illustrated bias against Defendant by engaging in alleged *ex parte* communications with the State concerning the scheduling of an evidentiary hearing is without merit. Contrary to Defendant's assertion, "ex parte communication" is not per se ground for disqualification as a matter of law." *Nassetta v. Kaplan*, 557 So. 2d 919. 921 (Fla. 4th DCA 1990); *See Arbelaez v. State*, 25 Fla. L. Weekly S586 (Fla. July 13, 2000)(judges ex parte communication with the prosecutor involving settling a time period for the State to respond at which time a date for an evidentiary hearing would be set did not require a judge's disqualification); *see also Harris v. P.S. Mortgage and Investment Corp.*, 558 So. 2d 430, 431 (Fla. 3d DCA 1990)(judge's prior, ex parte order approving settlement in mortgage foreclosure action did not require judge's disqualification). In *Rose v. State*, 601 So. 2d 1181, 1183 (Fla. 1992), this Court held that "a judge should not engage in *any* conversation about a pending case with only one of the parties participating in that conversation. Obviously, this would not include *strictly* administrative matters not dealing in any way

with the merits of the case." (emphasis original). As in *Arbelaez*, Defendant's allegation of ex parte communication involves setting a hearing date for an evidentiary hearing. As such, this administrative matter does not rise to the level of ex parte communication warranting recusal.

Defendant also complains that Judge Carney was biased against him when he allegedly excused subpoenaed witnesses from appearing at Defendant's evidentiary hearing on December 6, 1996. The record reflects that three witnesses were excused by Judge Carney that had advised the court that they possessed no relevant public records and were also served late for the hearing. (T., vol. 3, pg. 19-20). As the three witnesses excused by the court, Morgan Rood, Bill Camper and Dennis Williams, possessed no public records responsive to Defendant's subpoena, Defendant was not prejudiced by their absence at the hearing.

Defendant further alleges instances of Judge Carney's bias against Defendant on post-conviction occurred when Judge Carney engaged in ex parte communications with the State regarding documents submitted by the State for in camera inspection. The basis of Defendant's claim is the transference of said documents to Judge Carney. However, as previously discussed communications pertaining to strictly administrative matters do not require disqualification of the judge. *Arbelaez v. State*, 25 Fla. L.

Weekly S586 (Fla. July 13, 2000). Additionally, Defendant argues that Judge Carney should be have been disqualified once became "a material witness in the case" when the documents reviewed in camera and determined by him to not be public record were lost.

Defendant also complains that Judge Carney should have been disqualified when he became a witness regarding the loss of the non-public record documents from the State Attorney's Office that he had reviewed in camera. However, the record of hearing on December 6, 1996, reveals the extent of Judge Carney's testimony was that more than 10 pages of hand-written notes had been given to him by the Assistant State Attorney for his in camera review and that upon his conclusion of the review, he had re-sealed the documents for the clerk but could not remember whether he handed to the clerk or his secretary and that he had searched his office and could not find the documents. (T., vol. 4, 285-88). The documents, consisting of hand-written notes, of the subject testimony were determined to not be public record; hence, their loss poses no prejudice to Defendant nor forms no basis for Judge Carney's disqualification. As Judge Carney became a witness at Defendant's behest, Defendant should not now be heard to complain of alleged error he created.

VI. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CLAIMS PERTAINING TO THE JURY INSTRUCTIONS.

Defendant contends counsel was ineffective for failing to object to allegedly unconstitutional jury instructions concerning the aggravating circumstances of Defendant's case. Defendant did not raise the constitutionality of the jury instructions at trial or on direct appeal. As such, this issue is procedurally barred and cannot be raised in this motion for post-conviction relief. *See Hodges v. State*, 619 So. 2d 272 (Fla. 1993); *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991). Defendant cannot avoid the procedural bar by merely couching a procedurally barred issue in terms of ineffective assistance of counsel. *See Kight v. Dugger*, 574 So. 2d 1066 (Fla. 1990); *Blanco v. Wainwright*, 507 So. 2d 1377 (Fla. 1987).

As such, the trial court properly denied this claim.

Defendant also contends the trial court erred by improperly instructing the jury regarding burden of proof to find death appropriate Defendant's case. This issue could have or should have been raised on direct appeal. As, such Defendant's claim is procedurally barred. *Lambrix v. State*, 641 So. 2d 847 (Fla. 1994); *Bryan v. State*, 641 So. 2d 61 (Fla. 1994); *Chandler v. State*, 634 So. 2d 1066 (Fla. 1994); *Rose v. State*, 617 So. 2d 291 (Fla. 1993). Furthermore, 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); *Arango v. State*, 411 So. 2d 172, 174 (Fla. 1982). Thus, counsel would not have been ineffective for failing to raise this meritless claim, and the claim was properly summarily denied. *See Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *see also Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990).

Defendant alleges that his counsel was ineffective for failing to object to comments by the trial court and prosecutor that allegedly violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985). However, this claim could or should have been raised on direct appeal and is therefore procedurally barred. *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991). Moreover, given that the comments did not incorrectly state the jury's role in the capital sentencing procedure, counsel cannot be deemed ineffective for failing to raise this non-meritorious issue. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover*, 656 So. 2d at 425; *Hildwin v. Dugger*, 654 So. 107 (Fla.), *cert. denied,* 469 U.S. 1098 (1984); *Breedlove v. Singletary*, 595 So. 2d 8 (Fla. 1991).

Under *Caldwell*, error is committed when a jury is mislead regarding its responsibility for a sentencing decision so as to diminish its sense of responsibility for that decision. However,

"[t]o 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). This 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). As the trial court properly advised the jury that their role was to render an advisory opinion, the trial court did not improperly characterized the jury's role under Florida capital punishment procedures or did not violate *Caldwell*. *Davis v. Singletary*, 119 F.3d 1471, 1481-85 (11th Cir. 1997). As such, the trial court properly denied this claim.

Defendant's argument that the jury was improperly instructed on a unconstitutional and vague automatic aggravating circumstance is also procedurally barred because it was not raised on direct appeal. Accordingly, the lower court correctly summarily denied this claim. (S.R. 337). *Lambrix v. State*, 641 So. 2d 847 (Fla. 1994); *Bryan v. State*, 641 So. 2d 61 (Fla. 1994); *Chandler v. State*, 634 So. 2d 1066 (Fla. 1994); *Rose v. State*, 617 So. 2d 291 (Fla. 1993).

Additionally, Defendant charges that to the extent counsel failed to object to the automatic aggravating circumstance, counsel was deficient. However, "this Court has held there is no

merit to the argument that an underlying felony cannot be used as an aggravating factor." *Freeman v. State*, 25 Fla. L. Weekly S451 (Fla. June 8, 2000)(*citing Blanco v. State*, 702 So. 2d 1250 (Fla. 1997)); *Arbelaez v. State*, 25 Fla. L. Weekly S586 (Fla. July 13, 2000). Thus, Defendant cannot show that the outcome of his trial was affected by counsel's failure to object to these aggravating factors. As such, the trial court properly denied this claim.

VII. DEFENDANT'S CLAIM REGARDING ALLEGED PROSECUTORIAL MISCONDUCT IS PROCEDURALLY BARRED, NON-MERITORIOUS AND WAS CORRECTLY DENIED BY THE LOWER COURT.

Defendant alleges that the State introduced and argued impermissible non-statutory aggravating factors to the jury. To a large extent, this issue was litigated on direct appeal and rejected by this Court. *Rodriguez*, 609 So. 2d at 500-501. Other alleged acts of misconduct by the prosecutor, which were not raised at trial and on appeal, are likewise procedurally barred. *Blanco v. Wainwright*, 507 So. 2d 1377 (Fla. 1987).

VIII. THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIM THAT FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Defendant argues that Florida's death penalty statute is unconstitutional on its face and as applied in his case, because

execution by electrocution and/or lethal injection is cruel and unusual punishment under the constitutions of both Florida and United States. This claim was raised on direct appeal and rejected by this Court. *Rodriguez*, 609 So. 2d at 500. As such, the instant claim is procedurally barred. *Wuornos v. State*, 644 So. 2d 1012, 1020 n.5 (Fla. 1994). Merely re-framing a procedurally barred issue does not raise the bar. *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991).

IX. DEFENDANT'S CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ENSURE COMPLETE RECORD OF TRIAL TRANSCRIPTS IS WITHOUT MERIT.

Defendant contends that he was denied ineffective assistance of counsel of trial and appellate counsel's failure to ensure a complete record of his trial proceedings when defense counsel's opening statement was not transcribed. However, ineffective assistance of appellate counsel is not properly raised in a 3.850 motion. Additionally, as the missing transcripts were known at the time of the appeal but not raised on appeal, the issue is procedurally barred. *See Delap v. State*, 350 So. 2d 462 (Fla. 1977). Moreover, Defendant has not shown what issues he was prevented from raising because of the un-transcribed portion of defense counsel's opening. Thus, the claim is not proper for a motion for post-conviction relief. *See Buenoano v. Dugger*, 559

So. 2d 1116 (Fla. 1990). As such, the lower court correctly denied this claim.

X. DEFENDANT'S CLAIM REGARDING JUROR INTERVIEWS AND JUROR MISCONDUCT IS PROCEDURALLY BARRED.

Defendant contends that the rule prohibiting defense counsel or his representative from interviewing jurors, to explore misconduct, should be declared invalid. This claim should have been raised on direct appeal, and as such is procedurally barred. *See e.g., Shere v. State*, 579 So. 2d 86, 94-95 (Fla. 1991) (claims with respect to jury interviews are a direct appeal issue); Fla.R.Crim.P. 3.850 ("This rule does not authorize relief based upon grounds which could have or should have been raised at trial, and, if properly preserved, on direct appeal of the judgment and sentence.").

XI. DEFENDANT'S CLAIM REGARDING IMPERMISSIBLE VICTIM IMPACT TESTIMONY IS PROCEDURALLY BARRED AND NON-MERITORIOUS.

Defendant contends that he was denied ineffective assistance of counsel of trial and appellate counsel's failure to object to the impermissible victim impact testimony pursuant to *Payne v. Tennessee*, 111 S. Ct. 2597 (1991). However, Defendant did not raise this issue in his 3.850 motion, and therefore may not raise it in the appeal of the lower court's denial of his 3.850 motion. *Ragsdale v. State,* 720 So. 2d 203 (Fla. 1998). Additionally,

this claim was raised in Defendant's direct appeal and rejected by this Court without discussion. *Rodriguez*, 609 So. 2d at 500. Thus, this claim is procedurally barred.

Moreover, while ineffective assistance of appellate counsel is not properly raised on a 3.850 appeal, appellate counsel cannot be deemed deficient for failing to litigate a claim, which in fact, appellate counsel litigated. Nonetheless, this claim is without merit. The trial court stated that although he would not consider the family member's testimony as an aggravating factor, he thought they were entitled to be heard. (D.A.R. 1727-28). Furthermore, this Court in *Allen v. State,* 662 So. 2d 323, 329 (Fla. 1995), specifically upheld victim impact evidence:

> In *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), the United States Supreme Court held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." Florida's legislature has specifically provided for the admission of victim impact evidence "to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." Sec. 921.141(7), Fla.Stat. (Supp.1992). Even though section 921.141(7) did not become effective until eight months after the instant offense occurred, its application in this case does not violate the constitutional prohibition against ex post facto laws. *See Windom v. State*, 656 So.2d 432 (Fla.1995)(finding that section 921.141(7) only relates to admission of evidence and is procedural and thus does not

violate prohibition against ex post facto laws).

Hence, this claim is without procedurally barred, unsupported by the record, and without merit and should therefore be denied.

XII. DEFENDANT'S CUMULATIVE ERROR ARGUMENT IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Defendant alleges a catchall claim that due to all of the various errors alleged in the previous claims, that he was denied a fair trial. An appellant must allege specific deficiencies erroneously denied by the lower court to plead a facially sufficient claim for relief. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998); *Williams v. State,* 553 So. 2d 309 (Fla. 1st DCA 1989). To the extent that Defendant individually alleges errors in his other claims, the State addresses such arguments *supra*. However, this claim has only generally alleged issues which could have or should have been raised on direct appeal. As such, this is not proper for a motion for post-conviction relief and is procedurally barred. Accordingly, this claim should be denied.

CONCLUSION

For the foregoing reasons, the trial court's order denying Defendant 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 was furnished by U.S. mail to **Rachel Day**, Assistant CCR South, Office of the Capial Collateral Regional Counsel - South, 101 NE 3rd Ave. Ste. 400, Fort Lauderdale, FL 33301 this day of January 12, 2001.

_____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in compliance with Fla. R. App. P. 9.210(a)(2).

_____
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