IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Cross-Appellee,

vs. **CASE NO. SC01-1185**

JIMMIE LEE CONEY

Appellee/Cross-Appellant.

_____/

ANSWER BRIEF OF CROSS-APPELLEE AND REPLY BRIEF OF THE APPELLANT ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Westwood Center, Suite 700
2002 North Lois Avenue
Tampa, Florida 33607-2366
(813) 801-0600
Fax: (813) 356-1292

COUNSEL FOR STATE OF FLORIDA

TABLE OF CONTENTS

PAGE NO.:

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 2

APPELLANT'S/CROSS-APPELLEE'S REPLY ARGUMENT 4

ISSUE I 4

THE TRIAL COURT ERRED IN FINDING, AFTER AN EVIDENTIARY HEARING UNDER RULE 3.850, THAT DEFENDANT'S COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF TRIAL FOR FAILING TO HAVE DEFENDANT EXAMINED BY MENTAL HEALTH PROFESSIONALS AND PROPERLY INVESTIGATE DEFENDANT'S BACKGROUND FOR MITIGATING EVIDENCE.

ISSUE II 14

WHETHER THE TRIAL COURT ERRED IN DENYING CONEY'S CLAIM THAT TRIAL COUNSEL OPERATED UNDER A CONFLICT OF INTEREST IN THIS CASE. (STATED BY APPELLANT).

ISSUE III 18

WHETHER THE TRIAL COURT ERRED IN DENYING SEVERAL OF APPELLANT'S GUILT PHASE ISSUES WITHOUT A HEARING.

ISSUE IV 40

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING CERTAIN REQUESTED RECORDS PRIVILEGED AND THEREFORE NOT SUBJECT TO DISCLOSURE. (STATED BY APPELLANT)

ISSUE V 41

WHETHER CONEY'S REMAINING CHALLENGES TO THE PENALTY PHASE WERE PROPERLY DENIED BY THE TRIAL COURT WITHOUT A HEARING BELOW.

ISSUE VI 47

WHETHER THE TRIAL COURT ERRED IN DENYING CONEY'S CLAIM THAT HE IS 'INNOCENT OF THE DEATH PENALTY.' (STATED BY APPELLANT)

ISSUE VII 47

WHETHER CONEY IS INCOMPETENT AND CANNOT BE EXECUTED.

ISSUE VIII 49

WHETHER CONEY'S CLAIM OF CUMULATIVE ERROR WAS PROPERLY DENIED BY THE TRIAL COURT. (STATED BY APPELLANT).

CONCLUSION 50

CERTIFICATE OF SERVICE 50

CERTIFICATE OF FONT COMPLIANCE 50

TABLE OF CITATIONS

PAGE NO.:

Adams v. Wainwright,
709 F.2d 1443 (11th Cir. 1983),
cert. denied, 464 U.S. 1663 (1984) 11

Anderson v. State,
627 So. 2d 1170 (Fla. 1993),
cert. denied, 502 U.S. 834 (1994) 18

Andrews v. Deland,
943 F.2d 1162 (10th Cir. 1991) 32

Arizona v. Youngblood,
488 U.S. 51 (1988) 37

Atkins v. Dugger,
541 So. 2d 1165 (Fla. 1989) 19

Atkins v. Singletary,
965 F. 2d 952 (11th Cir. 1992) 19

Atkins v. State,
663 So. 2d 624 (Fla. 1995) 21

Bertolotti v. State,
476 So. 2d 130 (Fla. 1985) 46

Brian v. State,
748 So. 2d 1003 (Fla. 1999) 49

Burger v. Kemp,
483 U.S. 776 (1987) 8

Bush v. Wainwright,
505 So. 2d 409 (Fla. 1987) 6

Carroll v. State,
27 Fla. L. Weekly S214 (Fla. 2002) 12

Cave v. State,
476 So. 2d 180 (Fla. 1985) 24

Chandler v. United States,

218 F.3d 1305 (11th Cir. 2000) 8

Cherry v. State,
659 So. 2d 1069 (Fla. 1995) 20

Cherry v. State,
781 So. 2d 1040 (Fla. 2000) 5, 14

Clark v. State,
690 So. 2d 1280 (Fla. 1997) 20

Coney v. State,
653 So. 2d 1009 (Fla.),
cert. denied, 516 U.S. 921 (1995) 38, 39

Davis v. Singletary,
853 F.Supp. 1492 (M.D. Fla. 1994),
aff'd 119 F.3d 1471 (11th Cir. 1997) 46

Devier v. Zant,
3 F.3d 1445 (11th Cir. 1993) 29

Downs v. State,
740 So. 2d 506 (Fla. 1999) 12

Duest v. Dugger,
555 So. 2d 849 (Fla. 1990) 33, 37

Edwards v. State,
548 So. 2d 656 (Fla. 1989) 26

Engle v. Dugger,
576 So. 2d 696 (Fla. 1991) 12, 20

Eutzy v. State,
536 So. 2d 1014 (Fla. 1988) 42

Ferguson v. State,
593 So. 2d 508 (Fla. 1992) 11

Freeman v. State,
761 So. 2d 1055 (Fla. 2000) 31

Gaskin v. State,
27 Fla. L. Weekly S583 (Fla. June 13, 2002) 10

Harich v. Dugger,
844 F. 2d 1464 (11th Cir. 1988) 19

Harvey v. Dugger,
656 So. 2d 1253 (Fla. 1995) 18

Henderson v. Dugger,
522 So. 2d 835 (Fla. 1988) 42

Henderson v. State,
463 So. 2d 196 (Fla. 1985) 45

Herring v. State,
730 So. 2d 1264 (Fla. 1998) 15

Heuss v. State,
687 So. 2d 823 (Fla. 1996) 18

Hudson v. State,
708 So. 2d 256 (Fla. 1998) 43

Jackson v. State,
704 So. 2d 500 (Fla. 1997) 45

Johnson v. State,
593 So. 2d 206 (Fla. 1992) 17

Johnson v. State,
769 So. 2d 990 (Fla. 2001) 11

Johnson v. State,
804 So. 2d 1218 (Fla. 2001) 24

Jones v. State,
732 So. 2d 313 (Fla. 1999) 12

Kennedy v. Dugger,
933 F. 2d 905 (11th Cir. 1991) 19

Kennedy v. State,
547 So. 2d 912 (Fla. 1989) 19

Knight v. Duggar,
574 So. 2d 1066 (Fla. 1990) 33

Knight v. State,

746 So. 2d 423 (1998) 41

LeCroy v. Dugger,
727 So. 2d 236 (Fla. 1998) 34

Maharaj v. State,
684 So. 2d 726 (Fla. 1996) 20, 38, 42

Mansfield v. State,
758 So. 2d 636 (Fla. 2000) 44

McCrae v. State,
437 So. 2d 1388 (Fla. 1983) 20, 38

McDonald v. Pickens,
544 So. 2d 261 (Fla. 1st DCA 1989) 33

Medina v. State,
573 So. 2d 293 (Fla. 1990) 20

Medina v. State,
690 So. 2d 1241 (Fla. 1997) 32, 48

Melendez v. State,
718 So. 2d 746 (Fla. 1998) 49

Mickens v. Taylor,
2002 WL 459251 (March 27, 2002) 16

Mills v. State,
786 So. 2d 547 (Fla. 2001) 40

Morris v. State,
811 So. 2d 661 (Fla. 2002) 24

Parker v. State,
718 So. 2d 744 (Fla. 1998),
cert. denied, 526 U.S. 1101 (1999) 20

Provenzano v. Dugger,
561 So. 2d 541 (Fla. 1990) 19

Provenzano v. Singletary,
148 F. 3d 1327 (11th Cir. 1998) 19

Provenzano v. State,

616 So. 2d 428 (Fla. 1993) 19

Provenzano v. State,
751 So. 2d 37 (Fla. 1999) 48

Puiatti v. Dugger,
589 So. 2d 231 (Fla. 1991) 19

Reaves v. State,
27 Fla. L. Weekly S601 (Fla. June 20, 2002) 23

Robinson v. State,
707 So. 2d 688 (Fla. 1998) 37

Rose v. State,
617 So. 2d 291 (Fla. 1993) 28, 29

Shere v. State,
742 So. 2d 215 (Fla. 1999) 39

Sireci v. State,
469 So. 2d 119 (Fla. 1985) 20, 39

Sireci v. State,
773 So. 2d 34 (Fla. 2000) 39

Spencer v. State,
133 So. 2d 729 (Fla. 1961) 46

State v. Barber,
301 So. 2d 7 (Fla.),
rehearing denied, 701 So. 2d 10 (1974) 19

State v. Bolender,
503 So. 2d 1247 (Fla. 1987) 11

State v. Hamilton,
574 So. 2d 124 (Fla. 1991) 24

State v. Weeks,
166 So. 2d 892 (Fla. 1960) 19

Stewart v. Martinez-Villareal,
523 U.S. 637 (1998) 48

Strickland v. Washington,

466 U.S. 668 (1984) 5, 14, 28, 39

Sullivan v. Fairman,
819 F. 2d 1382 (7th Cir. 1987) 35

Sullivan v. State,
303 So. 2d 632 (Fla. 1974) 35

Turner v. Dugger,
614 So. 2d 1075 (Fla. 1992) 43

U.S v. Askew,
88 F. 3d 1065 (D.C. Cir. 1996),
cert. denied, 519 U.S. 986 (1996) 35

U.S. v. Berry,
814 F.2d 1406 (9th Cir. 1987) 34

Washington v. Watkins,
655 F.2d 1346 (5th Cir. 1981) 34

White v. Singletary,
972 F.2d 1218 (11th Cir. 1992) 11

Williams v. Head,
185 F.3d 1223 (11th Cir. 1999) 8

Wisner v. Goodyear Tire and Rubber Company,
167 So. 2d 254 (Fla. 2d DCA 1964) 33

OTHER AUTHORITIES

Florida Rule of Criminal Procedure 3.811(d) 48

Florida Rule of Criminal Procedure 3.850(c)(6) 19

Florida Statute 922.07 48

PRELIMINARY STATEMENT

References in this brief are as follows:

Direct appeal record will be referred to as “TR.”, followed by the appropriate page number. Post conviction record will be referred to as “PCR”, followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS

The State generally relies upon the Statement of the Case and Facts set forth in its initial brief. Any additional facts necessary for disposition of the issues presently before this Court will be discussed in the argument, *infra.*

SUMMARY OF THE ARGUMENT

ISSUE I-The trial court erred in finding trial counsel ineffective during the penalty phase. Counsel provided extensive background evidence regarding Coney to the jury and hired two well qualified experts to examine Coney prior to the penalty phase. That the two well qualified mental health experts did not find any material mitigation as a result of the examinations is not the fault of trial counsel.

ISSUE II-Coney did not sufficiently allege that counsel possessed an adverse interest to his own. Nor did Coney allege any real consequences emanating from the asserted conflict. Consequently, the trial court properly denied his claim below.

ISSUE III-The record refutes any allegation that counsel was ineffective during the guilt phase. Trial counsel pursued a vigorous defense of Coney. Coney's allegations of ineffective assistance of counsel demonstrate neither a deficiency nor resulting prejudice. Several of Coney's allegations are nothing more than an attempt to relitigate direct appeal issues decided adversely to Coney and raised again under the guise of ineffective assistance.

ISSUE IV-The record does not demonstrate that the trial court abused its discretion in finding certain material privileged and not subject to disclosure.

ISSUE V-Coney was provided a full and fair penalty phase in accordance with federal and state law.

ISSUE VI-Coney provides no support for his contention that he is innocent of first-degree murder and the death penalty. Coney is in fact guilty of first-degree murder and justly earned the death penalty.

ISSUE VII-There is no record support for Coney's contention that he is insane and cannot be executed. In any case, the issue is not ripe for review.

ISSUE VIII-As Coney has failed to establish individual errors below, there is no cumulative effect to consider.

APPELLANT'S/CROSS-APPELLEE'S REPLY ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FINDING, AFTER AN EVIDENTIARY HEARING UNDER RULE 3.850, THAT DEFENDANT'S COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF TRIAL FOR FAILING TO HAVE DEFENDANT EXAMINED BY MENTAL HEALTH PROFESSIONALS AND PROPERLY INVESTIGATE DEFENDANT'S BACKGROUND FOR MITIGATING EVIDENCE.

Inadequate Consultation Regarding The Penalty Phase

Post-conviction counsel asserts that it was trial counsel and not Coney who limited the discussions regarding preparation for the penalty phase prior to trial. (Coney's Answer Brief at 28-29). However, the trial court acknowledged that the testimony on this issue below was that Coney was reluctant to discuss the penalty phase with Casabielle. (PCR-10, 1328). In fact Casabielle testified that Coney was reluctant to discuss the penalty phase prior to trial and when Casabielle brought it up Coney would get upset. (PCR-5, 589). No testimony was introduced to contradict Casabielle's testimony below. Trial counsel therefore cannot be faulted for the allegedly deficient consultations regarding the penalty phase. See Carroll v. State, 27 Fla. L. Weekly S214 at 13 (Fla. March 7,2002) ("By failing to respond to counsel's requests to provide trial counsel with the names of witnesses who could assist in

presenting mitigating evidence, Carroll may not now complain that trial counsel's failure to pursue such mitigation was unreasonable.") (citing Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000)). It was clearly Coney who chose to focus his and counsel's effort on the guilt phase.

The trial court's finding of deficiency on the part of Casabielle was clearly erroneous based upon this record. In any case, Coney failed to establish any prejudice suffered as a result of the allegedly deficient consultations. It must be remembered that the defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland v. Washington, 466 U.S. 668, 693 (1984). Coney contends that Casabielle's failure to consult with Coney led to the experts having less background information on Coney regarding his substance abuse and family history. (Coney's Brief at 32). However, the trial court failed to articulate any prejudice in its order.

Doctors Mutter and David did not change or alter their opinion of Coney at the evidentiary hearing. Coney had an opportunity at the evidentiary hearing to confront the doctors with any additional materials and test their original opinions.

This was not done. Consequently, the record refutes Coney's suggestion that the allegedly deficient consultations had an impact upon the expert testimony presented in this case.

The record reflects that counsel had two weeks in order to focus on the penalty phase and ultimately procured and introduced the testimony of eight friends and family members to testify on Coney's behalf. Counsel also procured two well qualified experts who examined Coney. As Coney failed to establish any prejudice from the allegedly deficient consultations prior to trial, counsel cannot be deemed ineffective.

Failure To Contact Prior Counsel Or To Review Prior Court Records

Defense counsel was well aware of Coney's prior criminal history. Coney asserts that the prior case records reveal mental deficiencies and provide some reason for doubting Coney's competency. (Coney's Brief at 32-33). However, Coney did not argue that he was incompetent, much less establish that he was incompetent during the post-conviction hearing. See e.g. Bush v. Wainwright, 505 So. 2d 409, 412 (Fla. 1987) (allegation that mental health professional would testify as to "a *possibility* of incompetence" at the time of trial was insufficient to require an evidentiary hearing on the defendant's competency to stand

trial.)(Barkett, J., concurring). Indeed, Coney has never been found incompetent to proceed in any legal proceeding.

As noted in the State's initial brief, trial counsel watched for signs of possible incompetence but did not find any. And, Casabielle had two mental health experts examine Coney prior to the penalty phase who did not find any material abnormalities in Coney's mental status.

While post-conviction counsel states that Coney's [unproven] allegations of being beaten into unconsciousness by the police have "relevance as to head injury and neurological and neuropsychological issues in Mr. Coney's case" (Coney's Brief at 35), he failed to show how this information would have had an impact upon the opinions of the two experts retained by Casabielle. No prejudice has been shown based upon this record.

Additional Family Or Life History Evidence

Coney failed to present the testimony of one additional family member during the evidentiary hearing below. That fact alone speaks volumes about the job done by trial counsel, who presented the testimony of eight family members and friends of Coney during the penalty phase. The best post-conviction counsel could do is offer affidavits in an attempt to back door additional testimony from family members. However, since the affidavits were not independently admissible, they cannot form

the basis for proving counsel's presentation of family history evidence was deficient. In any case, even assuming such affidavits could be considered as substantive evidence, they do not establish counsel was ineffective.

Ineffective assistance is not shown, as Coney apparently believes, by simply pointing out that something more or something different could have been done. Courts evaluating ineffective assistance claims do not grade lawyers' performances. Trial lawyers, always, could have done something more or something different. The issue is not what is prudent or appropriate, but what is constitutionally compelled. Burger v. Kemp, 483 U.S. 776 (1987); Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000). In Williams v. Head, 185 F.3d 1223, 1236 (11th Cir. 1999), the Eleventh Circuit addressed a similar allegation of ineffective assistance for failure of trial counsel to discover and present family members in mitigation:

> Present counsel have proffered affidavits from Williams' father and sister which, if believed, indicate that they could have provided additional mitigating circumstance evidence if they had been called as witnesses. It is not surprising that they could have done so. Sitting *en banc*, we have observed that "[i]t is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called," but "the existence of such affidavits, artfully drafted though they may be, usually proves

> little of significance." *Waters*, 46 F.3d at 1513-14. **Such affidavits "usually prove[] at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel.** Id. at 1514. (emphasis added)

Not only did Coney fail to satisfy the deficiency prong, but he also failed to establish any resulting prejudice. While Coney observes that Dr. Mutter testified family background information is helpful, Dr. Mutter did not testify that his evaluation of Coney was inadequate or that it had changed since the time of trial. Thus, Coney's attempt to find prejudice based upon Casabielle furnishing his experts with inadequate background material is not well founded.

Failure To Obtain A Pre-Trial Mental Health Evaluation

Even assuming counsel did not have Coney evaluated prior to trial, there was no evidence presented to suggest that a mental status defense was available to Coney. Nor did Coney present evidence that he was incompetent to proceed to trial. There is no evidence that had Doctors Mutter and David examined Coney prior to trial their diagnosis would have been any more helpful to Coney. Thus, there is no **evidence** that Coney suffered any prejudice as a result of counsel's alleged failure to obtain a pretrial mental health evaluation.

Trial Counsel's Failure To Attend the Mental Health Evaluations

And Provide His Experts With Records From The Department Of Corrections

Casabielle procured two experts prior to the penalty phase whose qualifications in their respective fields were unchallenged by post-conviction counsel. Neither doctor testified that they needed or required an attorney to attend their evaluations of Mr. Coney. (PCR-5, 643-45). It is utter speculation for Coney to contend that Casabielle's presence and guidance could have had some impact on the experts' conclusions. (Coney's Brief at 44). There is no evidence to support such a conclusion, i.e., Doctors David and Mutter did not retreat from or disavow their earlier findings. (PCR-5, 631-673). Consequently, there is no basis to conclude that counsel was ineffective in failing to attend the evaluations.

In his brief, Coney mentions selective portions of the prison records which he contends should have been provided to Doctors David and Mutter. However, counsel made a reasonable strategic choice not to present his experts with the prison records. (PCR-5, 597-99). The testimony introduced during the evidentiary hearing supports the trial counsel's decision. Based upon those records, Coney's own experts revealed serious and continuing aggressive sexual misconduct in prison and manipulative behavior. (PCR-6, 724, 731, 742-46). These

revelations are so devastating that it was inherently reasonable for counsel to make this decision. Given the brutal and sexual nature of the prior violent felonies, it was important to prevent the jury from learning that Coney was continuing to sexually assault persons even while confined. (PCR- 5, 599-602). In fact, Casabielle recalled that one of the prosecutors, during the penalty phase, stated that he hoped Casabielle would get into the prison records because they were going to "hammer" him with the records. (PCR-5, 602).

This Court recently reaffirmed the principle that an attorney is not ineffective when he chooses not to present available mental health mitigation based upon the potential for exposing the jury to negative information. Gaskin v. State, 27 Fla. L. Weekly S583, S584 (Fla. June 13, 2002) ("Trial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony.") (citing Ferguson v. State, 593 So. 2d 508 (Fla. 1992) and State v. Bolender, 503 So. 2d 1247 (Fla. 1987)). Such a tactical decision is almost immune from post-conviction attack. The test for determining whether counsel's performance was deficient is whether some reasonable lawyer at trial could have acted under the circumstances as defense counsel acted at

trial; the test has nothing to do with what the best lawyers would have done or what most good lawyers would have done. White v. Singletary, 972 F.2d 1218 (11th Cir. 1992). See Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2001) ("Counsel's strategic decisions will not be second guessed on collateral attack."). "Even if in retrospect the strategy appears to have been wrong, the decision will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it." Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983), cert. denied, 464 U.S. 1663 (1984). Counsel's decision was so patently reasonable that, even using the prohibited "20-20" hindsight, counsel's decision was a wise one. It would certainly harm the defense to have evidence before the jury showing that not even prison was capable of stopping Coney's sexually aggressive conduct.[1]

Coney also failed to establish that any of the Department of Corrections records or life history information developed by

---

[1]Coney's feeble attempt to limit the damaging nature of these revelations comes down to proclaiming simply that no criminal convictions were obtained. That may be true, as prison rapes are seldom prosecuted for a number of reasons, not the least of which in this case is that Coney is already serving essentially a life sentence. Regardless, Coney offers no evidence to suggest the misconduct reports contained in his files documenting such behavior are unreliable. They were certainly reviewed and testified to by his post-conviction mental health experts.

post-conviction counsel would have had any impact upon the two qualified experts hired by Casabielle. See e.g. Engle v. Dugger, 576 So. 2d 696, 701 (Fla. 1991) ("Counsel had Engle examined by three mental health experts, and their reports were submitted into evidence. There is no indication that counsel failed to furnish them with any vital information concerning Engle **which would have affected their opinions.**")(emphasis added). The fact that Coney has now found two more favorable experts does not entitle him to any relief. See Carroll v. State, 27 Fla. L. Weekly S214, S216 (Fla. 2002) ("The fact that Carroll has now secured the testimony of more favorable mental health experts simply does not establish that the original evaluations were insufficient."); Downs v. State, 740 So. 2d 506, 518 n. 5 (Fla. 1999) ("The fact that Downs has found experts willing to testify more favorably concerning mental mitigating circumstances is of no consequence and does not entitle him to relief.")(citations omitted); Jones v. State, 732 So. 2d 313, 317-318 (Fla. 1999) (finding no deficient performance for failing to procure Doctors "Crown" and "Toomer" noting that trial counsel is not "ineffective merely because postconviction counsel is subsequently able to locate experts who are willing to say that the statutory mitigators do exist in the present case.").

In any case, the newly discovered mental health experts did not present the kind of testimony capable of altering the outcome in this case. While one or both opined that Coney qualified for a statutory mental mitigator, the impairment noted was not severe, was significantly impeached, and countered by damaging revelations surrounding Coney's conduct in prison.

Prejudice

Coney's prejudice argument focuses on the jury recommendation which he notes was by "the narrowest of margins." (Coney's Brief at 52). The trial court's finding of prejudice repeats this flawed analysis.[2] The trial court simply looked at the jury's vote and opined that if only something more had been done, one vote might have been changed. The court's analysis might have some validity in a case with one or two weak aggravating circumstances. In this case, with a massive case in aggravation including four strong aggravating circumstances, the jury's vote is a testament to counsel's effectiveness. Facts such as those present here can easily lead to a 12-0 jury recommendation for death. Coney was already serving a lengthy sentence for brutally raping and leaving for dead a twelve-year-

[2]Indeed, if we were to use such an analysis to judge guilt phase effectiveness the defendant would always note that if just one juror was persuaded to change his or her vote, the defendant could not have been convicted.

old girl when he chose to murder a fellow prisoner in one of the most horrible manners imaginable, by burning him alive, and inflicting a lingering death. Coney "must demonstrate that there is a reasonable probability that, absent trial counsel's error, 'the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000), cert. denied, 122 S.Ct. 179 (2001) (quoting Strickland, 466 U.S. at 695). Coney made no such demonstration here.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING CONEY'S CLAIM THAT TRIAL COUNSEL OPERATED UNDER A CONFLICT OF INTEREST IN THIS CASE. (STATED BY APPELLANT).

Coney asserts that his trial counsel operated under an actual conflict of interest for participating in a kickback scheme wherein he would provide a portion of his fee for representing Coney back to the initial judge who appointed him to the case. The State submits that this claim was properly denied as Coney's allegation, even if true, did not suggest that trial counsel possessed an interest adverse to Coney's.

In denying this claim below, the trial court stated:

> The defendant sets forth in claim XIV of his amended motion that trial counsel "was burdened by an actual

> conflict of interest adversely affecting counsel's representation." The conflict alleged is not the typical one of an attorney representing conflicting interests of two clients. Rather, the defendant claims there was a conflict between the attorney's self-interest in continuing to receive appointments from the trial judge and his duty to represent his client. [note omitted]. The defendant does not explain how these two interests are antithetical. But even assuming they are, the question remains whether the client's interest was compromised, that is, was the representation afforded the defendant deficient. *See Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Buenoano v. Dugger*, 559 So. 2d 1116 (Fla. 1990). Since this is precisely the question addressed in the defendant's other claims of ineffective assistance, the question need not be answered again. The court has already concluded that counsel's performance was deficient in the penalty phase and was adequate in the guilt phase. Counsel's motivation is not relevant.

(PCR-10, 1340-1341).

On appeal, Coney again fails to identify a single adverse interest to him which affected any decision counsel made in the case. The most Coney can assert is that trial counsel had a corrupt "personal financial incentive" to remain on his case. (Coney's Brief at 62). Of course, all privately appointed attorneys in criminal cases can be said to have some financial interest in remaining on a court-appointed case. That fact alone does not constitute an adverse interest or "conflict." Nor for that matter are privately retained criminal defense attorneys "conflicted" simply because they accept a fee for their services.

In Herring v. State, 730 So. 2d 1264, 1267 (Fla. 1998), this Court stated the following in addressing an allegation of conflict:

> To prove an ineffectiveness claim premised on an alleged conflict of interest the defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed. 2d 333 (1980); *Buenoano v. Dugger*, 559 So. 2d 1116, 1120 (1990). Our responsibility is first to determine whether an actual conflict existed, and then to determine whether the conflict adversely affected the lawyer's representation. A lawyer suffers from an actual conflict of interest when he or she "actively represent[s] conflicting interests." *Cuyler,* 446 U.S. at 350, 100 S.Ct. 1708. To demonstrate actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were impaired or compromised for the benefit of the lawyer or another party. *See Buenoano v. Singletary*, 74 F.3d 1078, 1086 n. 6 (11th Cir. 1996); *Porter v. Singletary*, 14 F. 3d 554, 560 (11th Cir. 1994); *Oliver v. Wainwright*, 782 F. 2d 1521, 1524-25 (11th Cir. 1986). Without this factual showing of inconsistent interests, the conflict is merely possible or speculative, and, under *Cuyler*, 446 U.S. at 350, 100 S.Ct. 1708, such a conflict is "insufficient to impugn a criminal conviction."

It is by now clear that even where an actual conflict is established, a defendant must allege and establish resulting prejudice emanating from the conflict. See Mickens v. Taylor, 2002 WL 459251 (March 27, 2002). However, in this case, Coney has not even sufficiently alleged a possible or speculative conflict of interest based upon the possibility that trial counsel would give back part of the money he received for his

appointment to the judge who initially appointed him. The judge who appointed Casabielle was not the judge who presided over Coney's trial. Coney did not allege any course of action which was taken or not taken because of the alleged kickback scheme.[3]

As for any allegation that the initial trial judge conspired with counsel to keep Casabielle on the case and therefore denied his motion to dismiss counsel, that specific claim was not made in Coney's motion for post-conviction relief. (PCR-10, 133-135). The first the State heard of such a claim was at the

---

[3]The State also noted the following in its written closing argument below:

> Although Defendant attempted to introduce the transcripts of Roy Gelber's testimony from his federal trial, Defendant failed to allege how such testimony or any of the details of the Courtbroom investigation in any way established a conflict relevant to Defendant's mental health issues. Even when expressly prompted to do so, Defendant failed to proffer how any alleged relationship between Mr. Gelber and Mr. Casabielle could have possibly affected Mr. Casabielle's investigation of Defendant's mental health issues or appointment of experts. At this hearing, Defendant failed to adduce any testimony from defense counsel regarding how the choice of Drs. David and Mutter to examine Defendant was colored by any alleged conflict. Likewise, Defendant failed to proffer or elicit any testimony concerning how defense counsel's investigation of Defendant's background, prison records, and family history was affected by any alleged conflict. (Hearing Transcripts, Vol. 2, pgs. 267-68). (PCR-10, 1296-97).

evidentiary hearing. And, the State properly objected that it was improper to raise such an allegation for the first time during the evidentiary hearing. (PCR-4, 532-533). The prosecutor also noted that any allegation that Coney's motion to discharge counsel should have been granted by the trial court appears in the record and should have been raised on direct appeal. If the specific allegation that Coney's motion to dismiss counsel had been improperly denied was raised in Coney's Rule 3.850 motion, it would have been procedurally barred. Johnson v. State, 593 So. 2d 206 (Fla. 1992) (issues which either were or could have been raised on direct appeal are not cognizable through collateral attack); Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995) (claims which could have been raised on direct appeal are procedurally barred from review in a Rule 3.850 motion).

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING SEVERAL OF APPELLANT'S GUILT PHASE ISSUES WITHOUT A HEARING.

Standards Of Review On The Summary Denial Of Post-Conviction Relief

In Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993), cert. denied, 502 U.S. 834 (1994), this Court observed that

"[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion.[4] However, an evidentiary hearing is not a matter of right, a defendant must present "'apparently substantial meritorious claims'" in order to warrant a hearing. State v. Barber, 301 So. 2d 7, 10 (Fla.), rehearing denied, 701 So. 2d 10 (1974) (quoting State v. Weeks, 166 So. 2d 892 (Fla. 1960)). The motion must assert specific facts which, if proven, would warrant relief. Fla. R. Crim. P. 3.850(c)(6). And, as for ineffective assistance of counsel, a defendant must allege specific facts that, when considering the totality of circumstances, are not conclusively rebutted by the record, and demonstrate that counsel's performance was so deficient that but for the deficiency, the outcome of the trial would have been different. Kennedy v. State, 547 So. 2d 912, 913-14 (Fla. 1989).

---

[4]Undersigned counsel at times adds to the rationale expressed in the trial court's order summarily denying relief. The State notes that at least on direct appeal, this Court has not hesitated to find an error harmless based upon the record before the Court. See Heuss v. State, 687 So. 2d 823, 824 (Fla. 1996) (affirming duty of appellate court to test for harmless error even when it is not argued by the State which is consistent with legislative directives "which prohibit reversal if the error does not result in a miscarriage of justice or injuriously affect a substantial right of the appellant." (citing Florida Statutes 59.041 and 924.33 (1995)).

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

Procedural Bar

Matters which either were raised or could have been raised on direct appeal or previous post-conviction proceedings are procedurally barred on collateral review. It is well settled that a Rule 3.850 motion is not a substitute for, nor does it constitute a second direct appeal. "[A] Rule 3.850 motion based upon grounds which either were or could have been raised as issues on appeal may be summarily denied." McCrae v. State, 437 So. 2d 1388, 1390 (Fla. 1983) (string citations omitted). See generally Parker v. State, 718 So. 2d 744 (Fla. 1998), cert. denied, 526 U.S. 1101 (1999) (claims procedurally barred on second 3.850 motion for failure to object at trial, for having raised issue on direct appeal, or for having raised issues in

prior motions or petitions); Maharaj v. State, 684 So. 2d 726 (Fla. 1996) (Post-conviction relief petitioner's claims which were either raised or could have been raised on direct appeal were properly denied without an evidentiary hearing); Engle v. Dugger, 576 So. 2d 696, 702 (Fla. 1991) (claim that the trial court failed to provide a factual basis to support imposition of death sentence was "procedurally barred because it should have been raised on the appeal from re-sentencing."). Accord Cherry v. State, 659 So. 2d 1069 (Fla. 1995); Medina v. State, 573 So. 2d 293 (Fla. 1990); Clark v. State, 690 So. 2d 1280 (Fla. 1997). Any attempt by a defendant to avoid the application of a procedural bar by simply recasting a previously raised claim under the guise of ineffective assistance of counsel is not generally successful. See Sireci v. State, 469 So. 2d 119, 120 (Fla. 1985) ("[c]laims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel.") "Procedural bars repeatedly have been upheld as valid where properly applied to ensure the finality of cases in which issues were or could have been raised." Atkins v. State, 663 So. 2d 624, 627 (Fla. 1995). With these principles in mind, the State submits that Coney's remaining claims were properly denied without a hearing below.

A. Jury Selection Issues

Coney asserts that his counsel inadequately inquired of several jurors regarding potential bias. The trial court denied this claim below, stating:

> The defendant asserts that trial counsel's questioning of jurors during *voir dire* was incomplete and otherwise inadequate. In particular he criticizes the manner in which the prospective jurors were questioned about their knowledge of the book "Maximum Morphonios" by Judge Ellen Morphonios, Judge Morphonios had presided over the 1976 case in which Coney was found guilty of raping a twelve-year old girl, and, in Judge Morphonios' book she described the case as one of the worst she had ever seen. The prospective jurors were, in fact, questioned about their knowledge of the book. Only one member of the panel seated as a juror, Walter Moore, stated that he had read the book. He was questioned separately to determine what parts he read and remembered and how the book may have influenced him. Counsel's questions were appropriately phrased to elicit from Mr. Moore what he remembered from the book without describing the very details that may have been prejudicial to the defendant. Nothing Moore said necessitated further questioning or provided a basis to excuse him from serving as a juror. (R. 1048-49, 1082-85, 1090-92). The other points raised by the defendant regarding jury selection lack merit and/or were raised and rejected on direct appeal.

(PCR-10, 1336).

The record supports the trial court's denial of this claim. Juror Moore was asked about the book and he remembered reading only parts of the book. The book was loaned to him by his friend and he recalled very little of note, that she had been married a number of times and the chapter about the juvenile

justice system. (TR. 1048-49). Casabielle was able to perform the delicate task of ascertaining if Moore learned anything prejudicial about Mr. Coney from the book without informing him by his questions of the negative material. (TR. 1048-49; 1090-92). The record reflects that counsel handled this issue competently and that juror Moore did not glean any prejudicial information from reading parts of the book in question. Indeed, defense counsel expressed his preference for having Moore sit on the jury if he had no recall of Judge Morphonious's reference to Coney. (TR. 1083).

Next, Coney argues the trial court erred in denying a hearing on his allegation that counsel was ineffective for failing to further question juror Stokes because she stated that she had a friend who was at one time Judge Morphonious's legal assistant. (Appellant's Brief at 75). Ms. Stokes was asked if she had read any books about the judicial system in Miami. (TR. 1048-49). Even when other jurors specifically mentioned the book, Stokes failed to indicate that she had read the book. (TR. 1048).

Coney next mentions several other jurors but his cryptic argument does not mention why such jurors were biased or how additional questioning would have revealed any bias. As for Mr. Griffin, while his son was a corrections officer, he had several

cousins in prison, he went to high school with a friend in the fire department who he saw "now and then" and he had a cousin who had been burned in a childhood accident. (TR. 793-96, 812-13, 1075-76, 1081). Contrary to Coney's allegations, Mr. Griffin did not suggest he would be biased in favor of correctional officers. Mr. Griffin repeatedly indicated that he would use common sense to assess the credibility of witnesses. (TR. 1004-06, 1054-55).

Coney's allegations, even if true, do not show either deficient performance or prejudice. The jurors mentioned by Coney revealed no information below which indicates they were biased against him. Coney's claims are far too speculative to warrant an evidentiary hearing. See Reaves v. State, 27 Fla. L. Weekly S601 (Fla. June 20, 2002) (affirming summary denial of ineffective assistance claims where no challenge for cause would have been successful for named jurors and where claims that followup questions would have revealed a basis for cause challenges constituted mere "conjecture.").

Coney next asserts that rules prohibiting post-conviction counsel from contacting and interviewing jurors are unconstitutional. (Appellee's Brief at 77). He does not address the trial court's determination that the issue was procedurally barred. (PCR-10, 1336). It is clear that Coney

has no specific information suggesting any juror misconduct, he simply seeks a fishing expedition to question jurors about their backgrounds and their verdict. See Morris v. State, 811 So. 2d 661, 667 (Fla. 2002). The State is unsure how this would work, individual polling or a group focus session with defense counsel asking questions no doubt designed to obtain the desired responses. Fortunately, neither this Court nor the Florida Rules of Professional Responsibility allow defense attorneys such broad license to question jurors about allegations of trial error after they have fulfilled their duty.[5] See Johnson v. State, 804 So. 2d 1218, 1224 (Fla. 2001) (rejecting defendant's contention that rule 4-3.5(d)(4) conflicts with defendant's right to effective assistance of counsel and right to a fair trial); Cave v. State, 476 So. 2d 180, 187 (Fla. 1985) ("This respect for jury deliberations is particularly appropriate where, as here, we are dealing with an advisory sentence which does not require a unanimous vote for a recommendation of death

[5] In State v. Hamilton, 574 So. 2d 124, 128 (Fla. 1991) this Court observed: "... Florida's Evidence Code, like that of many other jurisdictions, absolutely forbids any judicial inquiry into emotions, mental processes, or mistaken beliefs of jurors. (citation omitted). Jurors may not even testify that they misunderstood the applicable law. This rule rests on a fundamental policy that litigation will be extended needlessly if the motives of jurors are subject to challenge. The rule also rests on a policy 'of preventing litigants or the public from invading the privacy of the jury room.'" (Citations omitted).

or a majority vote for a recommendation of life imprisonment. To examine the thought process of the individual members of a jury divided 7-5 on its recommendation would be a fruitless quagmire which would transfer the acknowledged differences of opinion among the individual jurors into open court. These differences do not have to be reconciled; they only have to be recorded in a vote.").

B. Whether Trial Counsel Was Ineffective In Failing To Challenge The Dying Declarations Of The Murder Victim

The trial court rejected Coney's allegation that his trial counsel was ineffective for failing to impeach Southworth's dying declarations. The trial court stated:

> Although the defendant argues that trial counsel should have challenged the admissibility of statements by offering evidence to impeach the victim, [note omitted], the defendant does not suggest what evidence would be relevant to the victim's attitude toward death or the victim's need to tell the truth when dying. Or what evidence would show that the victim did not accurately observe the facts recounted, all of which would affect the admissibility of dying declarations. *See State v. Weir*, 569 So. 2d 897 (Fla. 4th DCA 1990). Rather, the defendant argues that the victim's statements identifying Mr. Coney as the person who ignited the fire were lies, and that trial counsel should have offered evidence at trial of the victim's positive HIV status to show the victim's motive for inculpating the defendant. He speculates that the victim, believing Coney gave him AIDS, may have been angry at Coney, and therefore, falsely accused Coney as the murderer. This may be good fiction but it has no relevance to the facts of this case. Here, the victim was dying because he was being burned alive, not because he was dying from AIDS.

> Common sense dictates he would have wanted to identify his killer. Nor do any of the other matters suggested by the defendant in his criticisms of trial counsel bear on the truthfulness of the dying declarations. Neither prong of *Strickland* has been satisfied.

(PCR-10, 1337-38).

The trial court's order points out the obvious, that Coney's belated attempt to attack the victim's credibility was weak and far too speculative to warrant a hearing. Coney simply provided no credible allegations to support his far fetched theory that Southworth would want to falsely implicate Coney in his death, hiding the true identity of the real killer, because Coney might have given him AIDS. Appellant did not indicate exactly how he might attempt to establish this far fetched theory.[6]

Indeed, as the trial court essentially noted, any attack upon the character of murder victim Southworth would have to fit within the Rules of Evidence. Appellant did not contend in his motion that he possessed any expert to support his theory that Southworth's recollection might not be reliable either due to the medication he was taking or his mental condition.[7] (PCR-1,

---

[6] Indeed, Coney's own motion establishes the highly speculative nature of this claim: "It is evident that such evidence had great potential for impeachment of Patrick Southworth as conduct showing a revengeful state of mind. Who did Southworth contract HIV from? Did he know he was infected? Who else knew? ..." (PCR-1, 41).

[7] At trial, the medical examiner testified that the victim received burns over fifty-five to sixty percent of his body.

61-62). See Edwards v. State, 548 So. 2d 656, 658 (Fla. 1989) (noting that evidence of drug use or addiction other than at the time of the event or time of trial is inadmissible to attack the credibility of a witness unless there is an express showing of other evidence that the drug use affected the ability of the witness to observe or remember matters about which the witness testified). Coney did not suggest how the dead victim's alleged history of DR's during his confinement would even be relevant and admissible to impeach his character.[8] Indeed it appears that much if not all of Coney's aspersions on Southworth's character would not be admissible at trial. Moreover, although not noted by the trial court, it is always a hazardous course for a defendant to attack the character of a murder victim, particularly one who, as in this case, suffered a painful, lingering death.

Further, Coney's allegation that Inspector Callahan should

(TR. 1302). Although some of the burns to the victim's head were first degree, the majority of burns were second and third degree burns. (TR. 1306). Second degree burns were described as very painful because the nerve fibers are still present under the skin. (TR. 1308). However, the victim's brain was not affected by the burns and, at the time he was taken to the hospital, he was oriented to time, place, and person. (TR. 1308).

[8] Coney's motion does not mention how many DR's Southworth had, when they were generated, what they were for, or for that matter, under what basis they would be admissible to impeach the deceased.

have been used to attack Santerfeit's account of the fire is without merit. As the trial court noted, although he initially had doubts about Santerfeit's testimony, he stated that he could not prove Santerfiet was lying. Further, he stated that the defendant could have had a soda can filled with lacquer thinner in his cell before the fire and that his investigation revealed no suspects other than Mr. Coney. (Deposition, Marvin Callahan, July 16, 1990, p. 44-45). On balance, Callahan's potential testimony was more damaging than beneficial to Coney.

In sum, Coney's highly speculative attack upon the character of the murder victim did not cast any doubt upon the truthfulness of his dying declarations. And, given the compelling, indeed, overwhelming evidence of Coney's guilt, it cannot be said the result of his trial is rendered unreliable based upon counsel's alleged failure to impeach the dead victim.

C. Failure To Obtain A Pre-Trial Mental Status Evaluation

Even assuming the defense established that trial counsel was not successful in having Dr. Castiello examine Coney prior to trial, Coney completely failed to establish any prejudice as a result of the failure. Of course, the Defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a

conviction or sentence." Strickland, 466 U.S. at 693. The defense did not allege any facts which suggest that a mental status defense was even available, much less facts to show that such a defense would likely succeed. In fact, such a defense would conflict with Coney's defense that he did not commit the murder. See Rose v. State, 617 So. 2d 291, 294 (Fla. 1993) ("when a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made.").

Coney's motion did not allege that a single expert was available to testify to the existence of an insanity defense or other mental status defense. He simply alleged that counsel was ineffective for failing to have a mental health expert examine him prior to trial. The prejudice is presumed by Coney; he was deprived of the **option** of exploring the possibility of a mental status defense. Unfortunately for Coney, the ineffective assistance of counsel standard does not presume prejudice, it must be alleged and proven.

During the evidentiary hearing, defense counsel testified that he was familiar with issues relating to mental health and remained watchful for signs of mental infirmity or competency. (PCR-4, 481). He did not observe any signs of mental incompetency or infirmity in defendant during the course of his

representation. Id. See Devier v. Zant, 3 F.3d 1445, 1451 (11th Cir. 1993) (because the record did not show that a reasonable attorney would be on notice that a psychological exam was needed to assess the defendant's competence, counsel was not constitutionally deficient). It is apparent that Coney's own experts who testified during the evidentiary hearing would not support an insanity defense. Based upon this record, it is abundantly clear that Coney could not establish any prejudice based upon the alleged failure to have him examined prior to trial.

D. Trial Counsel's Alleged Failure To Challenge The State's Case

Coney claims that the trial court erred in summarily denying his guilt phase claims regarding the failure to call some witnesses or effectively challenge state witnesses. The State disagrees.

As for his general claim that counsel was ineffective in preparing and presenting his defense, the trial court stated:

> ... Trial counsel adequately prepared for the guilt phase, having had his investigator contact sixty-one inmates for information, having called numerous witnesses, including the defendant, at trial, and having appropriately challenged the state's evidence against Mr. Coney. That there may have been more that trial counsel could have done or that new counsel in reviewing the record with hindsight would handle the

> case differently, does not mean that trial counsel's performance during the guilt phase was deficient. *Cherry v. State*, 659 So.2d 1069 (Fla. 1995); *Byron v. Dugger*, 641 So.2d 61 (Fla. 1994). Mr. Casabielles' performance at trial fell withing the "broad range of reasonably competent performance under prevailing professional standards." *Maxwell v. Wainwright*, 490 So.2d 927 (Fla. 1986) at 932.

(PCR-10, 1340)

As the claim regarding inmate Don Smith, Coney failed to articulate how Smith's potential testimony as set forth in the motion for post-conviction relief would tend to contradict Santerfeit's testimony. In fact, as pointed out by the State, Smith's testimony would tend to corroborate Santerfeit's trial testimony. The State observed below:

> ... According to the defendant Donald Smith would have testified that he saw a puff of smoke coming from the victim's cell, that he saw Byrel Santerfeit leaving the cell and closing the door behind him, and that he did not see the defendant near the cell at that time. The defendant has not explained how the failure to present this testimony in any way prejudiced the outcome of the proceedings. Santerfeit testified that he was wakened by the heat and the smoke in the cell, that he jumped out of bed, ran out of the cell and closed the door as he ran out. (Tr. 2238-39). He also testified that he did not see the defendant as he ran out the door. (Tr. 2240). Officer Lugo-Sanchez also testified that he did not see the defendant near the fire. (Tr. 1584).

(PCR-2, 194-95)

Coney's claim did not suggest how Smith's testimony would tend to exonerate him, much less lead to a different result had it been presented at trial. As such, this claim was properly

subject to summary denial below. See Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000) ("The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based.").

The trial court rejected any claim that defense counsel was ineffective in addressing the testimony of Officer Lugo-Sanchez, stating:

> The defendant criticizes trial counsel for failing to adequately cross-examine Officer Lugo-Sanchez, the officer on duty when the fire started. The officer testified that he had seen the defendant several times on the morning of the fire, as the defendant was preparing to transfer to another facility. However, he was not certain of Coney's whereabouts immediately before the fire. On cross-examination, defense counsel impeached the officer with entries made in a log book stating that Coney was standing in front of the officers' station at 4:57 A.M., and that at 4:58 A.M. the officer heard the victim's cellmate screaming about the fire. This cross-examination was adequate to bring out the inconsistencies in the officer's testimony. (R. 1576-1611) (PCR-10, 1338)

(PCR-10, 1338).

As trial counsel did in fact impeach Officer Lugo-Sanchez using the log, it cannot be said counsel was ineffective. Moreover, defense counsel objected to the State's rehabilitation of the officer with prior consistent statements and suggested that those statements were made as a result of coercion and intimidation by more senior officers. (TR. 1591-1611). See Andrews v. Deland, 943 F.2d 1162, 1194-1195 (10th Cir. 1991)

(the fact that counsel could have attempted to discredit the witness "through additional, or alternative, means," does not indicate that counsel's cross-examination was ineffective.).

Coney next asserts that trial counsel was ineffective for failing to "call important staff as witnesses," mentioning, among others, DOC Inspector Callahan, and DOC Inspector Paul French. Coney does not, however, bother to articulate how counsel was ineffective for failing to call these witnesses.[9] As such, the issue is not properly preserved for appeal. See Duest v. Dugger, 555 So. 2d 849, 851-852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve

---

[9] In a footnote (Coney's Brief at 90), Coney contends that he made a Brady claim below surrounding information that showed that at least initially, Santerfiet was a suspect. This information does not tend to exonerate Coney. As a preliminary matter, Coney failed to establish the State possessed material "favorable" information which was not disclosed to the defense. As this Court noted in Medina v. State, 690 So. 2d 1241, 1249 (Fla. 1997):

> *Brady* does not require disclosure of all information concerning preliminary, discontinued investigations of all possible suspects in a crime. Spaziano v. State, 570 So.2d 289 (Fla. 1990). In other words, simply because someone other than the defendant "was a suspect early in the investigation, though this theory was later abandoned, is not information that must be disclosed under *Brady.*" Id. at 291.

issues, and these claims are deemed to have been waived."); Knight v. Duggar, 574 So. 2d 1066, 1073 (Fla. 1990)."[10] The closest Coney comes to actually presenting an argument on appeal is on the failure of trial counsel to call Correctional Body Shop Manager Torres. (Appellant's Brief at 87). While preserved for appeal, the claim lacks any merit.

Although Coney maintains that Torres indicated that James Young's account of getting lacquer thinner for Coney was impossible (Coney's Brief at 87), he does not explain how this testimony would lead to a different result had it been presented at trial. In fact, the portion of Torres' statement quoted in Coney's motion did not contradict Young's trial testimony. Torres was simply stating that the lacquer thinner was locked up and that it would be impossible for an inmate to get into the locker. (PCR-10, 67-68). However, at trial, Young, who worked at the DCI vocational body shop, admitted that the lacquer thinner was kept locked up. (TR. 1837). Although it was kept locked, Young saved some lacquer thinner from the job he was

[10] McDonald v. Pickens, 544 So. 2d 261 (Fla. 1st DCA 1989) (Argument made in motion for new trial but not included in appellant's brief was not cognizable on appeal from denial of the motion); Wisner v. Goodyear Tire and Rubber Company, 167 So. 2d 254 (Fla. 2d DCA 1964) (A district court of appeal will not decide an issue not raised or briefed by the parties on appeal).

working on and gave it to Coney.[11] (TR. 1837, 1839). Since Torres would not contradict Young's account, trial counsel cannot be ineffective for failing to call him as a witness.

Coney next faults trial counsel for failing to interview or depose a number of potential witnesses. However, he completely fails to show what benefit to Coney would have resulted from such investigation. See LeCroy v. Dugger, 727 So. 2d 236, 240-241 (Fla. 1998) (noting summary denial was proper where motion failed to allege what unspecified evidence should have been developed or should have been used); Washington v. Watkins, 655 F.2d 1346, 1360-61 (5th Cir. 1981) (although a diligent counsel would have interviewed the State's two identification witnesses prior to trial, petitioner failed to show how such witness interviews would have changed the outcome of the trial). See U.S. v. Berry, 814 F.2d 1406, 1409 (9th Cir. 1987) (a defendant must show what the witnesses would have testified to and how it would have changed the outcome.)

As observed by the District of Colombia United States Court of Appeals:

---

[11] About one week before the murder, Coney had a conversation with Young at the DCI vocational body shop where Young worked. (TR. 1835). Young used lacquer thinner in the auto shop and Coney asked Young to get him some. (TR. 1836). Coney told Young he needed the lacquer to thin paint so that he would have enough to cover the walls of his cell. (TR. 1837).

> ... a defendant basing an inadequate assistance claim on his or her counsel's failure to investigate 'must make a comprehensive showing as to what the investigation would have produced. The focus on the inquiry must be on what information would have been obtained from such an investigation and whether such information, assuming its admissibility in court, would have produced a different result.'

U.S v. Askew, 88 F. 3d 1065 (D.C. Cir. 1996), cert. denied, 519 U.S. 986 (1996)(quoting Sullivan v. Fairman, 819 F. 2d 1382, 1392 (7th Cir. 1987). See also Sullivan v. State, 303 So. 2d 632 (Fla. 1974) (reversible error cannot be predicated on mere conjecture).

Coney next argues that trial counsel was ineffective in failing to challenge arson investigator Vincent McBee regarding the chemical composition of the accelerant used to start the fire and a sample of lacquer thinner from the body shop. (Appellant's Brief at 88). Coney claims that trial counsel should have challenged his testimony by calling for a Frye hearing and retaining an expert of his own. Coney's claims are without merit.

The trial court rejected this claim below, stating:

> At trial, the state called inmate James Young, who testified Coney asked him for some lacquer thinner from the prison auto body shop and that he gave Coney a soda can full shortly before the fire. Next, the state called technician Vincent McBee to testify about the chemical composition of various liquids. He compared the chemical make up of a sample of lacquer thinner from the body shop to evidence found at the fire scene and admitted on cross-examination that

> there was an inconsistency. He did not find a certain substance, toluene, in the auto body shop sample but did find toluene in the arson evidence. If the defendant is now arguing that McBee's testimony should not have been admitted because of this inconsistency, it is too late. Trial counsel objected to the admission of McBee's opinions but the objection was overruled. This alleged error could have been raised on direct appeal. If the defendant is claiming trial counsel was ineffective in failing to request a Frye hearing to challenge McBee's opinions, he has failed to even suggest that McBee's methods were faulty. This claim is not persuasive.

(PCR-10, 1339-1340). The trial court's order denying this claim is well supported by the record.[12]

As noted by the trial court, Coney has not alleged that the methodology used by McBee for determining which flammable compounds were used in the fire is novel or that the methodology utilized by McBee was unsound. Thus, there was no basis to request a Frye hearing below.

---

[12] Trial counsel did object to McBee's testimony and did bring out for the jury the inconsistency between the sample obtained from the body shop and the accelerant found in the victim's cell. (TR. 1866-72). McBee, an expert in arson evidence examination, testified that he expected to find toluene present in the standard sample, but only found the alcohol and methyl ethyl ketone. (TR. 1895). His findings were consistent with some of the standard sample having been mixed with a second container of different unknown chemical compound before being placed in the soda cans. (TR. 1908). They could also be consistent with the standard sample either being diluted or evaporated. (TR. 1908). All three of the substances found on the soda cans and shoe box, alcohol, toluene, and methyl ethyl ketone are incendiary compounds, individually and in combination. (TR. 1919).

As for Coney's contention that an expert should have been hired to challenge McBee's testimony, he did not make this claim in his motion for post-conviction relief. (PCR-1, 65-69). It is certainly inappropriate to raise such a claim for the first time on appeal. In any case, Coney does not allege that he has contacted an expert who could impeach McBee much less indicate what the expert would have to say in court. As such, Coney's unpreserved claim is facially deficient and should be summarily rejected.[13]

Coney next contends that counsel was ineffective for failing to object to improper prosecutorial argument. (Appellant's Brief at 90). However, Coney fails to brief the issue and simply cites pages of the trial transcript. This is insufficient to preserve the issue for appeal. Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("Merely making reference to arguments below without further elucidation does not suffice to

[13] The State is uncertain why Coney mentions the black plastic bags that prisoner Hasan Jones testified were in Coney's possession on the morning of the fatal fire. If his claim is based upon the alleged destruction of evidence, he fails to show how such evidence might have been favorable to him or that the State even destroyed it. Arizona v. Youngblood, 488 U.S. 51 (1988). If his claim is founded upon ineffective assistance of counsel, the State's Response well addressed this issue below: "... it is obvious from the cross-examination of Jones and the defendant's closing argument that trial counsel made use of the fact that no plastic bags were recovered and entered into evidence to support the theory of the defense. (R. 2041-46, 2589)." (PCR-2, 193).

preserve issues, and these claims are deemed to have been waived."). In any case, issues pertaining to the State's closing argument appear in the record and should have been raised, if at all, on direct appeal. Robinson v. State, 707 So. 2d 688, 697, n. 17 (Fla. 1998). In fact, appellate counsel did challenge the prosecutor's comments during the penalty phase on direct appeal.[14] (Coney's Direct Appeal Brief at 76).

Coney next challenges the trial counsel's failure to object to provision of the standard jury instruction on jury deliberations. (Coney's Brief at 90-91). Any issue surrounding the propriety of jury instructions provided in this case should have been raised, if at all, on direct appeal. "[A] Rule 3.850 motion based upon grounds which either were or could have been raised as issues on appeal may be summarily denied." McCrae v. State, 437 So. 2d 1388, 1390 (Fla. 1983)(string citations omitted); Maharaj v. State, 684 So. 2d 726 (Fla. 1996) (Post-conviction relief petitioner's claims which were either raised or could have been raised on direct appeal were properly denied without an evidentiary hearing). In any case, Coney's cryptic argument does not establish that the instruction was invalid or cite to case law to suggest that counsel was deficient for

[14] Coney v. State, 653 So. 2d 1009, 1016 n. 6 (Fla.), cert. denied, 516 U.S. 921 (1995) "... issue 7 (not preserved)[]"

failing to object. Consequently, his claim was properly denied without a hearing below.

E. Coney's Absence From Critical Stages Claim

Coney next argues that the trial court erred in finding his absence from the proceedings procedurally barred. Not only is this issue procedurally barred, but it is also patently without merit.

The trial court found this issue procedurally barred, recognizing that the issue was extensively litigated on direct appeal. The trial court stated: "This point was raised in the defendant's direct appeal, and the Florida Supreme Court decided that any error in this regard was harmless. *Coney v. State*, 653 So. 2d 1009 (Fla. 1995)." (PCR-10, 1341). Coney's attempt to relitigate this claim under the guise of ineffective assistance is unavailing. See Sireci v. State, 469 So. 2d 119, 120 (Fla. 1985) ("[c]laims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel."); Sireci v. State, 773 So. 2d 34, 45 n. 10 (Fla. 2000) (recognizing the procedural bar to claims previously raised on direct appeal and noting that to the extent defendant "uses a different argument to relitigate the same issue, the claims remain procedurally barred."); Shere v. State,

742 So. 2d 215, 218 n. 7 (Fla. 1999) (finding that defendant's claim challenging the sufficiency of this Court's harmless error analysis on direct appeal cannot be raised in a motion for postconviction relief).

On direct appeal, this Court found any error harmless below as Coney was only absent from discussions involving technical, legal, and procedural issues on which he would have no input. Coney, 653 So. 2d at 1012-1013. Even absent a procedural bar, Coney fails to show how his input would have changed the course of his trial below. Consequently, he has not alleged any prejudice to satisfy the second prong of Strickland. Thus, summary denial of this claim was clearly appropriate.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING CERTAIN REQUESTED RECORDS PRIVILEGED AND THEREFORE NOT SUBJECT TO DISCLOSURE. (STATED BY APPELLANT)

Coney does not argue why the trial court erred below in finding certain material not subject to disclosure after an in-camera inspection. He simply asks this Court to review the material and determine whether or not Coney was entitled to its disclosure. As Coney makes no specific argument regarding any of the material, he cannot show that the trial court abused its

discretion in failing to disclose it.[15] See generally Mills v. State, 786 So. 2d 547, 552 (Fla. 2001) (finding no abuse of discretion in trial court's denial of further production of public records).

[15]The State does recognize that Coney's argument for disclosure is necessarily limited by lack of access to the material.

ISSUE V

WHETHER CONEY'S REMAINING CHALLENGES TO THE PENALTY PHASE WERE PROPERLY DENIED BY THE TRIAL COURT WITHOUT A HEARING BELOW?

A. Florida's Capital Sentencing Statute Is Constitutional

Coney asserts that the Florida capital sentencing statutes are unconstitutional. (Appellant's Brief at 94). The trial court properly ruled below that this issue was both procedurally barred and without merit. The trial court stated: "This claim could have been raised on direct appeal, and furthermore has been found to be without merit by the Florida Supreme Court. *Johnson v. State*, 660 So. 2d 637 (Fla. 1995); *Wuornos v. State*, 644 So. 2d 1000 (Fla. 1994)." As this claim could have been raised on direct appeal, it cannot be raised for the first time in a Rule 3.850 motion. Moreover, as noted by the trial court, the claim lacks any merit. See Knight v. State, 746 So. 2d 423, 429 (1998) (rejecting claim that Florida's death penalty statute is unconstitutional).

B. The Trial Court's Alleged Failure To Find Non-Statutory Mitigation

Coney alleges that the trial court failed to find certain non-statutory mitigation presented during the penalty phase. The trial court found that Coney's attempt to relitigate this

direct appeal issue was procedurally barred from review in his motion for post-conviction relief. The trial court stated: "This claim was considered on direct appeal, the Florida Supreme Court finding no error in the trial court's rejection of non-statutory mitigating evidence." (PCR-10, 1342). As noted by the trial court, this issue was litigated on direct appeal and decided adversely to Coney. Maharaj v. State, 684 So. 2d 726 (Fla. 1996) (Post-conviction relief petitioner's claims which were either raised or could have been raised on direct appeal were properly denied without an evidentiary hearing); Eutzy v. State, 536 So. 2d 1014, 1015 (Fla. 1988) (affirming trial court's summary denial of claims "which the court aptly characterized as 'matters that were addressed on direct appeal and are attacks and criticisms of the decision of the Florida Supreme Court.'").

C. Whether The Trial Court Erred In Finding Coney's Challenge To His Prior Convictions Procedurally Barred

Coney provides no argument to support his allegation that his prior convictions were unconstitutionally obtained. As such, the issue is not properly presented on appeal. In any case, citing Henderson v. Dugger, 522 So. 2d 835 (Fla. 1988), the trial court properly found the issue below was procedurally barred as Coney did not challenge his prior convictions in the

trial court or on direct appeal. (PCR-10, 1342). As such, this claim is procedurally barred from review in a motion for post-conviction relief. Coney does not provide any argument on appeal to suggest the trial court erred in finding the issue procedurally barred.

D. Whether The Trial Court Erred In Finding Coney's Claim That Arson Constitutes An Impermissible Automatic Aggravating Factor

Coney claims that the Arson felony aggravator in this case constituted an unconstitutional automatic aggravating factor. The trial court rejected this claim below, finding the issue should have been raised, if at all, on direct appeal. Further, the court found that the argument lacked any merit, stating: "[T]his argument has been rejected by the Florida Supreme Court in *Johnson v. State*, 660 So. 2d 637 (Fla. 1995)." See also Hudson v. State, 708 So. 2d 256, 262 (Fla. 1998) (rejecting argument that the murder in the course of a felony aggravator is an invalid, automatic aggravator). Coney fails to argue how the trial court erred in relying upon procedural bar and this Court's controlling precedent. This claim was properly denied without a hearing below.

E. Whether Coney's *Caldwell* Claim Was Properly Denied Without A Hearing Below

The trial court rejected this claim below, stating: "This claim was not made at trial or raised in the direct appeal. Further, in cases where this issue is properly preserved, the Florida Supreme Court has held that an instruction which informs the jury that its sentencing recommendation is "advisory" has been upheld, and is not a violation of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985). ***See Combs v. State***, 525 So. 2d 853 (Fla. 1988)." (PCR-10, 1342-43). See also Turner v. Dugger, 614 So. 2d 1075, 1079 (Fla. 1992) (finding that ***Caldwell*** does not control Florida law on capital sentencing).

The jury's role in this case was not impermissibly diminished. The jury was instructed that its recommendation would be given "great weight." (TR. 2884). Summary denial of this claim was appropriate.

F. Admission of Photographs And Allegation Of Improper Prosecutorial Comments

The trial court held that Coney's claim regarding the admission of photographs was procedurally barred, stating: "All issues regarding the admission of photographs could have been or were raised on direct appeal." (PCR-10, 1343). As found by the trial court below, this claim is barred from review in Coney's motion for post-conviction relief as it should have been raised,

if at all, on direct appeal. Moreover, photographs of Coney's victims were relevant and admissible to establish cause of death and the nature and extent of Coney's criminal conduct. See Mansfield v. State, 758 So. 2d 636, 648 (Fla. 2000) (trial court did not abuse its discretion in admitting photographs depicting the mutilation of the victim's genitals where the photographs were relevant to the medical examiner's determination as to the manner of the victim's death and were probative of the HAC and sexual battery aggravators).

Coney essentially seeks to exclude the evidence of his homicidal violence. While the photographs are no doubt unpleasant, this is because appellant chose to murder the victim by burning him alive. See Henderson v. State, 463 So. 2d 196, 200 (Fla. 1985) ("Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.").

As for improper prosecutorial comments, while not addressed specifically by the trial court, the State's response noted that Coney's allegations were procedurally barred as they could have been raised and addressed on direct appeal. (PCR-2, 208). In any case, Coney fails to show that the comments at issue were improper or that they rendered the result of his penalty phase unfair or unreliable.

Although Coney faults counsel for failing to object to remarks diminishing the jury's role and implying it was the jury's duty to impose the death penalty[16] (Coney's Brief at 97), the record reflects that defense counsel did object to some of the comments Coney finds objectionable. Defense counsel took issue with comments he believed indicated the jury must send a message to the community or implied that the jury should stop Coney before he goes out in the community and commits additional crimes, (TR. 2867-69), a point which was raised and argued in Coney's initial brief on direct appeal. (Coney's Direct Appeal Brief at 76-78). Aside from being procedurally barred, Coney's cryptic argument does not set forth a primae facie case of ineffective assistance.

While perhaps additional objections could have been made to the prosecutor's argument, Coney does not establish that such objections would have resulted in a new trial. Nor does Coney explain how the prosecutor's brief comments rendered the result of his trial unfair or unreliable. The prosecutor's comments cannot be said to have been beyond the broad bounds and scope of proper argument. See generally Spencer v. State, 133 So. 2d 729, 731 (Fla. 1961) (Prosecutors' "discussion of the evidence,

[16] Jackson v. State, 704 So. 2d 500, 507 (Fla. 1997) (no error in claim that prosecutor encouraged juror to send law and order message to the community).

so long as they remain within the limits of the record, is not to be condemned merely because they appeal to the jury to 'perform their public duty' by bringing in a verdict of guilty."); Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (prosecutor's penalty phase closing argument not egregious enough to warrant new sentencing); Davis v. Singletary, 853 F.Supp. 1492 (M.D. Fla. 1994), aff'd 119 F.3d 1471 (11th Cir. 1997) (noting that argument which appealed to jury's societal duty to maintain law and order, the prosecutor's emotional appeals and the less than flattering characterizations of the defendant were not improper). This claim did not require an evidentiary hearing below.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING CONEY'S CLAIM THAT HE IS 'INNOCENT OF THE DEATH PENALTY.' (STATED BY APPELLANT)

As Coney offers no specific argument to support his claim that he is "innocent" of the death penalty, this issue is not preserved for appeal. In any case, this record indicates that Coney has duly earned the highest penalty authorized under the law. Coney is a violent repeat sex offender who, while serving over 400 years for the brutal rape and attempted murder of a child, carried out the premeditated, heinous, atrocious and cruel murder of a fellow inmate. Death is clearly the only appropriate punishment.

ISSUE VII

WHETHER CONEY IS INCOMPETENT AND CANNOT BE EXECUTED.

Although Coney acknowledges that this claim is not currently ripe for judicial review since no execution is pending, he suggests that it is included in this appeal in order to preserve the issue for federal review. Clearly, there is no basis for this Court to rule on Coney's present claim of possible incompetence. Moreover, there is no record evidence to support a contention that Coney is incompetent.

Florida law provides specific protection against the execution of an incompetent inmate. In order to invoke judicial review of a competency to be executed claim, a defendant must file a motion for stay of execution pursuant to Florida Rule of Criminal Procedure 3.811(d). Such motion can only be considered after a defendant has pursued an administrative determination of competency under Florida Statute 922.07, and the Governor of Florida, subsequent to the signing of a death warrant, has determined that the defendant is sane to be executed. Since the prerequisites for judicial review of this claim have not occurred in this case, there is no basis for consideration of this issue in appellant's present appeal. Compare Provenzano v. State, 751 So. 2d 37 (Fla. 1999); Provenzano v. State, 760 So. 2d 137 (Fla. 2000) (detailing procedural history of similar claim); Medina v. State, 690 So. 2d 1241 (Fla. 1997) (remanding for evidentiary hearing on issue in post-conviction appeal from Pasco County).

Coney's concern with preservation of this issue for federal review does not offer a reason for a premature ruling by this Court. Although the federal courts have refused to permit successive federal habeas petitions in order to secure federal review of this claim, that default may be avoided if a defendant presents the issue prematurely in his initial habeas petition.

See Stewart v. Martinez-Villareal, 523 U.S. 637 (1998). No federal decision requires this Court to consider and address the claim now presented, contrary to state law, in order to preserve Coney's federal rights.

Since Coney's claim of incompetence to be executed is not properly before this Court, it must be denied.

ISSUE VIII

WHETHER CONEY'S CLAIM OF CUMULATIVE ERROR WAS PROPERLY DENIED BY THE TRIAL COURT? (STATED BY APPELLANT)

Coney fails to mention which specific allegations of error, either individually or collectively, deprived him of the right to a fair trial and penalty phase. His lack of argument to support this allegation of error is enough to reject it on appeal before this Court. In any case, this claim must be rejected because none of the allegations demonstrate any error, individually or collectively. See Brian v. State, 748 So. 2d 1003, 1008 (Fla. 1999) ("where allegations of individual merit are without merit, a cumulative-error argument based thereon must also fail."); Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998) (where claims were either meritless or procedurally barred, there was no cumulative effect to consider).

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State asks this Honorable Court to overturn the lower court's granting of a new penalty phase but affirm the denial of post-conviction relief in all other respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____

SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 801-0600
(813) 356-1292 (Fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to William M. Hennis, III, Assistant Capital Collateral Regional Counsel - Southern Region, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, Florida 33301, on this _____ day of July, 2002.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____
___
COUNSEL FOR APPELLEE