IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1501

F.W. CUMMINGS-EL,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Defendant was charged, in an indictment filed on March 17, 1992, in the Eleventh Judicial Circuit of Florida in and for Miami-Dade County, Florida, case number 91-33268, with committing, on September 16, 1991: (1) the first degree murder of Kathy Williams Good and (2) the armed burglary of Ms. Good's home with an assault. (R. 4-5)[1] The matter proceeded to trial on January 25, 1993. (R. 7) On January 29, 1993, the jury found Defendant guilty as charged on both counts. (R. 55-56) The trial court adjudicated Defendant in accordance with the jury verdicts. (R. 88-89) After a penalty phase proceeding, the jury recommended a sentence of death for the murder of Ms. Good by a vote of 8 to 4. (R. 84)

The trial court followed the jury's recommendations and imposed death sentences for the murder. (R. 94-98) The trial court also sentenced Defendant to 22 years imprisonment for the burglary and ordered that the burglary sentence be served consecutively to the death sentence. *Id.* In support of the death sentence, the trial court found four aggravating circumstances: (1) prior violent felonies based on Defendant's

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[1] The symbols "R.", "T." and "ST." will refer to the record on appeal, transcript of proceedings and supplemental transcript of proceedings in Defendant's direct appeal, Florida Supreme Court Case No. 82,349, respectively. The parties will be referred to as they stood in the lower court.

two prior North Carolina convictions for armed robbery and his prior Florida aggravated battery conviction; (2) during the course of a burglary; (3) heinous, atrocious and cruel (HAC); and cold, calculated and premeditated (CCP). (R. 94-96) The trial court found nothing in mitigation and expressly rejected the testimony of Defendant's sisters because their opinions were inconsistent with the evidence. (R. 97)

Defendant appealed his convictions and sentences to this Court, raising 6 issues:

I.

WHETHER THE TRIAL COURT ERRED IN STRIKING JURORS KOZAKOWSKI AND OSHINSKY FOR CAUSE ON THE BASIS THAT THEY COULD, UNDER NO CIRCUMSTANCES VOTE TO IMPOSE THE DEATH PENALTY?

II.

WHETHER THE TRIAL COURT REVERSIBLY ERRED BY COMMENTING TO THE JURY ON THE DEFENDANT'S BURDEN OF PROOF AND UPON THE RIGHT TO REMAIN SILENT?

III.

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS TO THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS OR CRUEL?

IV.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE AGGRAVATING FACTOR OF "HEINOUS, ATROCIOUS AND CRUEL" APPLIED TO THE FACTS OF THIS CASE?

V.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT AGGRAVATING FACTOR OF "COLD, CALCULATED AND PREMEDITATED"?

VI.

WHETHER THE TRIAL COURT ERRED IN IMPOSING THE DEATH

PENALTY?

Initial Brief of Appellant, Florida Supreme Court Case No. 82,349, at 11. The Court affirmed Defendant's convictions and sentences on September 26, 1996. *Cummings-el v. State*, 684 So. 2d 729 (Fla. 1996). In doing so, this Court found the following facts:

> The defendant, Fred Cummings-El dated the victim, Kathy Good, for a short period and the two lived together for several months. After the relationship ended, Cummings-El harassed Good and she eventually obtained a restraining order after he assaulted her at a neighbor's house. He then made numerous verbal threats, such as: "Kathy, I'm going to kill you. Kathy, I'm going to kill you[ ]"; and "I love her. If I can't have her, nobody [can] have her"; and finally "If I can't have you, ain't nobody going to have you."
>
> Cummings-El broke into Good's home in the early morning hours of September 16, 1991, and stabbed her several times while she was sleeping, killing her. Several people heard Good's screams and saw Cummings-El at the scene. Good's eight year-old son, Tadarius, was asleep in bed with his mother and awoke to see Cummings-El "punching" his mother. Good's twenty year-old nephew, Michael Adams, was asleep on the floor of Good's bedroom and saw Cummings-El fleeing from the house. And Good's mother, Daisy Adams, confronted Cummings-El as he was leaving the bedroom. Cummings-El, whose face was only one or two feet from Daisy's, shoved Daisy to the ground and ran. Good then staggered from the bedroom and collapsed in her mother's arms, saying "Fred, Fred."

Id. at 730-31.

In affirming, this Court found the claims regarding the excusal of the veniremembers, the alleged comment on the right

to remain silent and the allegedly improper HAC instruction were procedurally barred. *Id.* at 731. This Court held that HAC and CCP were properly found and amply supported by the record. *Id.* Finally, this Court held that the sentence was proportionate. *Id.* Defendant sought certiorari review in the United States Supreme Court, which was denied on June 16, 1997. *Cummings-El v. Florida*, 520 U.S. 1277 (1997).

After numerous stays and extension of time from this Court, Defendant filed his initial shell motion for post conviction relief on May 13, 1998. (PCR. 32-46)[2] After CCRC-South withdrew and registry counsel was appointed, Defendant filed his Amended Motion for Post Conviction Relief on May 24, 1999. (PCR. 49-77) In this motion, Defendant raised 11 claims:

> I.
>
> DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, WERE VIOLATED BY COUNSEL'S INEFFECTIVENESS DURING VOIR DIRE IN FAILING TO PRESERVE FOR APPELLATE REVIEW THE ACTIONS OF THIS COURT IN STRIKING TWO MEMBERS OF THE JURY PANEL FOR CAUSE FROM SERVING AS JURORS WHO SAID ON VOIR DIRE THAT ALTHOUGH THEY DIDN'T WANT TO RECOMMEND THE DEATH PENALTY, THEY WOULD DO SO IF FOLLOWING THE LAW REQUIRED IT, AND BY SUCH COUNSEL'S FAILING TO

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[2] The symbols "PCR." and "PCR-SR." will refer to the record on appeal and supplemental record on appeal in the instant appeal, respectively. The symbol "PCT." will refer to the transcript of proceedings contained in volume 5 of the record on appeal in the instant appeal.

ADEQUATELY OBJECT TO THE OUTRAGEOUS PROSELYTIZING OF THE JURY PANEL DURING VOIR DIRE BY THE PROSECUTION.

II.

THE DEFENDANT[] WAS DENIED THE EFFECTIVE ASSISTANCE AT THE GUILT/INNOCENCE PHASE AND THE PENALTY PHASE OF THE TRIAL, IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION BY THE FAILURE OF HIS TRIAL COUNSEL TO CALL DAPHNE ROBERTS AS A WITNESS.

III.

DEFENDANT WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THE COUNTERPART PROVISIONS OF THE FLORIDA CONSTITUTION BY A COMBINATION OF THIS COURT NOT BEING REQUIRED BY FLORIDA LAW TO SPECIFICALLY REQUIRE THE JURY TO MAKE SEPARATE FINDINGS ON THEIR VERDICT OR VERDICTS AT THE GUILT/ INNOCENCE PHASE WITH RESPECT TO THE PROSECUTION'S CLAIM FOR PREMEDITATED FIRST DEGREE MURDER AND FOR FIRST DEGREE FELONY MURDER; BY THE COURT NOT NEVERTHELESS DOING SO; BY THE FAILURE OF DEFENDANT'S TRIAL COUNSEL TO MAKE A REQUEST THAT SUCH BE DONE; AND BY THE ACTION OF THE PROSECUTION IN ACTUALLY ARGUING TO THE JURY THAT IT COULD LAWFULLY RETURN A VERDICT FOR FIRST DEGREE MURDER BASED UPON SIX JURORS HAVING VOTED FOR FIRST DEGREE PREMEDITATED MURDER AND SIX JURORS HAVING VOTED FOR FIRST DEGREE FELONY MURDER; AND, LASTLY, BY THE FAILURE OF THE DEFENDANT'S TRIAL LAWYER TO EITHER OBJECT TO SUCH ARGUMENT OR TO MOVE THAT IT BE STRICKEN AND DISREGARDED.

IV.

DEFENDANT WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND UNDER THE COUNTERPART PROVISIONS OF THE FLORIDA CONSTITUTION BY THE FAILURE OF TRIAL COUNSEL TO RAISE AN OBJECTION TO A STATEMENT BY THIS COURT TO THE JURY TO THE EFFECT THAT WHILE IT WOULD BE POSSIBLE FOR THE DEFENSE TO NOT UTTER A WORD THROUGHOUT THE WHOLE TRIAL, THAT WOULDN'T AND SHOULDN'T HAPPEN, THE FAILURE OF HIS COUNSEL TO RAISE AN OBJECTION THERETO HAVING PROVEN TO BE A BAR TO THIS ISSUE BEING RAISED ON APPEAL. AND, OF COURSE, THE MAKING OF THIS STATEMENT IN THE FIRST INSTANCE

VIOLATED THESE CONSTITUTIONAL RIGHTS OF THE DEFENDANT.

V.

DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, BY SUCH COUNSEL'S FAILING TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE; INCLUDING INVESTIGATING WHETHER THERE WAS AVAILABLE EVIDENCE TO CONTEND FOR THE APPLICABILITY OF MENTAL HEALTH MITIGATING EVIDENCE, FAMILY RELATED, AND OTHER TYPES OF MITIGATING EVIDENCE.

VI.

DEFENDANT 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 COURT FOUND ONE OF THE AGGRAVATING FACTORS IN SUPPORT OF THE DEATH SENTENCE TO BE THAT THE MURDER OCCURRED DURING THE COMMISSION OF A FELONY, BECAUSE THAT FINDING WAS DUPLICATIVE OF ONE OF THE BASES FOR THE CONVICTION FOR FIRST DEGREE MURDER, i.e., FELONY-MURDER; WHEN THE COURT FOUND ANOTHER AGGRAVATING FACTOR IN SUPPORT OF THE SUPPORT OF THE DEATH PENALTY TO BE, "THE CAPITAL FELONY WAS....COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION BECAUSE THAT FINDING WAS DUPLICATIVE OF THE BASIS FOR THE CONVICTION FOR FIRST DEGREE MURDER, i.e., PREMEDITATED MURDER.

VII.

DEFENDANT WAS DENIED HIS FAIR TRIAL, DUE PROCESS AND OTHER INVOLVED FEDERAL AND STATE CONSTITUTIONAL PROTECTIONS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BY THE ACTIONS OF THE COURT IN FINDING APPLICABLE TO HIM BOTH THE AGGRAVATING CIRCUMSTANCE SET FORTH IN SECT. 921.141(5)(H), i.e., THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL AND THE AGGRAVATING CIRCUMSTANCE SET FORTH IN SUBSECTION (5)(I) OF THE SAID STATUTE, i.e., THAT THE CAPITAL FELONY WAS....COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION, FOR THE REASON THAT THESE TWO

AGGRAVATING CIRCUMSTANCES ARE AT LEAST PARTIALLY DUPLICITOUS OR AT LEAST PARTIALLY SO.

VIII.

DEFENDANT WAS DEPRIVED OF A LEVEL PLAYING FIELD AT BOTH PHASES OF THE TRIAL BECAUSE HIS ATTORNEY FAILED TO REQUEST THIS COURT TO APPOINT A SECOND LAWYER TO ASSIST IN HIS REPRESENTATION WHEN THE PROSECUTION CONSISTED OF TWO LAWYERS FROM BEGINNING TO END.

IX.

DEFENDANT'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, AND THE OUTCOME THEREOF WAS MATERIALLY UNRELIABLE BECAUSE THERE WAS NOT AN ADEQUATE AMOUNT OF ADVERSARIAL TESTING DUE TO THE CUMULATIVE EFFECT OF INEFFECTIVE ASSISTANCE OF COUNSEL, AND PROSECUTORIAL MISCONDUCT WITH THE RESULT THAT HE WAS DEPRIVED OF A FAIR TRIAL.

X.

DEFENDANT'S SENTENCE OF DEATH SHOULD BE VACATED BECAUSE A COMMENT MADE BY THIS COURT RAISES THE QUESTION AS TO WHETHER IT WAS INFLUENCED IN ANY MANNER BY DEFENDANT'S HAVING TOLD THE COURT THAT HE WANTED TO BE SENTENCED TO DEATH SHOULD THE JURY FIND HIM GUILTY AS CHARGED.

XI.

THE DEATH PENALTY IS PER SE CRUEL AND/OR UNUSUAL PUNISHMENT AND, ALTERNATIVELY, EXECUTION BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT, AND THE PUTTING OF DEFENDANT TO DEATH EITHER IN OR OUT OF THE ELECTRIC CHAIR VIOLATES HIS MOST BASIC RIGHT AS A CHILD OF GOD TO NOT HAVE HIS LIFE TAKEN FROM HIM AND HID MORE NARROW ABOVE-DESCRIBED RIGHT UNDER THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION AND THE COUNTERPART PROVISIONS OF THE FLORIDA CONSTITUTION.

(PCR. 49-77) In claim V, Defendant asserted that his counsel should have investigated mitigation but did not allege what such an investigation would have produced that could have been presented. (PCR. 59-63)

After the State filed its response, the lower court conducted a *Huff* hearing on July 23, 1999. (PCT. 1-58, PCR-SR. 2056-08) During this hearing, Defendant asked for an evidentiary hearing on the claims regarding ineffective assistance at voir dire but did not assert any factual dispute that needed to be settled. (PCT. 5-9) On the claim regarding ineffective assistance for failing to call Daphne Roberts, Defendant acknowledged that the claim "probably shouldn't be here." (PCT. 9) Defendant presented no argument on his claim of ineffective assistance of counsel for failing to object to the comment in voir dire. (PCT. 15)

With regard to the claim of ineffective assistance of counsel, post conviction counsel admitted that he had been unable to specifically plead what type of mitigation could have been presented because Defendant did not want mitigation presented, either at the time of trial or in the post conviction proceedings. (PCT. 15-24) In fact, Defendant had refused to provide releases for his records and generally refused to cooperate with an investigation into mitigating circumstances. (PCT. 15-24) The State pointed out that the record from the time of trial revealed that trial counsel had the same problem obtaining cooperation from Defendant, that counsel had then had a competency evaluation conducted on Defendant and that

Defendant had been found competent. (PCT. 24-27) Post conviction counsel suggested that trial counsel should have obtained the services of mental health professionals and investigators to try to convince Defendant to have cooperated. (PCT. 30-33) However, post conviction counsel admitted that Defendant may not have cooperated even if these steps had been taken. (PCT. 30-33) When pressed for a factual basis for the claim, Defendant asserted that trial counsel should have exerted more efforts to convince Defendant to allow the presentation of mitigation and should have presented evidence that Defendant came from a dysfunctional family. (PCT. 36-37) The State contended that even this assertion was legally insufficient but agreed to a limited evidentiary hearing in an abundance of caution. (PCT. 43-47)

After the hearing, the lower court summarily denied all of the claims except claim V. (PCR. 78-81) The lower court found all of the claims were procedurally barred, facially insufficient and/or conclusively refuted by the record. *Id.* However, the lower court granted an evidentiary hearing on the claim of ineffective assistance of counsel for failing to investigate and present mitigation out of an abundance of caution. *Id.*

After the *Huff* hearing, Defendant expressed his

dissatisfaction with his registry counsel. (PCR-SR. 277-78) After conducting a *Nelson* inquiry, the lower court discharged Defendant's first registry attorney and appointed new registry counsel. (PCR. 104-05, PCR-SR. 278-94, 328-30, 375-407, 412-15) Even during the *Nelson* inquiry, Defendant insisted that he did not want mitigation presented. (PCR-SR. 285-87, 334-36)

On June 22, 2000, six months after appointment of new counsel, Defendant filed his second amended motion for post conviction relief. (PCR. 112-20) This motion adopted the claims plead in the first amended motion and added 3 additional claims:

> XII.
> TRIAL COUNSEL FOR [DEFENDANT] WAS INEFFECTIVE FOR FAILING TO ARGUE THAT THE STATUTORY AGGRAVATING FACTOR OF "COLD, CALCULATED AND PREMEDITATED" (CCP), UNDER THEN-EXISTING CASE LAW, WAS INAPPLICABLE UNDER THE FACTS OF THE INSTANT CASE.
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> XIII.
> TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S RECALLING GUILT PHASE WITNESSES DAISY ADAMS AND JERRY ADAMS IN THE PENALTY PHASE, WHERE THEIR TESTIMONY, INTENDED TO SUPPORT A FIND OF "HEINOUS, ATROCIOUS, OR CRUEL" (HAC), WAS VIRTUALLY IDENTICAL TO THAT WHICH THEY PROVIDED DURING THE GUILT PHASE.
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> XIV.
> TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INTERVIEW MARTHA WOODEN AND DIANE ST. FLEUR, OR TO OTHERWISE OBTAIN AND RECORD INFORMATION FROM THEM RELATED TO POTENTIAL NON-STATUTORY MITIGATING CIRCUMSTANCES ARISING FROM [DEFENDANT'S] FAMILY HISTORY.

Id. On July 14, 2000, Defendant filed a third amended motion

for post conviction relief. (PCR. 132-40) This motion again adopted the previously filed claims and added an additional claim:

> XV.
> UNDERSIGNED COUNSEL, IN THE COURSE OF INVESTIGATING THE PREVIOUSLY-STATED CLAIMS, HAS LEARNED THAT A KEY STATE WITNESS, TADARIUS WILLIAMS, THE SON OF THE DECEDENT, HAS TWICE RECANTED HIS IDENTIFICATION OF [DEFENDANT] AS HIS MOTHER'S ASSAILANT.

Id.

The State filed a consolidated response to the second and third amended motions, asserting, *inter alia*, that the claims in these motions were time barred. (PCR. 163-96)

On July 27, 2000, Defendant filed a supplement to claim V, adding specific allegations about what nonstatutory mitigation counsel had allegedly been ineffective for failing to present. (PCR. 197-204) On September 25, 2000, the lower court held a second *Huff* hearing on the newly added claims. (PCR-SR. 585-672) During the hearing, Defendant asked that claim XIV be considered as a supplement to claim V. (PCR-SR. 601) The lower court found that the additional claims were untimely but agreed to consider them. (PCR-SR. 2050) However, the lower court summarily denied all of the additional claims, except claim XIV, which it considered to be a supplement to claim V. (PCR-SR. 2049-55) The lower court also denied claim XV without prejudice

to the presentation of sworn testimony by Tadarius Williams that he was recanting his trial testimony. (PCR-SR. 2049-55)

At the evidentiary hearing, Defendant called his sister, Catherine Covington, his niece, Catherine Wooden, his middle school principal, Moses Pool, the mother of four of his children, Deborah Dawson, his son Frederick and a childhood friend, Eddie Webster to testify regarding mitigation. Defendant also presented the testimony of three expert witnesses, Dr. Lynn Schram, Dr. Merry Haber, and Dr. Bruce Frumkin.

Defendant's sister, Catherine Covington, testified that Defendant's mother, Martha Wooden, was a "good mamma" and "a fair mother", but was not the type of parent to stay home with the children. (PCR-SR. 802-03) Instead, she preferred to stay out of the house playing cards. (PCR-SR. 803) Nonetheless, Defendant's mother was strict disciplinarian who would "beat" her children for their wrong doings. (PCR-SR. 818-23) Ms. Covington also testified that despite the fact Defendant's mother had several boy friends, Defendant had no real adult male role model while growing up and that Defendant grew up in a neighborhood filled with drug related activity. (PCR-SR. 881, 815-16)

When Defendant was twelve or thirteen years old, Ms.

Covington discovered that he was using drugs. (PCR-SR. 823, 826) Although she never saw him use drugs, she observed him while under the influence. (PCR-SR. 824-25) She knew that he was under the influence of narcotics because of his red eyes and because he "wasn't normal." (PCR-SR. 825-26)

Ms. Covington also testified that Defendant had four children and that when he returned from prison in North Carolina, the children lived alone with Defendant. (PCR-SR. 833-34) The family did not fear for the children's safety because Defendant "loved his kids." (PCR-SR. 836) While the children lived with Defendant, he interacted with them and took them to the store and to the park. (PCR-SR. 837) Ms. Covington never heard that Defendant had abused his children. (PCR-SR. 838) Ms. Covington also testified that Defendant was concerned about the children's education and upbringing and tried to teach them to be responsible notwithstanding his own mistakes. (PCR-SR. 839-41)

Ms. Covington also testified that before the trial in January 1993, she did not speak to trial counsel or anybody from his office and that to her knowledge, no attempts were made by counsel to talk to Defendant's family. (PCR-SR. 842-44) Ms. Covington spoke to trial counsel for the first time immediately before she testified. (PCR-SR. 844-47) Ms. Covington testified

that she was available to speak to trial counsel at all times after Defendant's arrest and would have cooperated with counsel if asked. (PCR-SR. 848)

During cross-examination, Ms. Covington demonstrated that her recall of Defendant's family history was not very accurate. (PCR-SR. 851-63) In fact, her memory was so deficient, she did not even know her brother's age, and she could not state with certainty who was living with Defendant at any given point in his life. (PCR-SR. 851-63) Nor could she recall with any certainty the nature of Defendant's prior convictions and the dates of his incarceration. (PCR-SR. 866-76)

Ms. Covington's testimony that Defendant was a loving and caring father who helped raise his children was impeached by the fact that she did not seem to recall that Defendant was incarcerated the majority of the children's lifetime. Ms. Covington testified that Defendant was arrested in 1973 and sent to the Job Corps program, that he was arrested and convicted in California for possession of concealed firearm and for public possession of a firearm, that he was convicted in North Carolina for two armed robberies and was sentenced to twelve years in prison, that he was arrested and convicted in Quincy, Florida, for aggravated battery within months of his return from North Carolina, and that he was arrested for this murder within months

of his release from prison for the Quincy conviction. (PCR-SR. 866-76)

Ms. Covington admitted that neither she nor any of her family members had witnessed the crime and that, although aware of the fact that Defendant was facing trial, neither she nor her family members made any attempt to contact trial counsel prior to trial. (PCR-SR. 875-83) Ms. Covington finally admitted that although she grew up in the same home and the same neighborhood as Defendant, she had never been arrested and she had never tried illegal drugs. (PCR-SR. 828, 897)

Catherine Wooden, Defendant's niece, testified that she was raised in her grandmother's four bedroom home with Defendant, some of Defendant's siblings and eight to ten of her grandmother's grandchildren. (PCR-SR. 910-12) According to Ms. Wooden, Defendant's mother was very strict disciplinarian who had a quick temper and would punish the punish the children for skipping school and not cleaning the house. (PCR-SR. 914-15) She saw Defendant's mother "whoop" Defendant with a mop handle, an extension cord and a belt. (PCR-SR. 915-21)

Ms. Wooden first became personally aware that Defendant was using drugs after he returned from serving time in prison in North Carolina. (PCR-SR. 922) Ms. Wooden personally saw Defendant using crack cocaine one time while Defendant's twelve

or thirteen year old son was sleeping in the next room. (PCR-SR. 924-26)

Ms. Wooden also testified that Defendant was a good father who spent time with his children and made the children to do chores around the house. (PCR-SR. 934-73, 943,945)

Ms. Wooden did not speak to trial counsel until the day the jury returned a verdict against Defendant. (PCR-SR. 959) According to Ms. Wooden, trial counsel told her that she might be called as a witness, but he never spoke to her about her potential testimony. (PCR-SR. 959-62)

During cross-examination, Ms. Wooden admitted that Defendant was not a being a good father when he repeatedly committed crimes, was arrested and was incarcerated. (PCR-SR. 967-71) Ms. Wooden's testimony that Defendant was a good father was further impeached by the fact that she could not recall how much time Defendant actually spent with the children and how much time he spent in prison before he was arrested for the murder in 1991. (PCR-SR.967-71) Ms. Wooden's testimony was finally impeached by her admission that "good father's (sic) don't use drugs" and that children often learn by example. (PCR-SR. 978, 980-81)

Moses Poole, former Assistant Principal of Cutler Ridge Junior High, met Defendant when Defendant was in the seventh grade. (PCR-SR. 986) While Defendant was a student at Cutler

Ridge Junior High, he was friendly, pleasant, and well liked by his peers. (PCR-SR. 987-89, 991-92) Defendant was not a discipline problem and was an average student. (PCR-SR. 990)

On cross-examination, Mr. Poole testified that he never observed Defendant under the influence of drugs when Defendant was in the seventh, eighth or ninth grades. (PCR-SR. 998) Mr. Poole did speak to Defendant's mother about Defendant's sister Annie and brother Jules. (PCR-SR. 992-97) Ms. Wooden did not appear to cooperate regarding the discipline of these two children, but rather seemed unable to control their behavior. (PCR-SR. 1000-01)

Deborah Dawson, the mother of four of Defendant's children, testified for the defense. Although they were never legally married, she and Defendant were together nine years. (PCR-SR. 1419) She met Defendant when she was fifteen or sixteen years old and was pregnant with her first child within a month of having met Defendant. (PCR-SR. 1420) She knows Defendant was using drugs while they were living in California because she and Defendant used drugs together in California. (PCR-SR. 1423) Ms. Dawson never used drugs until she lived with Defendant in California. (PCR-SR. 1423) Usually, the two would use crack cocaine together. (PCR-SR. 1423-24) She did not know what amount of drugs Defendant used when he was not with her. (PCR-

SR. 1424-25) During her time with Defendant, he appeared to be "in control with his drugs when he was using drugs." (PCR-SR. 1427) She did not know if Defendant also abused alcohol. (PCR-SR. 1428)

Ms. Dawson admitted that she and Defendant argued while they were together and that Defendant had slapped her "a couple of times." (PCR-SR. 1431) Ms. Dawson denied that Defendant was verbally abusive and claimed that Defendant did not hit her hard. (PCR-SR. 1432-33) Defendant was not physically or verbally abusive toward the children. (PCR-SR. 1432-33)

During cross-examination, Ms. Dawson testified that she had two toddlers and was pregnant with her third child when Defendant decided to move to California. (PCR-SR. 1435-36) Defendant did not discuss the move with the mother of his children before leaving. (PCR-SR. 1436) Instead, Defendant simply left for California without making any arrangements regarding Ms. Dawson and the children. (PCR-SR. 1436-37)

Ms. Dawson also testified that although Defendant worked for a period of time in California, he was not employed the entire time the family lived in California. (PCR-SR. 1439) In fact, Ms. Dawson could not recall that Defendant had been arrested five times while in California or that during the three years that she lived California, Defendant spent nine or ten months in

prison. (PCR-SR. 1440-41)

After returning from California, the family spent approximately one year together in Miami before Defendant moved to North Carolina, where Defendant was again incarcerated (PCR-SR. 1444-45) Defendant did not discuss his intent to leave Miami for North Carolina with Ms. Dawson before leaving. (PCR-SR. 1447) While they were together, Ms. Dawson never saw Defendant use any other drug than crack cocaine. (PCR-SR. 1448) Ms. Dawson testified that Defendant was not violent while under the influence of crack cocaine. (PCR-SR. 1448)

Frederick Dawson, Defendant's son, also testified for the defense. During direct examination, Frederick testified that his first memories of his father were when his father came home from prison in North Carolina when he was approximately six years old. (PCR-SR. 1456-47) When Defendant was released from prison, Frederick was living with Defendant's sister, Diane St. Fleur. (PCR-SR. 1456-57) Once Defendant got a job, the boys moved with Defendant to an apartment. (PCR-SR. 1457) According to Frederick, Defendant was a good father who taught his children to respect their elders, not to disrespect the teacher at school, to get their work done and to do their chores. (PCR-SR. 1459-60) According to Frederick, Defendant would "whoop" his children with a belt if they got into trouble but never hard

enough to draw blood or leave bruises or welts. (PCR-SR. 1460-61) Defendant also told his children that prison was no place to be and that they go to school instead of going to prison. (PCR-SR. 1462)

Frederick Dawson's testimony was impeached on cross-examination by the fact that Defendant was in prison in North Carolina from 1983-1990 and the fact that Frederick was too young to remember his father from before the North Carolina incarceration. (PCR-SR. 1464-65) Frederick's testimony was further impeached by the fact that Defendant was released from prison in North Carolina in December 1990 and was arrested in this case in September 1991, after living with his family for only nine months.[3] (PCR-SR. 1465)

Eddie Webster testified that he has known Defendant approximately thirty-two years. (PCR-SR. 1954) When Mr. Webster was approximately thirteen years old, he and Defendant began smoking cigarettes together. (PCR-SR. 1955) When Defendant was approximately fourteen years old, he began inhaling gasoline. (PCR-SR. 1956) According to Mr. Webster, the pair inhaled gasoline about twice a week for one month. (PCR-SR. 1956-57) When Defendant returned from California, he and Webster smoked

[3] This calculation ignores the time spent by Defendant incarcerated in Quincy Florida.

crack cocaine together. (PCR-SR. 1957-58) When asked what drugs Defendant was using when he came back from California, Webster replied "maybe marijuana." (PCR-SR. 1959) Webster further testified that he did not know what drugs, if any, Defendant used when they were not together. (PCR-SR. 1959-60)

Dr. Lynn Schram, a neuropsychologist, testified that he had been in private practice for 9 years. (PCR-SR. 1118) He had only been qualified as an expert once before in a civil case. (PCR-SR. 1123) He had not participated in any seminars or training programs. (PCR-SR. 1128) Dr. Schram was unfamiliar with any of the legal concepts related to mental health, including the definition of the mental health mitigating circumstances. (PCR-SR. 1128-30)

Dr. Schram administered a battery of tests to determine whether Defendant had any signs of brain damage. (PCR-SR. 1135-37) The first test administered was the California Learning Test, which measures memory in adults. (PCR-SR. 1148) Defendant had a score that fell into the low normal borderline range. (PCR-SR. 1149) The next test performed was the Stroop Color Word Test, which measures the ability to inhibit one response while doing another. (PCR-SR. 1152) Defendant's score fell in the severely impaired range, two standard deviations below the norm. (PCR-SR. 1154) Dr. Schram's interpretation of

this was that Defendant might find it difficult in situations where he had to move from one thing to another or where he had to hold one idea while he considered another. (PCR-SR. 1155) The next test performed was the Speech, Sounds, Perception Test, which measures attention and concentration. (PCR-SR. 1156). Defendant scored in the low/mildly impaired range which was indicative of some kind of deficit. (PCR-SR. 1158) On the Seashore Rhythm test, another test of attention and concentration, Defendant scored in mild to moderately impaired range. (PCR-SR. 1159, 1161)

Following this, Dr. Schram administered the delayed recall section of the California Learning Test. (PCR-SR. 1161) Defendant's score fell within the normal range of functioning. (PCR-SR. 1163) Dr. Schram next administered the logical memory subtest of the Wechsler Memory Scale Revised. (PCR-SR. 1163) Here, Defendant fell with a normal range of functioning. (PCR-SR. 1164)

On the Ground Peg Board, which measures manual dexterity, Defendant fell within the normal range on both sides. (PCR-SR. 1165-66) Following this test, Trials A & B Test was administered. (PCR-SR. 1166) This test measures visual scanning, sustained attention and psychomotor speed. *Id.* Defendant scored within the normal range of functioning. (PCR-

SR. 1167) Defendant's performance was also within the normal range on the Hooper Visual Organization Test, which measures visual synthesis, and on the visual reproduction sub-test of the Wechsler Memory Scale Revised. (PCR-SR. 1169) On the Judgment of Line Orientation Test, which measures angular relationships and visual space perception, Defendant's score fell within the low normal range. (PCR-SR. 1171-72).

In the Digits Forward and Digits Backwards Test, which was the final test, Defendant scored below normal. (PCR-SR. 1172-76) According to Dr. Schram, indicates that Defendant had difficulty "hold[ing] one thing in mind while he does another." (PCR-SR. 1172-1176)

Based upon his review of the test results and the materials provided to him, Dr. Schram concluded that Defendant suffers from "an attention/concentration problem." (PCR-SR. 1180) This opinion was based in large part on Dr. Schram's conclusion that Defendant did not have cognitive flexibility. (PCR-SR. 1180) Dr. Schram attributed Defendant's self-reported use of inhalants and narcotics as the likely cause of Defendant's organic brain damage. (PCR-SR. 1182-86) In Dr. Schram's opinion, the brain damage detected by his testing would have been detectable before Defendant's trial. (PCR-SR. 1207-09)

Dr. Schram admitted that while his testing is suggestive of

organic brain damage, the tests do not indicate brain damage with certainty. Ordinarily, brain damage would be confirmed by examining the life history of the patient. (PCR-SR. 1210-13, 1229-30) However, Dr. Schram was not asked to confirm or verify Defendant's self-reported history of drug and alcohol abuse. (PCR-SR. 1215-16, 1229-30) Nor was he asked to determine the source of the brain damage suggested by the tests administered by him. (PCR-SR. 1230) Dr. Schram stated that because he did nothing more than administer the tests and report the results, he was unable to render an opinion as to how Defendant functions in everyday life in terms of executive function. (PCR-SR. 1212, 1233-34)

Dr. Merry Haber testified that she was asked to evaluate Defendant and develop a social history to determine if there were any mitigating factors that would affect his sentence of death. (PCR-SR. 1313) Dr. Haber described Defendant's upbringing as anti-social and recounted Defendant's self reported drug abuse and social history. (PCR-SR. 1318-33) In Dr. Haber's opinion, Defendant was unable to conform his conduct to the requirements of the law at the time of the murder because of the way he was raised. (PCR-SR. 1334) She further opined that Defendant has "been under extreme mental and emotional disturbance almost all of his life" as a result of the

environment in which he was raised and his antisocial personality disorder. (PCR-SR. 1335-36, 1341)

On cross-examination, Dr. Haber admitted that she did nothing to confirm or corroborate the social history provided to her by Defendant and defense team. (PCR-SR. 1369) When asked whether she considered Defendant's criminal history as a source of corroboration, Dr. Haber indicated her surprise that the criminal history included no drug related arrests. (PCR-SR. 1369-73)

Dr. Haber also admitted that the drop in grades in seventh grade relied upon by her to corroborate Defendant's self-reported drug usage could have just as easily been attributed to factors unrelated to drug use. (PCR-SR. 1374-76)

On cross-examination, Dr. Haber described an antisocial personality as "a pattern of irresponsible, reckless behavior. Not fitting within the norms of societies, not conforming one's conduct to the rules and regulations of the society. Being reckless, impulsive, very frequently accompanied by the use of substances, illicit substances." (PCR-SR. 1379) When asked about the prognosis for possible treatment, Dr. Haber admitted that the prognosis was very poor in part because of Defendant's manipulative nature. (PCR-SR. 1385-89)

Dr. Haber's conclusion that Defendant was unable to act in

conformity with the law as a result of his upbringing was impeached by the fact that least two of Defendant's siblings and one niece who were raised in the same home with Defendant had never been arrested for committing any crimes. (PCR-SR. 1400-01)

Dr. Bruce Frumkin, a forensic and clinical psychologist, evaluated Defendant. (PCR-SR. 1474) During the course of the evaluation process, Dr. Frumkin received a self-reported social history from Defendant, which included an extensive account of substance abuse, including the use of inhalants, marijuana, cocaine, heroin, Quaaludes, crack cocaine, P.C.P., barbiturates and alcohol allegedly beginning at age nine or ten. (PCR-SR. 1477-79)

Dr. Frumkin gave Defendant the MMPI2. (PCR-SR. 1481-84) Defendant's score was elevated on the scales for psychopathy, hysteria and depression. *Id.* Based these results, Dr. Frumkin testified that Defendant "has Antisocial Personality features." (PCR-SR. 1481) If he were to guess, he would probably conclude that Defendant was depressed and suffered from a poly-substance disorder. (PCR-SR. 1491-92) Dr. Frumkin would also guess that Defendant would not meet the criteria of Antisocial Personality Disorder, notwithstanding his previous testimony that Defendant demonstrated Antisocial Personality features as reflected in the

MMPI 2. (PCR-SR. 1491)

In response, the State of Florida presented the testimony of Dr. John Spencer, a clinical forensic psychologist, Dr. Jane Ansley, a neuropsychologist, and Theodore Mastos, trial counsel, with regard to the issue of penalty phase ineffectiveness.

Dr. Spencer also interviewed and evaluated Defendant. (PCR-SR. 1541-42) In Dr. Spencer's opinion, Defendant demonstrated an Antisocial Personality Disorder and was functioning in the average to low average range of intelligence. (PCR-SR. 1542-43) Nothing in his interaction with Defendant suggested any "gross cognitive impairments." (PCR-SR. 1543-44) Although Defendant ultimately agreed to cooperate with Dr. Spencer, Defendant initially refused to be interviewed or evaluated by Dr. Spencer. (PCR-SR. 1547) In addition to the testing materials, Dr. Spencer relied on prison records, criminal records, Florida Department of Corrections medical and psychological treatment records, materials relied upon by Dr. Haber, previous evaluations of Defendant, and correspondence by Defendant to his attorneys. (PCR-SR. 1547-52) When asked to describe the Antisocial Personality disorder diagnosis, Dr. Spencer explained that a person demonstrating an Antisocial Personality Disorder does not have any regard for the rights of others and is generally "more concerned with their own wants, needs, likes."

(PCR-SR. 1553-54) An individual with this diagnosis is not likely to be delusional or suffering from a break with reality. (PCR-SR. 1554-59) Dr. Spencer further explained that a personality disorder is not comparable to a psychotic disorder in the sense that an individual suffering from a psychotic disorder would not be aware of the inappropriateness of the behaviors resulting from the psychosis. (PCR-SR. 1558-59) Dr. Spencer further described Defendant by referencing the Magarty Classification System. (PCR-SR. 1562) Defendant's score on this test suggests that:

> he is an impulsive and non-reflective person who may have a history of serious legal offenses. His problems have probably resulted from a hedonistic form of lifestyle an[d] inability to delay gratification . . . He may have had significant interpersonal difficulty in the past. Anger and Violence may result if he's provoked. His basic problem [s] to be he's impulsive and insist[s] on having his own way, regardless of law or feeling[s] of other people."

(PCR-SR. 1563) According to Dr. Spencer, an Antisocial Personality Disorder diagnosis is a pervasive, chronic, lifelong pattern with poor prognosis for his own situation. (PCR-SR. 1564) Dr. Spencer also disagreed with the suggestion that Defendant's cognitive flexibility was in any way impaired and used a videotaped interview of Defendant to demonstrate Defendant's cognitive flexibility. (PCR-SR. 1568-85)

Theodore Mastos, Defendant's trial attorney, testified and

described his experience as an Assistant State Attorney, a County Court Judge, a Circuit Court Judge, and a defense attorney. (PCR-SR. 1701-04) During the twenty-seven years he had been admitted to the bar, Mr. Mastos handled hundreds of cases as an attorney and thousands as a judge. (PCR-SR. 1701-04) Mr. Mastos handled death penalty cases as a defense attorney and presided over death penalty cases as a judge. (PCR-SR. 1704)

In Mr. Mastos' opinion, the strength of the State's case against Defendant rested on the fact that the murderer was observed in the house at the time of the murder, that fact that Defendant was named as the murderer by the victim's family members who were present at the time of the murder and the fact that the witnesses knew Defendant from his previous association with the victim. (PCR-SR. 1705-08) The eyewitness identifications were significant in Mr. Mastos' opinion because Defendant's only defense was a claim of mistaken identity. (PCR-SR. 1708) The defense was based primarily on Defendant's insistence that he was not guilty. (PCR-SR. 1708-09) Mr. Mastos considered the possibility of pursuing a second degree murder conviction but could not proceed with that option as Defendant refused to place himself at the scene. (PCR-SR. 1710)

Mr. Mastos described his relationship with Defendant as a

trusting, respectful one. Mr. Mastos also testified that Defendant was involved in the preparation of the case to the extent that Defendant read the depositions and noted the inconsistencies in the testimony. (PCR-SR. 1713) Defendant was, however, a strong willed client who was not easily steered by his attorney. (PCR-SR. 1713-14) Mr. Mastos was very impressed with Defendant's analytical abilities with regard to the depositions and saw no evidence of organic brain damages or undiagnosed mental illness. (PCR-SR. 1713-14) Nonetheless, Mr. Mastos did ask that Defendant be psychologically evaluated before trial. (PCR-SR. 1714-15)

This request was made because Defendant refused to consider the possibility of a penalty phase and Mr. Mastos wanted to ensure that the decision was a free and voluntary one, not one clouded by some undiagnosed mental problem or brain impairment. (PCR-SR. 1714-16) Mr. Mastos was told that Defendant suffered from no major mental illnesses, that Defendant understood the nature and consequences of his decision and that he was freely choosing not to present any penalty phase evidence. (PCR-SR. 1715)

Mr. Mastos testified that he discussed the bifurcated procedure, the concept of aggravators and mitigators and the importance of penalty phase evidence with Defendant. (PCR-SR.

1716) Mr. Mastos noted that Defendant seemed to view the presentation of mitigation evidence as a sign of weakness and turned on Mr. Mastos when Mastos suggested that Defendant be evaluated with regard to his ability to choose not to present mitigation evidence. (PCR-SR. 1717-18, 1751-52) Mr. Mastos ultimately did speak to two of Defendant's sisters. (PCR-SR. 1721, 52) Accordingly, Mr. Mastos had no choice but to attempt to put a "human spin" on the case in an attempt to convince the jury to spare Defendant's life. (PCR-SR. 1721, 1723) Mr. Mastos recalled that he pointed out Defendant's children to the jury in an attempt to humanize Defendant "because [he] has so little to work with." (PCR-SR. 1717-18)

Mr. Mastos testified that he was familiar with the aggravators and mitigators. (PCR-SR. 1727) When asked if he would considered telling the jury that Defendant had been diagnosed as suffering from an antisocial personality disorder with a suggestion that Defendant was a psychopathic manipulator, Mr. Mastos opined that presenting such evidence would only "make a bad situation worse" and compared the suggestion to throwing gasoline on a fire. (PCR-SR. 1727, 1770-71) Mr. Mastos further testified that he would not have presented a social history, which indicated that Defendant came from a family of criminals and had himself lived a criminal life because of the negative

impact it would have on the jury. (PCR-SR. 1728, 1775)

Although evidence of alcohol or drug use "can cut both ways," Mr. Mastos would have considered presenting evidence of drug use if Defendant had "come clean"[4] with him, as he did "after it was all over" and indicated that the crime was induced by cocaine use. (PCR-SR. 1728) Because Defendant refused to refused to place himself at the scene, testimony of drug use "wouldn't mean anything" (PCR-SR. 1729) In Mr. Mastos' professional opinion, evidence of drug use at the time of the crime itself would probably have been of little use because "[j]urors are not sympathetic to junkies generally" and because evidence of drug abuse would cause the jury to "like him less." (PCR-SR. 1729, 1792) Mr. Mastos further opined that Defendant could not argue that the crime was committed while Defendant was under the influence of extreme mental or emotional disturbance or that the capacity of Defendant to appreciate the criminality of his conduct or conform his conduct to the requirement of the law was substantially impaired because of his adamant denial of his guilt and refusal to place himself at the scene. (PCR-SR. 1729)

Mr. Mastos further testified that he looked at North

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[4] After the penalty phase, Defendant confessed to Mr. Mastos that he had committed the murder but claimed to have done so while intoxicated. (PCR-SR. 1810)

Carolina Prison records before the penalty phase. (PCR-SR. 1730) Mr. Mastos did not use those records at the penalty phase because the records contained numerous disciplinary violations reflecting violent fights and he did not want the jury to hear the evidence. (PCR-SR. 1730) In other words, it was a strategic decision not to tell the jury that Defendant had been involved in fights while incarcerated. (PCR-SR. 1731)

On cross-examination, Mr. Mastos testified that he was so concerned about Defendant's refusal to consider the presentation of mitigation evidence that he consulted with other attorneys about the matter. (PCR-SR. 1754-55) Mr. Mastos also testified that the "second chair specialists" who now have experts on hand to evaluate death penalty defendants did not exist when Defendant's case was tried and that the resources available today were not available when Defendant's case was brought to trial (PCR-SR. 1756-57 1800) When it was suggested on cross-examination that Defendant acquiesced in the presentation of a penalty phase, Mr. Mastos testified very strongly that the minimal cooperation suggested by the trial transcripts in no way demonstrated authority to speak to family members and investigate the family history for mitigation evidence and that the only testimony that was presented was allowed "grudgingly." (PCR-SR. 1759-60) The transcripts suggesting minimal

acquiescence do not reflect the tone recalled by Mr. Mastos. (PCR-SR. 1759-60, 1794-95) Mr. Mastos further testified that he asked Defendant to have family members call Mastos and nobody called. (PCR-SR. 1765) Mr. Mastos also did not request further mental health evaluations because Dr. Jacobson found nothing wrong with Defendant and there seemed to be no need for further examination. (PCR-SR. 1765-66) In fact, Dr. Jacobson's report raised no "red flags" suggesting prior or present psychiatric difficulties, no prior or present psychiatric difficulties, no substance abuse problems, and no reference to prior use of gasoline, transmission fluid, heroin, speed balls, or pesticides. (PCR-SR. 1795-1800)

Dr. Ansley completed a neuropsychological examination of Defendant. (PCR-SR. 1837) In Dr. Ansley's opinion, Defendant functioned in the low average intelligence range and met the criteria for Antisocial Personality Disorder. (PCR-SR. 1837) Dr. Ansley testified that Defendant showed no signs of organic brain damage and specifically testified that Defendant showed no signs of executive functioning deficit. (PCR-SR. 1839) Dr. Ansley's opinions were based in large part upon the raw data from the tests administered by the Dr. Schram. (PCR-SR. 1839-43) The testing by both Dr. Frumkin and Dr. Spencer indicates that Defendant the diagnosis of "Psychopathic Deviate

Personality is the one that is most descriptive of this defendant." (PCR-SR. 1854) The results showed Defendant to be an impulsive and non-reflective person with problems resulting from a hedonistic lifestyle and inability to delay gratification. (PCR-SR. 1856) The tests further suggested that Defendant would insist on having his own way "regardless of law or feelings of other people." (PCR-SR. 1856-57)

Dr. Ansley relied on Dr. Schram's report that indicated that Defendant has no memory deficiency. (PCR-SR. 1859) She testified that memory is the most easily injured aspect of brain functioning due to brain damage. *Id.* She stated that Dr. Schram's report indicated Defendant had borderline perseveration. (PCR-SR. 1859-60) Perseveration is a measure of one's loss of ability to engage in straight forward communication. (PCR-SR. 1861) A person will start and stop if the brain is injured. *Id.* To determine the amount of perseveration, Dr. Ansley administered the Miami Learning Test, which is a verbal learning test where the subject has to repeat what the examiner said. *Id.* Defendant had normal scores on this test. (PCR-SR. 1863-66) Dr. Schram's report stated that there was perseverance in the area of attention. *Id.* Dr. Ansley gave Defendant the Wexler Memory Scale 3 Test and concluded that Defendant was low average to borderline. (PCR-

SR. 1868)

Dr. Ansley testified that attention is one of the most basic skills for any test given. (PCR-SR. 1870) A lack of attention will impact the results of all other tests. *Id.* She performed the Digits Forward and Digits Backward tests. (PCR-SR. 1871). Defendant had no performance problems on the Digits Forward test. (PCR-SR. 1871-1872) She testified that he had some problems on the Digits Backwards test. (PCR-SR. 1872-73) Dr. Ansley stated that she, herself, took the Digits Backwards test, and her score was similar to that of Defendant. (PCR-SR. 1873-76) Dr. Ansley found that, in general, Defendant performed in the low average range of the tests. *Id.* Interestingly, she concluded that he performed as well on tests that do not require great attention as on tests that require attention to do well. (PCR-SR. 1876-77)

Dr. Ansley also evaluated Defendant's executive functioning. Because Dr. Schram's report noted deficits in cognitive flexibility, or the ability to change course, Dr. Ansley used the Wisconsin test. Id. In this test, four cards are put on the table. (PCR-SR. 1882) There are different figures, colors and numbers on the cards. *Id.* The subject is given a card and asked to put the card where it belongs. (PCR-SR. 1882-83) All the examiner says is right or wrong. *Id.* Cards can be put with

the same number, the same color, or shape. *Id.* The examiner changes the category without telling the subject. (PCR-SR. 1883-84) It tests the ability to deal with feedback. *Id.* The category is changed again. *Id.* Defendant did not have any problem with this test. *Id.*

Dr. Ansley also testified that she had Defendant perform the Tactical Performance Test. (PCR-SR. 1885) In this test, the subject is blindfolded and has to place blocks in the right hole, using one hand, in a certain amount of time. *Id.* The examiner only gives encouragement when the subject does it. *Id.* It requires developing a strategy. *Id.* Dr. Ansley also considered the results obtained by Dr. Schram and concluded that they did not support the conclusion that Defendant suffered from any serious attention problem. (PCR-SR. 1877) Based on this information, Dr. Ansley opined that Defendant did not have a problem with his executive functioning. (PCR-SR. 1878-89)

Dr. Ansley's testified that although drug and alcohol use cause organic brain damage, it does not necessarily follow that organic brain damage will follow drug and alcohol abuse. (PCR-SR. 1896-97)

Dr. Ansley further testified that the fact of this crime suggested that the crime was committed by a person with intact executive functioning. (PCR-SR. 1901, 1904) Moreover, nothing

in Defendant's neuropsychological profile suggested that Defendant was incapable of committing the crime as it occurred. (PCR-SR. 1901-04) Dr. Ansley's examination of Defendant did not suggested that Defendant was operating under the influence of any sort of extreme mental or emotional disturbance at the time of the crime or at the time of the examination. (PCR-SR. 1905) The testing also did not suggest that Defendant lacked the ability to appreciate the criminality of his conduct or conform his conduct to the requirement of the law at the time of the crimes. (PCR-SR. 1906)

During cross-examination, Dr. Ansley testified that Dr. Haber's conclusion that Defendant "had good insight and awareness as to his problems" was not only inconsistent with Dr. Ansley's observations, it was also inconsistent with the suggestion that Defendant has "impaired executive skills." (PCR-SR. 1917-18)

After considering the testimony presented at the evidentiary hearing and the written arguments of counsel, the lower court denied the remaining claims, after making extensive factual findings and conclusions of law. (PCR. 332-45) The lower court rejected the claim of deficiency because counsel was following the wishes of his competent client. It also found that counsel was not ineffective for failing to present additional testimony

about Defendant's family because it would have exposed the jury to negative information. It also found that not presenting evidence of drug use and antisocial personality disorder because of its negative impact on the jury was proper. The lower court rejected the claim that Defendant was brain damaged based on a credibility determination. Finally, the lower court found that there was no reasonable probability that presentation of the proposed mitigation would have affected Defendant's sentence. As such, the lower court denied post conviction relief.

This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly summarily denied the claim that counsel was ineffective for failing to request the appointment of a second attorney, particularly since the argument advanced in support of this claim was not presented to the lower court.

The lower court properly summarily denied the claim of ineffective assistance during voir dire. The claim regarding the manner in which the State questioned the venire was not raised below. Moreover, the State did not act improperly. The issue of the excusal of Mr. Kozakowski is procedurally barred and without merit.

The lower court properly summarily denied the claim regarding its comment during voir dire. The comment was proper, and there is no reasonable probability of a different result at trial had an objection been made.

The lower court properly found that counsel was not ineffective for failing to investigate and present mitigation. Its factual findings are supported by competent, substantial evidence and its legal conclusions are correct.

The lower court properly denied the claim that counsel was ineffective for failing to call Ms. Roberts in the penalty phase. Her testimony would have been cumulative to evidence

already presented. The claim that this testimony would have negated CCP was not presented below and is procedurally barred.

The lower court properly summarily denied the claim that counsel was ineffective for failing to object to the testimony of Michael and Daisy Adams at the penalty phase. The claim is procedurally barred and without merit. The claim of cumulative error was properly summarily denied.

ARGUMENT

I. THE LOWER COURT PROPERLY DENIED THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST THAT A SECOND LAWYER BE APPOINTED TO REPRESENT DEFENDANT.

Defendant first asserts that his trial counsel was ineffective for failing to request that a second attorney be appointed to represent him. Defendant contends that a second attorney was necessary because trial counsel did nor have sufficient experience to try a capital case on his own. However, the lower court properly rejected this claim as meritless, particularly considering that the claims of inexperience were not raised below and are refuted by the record.

This Court has consistently rejected claims that counsel was ineffective for failing to request that a second attorney be appointed. *State v. Riechmann*, 777 So. 2d 342, 378 (Fla. 2000); *Larkins v. State*, 655 So. 2d 95 (Fla. 1995); *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994). Given this Court's repeated denial of this claim, the lower court properly summarily denied it. It should be affirmed.

In a belated attempt to show that a second attorney should have been requested, Defendant asserts that his trial counsel was inexperienced. However, this rationale was not advanced in

the lower court. In the lower court, the totality of Defendant's claim in this regard was:

> Regardless of what the motive of Defendant's trial counsel was in not seeking the appointment of a second defense counsel for this indigent death penalty case defendant, it was a decision that penalized Defendant with an unfair advantage from the beginning of the Guilt/Innocence phase to the final sentencing by the Court.
>
> Had Defendant's trial counsel availed his client of this clear equalizing step, probably many of the deficiencies involved in the defense of the case would have been averted, if for no other reason but that the said defense counsel would have someone else to confer with other than a defendant who was, at least, obsessive compulsive in his wishes about how the trial should be conducted and, at most, was so mentally disturbed that some or all of the wishes he voiced as to how his trial should be conducted were self destructive.
>
> This was a critical error in judgment on the part of the defendant's trial attorney.

(PCR. 67-68) As can be seen from the foregoing, this claim was facially insufficient and was properly summarily denied. *Riechmann*, 777 So. 2d at 378; *Armstrong*; *Larkins*. Moreover, the claim does not include any allegation that a second attorney was needed due to inexperience on the part of trial counsel. This Court has held that it is inappropriate to add new allegations on the appeal from the denial of a motion for post conviction relief. *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988). As such, the denial of this claim should be affirmed.

Even if the allegations of inexperience were properly before

the Court, they are not true. The record reflects that trial counsel had been an attorney for about 18 years at the time he was appointed to represent Defendant. (PCR-SR. 1702) Trial counsel had also been a county and circuit judge and had sentenced defendants to death. (PCR-SR. 1702, 1704) As an attorney, Mr. Mastos has handled hundreds of cases. (PCR-SR. 1703) As a judge, he had handled thousands. *Id.* As a defense attorney, Mr. Mastos tried one capital case prior to Defendant's, *State v. Darvy & Harris*. Both defendants in that case were acquitted. (PCR-SR. 1704) Moreover, while Defendant points to a handful of cases over which trial counsel presided as a judge, Defendant does not show how this resulted in any deficiency in counsel's performance in this case or how this resulted in a reasonable probability of a different result in this case. As such, the lower court would have properly denied this claim, had these assertions been made before it.

II. THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE WAS PROPERLY SUMMARILY DENIED.

Defendant next asserts that the trial court improperly summarily denied his claim that counsel was ineffective for failing to object to the manner in which the State questioned the venire regarding the issue of the death penalty. He also contends that counsel was ineffective for not objecting to the excusal of Mr. Kozakowski for cause.[5] However, the trial court properly denied this claim because of the manner in which it was actually plead below.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court announced the standard under which claims of ineffective assistance must be evaluated. A petitioner must demonstrate both that counsel's performance was deficient, and that the deficient performance prejudiced the defense.

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

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[5] In the title of the claim, Defendant also asserts that trial counsel was ineffective for failing to object to the excusal of Mr. Oshinsky for cause. However, Defendant makes no argument about why the excusal of Mr. Oshinsky was erroneous or how counsel was ineffective in this regard. As such, any issue regarding the excusal of Mr. Oshinsky is not properly before this Court, as it has been waived. *Anderson v. State*, 27 Fla. L. Weekly S580 (Fla. Jun. 13, 2002); *Duest v. Dugger*, 555 So. 2d 849, 952 (Fla. 1990).

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. The test for prejudice requires the petitioner to show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Id.* at 694.

Here, the entirety of this claim as raised in the trial court was:

> The two involved jury panel member were Mr. Kozakowski and Mr. Oshinsky.
>
> The record shows that through extensive voir dire questioning by the prosecutor, Mr. Kozakowski leaned toward favoring life imprisonment over the death penalty, but that he could and did particularize situations where he would have no objections to recommending the death penalty. Under these circumstances, this Court should not have stricken this panelist for cause, particularly where the involved prosecutor’s argument was buttressed upon Mr. Kozakowski allegedly being “totally and irrevocably”, when those words were used by the prosecutor and not by the panelist.

> Mr. Oshinsky's firmness in saying that he would follow the law and vote to recommend the death penalty was also challenged on voir dire by the prosecution, but this Court abruptly cut off that questioning with the remark, "There's no sense in talking with Mr. Weiser or with a number of other people, sir. We have to move on".
>
> Thereafter the following colloquy occurred:
>
> "....Mr. Oshinsky: Which are you asking about, the reasonable doubt?
>
> Mr. Honig: Yes.
>
> Mr. Oshinsky: Well, that hasn't been asked of me.
>
> The Court: It's not needed to at this time." (T-343)
>
> Here again Defendant's trial counsel failed to sufficiently preserve on the record his objections to the striking of these jurors, and as a result thereof----as the Supreme Court of Florida found in its decision in this case----it declined to consider the matter of the constitutional propriety of the cause striking of these two panelists.
>
> With the death qualification voir dire process in death penalty cases in Florida already so loaded in favor of the prosecution having selected a jury predisposed to recommend death, Defendant's trial counsel should have gone down to the wire trying to prevent these two jurors from being taken off for alleged cause.
>
> Defendant's trial counsel also was remiss by failing to adequately object during voir dire by the prosecution to its repeated and outrageous proselytizing as to its contentions as to the substance of the cause under the guise of death qualifying the prospective jurors.

(PCR. 51-53) In *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998), this Court held "where the motion lacks sufficient factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied." As such, a claim may be summarily denied

where it is based merely on conclusory allegations. *Id.* As the allegations here were extremely conclusory, the lower court properly summarily denied this claim.

Moreover, as can be seen from the foregoing recitation of the claim, none of Defendant's present complaints about manner in which the State questioned the venire were raised below. Again, it is inappropriate to add new allegations on the appeal from the denial of a motion for post conviction relief. *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988). As such, Defendant's claims are not properly before this Court and do not show that lower court's rejection of this claim should be reversed.

Even if the allegations about the manner in which the State questioned the venire were properly before the Court, there would still be no grounds to reverse the summary denial of this claim. Defendant first faults the State for asking questions that did not track the test for cause challenges under *Wainwright v. Witt*, 469 U.S. 412 (1985). However, the State is permitted to exercise peremptory challenges against veniremembers whose view on the death penalty do not rise to the level of requiring their exclusion for cause. *San Martin v. State*, 717 So. 2d 462, 467-68 (Fla. 1998); *San Martin v. State*, 705 So. 2d 1337, 1342-43 (Fla. 1997). In order to exercise such peremptory challenges, it is necessary for the State to question

the venire about such views.

Here, the manner in which the State asked its questions permitted the elucidation of the issue of death qualification. The State started its questioning to determine whether the veniremembers would allow the thought of having to determine whether a death sentence would be imposed upon a conviction for first degree murder would affect the guilty phase deliberations in any manner. (ST. 42-43) From there, the State inquired how the deliberations would be affected. (ST. 44) Finally, the State inquired whether the veniremembers would hold the State to a higher standard of proof in other cases. (ST. 44) Through this method of questioning, Ms. Levin admitted that she would hold the State to a burden of proof higher than in other cases. (ST. 44) Immediately on the heels of this question, Mr. Kozakowski answered the State's question whether he would have to be "totally and irrevocably" convinced by saying, "Convinced, yes." (ST. 44-45) As such, while the veniremembers may not have had the standard by which the State's burden of proof was measured, they were agreeing that they would apply a higher standard of proof than in other cases, which does disqualify those veniremembers under ***Witt***. As the questioning was proper, counsel cannot be deemed ineffective for failing to raise a nonmeritorious objection to this questioning. ***Kokal v. Dugger***,

718 So. 2d 138, 143 (Fla. 1998); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107, 111 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992).

Moreover, when one veniremember expressed concern over the definition of reasonable doubt, counsel did object and request that the reasonable doubt instruction be read. (ST. 49) The trial court responded by reading the standard jury instruction on reasonable doubt. (ST. 49-50) As counsel did successfully object, he cannot be deemed ineffective for failing to do so. *Strickland*. Thus, the lower court would have properly summarily denied this claim had it been raised.

Moreover, the State did not then segue into racial bias. (ST. 50-51) Instead, the State inquired if having the reasonable doubt instruction read affected any of the veniremembers prior responses. (ST. 50-51) None of the veniremembers indicated that it changed their responses in any way. (ST. 51) In fact, later in voir dire, Mr. Kozakowski stated that the State "better prove it to me." (ST. 72) As such, Defendant cannot show that had the reasonable doubt instruction been requested and read earlier, any of the veniremembers' responses would have been different. He cannot, therefore, show that there is a reasonable probability that an earlier request for the

instruction would have affected the composition of the jury, let alone the result of the proceeding. *Strickland*. As such, this claim would have ben properly summarily denied had it been raised.

The issue of racial prejudice instead arose because one veniremember did respond to the question regarding whether hearing the reasonable doubt instruction affected any prior answer by stating that she had been the victim of a crime committed by an African-American. (ST. 51) Given the manner in which the veniremember raised the issue, the State asked follow up questions, which were particularly appropriate given that Defendant is African-American. (ST. 51-53) The veniremembers asking questions arose in much the same way: one veniremember asked a question pertinent to death qualification. The State then encouraged other veniremembers to express their concerns in the interest of getting as much information as possible from the venire. (ST. 54-56) As the manner in which these questions were asked allowed both parties to obtain information about the veniremembers and did not result in the improper disqualification of any veniremember, Defendant has not shown how counsel was deficient for not objecting to these inquiries or how any alleged deficiency result in any prejudice to him. *Strickland*. Thus, the claim would have been properly summarily

denied had it been raised.

Defendant next appears to contend that counsel should have required the State to explain what aggravating and mitigating circumstances were and how the weighing process works. However, counsel did object and request that the trial court explain how the penalty phase worked. (ST. 63-64) The trial court responded by generally explaining how the process worked. (ST. 63-64) When asked to provide further instruction, the trial court refused. (ST. 64) Given that the trial court refused and that the purpose of voir dire is not to pretry the case or instruct the venire on the law, *see Franqui v. State*, 699 So. 2d 1312, 1322 (Fla. 1997), Defendant has not shown that counsel's failure to raise another objection that would have been overruled could be deemed ineffective. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim would have been properly denied had it been raised.

Moreover, the State pointed out that it was merely questioning the venire to determine if the veniremembers were willing to listen to the evidence and the instructions on the law, what every they would be. (ST. 66-67) It was against this background that the State inquired if Mr. Kozakowski had already made a determination of what penalty he would recommend. (ST.

68) Moreover, despite the State's questioning, veniremembers indicated that they could set aside their personal opinions and follow the law. (ST. 66, 71-72, Given this context, it is clear that Mr. Kozakowski's responses were not the product of improper questions by the State. Instead, they were the result of his personal opinion, which he properly expressed. (ST. 68) Under these circumstances, the lower court would have properly denied this claim had it been raised before it. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The denial of the claim should be affirmed.

Defendant next asserts that his counsel was ineffective for allowing the State to refer to the guilt phase as phase 1 and the penalty phase as phase 2 and for the allegedly incomplete manner in which the State discussed the evidence presented at the penalty phase and its purpose. He contends that this allowed the State to confuse the venire. However, the trial court explained to the venire before it began questioning what the two phases of trial were and what the purpose of the penalty phase was. (ST. 10-11) He further explained the issue when counsel objected. (ST. 63-64)

With regard to the alleged ineffectiveness for failing to object to the State's excusal of Mr. Kozakowski for cause, the

lower court properly rejected this claim. This claim is procedurally barred and without merit.

On direct appeal, Defendant asserted that Mr. Kozakowski was improperly removed for cause. Initial Brief Of Appellant, Florida Supreme Court Case No. 82,349, at 13-27. This Court rejected that claim. *Cummings-el v. State*, 684 So. 2d 729, 731 (Fla. 1996). Defendant is now attempting to relitigate this claim under the guise of ineffective assistance of counsel. However, a motion for post-conviction relief cannot be utilized as a second appeal, and, re-litigation of claims raised on direct appeal under the guise of ineffectiveness is prohibited. *Robinson v. State*, 707 So. 2d 688, 697-98 (Fla. 1988); *Valle v. State*, 705 So. 2d 1331, 1335 (Fla. 1997); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990). As such, the lower court's finding that this claim is procedurally barred should be affirmed.

Even if the claim was not barred, the claim would still have been properly denied. Mr. Kozakowski was properly excused for cause, and counsel cannot be deemed ineffective for failing to raise an nonmeritorious issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

"The inability to be impartial about the death penalty is

a valid reason to remove a prospective juror for cause." *Hannon v. State*, 638 So. 2d 39, 41 (Fla. 1994). In light of the narrowed standards in capital sentencing schemes, "it does not make sense to require simply that a juror not 'automatically' vote against the death penalty; *whether or not a venireman might vote for death under certain personal standards, the state still may properly challenge that venireman if he refuses to follow the statutory scheme*." *Witt*, 469 U.S. at 422 (emphasis added). Furthermore, a prospective juror's views regarding capital punishment need not be made "unmistakably clear." *Witt*, 469 U.S. at 424. "Despite a lack of clarity in the printed record, 'there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge whose sees and hears the juror.'" *Hannon*, 638 So. 2d at 41 (quoting *Witt*, 469 U.S. at 425-26). Thus, where a prospective juror's responses are equivocal, conflicting or vacillating with respect to the ability to be impartial about the death penalty, the this Court has upheld the decision of the trial judge on whether such a juror was properly excludable. *See Randolph v. State*, 562 So. 2d 331, 335-37 (Fla. 1990); *Taylor v. State*, 638 So. 2d 30, 32

(Fla. 1994); *Hannon*, 638 So. 2d at 41.

Here, Mr. Kozakowski, was asked by the prosecutor whether he was able to listen to the evidence and follow the law with respect to a recommendation of death penalty. He responded in the negative:

> **[PROSECUTOR]:** If you find the defendant guilty of first degree murder, you and eleven other people on the jury, when we get to the second part, are you already going to have your mind made up? What do you think you're going to do? Are you going to be able to listen and follow the law? It's like another trial. You have to start with a clean slate. Do you think you will be able to do that?
>
> **MR. KOZAKOWSKI:** I'm afraid, in my own conscience, that I would go for the imprisonment rather than the death penalty.
>
> **[PROSECUTOR]**: If the judge tells you, well you can't. You have to clean it up and start from scratch. Could you do that or are you still going to be starting from one side or the other? You're still going to be starting, going towards imprisonment?
>
> **MR. KOZAKOWSKI**: I'm very skeptical of the death penalty. <u>I'll always agree I didn't hear the evidence</u> or it's right <u>or this wasn't enough evidence</u> that would linger in my mind.

(ST. 68-69) (emphasis added). Subsequent to the above expression of inability to follow the law, the juror then stated that in cases involving a "child or some defenseless person who's preyed upon," he would have no objections to the death

penalty. (ST. 72-73). The State then inquired whether women fell into the above stated defenseless category. This juror first stated that he was, “more likely to vote for a woman, “but then added that because of his own marital circumstances, “I’m not too fond for [sic] protecting woman either.” (ST. 77).

Defendant has argued that, although Mr. Kozakowski leaned towards life imprisonment, he could and did particularize situations where he would have no objections to the death penalty. As noted previously, however, “whether or not a venireman might vote for death under certain *personal standards*, the state still may properly challenge that venireman if he refuses to follow the statutory scheme.” ***Witt***, 469 U.S. at 422. Mr. Kozakowski’s personal exception for a certain category of defenseless persons, along with his conflicting answer as to who qualified within said group, did not ameliorate his clear expression of inability to follow the law. That inability was made clear, when he stated that “I’ll always agree I didn’t hear the evidence . . . or this wasn’t enough evidence,” due to his reservations about the death penalty. Trial counsel was thus not deficient in failing to object to removal of Mr. Kozakowski. ***Witt***, 469 U.S. at 422; ***see also Randolph***, 562 So. 2d at 337 (“The trial court had the opportunity to evaluate the demeanor of the prospective juror, and given juror Hampton’s equivocal

answers, we can not say that the record evinces juror Hampton's clear ability to set aside her own beliefs 'in deference to the rule of law.'" [citations omitted]). The claim was properly summarily denied.

Moreover, even if Mr. Kozakowski was not properly excused for cause, Defendant cannot demonstrate prejudice. There is no reasonable probability that the result of the proceeding would have been different had the allegedly deficient conduct not occurred. *Strickland*, 466 U.S. at 694. In fact, Defendant cannot show that the composition of the jury would have been different. At the conclusion of juror selection, the State had only exercised 9 of its 10 peremptory challenges. As such, the State would have been able to exercise a peremptory challenge against Mr. Kozakowski had Defendant been successful in preventing the State from excusing him for cause. Since the composition of the jury would not have changed, there is no reasonable probability that the result of the proceeding would have been different. *Strickland*. To the extent that Defendant may assert that he has shown prejudice because the allegedly improper excusal of Mr. Kozakowski for cause would have been reversible error on appeal, he would be wrong. *See Pope v. State*, 567 So. 2d 1241, 1244 (Fla. 1990) (for the purposes of the prejudice prong of the *Strickland* test of ineffectiveness,

the prospect of “a new trial on direct appeal is not dispositive.” Instead, a showing that “defendant’s right to a fair trial” was compromised is necessary)(Emphasis added). The lower court properly summarily denied this claim, and it should be affirmed.

III. THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVE ASSISTANCE FOR FAILING TO OBJECT TO A COMMENT DURING VOIR DIRE.

Defendant next contends that the lower court erred in summarily denying his claim that his counsel was ineffective for failing to object to a comment by the trial court during voir dire. He contends that the trial court's comment infringed upon his right to remain silent. However, the trial court properly summarily denied this claim as procedurally barred and without merit.

On direct appeal, Defendant asserted that the comment at issue infringed upon his right to remain silent. Initial Brief of Appellant, Florida Supreme Court Case No. 82,349, at 28-31. This Court rejected the issue. *Cummings-el*, 684 So. 2d at 731. Defendant is now attempting to relitigate this claim in the guise of a claim of ineffective assistance of counsel. However, a motion for post-conviction relief cannot be utilized as a second appeal, and, re-litigation of claims raised on direct appeal under the guise of ineffectiveness is prohibited. *Robinson v. State*, 707 So. 2d 688, 697-98 (Fla. 1988); *Valle v. State*, 705 So. 2d 1331, 1335 (Fla. 1997); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990). As such, the lower court's finding that this claim is procedurally barred should be

affirmed.

Even if the claim was not procedurally barred, the lower court would still have properly summarily denied the claim, as it is without merit. In order for a comment to be considered to be a comment on a defendant's right to remain silent, it must be "fairly susceptible" of being interpreted by the jury as comments on the failure to testify. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Here, the comment at issue was not fairly susceptible to be considered a comment on Defendant's right to remain silent given the nature of the comment and the context in which it was made.

During voir dire, the State was inquiring whether any veniremember would require physical evidence in addition to eyewitness testimony before they find that the State had proven its case beyond a reasonable doubt. (ST. 242-47) During this discussion, one veniremember suggested the possibility that the person who was identified by an eyewitness might have a twin. (ST. 246) Another veniremember stated that he would only have a reasonable doubt in a case where an eyewitness knew the person he identified "[o]nly if the defense case, if he says he has a twin brother." (ST. 247) At that point, counsel objected and requested a curative instruction on the fact that Defendant had no burden of proof. (ST. 247) The trial court gave such a

curative instruction:

> THE COURT: Folks, the only side, the only side of this case who has to go forward and prove anything is the State side. The defense does not have to prove anything. The burden of proof of coming forward with the evidence, of coming forward with the witnesses, coming forward with the exhibits, all that.
>
> The defense is not required to prove anything. They're not required to disprove anything and that burden of proof of coming forward with the evidence is beyond and to the exclusion of every reasonable doubt. So that would not be a requirement. I just want to make sure everybody understands for the defendant to prove that he had a twin, in order for the state to prove the case, they have to bring to you all the evidence.
>
> It's possible that the defense does not utter a word through the whole trial. Although it wouldn't happen. It shouldn't happen. We need to try to get on, if we can but go ahead.

(ST. 247-48) After this comment, the State reiterated that Defendant had no burden of proof.

When the trial court's comments are placed in the context, it is evident that the last paragraph could not reasonably be understood to constitute a comment on the Defendant's silence. Prior to the final two sentences in the trial court's admonition to the venire, it had explicitly been telling the venire that the Defendant did not have to prove anything or come forward with any witnesses; that the State had the burden of proving the case. This admonition was given to inform the venire that Defendant had the right to remain silent. Any effort to construe the final two sentences as a comment on silence, in

view of the prior two paragraphs, would be entirely unreasonable, as it would make the final paragraph inconsistent with what the trial court had just been telling the jury. As the comment was not fairly susceptible to being interpreted as a comment on Defendant's right to remain silent, trial counsel cannot be deemed ineffective for failing to make a meritless objection that it was. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim was properly summarily denied.

The cases relied upon by Defendant do not support his position. In *Love v. State*, 583 So. 2d 371 (Fla. 3d DCA 1991), the totality of the judge's comment was "I am going to tell you the defendant does not have to testify, will probably not testify, you will not hear both sides of the story." *Id.* at 371. In *State v. Kitchens*, 490 So. 2d 21, 21 (Fla. 1985), the codefendant's attorney commented that the defendant's statement to a witness was unrebutted. In *Andrews v. State*, 443 So. 2d 78, 83-84 (Fla. 1983), this Court found that a trial court's failure to inform a jury that it could not infer anything from a defendant's failure to testify rendered a comment that the defendant was not required to testify improper. In contrast here, the trial court extensively informed the venire that the State had the burden of proof and that Defendant bore no burden

to present any evidence. These comments provided what was lacking in the comments in the cases upon which Defendant relies. As such, they do not show that an objection would have been meritorious. The lower court properly found that counsel was not ineffective for failing to object to this comment. It should be affirmed.

Even if the comment could be considered to be erroneous, counsel could still not be deemed ineffective for failing to object to this comment. There is no reasonable probability that, but for counsel's failure to object to this comment, the result of the proceeding would have been different. Immediately prior to opening arguments, during preliminary instructions, the trial court properly advised the jury on the right to remain silent:

> Now, in every criminal case, as already mentioned to you, the defendant has the absolute right not to testify. It's his absolute right to remain silent. No juror should ever be concerned that a defendant has exercised his fundamental rights in accordance with the constitution and that should not enter into your deliberations.

(ST. 391) It also advised the jury that it would be instructed on the law at the end of the trial. (ST. 388) Consistent with that representation, the trial court, at the conclusion of the case, prior to deliberations, did again properly instruct the jury about Defendant's right to remain silent:

> The constitution requires the State to prove its accusation against the defendant. It is not necessary for the defendant to disprove anything. Nor is the defendant required to prove his innocence. It is up to the State to prove the defendant's guilt by evidence. The defendant exercised a fundamental right by choosing not to be a witness in this case. You must not view this as an admission of guilt or be influenced in any way by his decision. No juror should ever be concerned that the defendant did not take the witness stand to give testimony in the case.

(ST. 839-40) The trial court further advised the jury that it "must follow the law as it is set out in these instructions," (ST. 840), and that the jury should "disregard anything that I may have said or done that made you think that I preferred one verdict over another." (ST. 841) Moreover, the only matter that was contested at trial was identification.[6] The State presented overwhelming evidence on this issue, including the testimony of three eyewitnesses who knew Defendant prior to the crime and Ms. Good's own statements identifying Defendant as her assailant. Under these circumstances, there is no reasonable possibility of a different result had counsel objected to this comment. *Strickland*. The claim was properly summarily denied.

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[6] Defendant does not claim that any other issue should have been contested at trial nor has he made any claims that evidence of an alibi could have been presented.

IV. THE LOWER COURT PROPERLY FOUND THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT MITIGATION.

Defendant next asserts that the lower court erred in denying his claim of ineffective assistance of counsel for failing to investigate and present mitigation. Specifically, Defendant contends that lower court should have found counsel ineffective for failing investigated and presented family background and mental health mitigation. However, the lower court properly denied this claim after an evidentiary hearing.

In denying this claim, the lower court stated:

> After reviewing the record and carefully considering the testimony adduced at the evidentiary hearing, this Court does not feel the Defendant has met his burden of proving that trial counsel's conduct at the penalty phase amounted to deficient representation in light of Defendant's refusal to assist counsel in preparing for a penalty phase by expressly prohibiting counsel from presenting background evidence, irrespective of his later cursory consent to family members being contacted. Moreover, this Court is confident in the outcome of the penalty phase, as Defendant has failed to show that even if counsel's assistance was ineffective, that there was a reasonable probability that but for the errors complained of, the result would have been different.
>
> Defendant claims that counsel was ineffective for failing to investigate whether there was available evidence to contend for the applicability of mental health mitigating evidence, family related, and other types of mitigating evidence. In order to prevail on this claim, Defendant must demonstrate that counsel's performance was deficient and that counsel's performance affected the outcome of the sentencing proceedings. *Strickland* at 695. Because the reasonableness of counsel's acts (including what investigations are reasonable) depends "critically"

upon "information supplied by the [petitioner]" or "the [petitioner]'s own statements or actions," evidence of a petitioner's statements and acts in dealing with counsel is highly relevant to ineffective assistance claims. Strickland, 104 S.Ct. at 2066. "[An] inquiry into counsel's conversations with the [petitioner] may be critical to a proper assessment of counsel's investigative decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions." Id. ("[W]hen a defendant has given counsel reason to believe certain investigation would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."). *Chandler*, 218 F.3d at 1318, 1319.

During the Evidentiary Hearing, on December 20, 2000, Theodore Mastos, defendant's trial attorney testified before this court. Mr. Mastos is a former State Attorney, and a former County and Circuit Court Judge. After leaving the bench, Mr. Mastos became a criminal defense attorney. As a defense attorney, Mr. Mastos tried one capital case prior to Defendant's, *State v. Darvy & Harris*. Both defendants in that case were acquitted. As a Circuit Court Judge, Mr. Mastos presided over the trials of Burley Gilliam and Jesus Scull, both of whom were convicted and sentenced to death.

Mr. Mastos testified that the State had a strong case against the Defendant. The State's witnesses were family members of the victim who knew the Defendant personally. Mr. Mastos testified that his defense strategy was mistaken identity and that this was not the type of crime the Defendant would have committed because interactions with the victim had been confrontational prior to the murder, and that this type of murder was committed by a coward. Mr. Mastos testified that no other defense was presented because the Defendant did not agree to any other defense. Mr. Mastos felt he would lose the trust of his client if he went against his wishes and proceeded to craft any other strategy.

Defendant argues that trial counsel was ineffective for failure to call family members to testify. Mr. Mastos testified that he was familiar with the aggravators and mitigators. He testified

that neither the Defendant nor his family members gave him any information that would have been useful in presenting evidence of statutory mitigating factors. He stated that the Defendant was quite strong-willed and he could not convince him to do anything. Mr. Mastos testified that the Defendant did not want him to contact his family members to testify on his behalf, that he did not want his family "begging for his life" because he was innocent. (TR. December 20, pp. 44, 47, 49). Mr. Mastos testified that he became concerned about Defendant's refusal to provide information and witnesses and to ensure that the refusal was a knowing and intelligent decision, rather than the result of come unknown mental illness, he requested an evaluation by Dr. Sanford Jacobson. The report of Dr. Jacobson is Exhibit c to this Court's July 29, 1999 order. Dr. Jacobson found the Defendant competent to make the decision to waive a mitigation defense. The Court notes that no absolute duty exists to introduce mitigating or character evidence. *Chandler* at 1319.

Mr. Mastos further testified that Defendant grudgingly permitted trial counsel to contact family members, but maintained the position that he did not want them to beg for his life. The record shows that at the January 4, 1993 trial hearing Defendant gave trial counsel permission to speak to his family members to testify. However, during the penalty phase trial counsel presented testimony from the Defendant's two (2) available family members, to put a human spin on the case. Some of the Defendant's children were in court during the penalty phase, but did not wish to testify, nor did Defendant wish them to testify. This Court notes that trial counsel is not deficient for failure to present testimony from reluctant family members. *Ferguson v. State*, 593 So. 2d 508, 510 (Fla. 1992), nor is counsel ineffective for following the instructions of the Defendant.

At the evidentiary hearing, the Court heard testimony from the Defendant's sister, Catherine Covington, his niece Catherine Wooden, his middle school principal, Moses Poole, the mother of four of Defendant's children, Deborah Dawson, his sons Frederick and Lyndon Dawson, his nephew, Gregory Wooden, and a childhood friend of Defendant, Eddie

Webster. The Court notes that the testimony of Catherine Covington, Catherine Wooden, Frederick Dawson, and Deborah Dawson offered essentially the same non-statutory mitigation evidence as that presented at trial by the Defendant's two sisters. Mr. Mastos testified that he did not call the mother of four of Defendant's children Deborah Dawson, who lived in another state because, according to Mr. Mastos, her testimony, like that of other civilian witnesses, would not have been particularly helpful to Defendant. Her testimony would have revealed, during cross-examination, that the Defendant was a drug user, supported her periodically, when he was not incarcerated, and voluntarily left her and the children when he moved back to Florida.

Defendant further argues ineffective assistance for trial counsel's failure to introduce mitigation evidence including the extensive history of criminal conduct of Defendant's siblings, and Defendant's substance abuse. Mr. Mastos was successful in keeping out details of Defendant's prior convictions. Mr. Mastos testified that he did not present the Defendant's previous incarceration records because he did not want the jury to think the Defendant was a career criminal, as this would not have elicited their sympathy. Moreover, while there are indicia of good behavior in the records, there are also notations of involvement in violent fights while incarcerated. The testimony by the family members at the evidentiary hearing would have exposed the jury to parts of the Defendant's criminal record that were not presented at trial. Mr. Mastos also testified that he would not have presented to the jury the criminal history of Defendant's family members as that would have resulted in the jury voting 10-2 or 12-0 for death, rather than 8-4. (TR. December 20, 2000, p. 100-101). Trial counsel is not ineffective for failing to present background information which would allow the presentation of damaging or derogatory evidence, including violent tendencies, in rebuttal. ***Breedlove v. State***, 692 So. 2d 874, 878 (Fla. 1997); ***Medina v. State***, 573 So. 2d 293, 298 (Fla. 1990).

Regarding Defendant's drug use, Eddie Webster testified about the Defendant's drug use. Moses Poole testified that in seventh, eighth, and ninth grades he

had never observed the Defendant under the influence of drugs, and that the Defendant was an average student and was not a discipline problem. Mr. Mastos testified that the Defendant did not tell him about the drug use until after the trial was over. Counsel acknowledged that drug abuse can have a double-edged sword effect on the jury, as juries are not sympathetic to junkies generally. Further he believed that drug abuse testimony would have been helpful if the Defendant had claimed to have committed the crime while in a cocaine rage. Because the defense's strategy was to convince the jury that the Defendant was not present at the scene of the crime and did not commit the crime, and that Defendant is a decent, upstanding, family man, testimony of drug abuse at the penalty phase would not have been supportive of counsel's efforts. Counsel's strategic decision will not be second-guessed on collateral attack. *Johnson v. State*, 769 So. 2d 990, 1002 (Fla. 2000)(tactical decision not to present a defense of voluntary intoxication does not constitute ineffective assistance); *Remeta v. Dugger*, 622 So. 2d 452, 455 (Fla. 1993).

Mr. Mastos said he would have not used extreme emotional disturbance as a mitigator as it was not consistent with the defense strategy. He also would not have presented a claim of impairment of Defendant's ability to conform his conduct to the requirements of the law as it, too, was inconsistent with the defense of mistaken identity. Mr. Mastos testified he would never have presented evidence that showed that the Defendant had an anti-social personality disorder or depicted Defendant as a psychopathic manipulator as that would defeat his goal of presenting Defendant as a normal human being, and would have a negative effect on the jury.

As to Defendant's claim of mental health factors, the record reflects that trial counsel did have Defendant psychologically evaluated prior to the guilt phase. *See* Report of Dr. Jacobson, dated January 5, 1993. Dr. Jacobson's report found nothing wrong and raised no red flags suggesting organic brain damage, nor did his interactions with Defendant reveal any psychiatric difficulties.

During the Evidentiary Hearing, the Court heard

extensive testimony from five expert witnesses who conducted mental health evaluations of the Defendant for the purpose of determining the existence of mitigating factors. The three experts presented by the defense were psychologist Dr. Merry Haber, Dr. Bruce Frumpkin, a forensic and clinical psychologist, and Dr. Lynn Schram, a neuro-psychologist. The State presented Dr. John Spencer, a forensic and clinical psychologist and Dr. Jane Ansley, a clinical psychologist and forensic neuro-psychologist. The consensus of the expert testimony is that Defendant has an antisocial personality disorder, which is not a mitigating factor. They all agree that antisocial personality disorder does not cause criminal behavior, it explains it.

Dr. Haber testified that the Defendant has obsessive compulsive personality traits and has a tendency to focus on a certain issue and is unwilling or unable to change his focus. She also found that he is manipulative and likes to present himself in the best light and likes to convey the impression that he is an upright moral kind of guy. Dr. Haber also testified that Defendant had the capacity to know what he was doing when he killed the victim. She determined that he acts without impulse control. She was concerned about the possibility of brain damage due to the Defendant suffering a head injury as a child and while in prison, even though he did not lose consciousness during either incident. Additionally, she acknowledged that huffing gasoline could cause brain damage. As she is not a neuro-psychologist, she could not diagnose brain damage with certainty.

Dr. Frumpkin also testified about the Defendant’s social history and head injuries. In addition to having anti-social personality disorder, Dr. Frumpkin concluded that the Defendant is probably long-term chronically depressed. He agreed with Dr. Schram’s conclusion that the Defendant cannot shift attention. On cross-examination, Dr. Frumpkin admitted that the impairment in Defendant’s attention may not be due to improper brain functioning.

Dr. Schram, whose background does not include extensive experience in forensics and was not familiarity with the legal standard of incapacity, testified as to the result of a number of tests administered to Defendant. The results of these tests

were: borderline normal/impaired on the California Learning Test, low/mildly impaired on the Speech Sound Perception Test, mild to moderately impaired on the Seashore Rhythm test, low normal to normal on the Delayed Relay Test, normal on the Memory Test, normal on the Ground Peg Board and Trial A & B Tests, above normal on the Visual Synthesis Test, and good to normal on the Webster Memory Test. Dr. Schram also testified that the Defendant scored in the low normal range on the Judgment Test, Defendant scored below normal on the Digits Forward and Backward Test, which according to Dr. Schram, indicated that something is not right with the brain. Dr. Schram opined that the pattern on the tests he administered indicated that the Defendant has an attention and concentration problem, which is indicative of organic brain damage. Although the test suggests impairment in Defendant's attention and concentration abilities, Dr. Schram was unable to either definitively determine that Defendant suffers from brain damage, or find that Defendant is impaired in his everyday functioning.

Dr. Spencer found the Defendant has an anti-social personality disorder, but found no clinical evidence of significant brain damage. He testified that he personally observed that the Defendant could change his approach when confronted with information, known as changing sets. Dr. Spencer videotaped his interview with the Defendant. A portion of that tape was presented as evidence. [State's exhibit 3.] The video clearly showed the Defendant was capable of changing sets in the way he altered his mind set when responding to Dr. Spencer. As noted by Dr. Spencer, the tape revealed that the Defendant can become agitated, and not become violent. He can control his anger. Dr. Spencer also stated that it was possible to suffer from brain damage that is not detected or detectable. He stated that he did not see anything in his test results or in his interview with the Defendant that was indicative of organic brain damage.

Dr. Ansley provided a neuro-psychological evaluation. She testified that the results of her evaluation showed no indication of any organic brain damage and no executive functioning deficit. Dr. Ansley had reviewed the Defendant's medical history and the raw data from the testing performed by all of the aforementioned experts. She concluded that this

data was valid and reliable, and integrated it into tests she performed on her own. Her findings, like those of Dr. Spencer, were that the Defendant had an anti-social personality disorder and type D on the McGarty scale. This type of individual, according to Dr. Ansley, generally does not do well in treatment as the person does not accept responsibility in general.

Dr. Ansley relied on Dr. Schram's report that indicated that the Defendant has no memory deficiency. She testified that memory is the most easily injured aspect of brain functioning due to brain damage. She found that the results of Dr. Schram's report indicated the Defendant had borderline perseveration. Perseveration is a measure of one's loss of ability to engage in straight forward communication. A person will start and stop if the brain is injured. To determine the amount of perseveration, Dr. Ansley administered the Miami Learning Test, which is a verbal learning test where the subject has to repeat what the tester said. The Defendant had normal scores on this test. Dr. Schram's report stated that there was perseveration in the area of attention. Dr. Ansley gave the Defendant the Wexler Memory Scale 3 Test and concluded that the Defendant was low average to borderline.

Dr. Ansley testified that attention is one of the most basic skills for any test given. A lack of attention will impact the results of all other tests. She performed the Digits Forward and Digits Backward tests. The Defendant had no performance problems on the Digits Forward test. She testified that he had some problems on the Digits Backward test. Dr. Ansley stated that she, herself, took the Digits Backward test and her score was similar to that of the Defendant. Dr. Ansley found that, in general, the Defendant performed in the low average range on all the tests. Interestingly, she concluded that he performed as well on tests that do not require great attention as on tests that require attention to do well.

Dr. Ansley explained that executive functioning is the most complex behavior. It is observable when it is present and when it is absent. It is part of the functioning of the brain that enables us to make choices, to know what and what not to say, to problem solve, to think on our feet. To test the Defendant's

executive functioning she used tests that are designed so that you figure it out. Because Dr. Schram's report noted deficits in cognitive flexibility, or the ability to change course, Dr. Ansley used the Wisconsin test. In this test, four cards are put on the table. There are different figures, colors and numbers on the cards. The subject is given a card and asked to put the card where it belongs. All the examiner says is right or wrong. Cards can be put with the same number, the same color, or shape. The examiner changes the category without telling the subject. It tests the ability to deal with feedback. Then the category is changed again. The Defendant did not have any problem with this test.

Dr. Ansley also testified that she had the Defendant perform the tactile performance test. In this test, the subject is blindfolded and has to place blocks in the right hole, using one hand, in a certain amount of time. The examiner only gives encouragement when the subject does it. It requires developing a strategy. Based on the results of the tests she conducted, as well as her review of Defendant's prison records, and the reports of the other expert witnesses, Dr. Ansley testified that she reached the conclusion that the head injuries and the drug usage reported by Defendant did not cause brain damage, and that the Defendant does not have any brain damage that would affect his ability to understand what he was doing when he killed the victim. Moreover, she concluded that it was a volitional choice to violate the restraining order.

This Court found the video tape of the interview of Dr. Spencer and the Defendant very helpful. The Court observed first hand how the Defendant has the ability to change his behavior as the situation changed. Additionally, the testimony of Dr. Ansley was extremely credible. Dr. Ansley had the benefit of the work of the other experts, and took it another step. Dr. Ansley concluded that the Defendant does not suffer from organic brain damage. While Dr. Schram concluded that the Defendant may have brain damage, he is a neuro-psychologist, not a forensic neuro-psychologist. Dr. Schram has very little experience in the area of forensic cases. Dr. Ansley, on the other hand, is a forensic neuro-psychologist with vast experience, having worked on several hundred

> forensic cases. Due to her experience and expertise in the forensic neuro-psychology field, and the thoroughness of her work in this case, this Court finds her testimony to be extremely credible.
>
> Although Mr. Mastos testified that he did not research whether he could conduct an investigation for penalty phase mitigating evidence without his client's cooperation and against the expressed wishes of his client, this Court find that, under the circumstances of this case, the performance of trial counsel was within the parameters of "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). The Court notes that Mr. Mastos used the majority of his efforts in the guilt phase and cannot be faulted for following the wishes of his client in the penalty phase. *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000). Furthermore, the Court is convinced that the proposed mitigation evidence would not have made any difference on the outcome of the sentence, therefore, counsel cannot be ineffective for failing to present such evidence.

(PCR. 335-41)

In reviewing these findings, this Court is required to accept the lower court's factual findings to the extent that they are supported by competent, substantial evidence. *Stephens v. State*, 748 So. 2d 1028, 1033-34 (Fla. 1999). However, this Court may independently review the lower court's determination of whether those facts support a finding of deficiency and prejudice to support a holding that counsel was not ineffective. *Id.*

Defendant contends that the lower court should not have rejected the testimony of Dr. Schram. However, the lower court's factual finding that Defendant was not brain damaged is

supported by competent, substantial evidence and should be affirmed. Here, the lower court found that Dr. Ansley's conclusion that there was no brain damage was more credible than Dr. Schram's testimony that there was. Dr. Schram's conclusion was based on Defendant's alleged cognitive inflexibility; his inability to change sets. Dr. Spencer not only testified that Defendant could change sets but presented a videotape of his interview with Defendant in which Defendant was shown changing sets. Moreover, the lower court was free to rely upon the fact that Dr. Ansley had more experience dealing with criminals who have a reason to want to appear sick than Dr. Schram. In fact this Court has recognized that the making of such credibility determinations is the job of the lower court. *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001); *see also Stephens v. State*, 748 So. 2d 1028, 1034-35 (Fla. 1999). As such, the lower court properly determined that Dr. Ansley was more credible. Its rejection of the claim that Defendant was brain damaged was proper, as it is supported by competent, substantial evidence. *Stephens*. It should be affirmed.

Defendant also asserts that the lower court's finding that counsel's actions in not seeking to develop mitigation in the face of his client's desire not to present mitigation was reasonable was incorrect. He contends that the record does not

support the finding and that such a finding is contrary to the law. However, the lower court's finding is supported by the record and is not legally incorrect.

Theodore Mastos, Defendant's trial counsel, testified that Defendant adamantly refused to consider mitigation and did not want him to speak to Defendant's family. (PCR-SR. 1714-16, 1717-18, 1751-52) While Defendant suggests that the transcript of the hearing on January 4, 1993 indicates that Defendant was not adamant about not presenting mitigation, Mastos testified at the hearing that the cold record did not reflect the tone in which this statement was made. (PCR-SR. 1759-60, 1794-95) Considering the manner in which the statement was made, it did not authorize Mastos to investigate mitigation. (PCR-SR. 1759-60) Defendant also relies upon the fact that Defendant allowed two of his sisters to testify at the penalty phase. However, Mastos testified that even the permission to present this testimony was only given grudgingly. (PCR-SR. 1759-60). Moreover, a review of even the early post conviction hearings shows that Defendant continued to be adamant about not wanting mitigation presented even after receiving a death sentence. (PCT. 15-24, PCR-SR. 385-87, 334-36) Additionally, it must be remembered that the same judge presided over this matter at the January 4, 1993 hearing, at trial and in the post conviction

proceedings. As such, he observed Defendant's tone and demeanor when he made the statements upon which Defendant relies. Under these circumstances, the lower court's finding that Defendant refused to allow the presentation of mitigation is supported by competent, substantial evidence. *Stephens*. It should be affirmed. *Rose v. State*, 617 So. 2d 291, 294 (Fla. 1993)(no deficiency where defendant insisted on maintaining innocence, even through penalty phase); *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000); *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985)(no deficiency where defendant discouraged counsel from undertaking investigation, and counsel's attempts to elicit family's assistance were fruitless, it did not appear to counsel that finding useful evidence was likely).

Defendant's reliance on *State v. Riechmann*, 777 So. 2d 342 (Fla. 2000), is misplaced. In *Riechmann*, the post conviction court had found after an evidentiary hearing that the defendant had not precluded his counsel from investigating or presenting mitigation. *Id.* at 350. This finding was based on testimony from defense counsel that the defendant did not preclude him from investigating mitigation; the defendant had only precluded counsel from traveling to Germany. The same is true of *State v. Lara*, 581 So. 2d 1288, 1290 (Fla. 1991). There again, counsel testified that the failure to investigate was his fault and the

trial court made a finding based on that testimony. Here, there was direct testimony from counsel that Defendant did preclude him from investigating mitigation. The lower court found that Defendant did prevent the investigation. As such, *Riechmann* and *Lara* are inapplicable to this matter.

Deaton v. Dugger, 635 So. 2d 4, 8 (Fla. 1993), is also inapplicable to this matter. In *Deaton*, the trial court had found that the defendant's waiver of mitigation was not knowing, intelligent and voluntary. This finding was supported by the testimony of counsel that he did not investigate mitigation and did not discuss the subject with the defendant beyond telling the defendant he could testify. Here, the lower court found that Defendant did not want mitigation presented. As stated above, this finding is supported by competent, substantial evidence. It should be affirmed.

Defendant also contends that even if Defendant had not wanted mitigation presented, counsel still should have investigated mitigation against his client's wishes. However, the United States Supreme Court has recognized that a competent defendant has the right to control the course of litigation in his case. *See Faretta v. California*, 422 U.S. 806 (1975). Moreover, counsel did not blindly follow his client's wishes. He discussed the issue of mitigation with Defendant. (PCR-SR.

1716-18) He spoke to other defense attorneys about how to proceed. (PCR-SR. 1754-55) He brought the matter to the attention of the trial court and had the trial court discuss the matter with Defendant at the January 4, 1993 hearing. He had Defendant evaluated to ensure that Defendant was in fact competent to make this decision. (PCR-SR. 1714-16) That report gave no indication of that Defendant suffered from any mental problems. (PCR-SR. 1714-16) Moreover, counsel stated that he saw no evidence of mental illness in Defendant during his interactions with Defendant. (PCR-SR. 1765-66, 1795-1800) Both this Court and the Eleventh Circuit have held that where there was nothing to put counsel on notice of a defendant's alleged mental problems, counsel does not have a duty to hire mental health experts to evaluate the defendant's mental state. *See Mills v. Moore*, 786 So. 2d 532, 535 (Fla. 2001); *Mills v. State*, 603 So. 2d 482, 485 (Fla. 1992); s*ee also Williams v. Head*, 185 F.3d 1223, 1239 (11th Cir. 1999); *Baldwin v. Johnson*, 152 F.3d 1304, 1314-15 (11th Cir. 1998). As such, the lower court did not err in finding that counsel was not deficient for following his competent client's oft-expressed wishes. The denial of the claim should be affirmed.

Defendant's reliance on *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991), is again misplaced. There, counsel was

representing a mentally ill, though not incompetent, defendant. Counsel admitted that he was aware that the defendant was behaving in a manner that indicated that the defendant was not mentally well. Through lack of preparation, counsel was not prepared to present mitigating evidence, despite the fact that the defendant had previously provided information on witnesses to be contacted. When a dispute arose during trial about what witnesses to call, counsel latched onto the defendant's statement that he did not want witnesses presented and presented none. In contrast here, Defendant was adamant from before trial began that he did not want mitigation presented. Counsel attempted to discuss mitigation with Defendant but was met with resistance. Counsel spoke about the issue with other attorneys and brought the matter to the attention of the trial court. Despite having no indication that Defendant was mentally ill, he had Defendant evaluated. Under these circumstances, *Blanco* in not applicable.

Defendant next assails the lower court's determination that counsel was not ineffective because he would not have presented evidence of Defendant's family history, drug abuse and antisocial personality disorder even if he had such evidence. However, the lower court's determination on this matter is supported by Mastos' testimony. Moreover, contrary to

Defendant's assertions, the decision not to present such evidence was not based on any mistake of law. This Court has recognized that the failure to present additional family testimony that would have informed the jury of negative information is not ineffective. *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997). As such, deciding that such evidence should not be presented is a valid decision. This Court has also recognized that the decision not to present evidence of drug abuse based on its negative impact on the jury is also valid. *Johnson v. State*, 769 So. 2d 990, 1001-02 (Fla. 2000). Many courts do not even consider antisocial personality disorder mitigating because of the negative effect of informing a jury that a defendant is a person who understands right from wrong but acts in disregard of the rights of others. *See Cade v. Haley*, 222 F.3d 1298, 1305 (11th Cir. 2000); *Weeks v. Jones*, 26 F.3d 1030, 1035 n.4 (11th Cir. 1994); *Harris v. Pulley*, 885 F.2d 1354, 1383 (9th Cir. 1988). As such, deciding that such evidence should not be presented is a valid strategic decision. *See Johnson*.

While Defendant appears to suggest that counsel could have presented evidence of Defendant's life history without opening the door to testimony about his and his families criminal history, he does not explain how this would be true. Evidence

that Defendant was a good father would have opened the door to evidence that Defendant was never with his children because he was usually incarcerated. *Jackson v. State*, 530 So. 2d 269 (Fla. 1988); *Smith v. State*, 515 So. 2d 182 (Fla. 1987); *Collier v. State*, 681 So. 2d 856 (Fla. 5th DCA 1996). Moreover, Dr. Haber, upon whom Defendant heavily relies, based her opinion about Defendant on the fact that he was brought up to be a criminal by a family of criminals. The State would have been permitted to explore the basis of her opinion. §90.705, Fla. Stat. Under these circumstances, the lower court properly credited counsel's testimony. *See Robinson v. State*, 707 So. 2d 688, 697 (Fla. 1998)(noting that the trial court could have concluded that trial counsel was not ineffective in not opening the door to potentially devastating rebuttal evidence); *Medina v. State*, 573 So. 2d 293, 298 (Fla. 1990)(finding no ineffectiveness for counsel's choice not to present witnesses who would have opened the door for the State to cross-examine them about the defendant's violent past). Because counsel's reasons for not presenting evidence of Defendant's drug use, family history, antisocial personality and Dr. Haber's testimony are not based on legal error, Defendant's reliance on *Torres-Arboleda v. Dugger*, 636 So. 2d 1321 (Fla. 1994), is misplaced. The lower court properly rejected this claim and should be affirmed.

Moreover, the lower court's conclusion that the failure to present this evidence did not prejudice Defendant was correct. The lower court properly rejected the claim of brain damage on credibility grounds. The presentation of Dr. Haber and Dr. Frumkin's testimony and the additional testimony of the family members would have shown the jury that Defendant was a drug addict and career criminal from a family of criminals. Additionally, the testimony that Defendant was a good father was no more reality based at the post conviction hearing than it was at the trial. Instead, the jury would have heard additional information that Defendant frequently abandoned his girlfriend and children, was not around his children much because he was incarcerated and set a poor example for them when he was by being abusive toward their mother and using drugs around them. Given all of the additional negative information that the jury would have learned, the lower court properly found that Defendant was not prejudiced by the failure to present this testimony. *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997).

Further, the jury had already heard of Defendant's obsession with Ms. Good during the guilt phase. Moreover, it must be remembered that Defendant brutally and repeatedly stabbed Ms. Good to death as she lay sleeping with her family. This murder was carried out in a cold, calculated and premeditated manner by

a multiple time convicted felon while he was burglarizing Ms. Good's home. The jury already heard that Defendant was from a large and loving family. Under these circumstances, and particularly given the additional negative information that would have been introduced, there is no reasonable probability that but for counsel's failure to present this evidence, Defendant would have been sentenced to life. *Strickland*. The lower court's proper denial of this claim should be affirmed.

V. THE LOWER COURT PROPERLY DENIED THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL DAPHNE ROBERTS DURING THE PENALTY PHASE.

Defendant next contends that the lower court erred in denying his claim that counsel was ineffective for failing to present the testimony of Daphne Roberts in the penalty phase. Defendant asserts that counsel should have elicited from Roberts statements that the victim made to her concerning statements that Defendant had allegedly made to her. Defendant contends that had counsel elicited this information, it would have showed that Defendant acted under an extreme mental or emotional disturbance and could have supported an argument that CCP was negated. However, the lower court properly summarily denied this claim.

With regard to the contention that counsel should have elicited this testimony to support mitigation, the lower court properly summarily denied this claim. As Defendant conceded in the lower court, substantially this same evidence was elicited in the guilt phase. (PCR. 55-56) During the guilt phase, the State presented the testimony of Ellen Thompson that she personally heard Defendant accusing Ms. Good of having other relationships, including a homosexual relationship with Ms. Thompson. (ST. 589-91) Defense counsel elicited during the cross examination of Deborah Griffen that Defendant was upset

because Ms. Good frequented nightclubs. (ST. 579) As this evidence was already elicited during the guilt phase, counsel cannot be deemed ineffective for failing to call Ms. Roberts to present cumulative evidence. *State v. Riechmann*, 777 So. 2d 342, 356 (Fla. 2000); *see also Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla. 1997); *Provenzano v. Dugger*, 561 So. 2d 541, 545-46 (Fla. 1990). This claim was properly summarily denied.

Even if the evidence had not already been presented, counsel could still not have been deemed ineffective for failing to seek to call Ms. Roberts to present this testimony. As Defendant admitted in his post conviction motion, Ms. Roberts never met Defendant. (PCR. 55) Instead, her testimony was based on what Ms. Good told her Defendant had said to Ms. Good. Such testimony would have been hearsay. §90.801, Fla. Stat. As Ms. Good was dead, the State could not attempt to rebut her statements. Defendant does not attempt to explain how this testimony would have been admissible. Moreover, under this Court's holding in *Blackwood v. State*, 777 So. 2d 399, 411 (Fla. 2000), it does not appear that it would have been. In *Blackwood*, the defendant attempted to elicit statements that the victim had made to a friend during the penalty phase. The trial court refused to permit the testimony. This Court held that the trial court had properly refused to admit the testimony as it

was hearsay that the State did not have a fair opportunity to rebut. As such, had counsel attempted to call Ms. Roberts to elicit this testimony, the trial court would properly have refused to admit it. Thus, counsel cannot be deemed ineffective for failing to raise this nonmeritorious issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim was properly summarily denied.

With regard to the contention that this testimony could have been used to argue against the application of CCP, this issue was not raised in the lower court. In his motion below, Defendant only asserted that hearsay evidence could have been used in the penalty phase to support a claim that the mitigating circumstance of under extreme duress and under extreme mental or emotional disturbance existed. (PCR. 53-56) He did not contend that this evidence could have also been used to negate CCP. As this issue was not raised below, it is not properly before this Court. *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988). The denial of the claim should be affirmed.

Even if the issue was properly before this Court, the lower court would have properly summarily denied this claim. On direct appeal, Defendant argued that the trial court had erred in finding CCP because Defendant was distraught over the loss of

his relationship with Ms. Good. This Court rejected this claim:

> Cummings-El next contends that this was a hot-blooded crime of passion and that the court erred in finding the killing cold, calculated, and premeditated. We disagree. As the court pointed out in its sentencing order, the record is replete with evidence of heightened premeditation. Several weeks before the murder, Cummings-El put a gun to Good's face and told her he was going to kill her. Two days later, Cummings-El kicked in the door at Good's friend's house, punched Good, twisted her arm behind her back, broke her wrist, kicked her, stomped on her, threw a TV on her, and promised he would kill her. Two weeks later, Cummings-El swore to Good that if he could not have her no one could. On the night of the murder, Cummings-El armed himself with a knife, waited outside Good's home until she arrived at 5:30 a.m., broke into her house after she was asleep, and attacked her in her sleep. We find no error.

Cummings-el v. State, 684 So. 2d 729, 731 (Fla. 1996). As this issue was addressed on direct appeal, the lower court properly rejected this claim as procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). Moreover, attempting to relitigate this issue under the guise of an claim of ineffective assistance of counsel does not lift the bar. *Robinson v. State*, 707 So. 2d 688, 697-98 (Fla. 1988); *Valle v. State*, 705 So. 2d 1331, 1335 (Fla. 1997); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990). The lower court properly summarily denied this claim and should be affirmed.

VI. THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT TO THE ADMISSION OF THE WITNESS TESTIMONY AT THE PENALTY PHASE WAS PROPERLY SUMMARILY DENIED.

Defendant next asserts that his counsel was ineffective for failing to object to the penalty phase testimony of Daisy Adams, the victim's mother, and Michael Adams, the victim's nephew. Defendant contends that counsel should have objected on the grounds that their penalty phase testimony was cumulative to their guilty phase testimony and the prejudicial nature of their penalty phase testimony outweighed its probative value. However, this claim was properly summarily denied as it is procedurally barred and meritless.

This Court has held that where the basis for a claim appears in the trial record that claim could have and should have been raised on direct appeal. *Kelly v. State*, 569 So. 2d 754, 756 (Fla. 1990). Here, the testimony that Defendant asserts was improperly admitted is contained in the trial record. As such, this issue could have and should have been raised on direct appeal. *Id.* Thus, the claim is procedurally barred in a post conviction proceeding. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). While Defendant has couched this claim in terms of ineffective assistance of counsel, doing so does not lift the procedural bar. *See Lopez v. Singletary*,

634 So. 2d 1054, 1057 (Fla. 1993). The lower court properly summarily denied this claim and should be affirmed.

Even if the claim was not procedurally barred, the claim would still have been properly summarily denied, as it is without merit. A comparison of the guilt phase testimony of these witnesses to their penalty phase testimony shows that the testimony was not cumulative. Moreover, a review of the penalty phase testimony shows that it was directly relevant to proving HAC and that it was not unduly prejudicial. Because the objections that Defendant claims should have been made were without merit, counsel cannot be deemed ineffective for failing to make them. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

During the guilty phase, Michael Adams testified that Ms. Good had started dating Defendant during the summer or fall of 1991, and that he had known Defendant even before he had started dating Ms. Good. (ST. 654-55) Michael was aware that Defendant and Ms. Good's relationship was abusive in that he observed Ms. Good with a broken arm and saw an argument between them on August 27, 1991, during which Defendant had a gun. (ST. 655-57, 697)

On the evening of September 15, 1991, Michael, Ms. Good and some friends decided go to a nightclub named Luke's. (ST. 657-

58) After spending some time at the club, the group left to return home with Ms. Good leaving about 15 minutes before Michael. (ST. 658-59) Upon arriving home, Michael locked the door to the house, got ready for bed and went to sleep on the floor in Ms. Good's room. (ST. 659-61) At the time that Michael went to sleep, Ms. Good, Daphne Roberts and Ms. Good's son Tadarius were in the room. (T. 662) Despite the fact that the lights were off, there was enough light from the T.V. in Ms. Adams' room, the spotlight in the neighbor's yard, the street light and the lights from a church next to the house to see around the house. (ST. 664-65)

As Michael was falling asleep, he suddenly heard Ms. Good jump up and scream that she was cut. (ST. 666) Michael immediately rose onto his knees and saw a person who had light skin and no shirt on leave the house. (ST. 666) The person ran into Ms. Adams as he was leaving the house and hit Ms. Adams, knocking her down onto the couch. (ST. 667) The person then ran out the unlocked back door to the house with Michael chasing him. (ST. 667-68, 672) After the person got out of the house, he disappeared. (ST. 672) During the 50 seconds that Michael observed the person, he briefly saw the person's profile. (ST. 672) He recognized the person as Defendant. (ST. 673) Michael was able to recognize Defendant because he had known Defendant

for 3-4 years when Michael's father had dated Defendant's sister and had developed a friendship with Defendant when Defendant was dating his aunt. (ST. 673-74)

Once Michael lost sight of Defendant, he went into the kitchen and called 911. (ST. 675-76) While Michael was on the phone, Ms. Adams was holding Ms. Good. (ST. 676) Michael noticed that Ms. Adams was unable to support Ms. Good, so he dropped the phone and went to assist Ms. Adams. (ST. 676) Before Michael could reach Ms. Good, Ms. Good fell onto the T.V. (ST. 676) Michael then remained with Ms. Good while Ms. Adams went to the phone. (ST. 676-77) Ms. Good died in Michael's arms. (ST. 677)

After Ms. Good died, fire rescue and the police arrived. (ST. 677) After fire rescue separated Michael from Ms. Good, Michael ran out of the house and banged on the car because he was angry and frustrated over the death of his aunt. (ST. 678) Michael did not speak to the police or Tadarius at the scene. (ST. 679) Ms. Adams did tell Michael that the person who had run into her was Defendant. (ST. 679-80)

During the penalty phase, Michael described Ms. Good's ability to scream loudly and speak quickly immediately after she was stabbed. (T. 936-38) He stated that Ms. Good was initially able to move quickly and under her own power. (T. 938-39) He

asserted that Ms. Good was initially able to stand in the living room but that as time passed she fell. (T. 939) He described holding Ms. Good after she fell and Ms. Good's initial ability to place her arms on his shoulders. (T. 939-40) He stated that Ms. Good's speech became slower and softer as time passed. (T. 940-41) He stated that he tried to comfort Ms. Good by tell her that the paramedics were on their way. (T. 941) Ms. Good responded, "What's taking so long." (T. 941) He finally described the moment at which Ms. Good lost consciousness and died. (T. 942)

During the guilt phase, Daisy Adams testified that Ms. Good had dated Defendant for less than a year before her death and had broken up with Defendant in September 1991. (T. 749-51) During the time that Ms. Good dated Defendant, Ms. Good and Tadarius lived with Defendant for a brief time. (T. 751) In August 1991, Ms. Good moved back in with Ms. Adams. (T. 751) Ms. Adams was aware that Ms. Good had obtained a restraining order against Defendant and that Defendant was still coming to the house and phoning Ms. Good after the restraining order was issued. (T. 752) Ms. Adams once informed Defendant on the telephone that he was violating the restraining order, and Defendant acknowledged the wrongfulness of his conduct. (T. 752)

On the night of September 15, 1991, Ms. Adams went to play bingo and returned around 11:30 p.m. (T. 752) When she returned home, Ms. Good, Michael and some friends decided to go out to celebrate the birthday of one of the friends. (T. 753) After the group left, Ms. Adams watched T.V. in her bedroom and fell asleep with the T.V. on. (T. 753-54) Ms. Adams awoke when Ms. Good returned home but did not speak to her and went back to sleep. (T. 755-56)

Later, Ms. Adams was awoken by the sound of her daughter screaming. (T. 756) Ms. Adams originally believed that Ms. Good was just having fun. (T. 756) However, Ms. Adams realized that something was wrong when she heard Ms. Good say, “Mama. Mama. He hurting me. He hurting me.” (T. 757) Upon hearing this, Ms. Adams got up to see what was wrong. (T. 757) As Ms. Adams got to the door to Ms. Good’s room, she ran into Defendant coming out of the room and stood face to face with him. (T. 758, 764) Defendant pushed Ms. Adams out of his way, causing her to fall onto her sofa. (T. 761-62) Ms. Adams was able to recognize Defendant because she had known him since he was a child and had seen him several times when he had been dating Ms. Good. (T. 763-64) At the time of the crime, Defendant was not wearing a shirt. (T. 763)

After encountering Ms. Adams, Defendant jumped over the sofa

and ran out the back door to the house. (T. 764-65) Ms. Adams saw Michael follow Defendant as far as the back door. (T. 765) As this was happening, Ms. Adams was holding Ms. Good, who said, "Fred, Fred." (T. 767, 770) After about a minute, Ms. Good became too heavy for Ms. Adams to hold so she asked Michael to hold Ms. Good while she spoke to the 911 operator. (T. 767, 770)

Ms. Adams testified that she did not lock her back door. (T. 765) However, she did keep a padlock on the inside latch to the door, which prevent the door from being opened from the outside. (T. 765-66) After the crime, Ms. Adams discovered that the screen to the door had been cut next to the frame. (T. 766) This made it possible to reach through the screen to remove the padlock without the screen appearing to be damaged. (T. 766)

In contrast, at the penalty phase, Ms. Adams testified that Ms. Good screamed, without saying any words, loudly three times before Ms. Adams realized that something was wrong. (T. 925-28) After the three wordless screams, Ms. Good yelled loudly, "Mama, he is hurting me." (T. 928) Ms. Adams described how Ms. Good leaned against the wall with one hand reaching for the wound in her back and the other hanging limply as she emerged from her bedroom. (T. 929-31) She described how Ms. Good slumped over as Ms. Adams attempted to support her. (T. 932-34) She stated that

there was no knife missing from her house and that the blue towel was not from her house. (T. 934)

As can be seen from the foregoing, counsel cannot be deemed ineffective for failing to object to this testimony on the grounds that it was cumulative. "Cumulative evidence" is defined as evidence "which goes to prove what has already been established by other evidence." BLACK'S LAW DICTIONARY 343 (5th ed. 1979). Here, the focus of Michael's guilt phase testimony was his ability to perceive the events of the murder and Defendant. It explained his level of consciousness, his opportunity to observe the events and the reason why his description of what he saw and heard would be different from his grandmother's testimony. It also focused on whether the family witnesses had the opportunity to influence one another's identification of Defendant. In contrast, his penalty phase testimony concerned Ms. Good's initial level of consciousness and ability to function and the decline of that ability over time. He also provided insight into Ms. Good's awareness of her own impending death during this time. Similarly, Ms. Adams' guilt phase testimony focused on her ability to observe the crime and Defendant, her ability to identify Defendant and the reasons why her testimony differed from Michael's. Her penalty phase testimony was directed to Ms. Good's abilities immediately after

being stabbed, Ms. Good's awareness of her wound and her progressive weakening before her death. As such, the evidence was not cumulative. Because this testimony was not cumulative, counsel cannot be deemed ineffective for failing to make the meritless objection that it was. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The summary denial of this claim should be affirmed.

Defendant also appears to contend that counsel should have objected to the admission of this evidence because it was not necessary for the State to present this evidence to prove HAC.[7] However, the test for admissibility is relevancy; not necessity. *See Gudinas v. State*, 693 So. 2d 953, 963 (Fla. 1997); *Pope v. State*, 679 So. 2d 710, 713 (Fla.1996). Here, the evidence that Ms. Good was aware of her wound, that she became progressively weaker, a fact of which she had to be aware, and that she expressed knowledge that she was dying was relevant to HAC. *See Cox v. State*, 819 So. 2d 705, 719 (Fla. 2002)("Obviously, a victim's suffering and awareness of his or her impending death

[7] Defendant's present position is especially ironic, given that Defendant contended both at the time of trial and on direct appeal that the evidence was insufficient to prove HAC. (T. 979); Appellant' Initial Brief, Florida Supreme Court Case No. 82,349, at 34-38. He again raised this issue before the lower court. (PCR.

certainly supports the finding of the heinous, atrocious, or cruel aggravating circumstance.”); *Francis v. State*, 808 So. 2d 110, 134 (Fla. 2001)("the fear and emotional strain preceding the death of the victim may be considered as contributing to the heinous nature of a capital felony.")(quoting *Walker v. State*, 707 So. 2d 300, 315 (Fla. 1997); *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997) ("[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel."); *Hitchcock v. State*, 578 So. 2d 685, 692 (Fla. 1990)(“This aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's.”). Since any objection that the evidence was not necessary to prove HAC would have been meritless, the lower court properly rejected the claim that counsel could be deemed ineffective for failing to make that objection. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The denial of the claim should be affirmed.

Defendant finally appears to assert that the lower court erred in rejecting his claim that counsel was ineffective for failing to object to this evidence on the grounds that it was unduly prejudicial. However, the lower court properly rejected this claim because it not. The State limited its questions to

the level of the victim's consciousness, her knowledge of her wound, the decline of the victim and a statement that showed that she knew she was about to die. It did not seek to present the testimony in an overly emotional manner. This evidence was directly relevant to HAC. *Cox*, 819 So. 2d at 719; *Francis*, 808 So. 2d at 134; *Walker*, 707 So. 2d at 315; *James*, 695 So. 2d at 1235; *Hitchcock*, 578 So. 2d at 692. Defendant is the one who chose to kill Ms. Good in a heinous, atrocious and cruel manner and to do so in the presence of her family members. As such, the prejudice from the jury learning of the facts that were relevant to a proper determination of his punishment was not undue. As this Court has stated, "Those whose work products are murdered human beings should expect to be confronted by [evidence] of their accomplishments." *Henderson v. State*, 463 So. 2d 196, 200 (Fla. 1985). Because the evidence was not unduly prejudicial, the lower court properly rejected the claim that counsel was ineffective for failing to claim that it was. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. It should be affirmed.

Defendant relies upon *Ruiz v. State*, 743 So. 2d 1 (Fla. 1999), *Urbin v. State*, 714 So. 2d 411 (Fla. 1998), *Campbell v. State*, 679 So. 2d 720 (Fla. 1996), *Johnson v. State*, 660 So. 2d

637 (Fla. 1995), *King v. State*, 623 So. 2d 486 (Fla. 1993), *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993), *Jones v. State*, 569 So. 2d 1234 (Fla. 1990), and *Cooper v. State*, 336 So. 2d 1133 (Fla. 1976), to claim that the admission of this evidence was overkill and inflammatory and that counsel was therefore ineffective for failing to raise that objection. However, these cases do not support that contention. In *Ruiz*, the prosecutor made several improper comments in closing, introduced a blown up copy of a photograph that was already in evidence without offering any relevant purpose and introduced evidence that was unrelated to any fact at issue. *Urbin* again involved improper comments in closing, including making up an imaginary script of what the victim may have said before he died.

In *Campbell*, the prosecutor improperly cross examined a defense witness and made improper comments in closing. *Johnson* involved an attempt to introduce records without laying a proper predicate. In *King*, the State made improper comments in closing. In *Garcia*, the court found that the State had suppressed material evidence and then had argued a theory of the case that the suppressed evidence showed was false. In *Jones*, the Court found that it was improper for family members of the victim to identify the victim when other witnesses were

available. In *Cooper*, the defendant attempted to introduce evidence of his codefendant's character that was not relevant to him.

Here, the claim concerns the alleged ineffectiveness of counsel for failing to object to the admission of evidence. That evidence was directly relevant to an aggravating circumstance. *Cox*, 819 So. 2d at 719; *Francis*, 808 So. 2d at 134; *Walker*, 707 So. 2d at 315; *James*, 695 So. 2d at 1235; *Hitchcock*, 578 So. 2d at 692. The evidence was not based on speculation but on direct eyewitness accounts. This testimony had to come from family members because Defendant chose to kill the victim in their presence. Under these circumstances, none of the cases relied upon by Defendant show that the evidence should not have been admitted. As such, they do not show that counsel was ineffective for failing to raise this objection. The denial of the claim should be affirmed.

VII. THE LOWER COURT PROPERLY DENIED THE CLAIM OF CUMULATIVE ERROR.

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

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Sara D. Baggett, 2311 23rd Way, West Palm Beach, FL 33407, and Tony Moss, 851 N.E. 118th Street, Miami, FL 33161, this 22nd day of November, 2002.

_____
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CERTIFICATE OF COMPLIANCE

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

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