**IN THE SUPREME COURT OF FLORIDA**

MARSHALL LEE GORE,

Appellant,

v. CASE NO. SC01-1524

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR COLUMBIA COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS[1]

The facts and circumstances surrounding the death of Susan Roark may be found in the opinion of the Florida Supreme Court affirming Gore's conviction and sentence of death, Gore v. State, 599 So.2d 978 (Fla.), cert. denied, 113 S.Ct. 610 (1992). Those facts reflect:

> Susan Roark was last seen alive on January 30, 1988, in Cleveland, Tennessee, in the company of Marshall Lee Gore. Gore had planned to travel to Florida with a friend from Cleveland. While waiting for his friend at a convenience store, Gore struck up a conversation with Roark. Gore then entered Roark's car, a black Mustang, and they drove away.
>
> Gore accompanied Roark to a party at the home of a friend of hers. Roark had planned to spend the night at her friend's home. Sometime between 11:30 and 12:00, Roark left to drive Gore home. She never returned. The following day Roark's grandmother reported her missing. She had been expected home at 7:00 a.m. that morning.
>
> Gore arrived in Tampa on January 31, driving a black Mustang. He convinced a friend to help him pawn several items of jewelry later identified as belonging to Roark. Gore then proceeded to Miami, where police subsequently recovered Roark's Mustang after it was abandoned in a two car accident. Gore's fingerprint was found in the car, as well as a traffic ticket which had been issued to him while he was in Miami.

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[1] OTR - Original Trial Record and PCR - Postconviction Record - are used to delineate citations to the records in this case.

> On April 2, 1988, the skeletonized remains of Roark's body were discovered in Columbia County, Florida. The naked body was found in a wooded area which has been used as an unauthorized dumping ground for household garbage and refuse. Expert testimony established that the body was placed in its location either at the time of death or within two hours of death. The body could have been there anywhere from two weeks to six months prior to discovery. The forensic pathologist who testified for the state concluded that the cause of death was a homicide, given the situation in which the body was found and the fact that the neck area of the body was completely missing. The pathologist explained that this was probably due to some injury to the neck, such as a stab wound or a strangulation trauma, which provided a favorable environment for insects to begin the deterioration process.
>
> Gore was found guilty of first degree murder, kidnapping and robbery. The jury recommended a sentence of death by a vote of 11 to 1, and the trial court followed this recommendation.

Gore v. State, 599 So.2d at 980.

In sentencing Gore to death, the trial court found that four aggravating factors (prior conviction of violent felony; committed during a kidnapping; committed for pecuniary gain; and cold, calculated and premeditated (CCP)) outweighed the mitigating evidence.

Gore raised seven issues on direct appeal: (1) the trial court erred in denying the motion to suppress Gore's statements; (2) the trial court erred in allowing the State to present

evidence of collateral crimes; (3) the trial court erred by denying a motion for continuance regarding a defense witness and in not allowing Gore to attend that witnesses deposition; (4) the trial court erred in denying the motion for acquittal as to the kidnapping charge; (5) the trial court erred in excusing the victim's stepmother from the rule of sequestration; (6) the trial court erred in allowing the prosecutor to question the defense expert about Gore's sanity at the time of the offense, and (7) the trial court erred in finding the CCP, prior conviction, and felony murder/kidnapping aggravators. In Gore v. State, 599 So.2d at 981-87, the court agreed that the cold, calculated and premeditated aggravator should not have been found, but affirmed as to all other issues. After striking the CCP aggravator, the court performed a harmless error analysis and concluded:

> There is no reasonable possibility that the trial court would have concluded that the three valid aggravating factors were outweighed by the mitigating evidence.

599 So.2d at 987. The court then affirmed Gore's death sentence.

Gore filed his original motion for postconviction relief in May 1994. The motion contained thirty-seven claims, most of which were mere allegations that the claims could not be fully pled until public records had been disclosed. Following a

series of motions and hearings on said motions, CCRC finally filed an amended motion to vacate judgment of conviction and sentence on February 27, 1997. The amended motion contained forty-seven claims and, albeit, public records had been disclosed, several of the new claims included allegations contained in the original motion that purportedly could not been fully pled because public records were not disclosed. The State filed its response to amended to vacate conviction and sentence on April 1, 1997, addressing all claims.

On June 13, 1997, the trial court entered an order pursuant to the Huff hearing held. Gore's counsel argued that it was necessary an evidentiary hearing be held on all forty-five issues presented, while the State argued that the claims requiring further evidentiary development were the claims of ineffective assistance of counsel found in claims VII and XVIII. With regard to all other claims, the State argued that they were either procedurally barred, insufficiently pled, moot, and/or not cognizable in a 3.850 proceeding. The trial court held, in its findings:

> 1. Claim I (Public Records) is moot for the reasons set out in the State's response. See Mills v. State, 684 So.2d 801, 804 (Fla. 1996) (affirming the trial court's finding 'the issue raised by Mills 'procedurally barred as representing matters which were or could have been raised previously for the reasons contained [in] the State's

response.’’). This claim is summarily denied.

2. The following claims are summarily denied because they are procedurally barred under Florida Supreme Court precedent as set out in the State’s response, see Mills: II (jurisdiction), VIII and IX (conviction and sentence while incompetent), X (prior conviction), XI (burden shift), XII (nonstatutory aggravators), XIII (trial court’s consideration of aggravators), XIV (prosecutorial argument), XV (constitutionality of the death penalty), XVI (automatic aggravator), XVII (sufficiency of the evidence), XIX (mandatory death recommendation), XX (adequacy of mental health assistance), XXI (waiver or right), XXII (violation of Caldwell v. Mississippi, 472 U.S. 320 (1985)), XXIII through XXV (cold, calculated, and premeditated aggravator), XXVII (overbroad aggravators), XXVIII (pecuniary gain), XXIX (recess prior to sentencing), XXX (challenges for cause), XXXI (ex parte communication with prospective juror), XXXII (defense witnesses testimony), XXXIII (bailiff’s communication with jurors), XXXIV (similar fact evidence), XXXV (pretrial publicity), XXXVI (cumulative error), XXXVIII (shackling), XXXIX (law library), XL (interviewing jurors), XLI (absence), XLII (insanity), XLIII (selection of Grand Jury), and XLIV (violation of Faretta v. California, 422 U.S. 806 (1975)). Any allegations of ineffectiveness in these claims are insufficient either to overcome the procedural bars or to warrant an evidentiary hearing. Despite full public records disclosure and in spite of having more than two years to prepare the amended motion, most of these claims are insufficiently pled. Furthermore, for the reasons set out in the State’s response, many of these claims have no factual basis in the record (e.g., II, VIII-X, XIV, XVII,

XX, XXX, XXXI, XXXIII, XXXV, XXXVIII, XLI, XLII, and XLIV). Any public records allegations in claims XLII through XLV are moot.

3. The following claims are summarily denied because they are insufficiently pled: III (denial of adversarial testing), IV (whether the outcome of Gore's trial was reliable), V (newly discovered evidence), VI (the State withheld exculpatory evidence). Besides being insufficiently pled, claim IV contains subclaims that are procedurally barred and without merit as set out in the State's response. Any allegations of counsel's ineffectiveness in claim IV are insufficient to provide relief.

4. The following claims are summarily denied because they are not cognizable in these proceedings and should have been raised in some other form: XXVI (Florida Supreme Court performed inadequate harmless error analysis), XXXVII (inadequate transcript precluded reliable appellate review), and XLV (funding). See Hardwick v. Dugger, 648 So.2d 100, 103 (Fla. 1994) ('the trial court has no authority to review the actions of [the Florida Supreme] Court').

5. The following claims are cognizable in postconviction proceedings and would warrant an evidentiary hearing if sufficiently pled: VII (ineffectiveness of trial counsel), and XVIII (ineffective assistance at the penalty phase). Claim VII raises twenty-two alleged instances of ineffectiveness in paragraph 11 through 29, 32, 18 [sic], and 35 (page 24-29 of the amended motion). These allegations are insufficiently pled, however. For example, paragraph 15 (amended motion at 25), states: 'Mr. Gore's attorney was given the name [sic] the witnesses that would have offered evidence necessary in establishing a verdict of not guilty but he failed to investigate them.' (Paragraph 20

(amended motion at 25), states: 'Counsel failed to secure expert witnesses that would have rebutted and negated the testimony of the State's expert witnesses.' As currently set out, the allegations in claim VII are inadequate; they fail to identify the witness counsel was allegedly ineffective for failing to call, are devoid of any facts as to what those witnesses would have testified to, and are inadequate to demonstrate either let alone both parts of the test for ineffectiveness set out in Strickland v. Washington, 466 U.S. 668 (1984).

This Court, however, recognizes that trial courts are encouraged 'to hold evidentiary hearings on postconviction claims when those courts deem such actions warranted . . . because there findings of fact are but valuable aids to reviewing courts.' Francis v. State, 529 So.2d 670, 679 n.2 (Fla. 1988). Therefore, instead of summarily denying the twenty-two allegations in this claim as insufficiently pled, the court directs Gore to specifically plead the allegations in the above listed paragraphs (11 through 29, 32, 18, and 35), including naming the witnesses and setting out the evidence that will support the allegations, providing the substance of the witnesses' testimony, and explaining how such testimony and evidence demonstrates trial counsel's ineffectiveness. Record citations should be provided where applicable. Failure to correct the adequacies of any allegation will result in that allegation's summary denial as insufficiently pled.

Claims XVIII suffers from the same deficiencies as Claim VII. Gore argues that trial counsel failed to discover and present mitigating evidence (amended motion at 65, paragraph 10). Paragraph 12 (page 65), and 18 (page 68), appear to set out the areas of counsel's alleged failures:

> 12. At the penalty phase, counsel provided only scant information about Mr. Gore to the judge and jury in contrast to the vast amounts of compelling information that was available in mitigation. Investigation has revealed evidence indicating that Mr. Gore may suffer from brain damage and schizophrenia, that he was raped as a child by family members, that there is a history of mental instability in Mr. Gore's family, and further information supporting statutory and nonstatutory mitigation . . .
>
> 18. Substantial and valuable lay and expert testimony as to Mr. Gore's intoxication was available, but not considered at all in terms of establishing mitigating circumstances (R 1371, 1073, 2344).

As with Claim VII, however, no specifics are included to identify the witnesses and evidence that would support these allegations. Therefore, Gore is directed to plead these claims with more specificity or they will be denied summarily as insufficiently pled. Any allegations as to public records in Claims VII and XVIII are moot.

## Conclusion

As stated above, an evidentiary hearing will be held on the allegations of ineffective assistance of counsel in Claims VII and XVIII if Gore pleads them with particularity. All other claims are summarily denied for the reasons set out above. Claims VII and XVIII must be repled by July 21, 1997. Any allegations of ineffectiveness that remain inadequately

> pled after that date will be summarily denied. Gore will file his witness list on August 19, 1997, and the State will file its witness on August 29, 1997. Thereafter, the Court will conduct an evidentiary hearing on the sufficiently pled allegations in Claims VII and XVIII on September 17-18, 1997, at the Columbia County Courthouse, beginning at 9:00 a.m.

(PCR V, 871-877).

On or about July 21, 1997, Gore filed an amended motion to vacate judgment of conviction and sentence with special request for leave to amend. Therein Gore asked for additional requests for leave to amend and restated claims VII and XVIII with regard to the ineffectiveness of counsel at the guilt and penalty phase of his trial.

Following the amended motion in July 1997, a series of motions to disqualify the trial court and the State Attorney's Office, and to determine Gore's competency were filed and adjudicated. The record reflects that collateral counsel filed a motion to determine Gore's competency to proceed on April 15, 1998, wherein counsel alleged that Gore had no ability to consult with his lawyer regarding postconviction matters. A hearing was held on April 27, 1998, with regard to the motion at which point the State had no objection to a mental health examination being performed. The court appointed psychiatrists Dr. Umesh Mhatre and Dr. Kevin Holbert to examine him. Gore

hired Dr. Terry Leland and Dr. Harry McClaren as defense experts. The trial court, after hearing all the testimony and reviewing the reports presented by the experts, concluded:

> Applying the above stated principles to the evidence presented at the competency hearing, this court concludes that Gore is competent to proceed. The defense experts, Drs. McClaren and Leland, found Gore delusional and incapable of cooperating with collateral counsel. The court experts, Drs. Mhatre and Holbert, on the other hand, found that Gore was not delusional and that he can, if he chooses to do so, cooperate with counsel. The court finds the reports and testimony of Mhatre and Holbert to be more persuasive than that of McClaren and Leland.
>
> All of the experts commented in their written reports or testimony or both on Gore's dissatisfaction with counsel and with their representation of him. As noted by Dr. Holbert and Dr. Mhatre, Gore is controlling and manipulative, common traits of his personality disorder. He is also suspicious, distrustful, and self-centered, which are also common traits to his personality disorder. As found by all of the experts, Gore is intelligent and fully aware of his legal situation.
>
> Mr. Gore is also a notoriously difficult client. There is, however, no right to a meaningful attorney-client relationship, when the client's conduct prevents a meaningful relationship. Morris v. Slappy, 461 U.S. 1, 13 (1983). Based on this Court's observations of Gore, both during the trial and over the last several years of these postconviction proceedings and the reports and testimony of the experts, the Court finds that Gore's current dislike of and refusal to cooperate with collateral counsel are not the result of a delusional

> disorder. Instead, such behavior is consistent with Gore's personality disorder.
>
> The Court finds that the greater weight of the evidence supports a conclusion that Gore has both a rational and factual understanding of these proceedings and that he has the ability to consult with counsel if he chooses to do so. Therefore, it is 'ordered and adjudged that Gore is competent to proceed and the evidentiary hearing on the claims of trial counsel's ineffectiveness is set for two days. Done and ordered in Chambers at Lake City, Columbia County, Florida, this 16th day of November, 1998.'

(PCR VIII, 1352-1353).

Following a series of more delays and continuances requested by CCRC, CCRC was ultimately conflicted out of the case and present counsel, Mr. Glenn Arnold, Registry Counsel, was assigned to handle postconviction matters. On or about November 8, 1999, Mr. Arnold requested a motion for extension of time within which to file motions for postconviction relief without objection by the State. (PCR VIII, 1431-1433). On or about February 14, 2000, a fourth amended motion to vacate, set aside or correct sentence was filed in Gore's behalf. Gore, unhappy with the fourth amended motion, filed a pro se emergency motion for substitution of counsel on February 28, 2000 (PCR VIII, 1444-1448), and, as a result thereof, postconviction counsel Glenn Arnold filed a motion to proceed on the original amended motion filed by CCRC in February 1997. The trial court granted

leave to go forward on the February 1997 motion, on July 5, 2000, and finally on December 14, 2000, an evidentiary hearing was held on claims VII and XVIII. (PCR XVII, pages 1742-1808). At the evidentiary hearing, counsel requested the trial court reconsider the summary denial of other issues raised in that previous motion. (PCR XVII, 1744-1754).

On May 31, 2001, the trial court entered an order denying relief on all claims. (PCR IX, 1498-1514). A notice of appeal was filed on June 27, 2001. (PCR IX, 1519).

At the December 14, 2000, evidentiary hearing held on claims VII and XVIII (ineffectiveness of counsel at guilt and penalty phases respectively), the defense, prior to calling the first witness, renewed his motion to have all those claims previously summarily denied reconsidered. (PCR XVII, 1745-1754). The trial court again denied all relief. (PCR XVII, 1754). The defense then called Mr. Jimmy Hunt, Gore's defense lawyer at trial and at the penalty phase. Defense counsel asked Mr. Hunt a series of questions relating to allegations contained in the Rule 3.850 motion. Specifically, Mr. Hunt responded that he was never notified that witnesses were violating a court order not to discuss the case or what they had heard about the Gore case. He testified that had he known he would have objected or acted upon it. (PCR XVII, 1757). He observed that his original notes

had been turned over to the capital collateral representative and he had retained no copies of those notes. (PCR XVII, 1759). He recalled that there had been a Williams Rule hearing but did not recall whether family members of the jurors remained in the courtroom during the proceedings. (PCR XVII, 1760). With regard to whether there was a "media blitz" about the crime, Mr. Hunt testified that there was very little coverage either through print or electronic media and he certainly did not have any recollection of "saturated" coverage. "This case was hardly mentioned in the newspaper and to my knowledge wasn't mentioned on the radio perhaps until right at the time of the trial. May have been one or two articles about him being arraigned or something like that, but there was very little coverage about the case." (PCR XVII, 1761). Mr. Hunt did not remember a front page news article that had the defendant's picture and that of Bundy used together. (PCR XVII, 1761). In discussing potential jurors, Mr. Hunt recalled that some people had heard about the case but compared to other murder cases, relatively little was known about the case by the venire. (PCR XVII, 1762). Mr. Hunt testified that he talked to the defendant about a change of venue and based his recollection of the record no change of venue was filed. He also recalled that he did not exhaust all

of his peremptory challenges with regard to the jury venire. (PCR XVII, 1762).

With regard to an article in the Lake City Reporter, wherein a worker in the public defender's office said that Gore was not always telling the truth about certain things, Mr. Hunt recalled that the trial court held a hearing on January 4, 1990, about the article. (PCR XVII, 1763).

It was Mr. Hunt's observation that he got along well with Gore personally, however, Gore was never a cooperative client, but Mr. Hunt did not find him particularly difficult to represent. (PCR XVII, 1763). Mr. Hunt said he never struck Gore and he did not recall any circumstance where Gore was accosted by a bailiff. (PCR XVII, 1763-1764). During the January 4, 1990, hearing, there was some discussion regarding a conflict of interest, however, following extensive discussion between the attorneys, Gore and the Court, the Court ruled that there was no conflict and determined that Mr. Hunt was to continue to represent Gore. (PCR XVII, 1764).

Following an in chambers Faretta hearing held as to whether Gore could cross-examine a State's key witness Tina Corolis, Gore was allowed to do the cross-examination. Mr. Hunt recalled that Gore did fairly well at cross-examination considering he was not a lawyer and did no harm to the case. (PCR XVII, 1765-

1766). Mr. Hunt did not recall whether Gore was on any antidepressant medications during the time of the cross-examination, or for that matter, during trial. (PCR XVII, 1765).

Mr. Hunt recalled that he spoke to Gore a number of times and reduced some of the interviews to writing. He talked with Gore about potential witnesses and wrote down the names and information with regard to potential witnesses. As to Nathan Caywood, Hunt recalled that Caywood testified at trial. (PCR XVII, 1766-1767). With regard to a Paula or Paulette Johnson, there was no evidence in his notes, that that name ever came up. Mr. Hunt testified that his notes did not reflect nor did he have any recollection of potential witnesses in Panama City, Florida, who could establish an alibi or testify that the victim Susan Roark was in Panama City after January 31st. (PCR XVII, 1767). Mr. Hunt observed that the questions regarding Panama City were inconsistent with Gore's accounting of the events surrounding Susan Roark's death to him. (PCR XVII, 1767).

In discussing potential witnesses Tina Corolis, Nathan Caywood and Eric Hammond, Mr. Hunt observed that he took the deposition of Caywood, but he did not know who Eric Hammond was. He further observed that there was tons of information concerning Tina Corolis from the FBI and other sources and that,

in fact, he had taken her deposition and had her trial testimony from the Miami trial. (PCR XVII, 1768). Mr. Hunt did not recall whether he was told that M. Trammel or Brian Swafford, both of Tennessee, had criminal records, however, if he had been it would have been in his notes. (PCR XVII, 1768). Mr. Hunt did not know who Frank McGhee was nor did he know of a Michelle Hammond or a Dennis Laramore from Panama City. (PCR XVII, 1769). Gore did tell Mr. Hunt that he should talk to Stephanie Refner and her husband because they both saw Susan Roark alive after the day of her disappearance. Mr. Hunt testified they investigated and, in fact, spoke to Stephanie Refner's husband on the phone. The husband had no recollection and could not confirm that he saw the victim after the date she was missing. (PCR XVII, 1769-1770).

Mr. Hunt recalled some discussion about a Holiday Inn on the top of a hill near I-75 outside Cleveland, Tennessee but was not told by Gore about any scam Gore and various women had videotaping clients of prostitutes and blackmailing them. (PCR XVII, 1770).

When asked whether he heard the name Anna Fernandez-Ladon, he said he never heard of her and further said he had never seen a "1992 affidavit" which indicated Gore was someplace else during the time of the crime. Mr. Hunt observed that the trial

was in 1990 and that a 1992 affidavit would not have been helpful. (PCR XVII, 1770-1771). Mr. Hunt knew who Raul Coto was and acknowledged that Gore had told him that Mr. Coto would know Marisol Coto was mad at Gore because Gore had told Raul she had had sexual relationships with somebody other than Raul. Hunt spoke with Raul Coto who said that wasn't true. (PCR XVII, 1771-1772).

As to photos or videos made at the Holiday Inn, Mr. Hunt testified Gore never told him about that and Hunt was not familiar with any photos left at DOC. (PCR XVII, 1772).

Mr. Hunt communicated with a Dr. Joseph L. Burton from Atlanta, Georgia, about the nick injury to the neckbone and whether it was done during an autopsy. He testified he received a verbal report from Dr. Burton that stated that Dr. Burton agreed with the medical examiner in Jacksonville that it was a homicide. (PCR XVII, 1773).

With regard to the accusation that he, Hunt, conceded aggravators without Gore's approval, Hunt dismissed that. He said that he had discussed in great detail with Gore: the trial, the witnesses, what Hunt expected to say and what evidence would be used during the guilt and penalty phases of the trial. (PCR XVII, 1774). In discussing the accusation that he did not investigate mental health evidence, Hunt testified that as the

public defender, he had handled numerous homicide cases and, had represented people who were incompetent or insane at the time of the crime. It was his practice to first observe his client and try to make a personal assessment as to the individual's competency. In Gore's case, he discussed with Gore his mental state. Gore admitted to Mr. Hunt that he, Gore, was competent and not insane at the time of the crime. (PCR XVII, 1776-1777). Gore told him that he could appear insane if he wanted to. (PCR XVII, 1777). In addition to speaking with his client and discussing with Gore's mental condition, Mr. Hunt contacted the Miami public defender's office, Art Koch, who had handled the Miami case. Mr. Koch provided Hunt with two prior evaluations and Hunt then obtained the PSI from a federal prison which had psychiatric evaluations. Upon reviewing all of the information, Mr. Hunt then requested of the Court that Dr. Mhatre and Dr. Krop be appointed. Based on his notes and his practice, Mr. Hunt gave all the information including interviews with Gore to the doctors. (PCR XVII, 1777). The doctors were specifically instructed to assess Gore's competency, his sanity at the time of the crime, and look for all possible mental mitigation. (PCR XVII, 1777).

Mr. Hunt recalled that Dr. Mhatre's testimony at trial reflected that Gore had an antisocial personality disorder. Mr.

Hunt recalled that he provided everything that was located about Gore including his childhood attention deficit, his hyperactivity disorder, his paranoia and his history of polysubstance abuse to the doctors. (PCR XVII, 1778). It was Mr. Hunt's recollection that after receiving and reviewing all the medical records and reports, that no one diagnosed Gore with a major mental illness. Gore had an antisocial personality disorder and exhibited some paranoia. (PCR XVII, 1779-1780).

Hunt obtained from Gore's mother, that Gore had attempted suicide when he was younger via a drug overdose. Moreover, Mr. Hunt noted that Dr. Krop also interviewed Gore's mother and had that information available to him. (PCR XVII, 1780).

In response to inquiry as to why some of this evidence was not presented to the jury, Mr. Hunt testified that it was a judgment call and that some of the evidence was not introduced because he, Hunt, did not believe it would be helpful.

> Q: As a trial lawyer with some 16, 17 years at the time of this trial, would you agree that if in fact that mitigating evidence dealing with drug abuse, attempted suicide, and those matters that we have just discussed, would you not agree that those would be significant in statutory and nonstatutory mitigators?
>
> A: I don't know that attempted suicide. Drug overdose would be a mitigator. As far as what was placed in front of a trial jury, it is a judgment call. But I don't think

> jurors as a general rule regard substance abuse as a mitigator.
>
> The fact that somebody goes out and abuses drugs is evidence of additional criminal activity. Whether that's mitigating or not, I guess it is in the mind of the beholder, but my observation is that most jurors don't view that as a mitigator. They view it as additional criminal activity.
>
> The other thing is it would have more relevance and perhaps be more of a mitigator in my opinion if in fact we can show that at the time of the offense he was using drugs or using alcohol and was under the influence of some substance at that time. We had no such evidence.
>
> Mr. Gore never testified. He was the only one that was with her at the time of her demise, and he refused to discuss the exact circumstances of that with me and certainly we offered no evidence to the jury as to exactly what happened. On top of that, in addition to that, when Mr. Gore was interviewed by the experts, Mr. Gore declined to discuss with them the exact specifics as just how she died and what the circumstances were. In a roundabout way, he acknowledged it and admitted it, but he would not discuss the specifics.

(PCR XVII, 1781-1782).

Lastly, Mr. Hunt was asked on direct examination whether he observed Gore using drugs during trial. He answered that he had several discussions with Gore about his behavior during the trial but none of those discussions had to do with Gore taking drugs. (PCR XVII, 1782).

On cross-examination, Mr. Hunt testified that Gore admitted the murder to him in general terms at first and then with more specificity. (PCR XVII, 1783-1785). The record reflects the following:

> THE WITNESS: Getting to the point where he first came in contact with Susan Roark, he said he first met her at a gas station in Cleveland, Tennessee, that the time was approximately 10:30 p.m. He said that she wanted to go fool around and get stoned with her friends. He told me she was about 18 years old, that she was 5'4" tall and weighed approximately 100 pounds and she had brown hair and brown eyes. He said he never met her before to his knowledge.
>
> I asked him to describe the kind of person she was. And he said that she was not a whore but she was open, she was ready for somebody and a real sweet girl and told me she was alone. He said that he had gone to this particular convenience store or service station with a friend but he left with Susan.
>
> Mr. Gore had been driving his mother's car. He took that car to his mother's house and he dropped it off. And he and Susan left in her car, which was a black 1985 to 1987 Mustang, he thought. He says he thinks he left a note for his mother telling her that he would not be back for awhile and that he left her some money to retrieve a ring from a pawn shop. He told me he thought the authorities had retrieved that note and they might use that against him in his case.
>
> He said that he got into the car with Susan. He started racing around. He said her driving scared and he finally told her that if she did not let him drive, he was going to get out of the car. He said they both

had a lot to drink. He said that Miss Roark had already been drinking when he first saw her at the station.

THE DEFENDANT: Could I have some popcorn for this?

THE WITNESS: He said that she started hitting on him at the store, that otherwise he would not have given her a second look. He said that they went to the home of one of her friends where they drank some more booze and smoked marijuana. He doesn't recall whether he used cocaine, but does remember that he had some cocaine with him at the time.

Upon leaving the residence, he and Susan drove around without stopping. Susan took him to a secluded location where they parked and began petting. Gore says that she wanted to have sexual relations and it got hot and heavy, but they did not have sexual relations.

He told her that he wanted to – that he was wanting to bring a quantity of cocaine from Miami and Susan told him that she and her friends used cocaine. And after they discussed this, the two of them discussed this more, that she decided she would go with him to Miami and procure some cocaine.

THE DEFENDANT: Lie about me, but not about her.

THE WITNESS: They left that night. He said he had approximately sixty dollars leftover from a gram of cocaine that he had sold and she had about a hundred dollars. They stopped at a Krystal in Cleveland before leaving. They stopped a number of times at fast food places and gas stations between Cleveland and Lake City, but he claimed not to recall any of those places. He does not recall the day of the week of the day that

he and Susan left for Miami, but he believes it was late January or early February of 1989. He said that both of them drove as they were going south towards Miami.

He said that they got to a place near Lake City and he told me that's where the story ends. He told me he would not discuss what happened in this area because of his fear that the authorities were listening in on our conversation. He told me he would be glad to discuss this with me after he had been transferred to south Florida and discovery had been received in his case.

He told me that he wrote a book while in prison, that his brother does not know the location of the book but if the location were described to him, his brother would know where that was. I reminded him that during the initial interview he told me that his brother was dead and he said, Oh yeah, that's right.

At this point, I had spent approximately half of an hour speaking with him about his case and encouraged him to tell me what had happened. I told him I would put down my pen and not make any notes if he would verbally tell me what had taken place. He kept refusing to tell me exactly what had happened.

I pointed out that the indictment did not specify the cause of death and asked him how she was killed. His response was that he would not give me any details, but that the killing was painless. He also said that the killing was sparked by him learning that her middle name was Marie and said that he became aware of that when he saw her driver's license. He told me that the key to this case and all other cases lies in the name of the victims. All three have Marie either for the first or the middle name but he wouldn't explain that further.

(PCR XVII, 1785-1788).

During the course of the hearing, the State introduced files and letters that Mr. Hunt retained. He testified that there were omissions in the notes. (PCR XVII, 1790).

Mr. Hunt testified on cross that he tried to locate all the witnesses that Gore wanted, but there were some, like Gore's brother Michael Gore, who he could not find. (PCR XVII, 1790).

He did try to locate mitigation witnesses, in particular Gore's family, however, after talking with Gore's sisters and his father, it was clear that Brenda Gore, Gore's mother and his uncle, Rex Gore, were the best spokespersons for the family in explaining Gore's past.[2] (PCR XVII, 1791). Mr. Hunt recounted how he tried to have Michelle Gore, one of Gore's sisters, testify for the penalty phase. Although she was under subpoena, she did not appear, and when he finally did locate her and speak to her on the telephone, she indicated that Gore had called her and threatened to kill her if she or any other family member appeared or testified at trial. Gore's father told Mr. Hunt that if subpoenaed, he would come to the trial and he would do his best to insure that Gore got the death penalty. (PCR XVII, 1792).

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[2] The record below reflects that both testified at the penalty phase of Gore's trial. (OTR XXIV 2595-2628, 2628-2687).

Additional correspondence between Drs. Mhatre and Krop were admitted into evidence. When asked why Dr. Krop was not called to testify, Mr. Hunt explained that although Krop had interviewed the defendant and other family members, he told Mr. Hunt that he, Dr. Krop, did not believe his testimony would be helpful and that any testimony that he would give might have more of a negative impact. (PCR XVII, 1794).

It was Mr. Hunt's view that Gore did not want to cooperate with his counsel with regard to securing mitigating evidence. The best evidence of that, was Gore's threats to his sister if she came to testify. (PCR XVII, 1798). He also observed that during trial, Gore did things to be a problem. He would act deranged in front of the jury and he did things like unbutton his shirt to his navel in court. Mr. Hunt told Gore he needed to dress and act more appropriately. It was Hunt's view that Gore was intelligent and he knew what he was doing; his actions were deliberate. (PCR XVII, 1799).

On redirect, Mr. Hunt testified that Gore did tell him that he had tried to commit suicide and kill his alter-ego, Tony James Jordan, and that Gore had made some statements regarding the fact that Susan Roark was not murdered but that her death was a sacrifice that he delivered. (PCR XVII, 1802-1803). He remembered Gore telling him about cassette tapes that were in

the custody of Gore's mother or at her house that, he claimed, would prove him innocent. The cassette tapes had to do with phone conversations about a drug sting and it was Mr. Hunt's opinion that these tapes were not relevant to anything. (PCR XVII, 1806-1807). Mr. Hunt reaffirmed that Gore's accounting of what transpired leading up to the death of Susan Roark was basically the same, however, he never discussed the murder except to say that it was painless. Gore further refused to discuss with the experts how the murder occurred. (PCR XVII, 1807).

At the conclusion of Mr. Hunt's case, the defense elected not to call the defendant, and the hearing ended. (PCR XVII, 1808).

## SUMMARY OF ARGUMENT

Issue I: Gore asserts the trial court erred in summarily denying nine issues raised in his amended 1997 motion for postconviction relief. Each claim was either procedurally barred due to failure to preserve the issue for review; insufficiently pled; moot; previously raised and rejected in material part, or rebutted by the record. The trial court was not incorrect in denying summarily these claims even though most were also presented under an ineffective counsel component.

Issue II: Gore next contends there was insufficient adversarial testing regarding two "evidentiary matters." Specifically, he contends either a discovery or ineffective counsel violation occurred concerning a "phone book" which contained names of witnesses. He has made no showing whether a phone book ever existed let alone how prejudice occurred to Gore.

He further contends more should have been done regarding the trial testimony of Lisa Ingram. This issue was disposed of on direct appeal on the merits, adversely to him. His ineffective assistance assertion cannot be supported on either prong of Strickland.

Issue III: The December 14, 2002, evidentiary hearing was ordered to allow Gore to pursue his ineffective assistance

claims. On appeal he has abandoned most allegations. The remaining allegations preserved herein for review are groundless and fail to meet the Strickland standard.

Specifically, the trial court, on postconviction, found no merit to the change of venue and pretrial publicity complaint. The record of the evidentiary hearing, as well as what transpired at trial, reflects counsel investigated mitigation and provided experts with materials in order to assess Gore.

## ARGUMENT

### Issue I

WHETHER THE TRIAL COURT COMMITTED ERROR WHEN IT SUMMARILY DENIED AS PROCEDURALLY BARRED CLAIM II (JURISDICTION), CLAIM XIV (PROSECUTORIAL ARGUMENT), CLAIM XVII (SUFFICIENCY OF EVIDENCE), CLAIM XIX (MANDATORY DEATH RECOMMENDATION), CLAIM XX (ADEQUACY OF MENTAL HEALTH ASSISTANCE), CLAIM XXII (VIOLATION OF CALDWELL v. MISSISSIPPI), CLAIM XXIX (RECESS PRIOR TO SENTENCING), CLAIM XXX (CHALLENGE FOR CAUSE), AND CLAIM XXXI (DEFENSE WITNESS TESTIMONY).

Gore identifies nine claims found in his amended motion for postconviction relief that he asserts should not have been summarily denied as procedurally barred.

In Freeman v. State, 761 So.2d 1055, 1061 (Fla. 2000), this Court observed that as a general proposition a defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively shows that the prisoner is entitled to no relief, or (2) the motion or particular claim is legally insufficient. The court further observed that the defendant bears the burden of establishing a prima facie case based upon a legally valid claim and that mere conclusory allegations are not sufficient to meet this burden. Where no evidentiary hearing is held on a claim, the court accepts the factual scenario made by a defendant to the extent it is not refuted by the record. The

court, however, is further obligated to look at the legal sufficiency and if its sufficient determine whether the claim is refuted by the record. See Thompson v. State, 759 So.2d 650 (Fla. 2000).

Albeit the Florida Supreme Court has encouraged trial courts to hold evidentiary hearings in capital cases, Ragsdale v. State, 720 So.2d 203, 207 (Fla. 1998), Mordenti v. State, 711 So.2d 30, 33 (Fla. 1988), the court routinely affirms summary denial of claims that are procedurally barred or without merit as a matter of law. See Floyd v. State, 808 So.2d 175 (Fla. 2002), wherein the court affirmed the summary denial of the claims that were procedurally barred, facially or legally insufficient and without merit as a matter of law but require an evidentiary hearing with regard to an ineffectiveness of counsel claim. In Floyd the court explained a defendant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel, if he alleges specific facts which are not conclusively rebutted by the record and, demonstrates deficient performance that prejudices him. However, as observed in Thompson v. State, 796 So.2d 511 (Fla. 2001), summary denial of ineffectiveness of counsel claims may also be affirmed where the underlying claim is either procedurally barred, factually or legally insufficient, clearly without merit as a matter of law, moot and

the defendant attempts to circumvent a procedural bar by interjecting conclusory allegations of ineffective assistance of counsel for the failure to raise an appropriate objection or otherwise preserve the issue for review. Citing Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989), the court reaffirmed the notion that a defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. A defendant must allege specific facts that demonstrate a deficiency on the part of counsel and actual prejudice. As observed in Floyd, 808 So.2d at 180, n.10:

> Interjected within issues (5) and (7) are claims based on ineffective assistance of counsel for failure to raise an appropriate objection or otherwise preserve the issue for appellate review. We find these allegations legally or factually insufficient to warrant relief under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Contrary to Floyd's assertions within issue (5), the State did not argue during resentencing that the CCP aggravating circumstance was applicable to the case, nor was the jury instructed on CCP. Further, Floyd has failed to demonstrate prejudice as a result of the State's isolated reference to lack of remorse during closing argument and comments regarding the victim. Additionally, several of the substantive issues raised within issue (7) are without merit as a matter of law. See Harvey, 656 So.2d at 1257, n.5 (rejecting claim that penalty phase jury instruction properly shifted the burden to defendant); Kelley v. Dugger, 597 So.2d 262,

> 265 (Fla. 1992) (rejecting claim that pecuniary gain aggravator is unconstitutionally vague); Turner v. Dugger, 614 So.2d 1075, 1079 (Fla. 1992) (finding Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), does not control Florida law on capital sentencing). Moreover, '[W]hen jury instructions are proper, the failure to object does not constitute a serious or substantial deficiency that is measurably below the standard of competent counsel.' Mendyk v. State, 592 So.2d 1076, 1080 (Fla. 1992), receded from on other grounds, Hoffman v. State, 613 So.2d 405 (Fla. 1992).

Albeit the Court reversed for evidentiary development with regard to a number of claims in Thompson v. State, 796 So.2d at 514, the Court held:

> [5] Claims (2), (3), and (4) are procedurally barred because they should have been raised on direct appeal. See, e.g., Sireci v. State, 773 So.2d 34, 40, n.10 (Fla. 2000); Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995).
>
> Within claims (2) and (4), Thompson seeks to circumvent a procedural bar as to the substantive claims by interjecting conclusory allegations of ineffective assistance of counsel for failure to raise an appropriate objection or otherwise preserve the issue for appellate review. We find these allegations to be legally and factually insufficient to warrant relief under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), because at no point has Thompson alleged how he was prejudiced by counsel's failure to object or raise the asserted error. See Sireci, 773 So.2d at 40, n.11 (quoting Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989) ('a defendant may not simply file a

motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing.')).

Moreover, the substantive issues presented in claims (2) and (4) are without merit as a matter of law. See, e.g., Downs v. State, 747 So.2d 506, 509 (Fla. 1999) (citing Harvey v. Dugger, 656 So.2d 1253, 1257 (Fla. 1995) (finding ineffective assistance of counsel claim based on counsel's failure to object to jury instruction that allegedly shifted the burden to defense to establish that mitigators outweighed aggravators to be without merit as a matter of law)); Hudson v. State, 708 So.2d 256, 262 (Fla. 1990) (rejecting argument that the murder in the course of a felony aggravator is an invalid, automatic aggravator). Thus, even if Thompson had sufficiently alleged prejudice, counsel could not be deemed deficient for failing to object at trial. See Mendyk v. State, 592 So.2d 1076, 1080 (Fla. 1992) ('when jury instructions are proper, the failure to object does not constitute a serious and substantial deficiency that is measurably below the standard of competent counsel').

Similarly, claim (3), which is procedurally barred but which does not include any allegation of ineffective assistance of counsel (as is the case with claims (2) and (4)), is also without merit as a matter of law. See, e.g., Knight v. State, 746 So.2d 423, 429 (Fla. 1998) (rejecting claim that Florida's death penalty statute is unconstitutional); Fotopoulos v. State, 608 So.2d 784, 794, n.7 (Fla. 1992)(same).

As claim (5), Thompson asserted that the Death Penalty Reform Act (DPRA), and execution by lethal injection are unconstitutional. The part of the claim relating to the constitutionality of DPRA is

> without merit because we have already determined that DPRA is unconstitutional. See Allen v. Butterworth, 756 So.2d 52 (Fla. 2000). The remainder of the claim is without merit as a matter of law because this court has previously concluded that the statute authorizing death by lethal injection does not offend notions of separation of powers; its retroactive application does not violate state or federal ex post facto clauses; and death by lethal injection does not constitute cruel and unusual punishment. See Sims v. State, 754 So.2d 657 (Fla. 2000).
>
> We further decline to address claim (6) through (9) because they were not properly presented before the trial court (i.e., absolutely no factual basis or argument was asserted in support of these claims in the initial or amended motions). . . .

### *A. Claim II (Jurisdiction)*

Gore first argues that the victim, Susan Roark, was not killed in Florida and as a result, this State had no jurisdiction to try him for her murder. He also argues that trial counsel rendered ineffective assistance of counsel for failing to raise jurisdiction as an issue at trial. Specifically, Gore contends that trial counsel's arguments during closing argument that the State failed to establish venue (OTR 2226-2235), does not overcome the alleged ineffectiveness of counsel assertion. He also points to the fact that trial counsel did not object to the State's argument that it need not prove jurisdiction beyond a reasonable doubt.

The record reflects that the trial court found claim II (jurisdiction) to be procedurally barred based on Mills. (PCR V, 872). The State argued below that this issue was procedurally barred because it could and should have been raised on direct appeal, citing Cherry v. State, 659 So.2d 1069 (Fla. 1995). Additionally, the State asserted that the claim was without merit because the State did prove that Florida had jurisdiction (PCR XII, 956-957, 974-976, 996; XIII, 1150, and Gore v. State, 599 So.2d 978, 980 (Fla. 1992)):

> On April 2, 1988, the skeletonized remains of Roark's body was discovered in Columbia County, Florida. The naked body was found in a wooded area which had been used as an unauthorized dumping ground for household garbage and refuse. Expert testimony established that the body was placed in its location either at the time of death or within two hours of death. The body could have been there anywhere from two weeks to six months prior to discovery. The forensic pathologist who testified for the State concluded that the cause of death was a homicide, given the situation in which the body was found and the fact that the neck area of the body was completely missing. The pathologist explained that this was probably due to some injury to the neck, such as a stabbing wound or strangulation trauma, which provided a favorable environment for insects to begin the deterioration process.

The record reflects that, at trial, defense counsel argued that the State did not prove the crimes were committed in Columbia County, Florida, in moving for a judgment of acquittal

(OTR XXI, 2226), and also requested specific instructions as to venue. (OTR XXII, 2394-2397).

The instant claim is procedurally barred because it could have and should have been raised on direct appeal and was not. See Reaves v. State, 27 Fla.L.Weekly S601a (Fla. June 20, 2002). And trial counsel is not ineffective for being selective as to how a claim could be argued below. See Jackson v. State, 547 So.2d 1197, 1200 (Fla. 1989) (nor is the attorney representing the defendant ineffective for failing to pursue every possible defense based on a particular mental condition). Nor is counsel's representation wanting where the evidence clearly reflects that the underlying claim is meritless.

In Lane v. State, 388 So.2d 1022, 1027 (Fla. 1980), this Court held:

> By section 910.005, we have broadened our jurisdiction to allow the trial of a homicide offense when the death occurs in the state or when an essential element of a homicide occurs in Florida even though the fatal blow was struck outside the state. The applicable provisions of section 910.005 provide:
>
> > 1. A person is subject to prosecution in this state for an offense that he commits, while either within or outside the state, by his own conduct or that of another for which he is legally accountable, if: (a) the offense is committed wholly or partly within the state;

> 2. The offense is committed partly within this state if either the conduct that is an element of the offense or the result that is an element, occurs within the state. In a homicide, the 'result' is either the physical contact that causes death, or the death itself; and if the body of the homicide victim is found within the state, the death is presumed to have occurred within the state (emphasis added).

388 So.2d at 1027.

The Court, in determining whether the defendant had committed premeditated murder of Earl Slay, observed:

> . . . One of the essential elements of this offense is the premeditated design of the Appellant to effect the death of the victim or, in the alternative, the perpetuation of or an attempt to perpetuate a robbery upon the victim. It is our view that if either of these alternative essential elements of the offense occurred within the state of Florida, then Florida has jurisdiction to try the Appellant.
>
> A person who commits a crime partly in one state and partly in another state maybe tried in either state under the Sixth Amendment of the United States Constitution.

While Gore acknowledges that Lane in controlling, presumably his contention is that the State was required to prove the State of Florida had jurisdiction beyond a reasonable doubt. The record bears out that the State proved that the body of Susan Roark was found in Columbia County, Florida; that the medical

examiner testified that she either died there or was placed there within two hours of death; the defendant was convicted of the kidnapping and robbery of Susan Roark and the record reflects that although he was seen driving Miss Roark's Mustang, Gore made statements with regard to Miss Roark's property, but denied to the police that he knew Miss Roark or ever drove her car. See Gore v. State, 599 So.2d at 980-981. Clearly, the State proved beyond a reasonable doubt that jurisdiction reposed in Florida.

Additionally, Gore's reliance on Deaton v. Dugger, 635 So.2d 4 (Fla. 1993), is not well taken. In Deaton, the court held:

> The State is obligated to prove the court's jurisdiction over the defendant. Lane. Upon the request of the defendant, the court should instruct the jury on jurisdiction when the evidence is in conflict on the issue. However, because no such instruction was requested and there was substantial evidence that the criminal acts at issue except the actual disposal of the body were done or begun in Florida, no error occurred in this case. Even though counsel's failure to request an instruction on jurisdiction could be characterized as ineffective, the evidence was such that if an instruction had been given, there was not a reasonable probability the results would have been different. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Therefore, we reject this claim.

635 So.2d at 7.

In the instant case, Gore cannot satisfy either prong of Strickland, and as such, the trial court did not err in summarily denying this issue. See also Morrison v. State, 27 Fla.L.Weekly S253 (Fla. March 21, 2002).

### *B. Claim XIV (Prosecutorial Argument)*

Gore next argues that he was entitled to relief as to his allegation that the prosecutor's misconduct "rendered the convictions fundamentally unfair, and his sworn motion set forth a number of specific facts and comments, with reference to the record, which the prosecutor made during guilt phase arguments." He further contends that his lawyer rendered ineffective assistance of counsel for failing to raise these issues.

The trial court summarily denied relief as to this claim (PCR V, 872), based on the claim presented. This claim could have been and should have been raised on direct appeal. It was not. Moreover, there was no objection raised by defense counsel at trial (which, in and of itself, does not demonstrate deficient performance) because the comments found only in his amended 3.850 motion, reflects remarks that if objected to at trial, could have easily been cured by instructions to the jury

to disregard.[3] (See OTR XXIII, 2425-2499). See Card v. State, 803 So.2d 613, 622 (Fla. 2001), wherein the Court held:

> . . . A timely objection allows the trial court an opportunity to give a curative instruction or to admonish counsel for making an improper argument. See Nixon v. State, 572 So.2d 1336, 1341 (Fla. 1990). The exception to the contemporaneous objection rule is where the unobjected to comments rise to the level of fundamental error, which has ben defined as error that reaches down into the validity of the trial itself to the extent that a verdict of guilty or jury recommendation of death could not have been obtained without the assistance of the alleged error. . . .

803 So.2d at 622.

As previously observed, a defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to satisfy this burden. Gore, in his amended 3.850 motion, merely listed numerous isolated comments and then strung together quotes from a series of cases regarding prosecutorial misconduct to support his claim. On appeal, he has cited no authority that supports his proposition and provides neither the comments nor case authority that would suggest that any of the comments standing alone or together rendered his trial fundamentally

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[3] The State is not conceding that any of the remarks noted were objectionable but would note that if no prejudice can be demonstrated - Strickland inquiry ends.

unfair. A casual review of the comments made such as "I don't believe the evidence shows" or "I think" when placed in context of the entire sentence are neither erroneous nor prejudicial to Gore. Comments that the defendant lied are accurate portrayals of the record. These comments, when viewed in light of their context reflect that the prosecution was discussing the fact that Gore told his mother that he never drove Susan Roark's black Mustang. The evidence at trial reflects that not only was he seen in the Mustang and he got a traffic ticket while driving it, but a fingerprint was found in the Mustang belonging to Gore and he had in his possession Susan Roark's jewelry and tried to have it pawned. See Evans v. State, 808 So.2d 92, 107 (Fla. 2002)

These statements were either fair comment on the evidence, Monlyn v. State, 705 So.2d 1, 4-5 (Fla. 1992), Overton v. State, 801 So.2d 877, 897 (Fla. 2001), were made to rebut the defense's arguments, were not erroneous, and ultimately could not have been prejudicial to Gore. Card v. State, supra.

To the extent that he argues trial counsel rendered ineffective assistance of counsel, caselaw mandates that he is unable to satisfy that burden. He has not demonstrated how there was any deficiency on the part of counsel. The record reflects that during the course of the prosecutor's arguments,

the defense did in fact object to other remarks made (OTR XXIII, 2426, 2428, 2430, 2495; XXIV 2694). See Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982) ("whether to object is a matter of trial tactics which are left to the discretion of the attorney so long as his performance is within the range of what is expected of reasonable competent counsel"). The trial court did not err in summarily denying this issue. See Gorby v. State, 27 Fla.L.Weekly S315 (Fla. April 11, 2002); Spencer v. State, 27 Fla.L.Weekly S323 (Fla. April 11, 2002); Carroll v. State, 27 Fla.L.Weekly S214 (Fla. March 7, 2002); Bertolotti v. State, 476 So.2d 130 (Fla. 1985).

### *C. Claim XVII (Insufficient Evidence)*

Gore next argues that "the jury would have had to pyramid inference upon inference to convict him of the charged offense of premeditated murder. The trial court summarily dismissed this claim finding that it was procedurally barred and the sufficiency of the evidence with regard to premeditation could have been raised on direct appeal.

Gore also argues that counsel rendered ineffective assistance of counsel for failing to argue the sufficiency of the evidence in his motion for new trial and further chides appellate counsel for failing to raise this issue on direct appeal. The evidence presented at trial supports Gore's

conviction for first degree murder. Albeit, the Florida Supreme Court in Gore v. State, 599 So.2d at 986, 987, concluded that the cold, calculated and premeditated manner to establish the "heightened premeditation" necessary for a finding of this aggravating factor was not proven under Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), the failure in proof was not as to premeditation, but rather heightened premeditation. The Court observed that there was a failure to prove "a careful plan or prearranged design to kill" as to CCP. The facts of this case reflect that Gore, a consummate opportunist, targeted Susan Roark and her black Mustang. He methodically befriended her, gained her trust, kidnapped her and took her to an isolated area where he "ultimately killed her." 599 So.2d at 987. On direct appeal, the Court found the evidence sufficient to support Gore's conviction for first degree murder. See Parker v. Dugger, 660 So.2d 1386 (Fla. 1995); Mills v. State, 507 So.2d 602 (Fla. 1987); Tibbs v. State, 397 So.2d 1120 (Fla. 1995).

In order to overcome the procedural bar, Gore now argues that trial counsel was ineffective. Gore acknowledges that counsel argued that the evidence was insufficient to support first degree premeditated murder (OTR XXI, 2226-2240), but argued below and argues here that: "Counsel should have argued that, to convict, the jury would have to pyramid inferences."

Absent any specific allegation that would support his contention, this allegation is merely conclusory and therefore the underpinnings of his ineffectiveness of counsel claim fails. Swafford v. State, 569 So.2d 1264, 1266 (Fla. 1990); Gore v. State, 784 So.2d 418, 430 (Fla. 2001).

The trial court did not err in denying summarily Gore's argument that the evidence was insufficient to support premeditated first degree murder.

### *D. Claim XIX (Mandatory Death Recommendation)*

Gore next argues that the trial court erred in summarily denying his contention that "during voir dire the State repeatedly asked the prospective jurors if they could vote for a death sentence if the aggravating circumstances required or called for that sentence." (Appellant's Brief, page 31).

The trial court summarily denied this claim because it could have been and should have been raised on direct appeal. (PCR V, 872).

Initially, "even" assuming for the moment the claim had been preserved for appeal, Gore is entitled to no relief. The record reflects that the jury was properly instructed with regard to their role and were further instructed that the court would

instruct the jury with regard to the law, not the attorneys. (OTR XXIV 2716). Clark v. State, 363 So.2d 331, 332 (Fla. 1978) (contemporaneous objection needed); Morrison v. State, 27 Fla.L.Weekly S253 (Fla. March 21, 2002); Carroll v. State, 27 Fla.L.Weekly S214 (Fla. March 7, 2002); Franqui v. State, 804 So.2d 1185, 1194 (Fla. 2001). Gore's attempt to suggest that counsel rendered ineffective assistance of counsel for failing to object to the statements made during voir dire are unpersuasive in that the jury was properly instructed in this case. Mann v. State, 770 So.2d 1158, 1165 (Fla. 2000). No relief should be forthcoming because the trial court was correct in summarily denying this claim.

***E. Claim XX (Adequacy of Mental Health Assistance)***

Gore argued in Claim XX below that (1) trial counsel failed to provide background material to the mental health experts to assist them in their evaluation of Gore; (2) that the experts, if given proper information, could have identified mitigating factors, both statutory and nonstatutory, and (3) trial counsel failed to properly investigate mental health mitigation. The trial court, while denying this claim as to the adequacy of mental health evaluations under an Ake v. Oklahoma, 470 U.S. 68 (1985), claim, did allow evidentiary development as to what evidence defense counsel secured and turned over to the mental

health experts at the December 14, 2000, evidentiary hearing.[4] As detailed in the State's statement of the case and facts, a plethora of evidence was presented to the mental health experts surrounding Gore's childhood his attempted suicide, his drug usage, his alter-ego and other factors concerning his life. This claim as it relates to the adequacy of mental health evaluation is procedurally barred because it could have been raised on direct appeal. However, the underpinnings of the claim are also meritless based on the evidentiary development regarding the effectiveness of trial counsel as to this claim. Gorby v. State, 27 Fla.L.Weekly S315 (Fla. April 11, 2002); White v. State, 27 Fla.L.Weekly S291 (Fla. April 4, 2002); Cook v. State, 792 So.2d 1197, 1203 (Fla. 2001) (summary denial Ake claim); Sireci v. State, 773 So.2d 34, 45 (Fla. 2001) (because record conclusively refutes Sireci's claim that he received incompetent mental health evaluation, summary denial justified), and Thompson v. State, 759 So.2d 650, 665 (Fla. 2000) (Thompson makes no specific allegations as to how his counsel was deficient in failing to prepare the psychiatrists or how their

[4] The record reflects Gore also asserted in his purely ineffective claims that trial counsel failed to develop mental mitigation or provide information to the experts. The transcript of the December 14, 2000, hearing refutes any notion that counsel did not provide adequate materials to the experts.

evaluations would have changed had counsel "performed effectively.").

The trial court did not err in finding that Gore's Ake claim could have been argued on direct appeal and since it was not, it was procedurally barred.[5]

### *F. Claim XXII (Caldwell v. Mississippi)*

Gore's argument that comments made by the trial court and the prosecutor misled the jury with regard to their duty at sentencing and improperly diluted the jury's sense of responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), is procedurally barred. This claim could have been and should have been raised on direct appeal and was not. See Bottoson v. State, 674 So.2d 621 (Fla. 1996); Cherry v. State, 659 So.2d 1069 (Fla. 1995). Moreover, this Court has said that under the Florida death penalty scheme, there is no merit to Caldwell v. Mississippi assertion. Johnson v. State, 660 So.2d

[5] The penalty phase testimony from Brenda Gore, Rex Gore and Dr. Mhatre cover all the information that Gore herein argues should have been presented. (OTR XXIV (Brenda Gore) 2595-2628, (Rex Gore) 2628-2650, (Dr. Mhatre) 2650-2687). To the extent that trial counsel made strategic decisions whether to include all aspects of Gore's earlier life does not render trial counsel's efforts wanting.

637 (Fla. 1995); Turner v. Dugger, 614 So.2d 1075 (Fla. 1992); Hunter v. State, 660 So.2d 244, 252-53 (Fla. 1993).

The trial court did not err in summarily denying this claim as being procedurally barred because it could have been raised on direct appeal. (PCR V, 872).

***G. Claim XXIX (Recess Prior to Sentencing)***

Gore next contends that the trial court had already prepared its sentencing order prior to the "Spencer hearing which obviously means that trial counsel had no chance to present additional evidence or comment concerning an appropriate sentence. . . .". (Appellant's Brief, page 35). The trial court found this claim to be procedurally barred. The record reflects that a Spencer hearing which evolved from Spencer v. State, 615 So.2d 688 (Fla. 1993), was decided long after Gore's trial and Gore's 1992 direct appeal. As observed in Armstrong v. State, 642 So.2d 730 (Fla. 1994), hearings mandated by the Spencer decision are not retroactive. See also Asay v. State, 27 Fla.L.Weekly S577 (Fla. June 13, 2002), and Layman v. State, 652 So.2d 373, 375, n.5 (Fla. 1995).

The trial court did not err in summarily denying this claim.

***H. Claim XXI (Challenge for Cause)***

Gore contends that "the trial court improperly failed to exclude jurors who were properly challenged for cause." He

further contends that trial counsel was ineffective in his failure to challenge other jurors for cause, when in fact cause existed. Specifically, he points to jurors Roof, Scott, Anders and Crawford in his brief herein, who purportedly sat on his jury despite the existence of a "valid" cause challenge for each.

The trial court found this issue procedurally barred because it could have and should have been raised on direct appeal. (PCR V, 872). To overcome the failure to raise this issue on direct appeal, Gore again asserts counsel's ineffectiveness. The record conclusively demonstrates that there is no merit to the claim of ineffectiveness. Originally, Gore argued that seven prospective jurors should have been struck for cause. Ms. Roof, Ms. Scott, Mr. Powers, Mr. Knox, Mr. Anders, Mrs. Crawford and Mr. Dicks. Powers, Knox and Dicks were excused through peremptory challenges. The remaining four jurors Roof, Scott, Anders and Crawford sat on the jury.

Gore's basic premise is that counsel should have moved for cause challenges to all seven named prospective jurors. Powers, Knox and Dicks were excused peremptorily (OTR IX, 472; X, 657; XI, 865). Excusal which occurs whether through peremptory challenge or for cause as to these three potential jurors, eliminates any prejudice that could have accrued to Gore. The

claim only has a basis for analysis as to any of these seven prospective jurors if, at the end of voir dire, all of the peremptory challenges were exercised and objectionable jurors still remained on the jury. At the end of voir dire in Gore's trial, defense counsel announced that he had four peremptory challenges left. (OTR, XI, 831). He used an alternate challenge to remove Dicks (OTR XI, 865).

In determining whether a juror is competent to sit, the question is whether a juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. A prospective juror must be excused for cause only if "any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment." Hill v. State, 477 So.2d 553, 556 (Fla. 1985); Bryant v. State, 656 So.2d 426, 428 (Fla. 1995). As to the remaining four complained-about prospective jurors who sat on the jury, the record shows that no bias existed that would justify challenging them for cause.

For example, Miss Roof, who responded that she had never thought about the death penalty, stated "but I feel that if the person is found guilty beyond any doubt, that they should be sentenced to death." (OTR VIII, 294). Thereafter, she was

informed of the sentencing proceedings, she affirmatively stated that her feelings about the death penalty were not so strong that she would not be able to set them aside and follow the law. (OTR VIII, 301). She also stated that she would listen to the court's instructions, the evidence and then render her decision. (OTR VIII, 302). Ironically, the record reflects that following individual voir dire, the prosecutor challenged Roof for cause because "overall, her answers indicated she could not vote for the death penalty under any circumstances." Defense counsel objected and the court denied the State's cause challenge. (OTR VIII, 305).

The record reflects that Scott responded affirmatively when defense counsel asked if she would "automatically be in favor of a death sentence if Gore were convicted of all three crimes with which he was charged." (OTR VIII, 340-341). The prosecutor objected and the Court sustained the objection. (OTR VIII, 341). Defense counsel then rephrased his question, and the following exchange occurred:

> MR. HUNT: Ma'am, let me ask you this. It may be that your views regarding the appropriateness of the death penalty is not consistent with what the law is, you may find that if you sat on the jury and the judge instructed you on the law, you may find yourself saying, 'I didn't know that's what the law was, or I didn't think that. That's different than what I thought before I came in here.'

> Would you, if you found you were at odds or you're thinking was different that what the law actually is, would you set aside your personal feelings about it and base you decisions strictly not the law?
>
> THE JUROR: I would base my feelings on the law.

(OTR VIII, 341).

Clearly there was no basis upon which to support a cause challenge regarding Scott. As to Mr. Anders, he stated he did not believe the death penalty is justified in all cases (OTR IX, 538-539), and that he would follow the instructions and evaluate the aggravators and mitigators according to those instructions. (OTR IX, 540). During defense counsel's questioning of Mr. Anders, he stated that he would follow the instructions even if he disagreed with what the law should be or his personal feelings about the death penalty because they were not so strong that he could not set them aside. (OTR IX, 544). There was no basis upon which to challenge for cause Mr. Anders.

Lastly, Mrs. Crawford answered affirmatively when defense counsel asked if she would set aside her personal views and follow the Court's instructions on the law. (OTR XI, 716, 717).

Based on the state of this record, Gore cannot demonstrate that he was prejudiced by any beliefs retained by those jurors, he has identified objectionable, who sat on his jury.

The trial court was correct in finding that as to the initial claim, Gore was procedurally barred for failing to raise this issue on direct appeal, however, the Court was equally correct in denying relief because there is no basis to support relief because the record specifically refutes all allegations. Castro v. State, 644 So.2d 987 (Fla. 1994).

***I. Claim XXXI (Defense Witness Testimony)***

Gore contends that the trial court engaged in an improper *ex parte* communication with a prospective juror when the Court announced in open court that he had granted a hardship excusal to prospective juror, Mr. Pete Schlipp, who the Court took upon himself to contact. (OTR X, 689). The record reflects that neither defense counsel nor the prosecution objected to the hardship excusal and more importantly this issue was not raised on appeal although it was available and known to the defense.

The trial court summarily denied this claim because it was cognizable and could have been raised on direct appeal. (PCR V, 872). The fact that defense counsel failed to object to a perceived "constitutional right" regarding the excusal of a prospective juror, does not rise to the level of ineffective assistance of counsel. As observed in Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982), whether to object is a matter of trial tactic which is best left to the discretion of an attorney

so long as his performance is within the range of that expected of a reasonably competent attorney. In the instant case, neither the defense nor the prosecutor objected to the Court's actions and in fact, the record reveals that shortly after the aforenoted announcement by the Court, the Court granted additional hardship excusals to other prospective jurors and the defense counsel had no objection to those excusals. (OTR X, 771, 783). Certainly agreeing to excusing a prospective juror who might lose his or her livelihood if required to serve on a jury is not a flawed tactic. Besides failing to demonstrate substandard performance, Gore has made no attempt to show that excusing this prospective juror prejudiced him. He cannot overcome the procedural default by asserting that counsel rendered ineffective assistance of counsel.

Because the issue should have been raised on direct appeal, this claim is procedurally barred. See Hill v. Dugger, 556 So.2d 1385 (Fla. 1990).

***J. Claim XXXV (Pretrial Publicity)***

Gore now argues that the trial court should have ordered a change of venue because pretrial publicity precluded the selection of a fair and impartial jury. This claim is procedurally barred because it could have been raised on direct appeal. Moreover, the trial court so found that there was no

basis why this claim had not been raised on direct appeal and further observed that there was no factual basis asserted by the defendant that would even give rise to further review. (V, 872-873). Smith v. State, 445 So.2d 323, 325 (Fla. 1983); Foster v. State, 778 So.2d 906, 913 (Fla. 2000); Farina v. State, 679 So.2d 1151, 1154 (Fla. 1996).

In Gore's amended motion for postconviction relief, he argued that numerous prospective jurors' responses indicated that they knew about the case, however, he failed to identify them and failed to demonstrate how their particular knowledge would have prevented jury service. He argues that the trial court erred in failing to sequester the jury, however, he points to no event that brings into question the failure to sequester. Ultimately, he argues that the voir dire was "riff with evidence that jurors had been influenced by what they had been exposed to through the media." However, this allegation is conclusory at best and there is no evidence in this record that the jury selection process or the jurors that actually sat were either unfair or biased and therefore could not fairly determined Gore's guilt and the appropriate sentence to be imposed. See Rolling v. State, 27 Fla.L.Weekly S611 (Fla. June 27, 2002).

Moreover, the record conclusively rebuts this claim. Trial counsel moved for and secured individualized voir dire regarding

the prospective jurors' knowledge of the case. (OTR XXVI, 2881; 2923; VIII, 206). See Boggs v. State, 667 So.2d 987, 990 (Fla. 1994); Singleton v. State, 783 So.2d 970, 975 (Fla. 2002). The court granted Gore's challenge for cause to Morris because she stated she could not be impartial given that she knew of the case. (OTR IV, 578). On the second day of voir dire, counsel mentioned a newspaper article and asked to be allowed to re-examine the prospective jurors regarding the article. The trial court granted defense counsel's request. (OTR XI, 690-691). Interestingly, Gore has not shown that any of the prospective jurors even read the article or were influenced by it. "The mere fact that jurors were exposed to pretrial publicity is not enough to raise a presumption of unfairness." Castro v. State, 544 So.2d 987, 990 (Fla. 1990); Kearse v. State, 770 So.2d 1119 (Fla. 2000).

Contrary to Gore's initial claim, defense counsel did not exhaust all Gore's peremptory challenges (OTR XI, 831). In fact, four peremptory challenges were left at the end of voir dire and thereafter, the defense used one of its alternate juror challenges to excuse prospective alternate juror Dicks. (OTR XI, 865). The record of the voir dire reflects that all those who sat on the jury said that they would follow the law and ultimately were found satisfactory to defense counsel at the

close of the jury selection process. See Rolling v. State, 695 So.2d 278 (Fla. 1997).

Additionally, at the December 14, 2000, evidentiary hearing, defense counsel asked Jimmy Hunt during direct examination about the jury selection process. Mr. Hunt testified that he did not recollect any media blitz about the crime (PCR XVII, 1760). He testified there was very little coverage either in print or the electronic media. He stated that he had no recollection of saturated coverage, did not recall seeing any coverage on television. (PCR XVII, 1761). Mr. Hunt testified that some of the people making up the voir dire had heard about the case but compared to other murder cases, "relatively little was known about the case by the venire." Gore and Mr. Hunt talked about a change of venue and ultimately they decided not to change the venue. It was Mr. Hunt's recollection that he did not exhaust all of his peremptory challenges at the end of voir dire. (PCR XVII, 1761-1762). Moreover, the trial record bears out that on January 4, 1990, a hearing was held regarding the newspaper articles complained about by defense counsel. Following that hearing, jury selection continued. (PCR XVII, 1763).

Based on this record, Gore's conclusory allegations are overwhelming refuted by the record. Bundy v. State, 471 So.2d 9, 19 (Fla. 1985).

As previously stated, Gore has raised in Claim I issues which the trial court found to be procedurally barred for a number of reasons. Those same claims are not properly before this Court and, this Court, should affirm the denial of all relief with regard to Issue I.

## Issue II

THE TRIAL COURT DID NOT ERR WHEN IT SUMMARILY DENIED CLAIM IV (NO ADVERSARIAL TESTING) AS BEING INSUFFICIENTLY PLED.

Gore's assertion is two-fold. He first argues that prior to trial Gore told defense counsel that a phone book containing names, telephone numbers and addresses for defense witnesses existed and that the State had obtained the book. As a result of these allegations, he suggests that because trial counsel failed to procure the book and/or because the State improperly concealed or failed to turn over the book, he was denied a fair trial. The trial court, in reviewing this claim, summarily denied it finding that the allegations were insufficiently pled. (PCR V, 873).

A. The factual allegations surrounding the "phone book" have never been developed. In his amended motion for postconviction relief, Gore makes reference to a phone book but no more is said. There are no allegations as to who specifically he gave the phone book to, what the phone book

contained other than a general observation of witnesses and other information, and, he has never asserted how or identified the names of persons who, could have been called who were in the phone book - who either were not called or provided to defense counsel. These bare allegations further fail to set out the "considerable and compelling evidence that was obviously exculpatory" that the jury did not hear. As previously observed, mere conclusory allegations are insufficient to state a claim for relief. Jackson v. Dugger, 633 So.2d 1051 (Fla. 1993); Phillips v. State, 608 So.2d 778 (Fla. 1993); Roberts v. State, 568 So.2d 1255 (Fla. 1990); Smith v. Dugger, 565 So.2d 1293 (Fla. 1990); Kennedy v. State, 547 So.2d 912 (Fla. 1989). He has shown no probability that the results of his proceedings below would have been different and has failed totally to demonstrate that the State withheld evidence under Brady v. Maryland. Moreover, he has not alleged how any "possible" discovery violation would have prevented his conviction and sentence of death.

To reiterate, claims regarding counsel's effectiveness cannot serve to revitalize an insufficiently pled claim. Cherry v. State, 659 So.2d 1069 (Fla. 1995); Lopez v. Singletary, 634 So.2d 1054 (Fla. 1994); Medina v. State, 573 So.2d 293 (Fla. 1990). Indeed, Brady and ineffectiveness claims are mutually

inconsistent. "'Counsel cannot be considered deficient in performance for failing to present evidence which allegedly has been improperly withheld by the State.'" Williamson v. Dugger, 651 So.2d 84, 88 (Fla. 1994).

B. Gore also argues that trial counsel failed to effectively object to and improperly allowed Lisa Ingram's testimony regarding a purse and statement she alleged Gore made. (Appellant's Brief, page 42). This claim is procedurally barred because the propriety of allowing Lisa Ingram's testimony was raised at trial (OTR XVIII, 1767; XX 2018-2024), and on direct appeal and rejected on the merits. Gore v. State, 599 So.2d at 983. Specifically, the court held:

> Gore next claims that the trial court erred in admitting evidence of collateral crimes through the testimony of two witnesses, Lisa Ingram and Tina Corolis. Miss Ingram was riding in a car with Gore on February 19, when she saw a woman's purse in the back seat. She testified that Gore stated that the purse belonged to 'a girl that he had killed last night'. Gore argues that this conversation referred to a murder that must have taken place on the 18th of February. Therefore, his statement could not be relevant to the murder of Roark, which took place on January 31st, but was instead introduced solely to show propensity – that Gore had committed a different murder.
>
> We find that this testimony was admissible as an admission with regard to Roark's homicide. Section 90.803(18), Florida Statutes (1989). When Ingram was asked if she was sure about the time that Gore said,

> she stated that he said he killed a girl 'last night or a few nights ago.' Testimony had previously established that Roark had a purse with her on the night she disappeared. While there are some timing problems with this testimony, as well as a lack of connection Roark's purse and the purse Ingram saw in the car, these were matters to be considered by the jury in evaluating the weight to give this testimony and did not render the evidence inadmissible.

599 So.2d at 983.

Gore now argues inappropriately that counsel rendered ineffective assistance of counsel because, he did not persuade, the trial court to rule in his favor. Counsel raised the issue (OTR XVIII, 1767; XX, 2018-1024), and cannot be deemed ineffective for failing to persuade the court to rule in his favor. Haliburton v. State, 691 So.2d 466 (Fla. 1997); Swafford v. Dugger, 569 So.2d 1264 (Fla. 1990). Gore's ineffectiveness assertion is wanting and can provide no basis upon which to suggest that the trial court's and the Florida Supreme Court's review of this legal issue is wanting. Strickland v. Washington, supra.

All relief should be denied as to issue II.

## Issue III

## THE TRIAL COURT DID NOT COMMIT ERROR WHEN IT DENIED GORE'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL FOLLOWING THE EVIDENTIARY HEARING.

The record reflects that the trial court, in ordering an evidentiary hearing as to claim VII (ineffectiveness of trial counsel), and claim XVIII (ineffective assistance at the penalty phase), was concerned that the allegations as to ineffective assistance of counsel were insufficiently pled. The court noted several examples in its order and observed that ". . . As currently set out, the allegations in claim VII are inadequate; they fail to identify the witnesses counsel alleged ineffective for failing to call, are devoid of any facts as to what those witnesses would have testified to, and are inadequate to demonstrate either let alone both parts of the test for ineffectiveness set out in Strickland v. Washington, 466 U.S. 668 (1984)." (PCR V, 874-875). In spite of these failings, the Court acknowledged:

> This Court, however, recognizes that trial courts are encouraged 'to hold evidentiary hearings on postconviction claims when those courts deem such actions warranted . . . because their findings of fact are valuable aids to reviewing courts.' Francis v. State, 529 So.2d 670, 679, n.2 (Fla. 1988). Therefore, instead of summarily denying the twenty-two allegations in this claim as insufficiently pled, the Court directs Gore to specifically plead the allegations in the above-listed paragraphs (11 through 29, 32, 18 and 35), including naming the witnesses

> and setting out the evidence that will support the allegations, providing the substance of the witnesses' testimony, and explaining how such testimony and evidence demonstrates trial counsel's ineffectiveness. Record citations should be provided where applicable. Failing to correct the inadequacies of any allegations will result in that allegation's summary denial as insufficiently pled.

(PCR V, 875).

With regard to claim XVIII, the Court also found that it suffered from the same deficiencies and therefore ordered Gore to "plead these claims with more specificity or they will be denied summarily as insufficiently pled." (PCR V, 876).

Gore ultimately filed an additional amended motion as to claim VII and claim XVIII. (PCR VI, 1048-1072). Witness lists were exchanged (PCR VII, 1153-1154, 1158), however, when the case ultimately came to hearing on December 14, 2000, only defense trial counsel, Jimmy Hunt, was called. On May 31, 2001 (PCR IX, 1498-1513), the trial court denied all relief. In doing so, however, the trial court observed:

> Ineffective assistance of counsel claims are governed by Strickland v. Washington, 466 U.S. 668 (1984), under which the defendant must prove both his trial counsel's performance was deficient, i.e., that counsel made such serious errors that he did not function as the counsel guaranteed by the Sixth Amendment, and that counsel's deficient performance prejudiced him, i.e., 'counsel's errors were so serious as to deprive the defendant of a fair trial, a

> trial whose result is reliable.' Id., at 687. Counsel's performance should be measured against the 'reasonableness of prevailing professional norms,' id., at 688, and scrutiny of that performance should 'be highly deferential.' Id., at 689. Moreover, 'every effort' must 'be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from counsel's perspective at the time.' Id. In doing this, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' Id.; see Asay v. State, 769 So.2d 974 (Fla. 2000); Shere v. State, 742 So.2d 215 (Fla. 1999); Teffeteller v. State, 734 So.2d 1009 (Fla. 1999).
>
> The State did not object to the court holding an evidentiary hearing on the two pure ineffectiveness claims, but complained that they were too ill-pled to state valid claims for relief. The court gave the defendant the opportunity to plead the allegations of ineffectiveness more fully, and CCRC-N filed amendments to them in July 1997. Those latest amendments consisted primarily of adding record citations to some of the allegations, as well as the sentence: 'Mr. Jimmy Hunt is a witness to these matters.' Even with these additions claim VII consists solely of conclusory allegations that the defendant had the burden of proving at the evidentiary hearing. E.g., Strickland; Asay; see also Gorham v. State, 521 So.2d 1067 (Fla. 1988); Smith v. State, 445 So.2d 323 (Fla. 1983); Walden v. State, 284 So.2d 440 (Fla. 3rd DCA 1973). . . .

(PCR IX, 1501-1502).

Following this preliminary statement, the Court addressed each of the allegations in turn (PCR IX, 1502-1511), with regard to the twenty-two allegations made in claim VII and then (PCR IX, 1511-1512), discussed the evidence and the ineffectiveness of counsel claim regarding penalty phase representation as to claim XVIII.

On appeal, Gore has actually abandoned all of his allegations with the exception of the assertions (claim VII) that he was denied effective assistance of counsel because trial counsel failed to move for a change of venue, "thereby prejudicing him at trial" (Appellant's Brief, page 43), and that the pretrial publicity precluded the selection of a fair and impartial jury which resulted in "Gore not receiving a fair trial." (Appellant's Brief, page 43). With regard to the penalty phase ineffectiveness found in claim XVIII, Gore has abandoned all aspects of his penalty phase ineffectiveness challenge with the exception that ". . . because trial counsel failed to properly investigate or to provide mental mitigation information to experts, or failed to present same during penalty phase" he suffered prejudice. (Appellant's Brief, page 43-44).

The trial court found as to the change of venue issue:

> C. Change of Venue. Defendant claims that Mr. Hunt was ineffective for not moving for a change of venue due to extensive pretrial publicity. Mr. Hunt testified that there

> was no 'media blitz' concerning this case. And the defendant produced no evidence at the evidentiary hearing to the contrary. Mr. Hunt moved for individual voir dire, which the Court granted (VIII 206-07), and the record of voir dire shows no evidence that the prospective jurors had been unduly affected by any pretrial publicity. (VIII 223-XVI 923). The defendant has not demonstrated ineffectiveness regarding this allegation. See Patterson v. State, 25 Fla.L.Weekly S749, S751 (Fla. Sept. 28, 2000).

(PCR IX, 1503).

Additionally, Jimmy Hunt, defense trial counsel, testified at the December 14, 2000, evidentiary hearing that while some people may have heard about the case, compared to other murder cases, relatively little was known about the case by the potential venire. (PCR XVII, 1762). He observed that it did not take an extraordinary amount of time to select a jury and that each juror was individually voir dired at his request. Mr. Hunt testified that he spoke to the defendant about a change of venue and strategically determined that he would not file a change of venue in Gore's case. (PCR XVII, 1762).

In Rolling v. State, 27 Fla.L.Weekly S611a (Fla. June 27, 2002), the Florida Supreme Court rejected Rolling's assertion that trial counsel rendered ineffective assistance for failing to file a timely motion for change of venue. In citing to Strickland v. Washington, 466 U.S. 668, 687 (1984), and

Rutherford v. State, 727 So.2d 216, 219-20 (Fla. 1988), the Court acknowledged the standard for assessing effective assistance of counsel and ultimately concluded that no relief should be granted.[6] The Court observed:

> The decision of whether to seek a change of venue is usually considered a matter of trial strategy by counsel, and therefore not generally an issue to be second-guessed on collateral review. See, e.g., Buford v. State, 492 So.2d 355, 359 (Fla. 1986) ('counsel's failure to move for change of venue was a tactical decision and therefore not subject to attack'). Further, this Court has reiterated that 'strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.' Occhicone v. State, 769 So.2d 1037, 1048 (Fla. 2000). The fact that Rolling's collateral counsel might have moved for a change of venue earlier in the proceedings does not necessarily place trial counsel's decision to forego that option outside the range of reasonably effective assistance. See Occhicone, 768 So.2d at 1048 ('counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions.'); Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995) ('the standard is not how present counsel would have proceeded, is hindsight . . .'). 'A bare assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances

[6] In Rolling, the Court found the ineffective counsel claim procedurally barred because the underpinnings of the claim were addressed on direct appeal.

> of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' Strickland, 466 U.S. at 689.

After discussing in detail what transpired in the Rolling hearing, the Court concluded:

> Collateral counsel, in essence, first sought to have the trial court and now seeks to have this Court second-guess trial counsel's initial decision about whether Rolling had a better chance, however slim it may have been, with a jury in Alachua County, than with a jury in another part of Florida. We decline to do so. See Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998) (declining to second-guess counsel's 'considered decision about whether Provenzano stood a better chance, however slim it may have been, with a jury in Orlando than a jury in St. Augustine'). Although attorneys may differ as to venue strategy, we agree with the trial court's conclusion that the decision in this case has not been demonstrated to have fallen outside the wide range of reasonably professional assistance. See Weeks v. Jones, 26 F.3d 1030, 1044, n.13 (11th Cir. 1994) (noting that counsel's strategic decision not to seek a change of venue based upon his experience in that county was the type of decision the Supreme Court cautioned courts about questioning); see also Cox v. Norris, 133 F.3d 565, 573 (8th Cir. 1997) (holding that counsel's tactical decision not to seek a venue change was reasonable because he believed other counties were prone to harsher sentences); Huls v. Lockhart, 958 F.2d 212, 214-15 (8th Cir. 1992) (concluding that trial counsel were not ineffective for failing to seek a change of venue where counsel considered among other things there familiarity with the county where case was to be tried).

Gore has provided no factual scenario, nor has he alleged that counsel did not discuss the issue of a change of venue or that Gore objected to the strategical decision not to file a motion for change of venue at the time of trial. Absent any of those factors being demonstrated, Gore is without remedy and he has failed to demonstrate any deficient performance let alone prejudice with regard to trial counsel's decision not to change venue in the instant case.

As to the pretrial publicity and, whether Gore was precluded from a fair and impartial jury sitting on his case, the State would suggest that in Rolling v. State, 695 So.2d 278 (Fla. 1997), the Court set out how such a claim must be presented. As observed in Rolling v. State, in his postconviction appeal, the Court observed:

> Simply put, Rolling has not demonstrated any basis for this Court to re-evaluate its previous rejection of his claim alleging presumptive and actual prejudice on the part of the jurors. In light of the amount of pretrial publicity presented at trial, appellate counsel's strenuous argument on direct appeal as to venue, and this Court's thorough examination of the issue, we find Rolling has failed to establish prejudice.

In the instant case, Gore has demonstrated neither deficient performance or alleged specifics with regard to prejudice except to say that he is entitled to a new trial. The record developed from the hearing shows counsel took those steps necessary to

ensure a fair jury was selection from the potential venire. He received individualized voir dire, had valid cause challenges granted and had peremptories remaining with which he could have removed any objectionable juror. He stated he was satisfied with the panel selected which came at the end of unlimited inquiries by trial counsel. In the instant case, the trial court was correct in denying relief following an evidentiary hearing as to this issue.

Gore argues in claim XVIII that trial counsel failed to properly investigate or to provide mental mitigation information to experts and failed to present same during the penalty phase of his case. The trial court found as to claim XVIII (penalty phase ineffectiveness), the following:

> In this claim the defendant alleges that trial counsel was ineffective in discovery and presentation of mitigating evidence at the penalty phase. According to the amended motion, the defendant has mild to medium brain damage, attention deficit disorder, paranoia, and a history of polysubstance abuse, and the sentencing jury never heard of those afflictions or his intoxication and child abuse. The amended motion alleges that, if given an evidentiary hearing, 'witnesses including Barry Crown, Ph.D, family members and relatives of Marshall Gore, any and all witnesses at trial and those persons present with Marshall Gore near the time of the crime can be called as witnesses.' Although granted an evidentiary hearing, the defendant presented no testimony from any of the just-listed people

and failed to prove the conclusory allegations contained in the amended motion.

Instead, Mr. Hunt testified that he interviewed the defendant's mother and father, three sisters, and his aunt and uncle with the aim of developing mitigating evidence. Other than the mother and uncle, the defendant's family was less than helpful. A sister that counsel thought would testify refused to do so and later told counsel that the defendant threatened to kill her if she testified. The defendant's father told Mr. Hunt that, if called to testify, he would do everything he could to see that the defendant was sentenced to death.

Mr. Hunt also testified that he contacted the defendant's prior counsel in Miami who sent him several mental health evaluations and that he secured a copy of the defendant's federal PSI that included a psychiatric evaluation. Counsel also secured the appointment of psychiatrist Umesh Mhatre and psychologist Harry Krop, who both evaluated the defendant. Both doctors diagnosed the defendant has having an anti-social personality disorder.

Dr. Krop did not testify at the penalty phase, and counsel testified at the hearing that Krop told him he did not think his testimony would benefit the defendant. Dr. Mhatre did testify at the penalty phase, and the Court found that nonstatutory mitigation had been established based on the testimony from Mhatre, the mother, and the uncle.

Based on the testimony at the evidentiary hearing, it is obvious to this Court that trial counsel conducted a reasonable investigation and had strong, strategic reasons for presenting the evidence he did at the penalty phase or for not calling other witnesses. See Asay, 769 So.2d at

> 985-88; Jones v. State, 732 So.2d 313, 316-21 (Fla. 1999); LeCroy v. Dugger, 727 So.2d 236, 239-41 (Fla. 1999); Rutherford v. State, 727 So.2d 216, 221-26 (Fla. 1998); Rose v. State, 617 So.2d 291, 293-94 (Fla. 1993). The defendant failed to prove that counsel was deficient in regards to the penalty phase and that he was prejudiced by any deficient representation.

(PCR IX, 1511-1513).

Having failed as to all proof, at the evidentiary hearing, Gore is entitled to no relief as to this claim.

The trial court was correct in denying all relief following an evidentiary hearing on the ineffectiveness of counsel claims.

## Conclusion

Based on the foregoing, all relief should be denied.

Respectfully submitted,

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## Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. R. Glenn Arnold, 210A East Government Street, Pensacola, Florida, 32501, this 1st day of August, 2002.

CAROLYN M. SNURKOWSKI
Assistant Attorney General

## Certificate of Compliance

This pleading was produced in Courier New 12 point, a font which is not proportionately spaced.

CAROLYN M. SNURKOWSKI
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