IN THE SUPREME COURT OF FLORIDA

LANCELOT URILEY ARMSTRONG,

Appellant,

vs. Case No. 01-1874

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

CHARLIE CRIST
ATTORNEY GENERAL

CELIA A. TERENZIO
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO.0656879
1515 N. FLAGLER DR.
SUITE 900
WEST PALM BEACH, FL. 33409
(561)-837-5000

ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

MISCELLANEOUS

IN THE SUPREME COURT OF FLORIDA

LANCELOT URILEY ARMSTRONG,

Appellant,

vs. Case No. 01-1874

STATE OF FLORIDA,

Appellee.
_____/

PRELIMINARY STATEMENT

Appellant, LANCELOT URILEY ARMSTRONG, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the record on direct appeal record will be by the symbol "ROA," reference to the supplemental pleadings and transcripts from the record on appeal will be by the symbol”SR-ROA,” reference to the transcripts and pleadings from the evidentiary hearing below will be by the symbol "PCR," and reference to the supplemental pleadings and transcripts from the proceedings below will be by the symbols "SR-PCR" followed by the appropriate page number(s). Reference to the transcripts

contained in volumes XII and XIII will be the symbol “T” followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The relevant facts of the crime have been recounted by this Court as follows:

> The record reflects the following facts. In the early morning hours of February 17, 1990, Armstrong called a friend and asked him to go with him to rob Church's Fried Chicken restaurant. The friend refused. According to several employees of Church's, around two o'clock that same morning, Armstrong and Michael Coleman came to the restaurant asking to see Kay Allen, who was the assistant manager of the restaurant and Armstrong's former girlfriend. The restaurant employees testified that Allen did not want to see Armstrong and asked him to leave. Armstrong and Coleman, however, remained at the restaurant and eventually Allen accompanied Armstrong to the vehicle he was driving while Coleman remained inside the restaurant. The employees additionally testified that Allen and Armstrong appeared to be arguing while they were sitting in the vehicle.
>
> Allen testified that, while she was in the car with Armstrong, he told her he was going to rob the restaurant, showed her a gun under the seat of the car, and told her he might have to kill her if she didn't cooperate. Coleman then came out to the car, and Armstrong, Coleman, and Allen went back into the restaurant. Allen was responsible for closing the restaurant, and by this time, the other employees had left. Coleman and Armstrong ordered Allen to get

the money from the safe. Before doing so, she managed to push the silent alarm. Shortly thereafter, Armstrong returned to the car. Coleman remained in the restaurant with Allen to collect the money from the safe.

Other testimony reflected the following facts. When the alarm signal was received by the alarm company, the police were notified and Deputy Sheriffs Robert Sallustio and John Greeney went to the restaurant where they found Armstrong sitting in a blue Toyota. Greeney ordered Armstrong out of the car and told him to put his hands on the car. After Greeney ordered Armstrong to put his hands on the car, Greeney holstered his gun to "pat down" Armstrong. Sallustio then noticed movement within the restaurant, heard shots being fired from the restaurant and from the direction of the car, and felt a shot to his chest. Apparently, when the movement and shots from the restaurant distracted the officers, Armstrong managed to get his gun and began firing at the officers.

According to Allen, when Coleman noticed that police officers were outside the building, he started firing at the officers. Allen took cover inside the restaurant, from where she heard Coleman firing more shots and heard a machine gun being fired outside the restaurant. Sallustio was shot three times, but still managed to run from Armstrong and radio for assistance. When other officers arrived, they found Greeney dead at the scene.

Greeney had died instantly. Allen was found inside the restaurant; Coleman and Armstrong had fled.

That same day, Armstrong told one friend that he got shot and that he returned a shot; he told his girlfriend that a police officer had asked him to step out of his car and that, when he did so, the officer pulled a gun on him and tried to shoot him; and he told another friend that someone shot him while trying to rob him. Thereafter, Armstrong and Coleman fled the state but were apprehended the next day in Maryland. Before being apprehended, Armstrong had two bullets removed from his arm by a Maryland doctor.

A number of shell casings were recovered from the scene. All of the bullets removed from Sallustio and Greeney were fired from a nine-millimeter, semi-automatic weapon; Greeney had been shot from close range. Evidence reflected that Armstrong had purchased a nine-millimeter, semi-automatic weapon the month before the crime. Armstrong's prints were found in the blue Toyota as well as on firearm forms found in the car. Additional ballistics evidence reflected that the shots fired from the restaurant did not come from a nine-millimeter, semi-automatic weapon. This indicated that only someone near the car could have fired the shots that wounded Sallustio and killed Greeney. Additionally, testimony was introduced to show that Armstrong was seen with a nine-millimeter, semi-automatic

gun right after the incident. Armstrong was convicted as charged. > (FN1)

At the penalty phase, the State presented evidence showing Armstrong's prior conviction of indecent assault and battery on a fourteen-year-old child. Armstrong presented evidence from a number of witnesses in support of the following nonstatutory mitigating circumstances: (1) he had significant physical problems during childhood (he was dyslexic but a good student and had a brain hemorrhage when he was a baby); (2) helped others and had a positive impact on others (routinely assisted his grandmother, brothers and sisters, both financially and emotionally; was a good father and provider to his son; trained others to do carpentry work and was a positive influence on those he assisted); (3) was present as a child when his mother was abused and would come to her aid; (4) could be productive in prison (was an excellent carpenter and plumber); (5) is a good prospect for rehabilitation; (6) codefendant received a life sentence; (7) the alternative sentence is life imprisonment without the possibility of parole; (8) Armstrong is religious (attends church); and (9) Armstrong failed to receive adequate medical care and treatment as a child (had a brain hemorrhage when he was a baby but, due to finances, did not receive the medical attention he needed).

The jury recommended death by a nine-to-three vote. The trial

> judge found no statutory mitigating circumstances and four aggravating circumstances: (1) prior conviction of a violent felony; (2) committed while engaged in the commission of a robbery or flight therefrom; (3) committed for the purpose of avoiding arrest or effecting an escape from custody; and (4) murder of a law enforcement officer engaged in the performance of official duties. The trial judge sentenced Armstrong to death for the murder of Officer Greeney, to life imprisonment for the attempted murder of Officer Sallustio, and to life imprisonment for the armed robbery.

Armstrong v. State, 642 So.2d 730, 733-734 (Fla. 1994). Armstrong raised twenty-two issues on appeal. They were as follows:

> Armstrong claims that: (1) a new trial is warranted because a witness lied about material facts at trial; (2) the State elicited inadmissible evidence under the guise of refreshing a witness's recollection; (3) the trial judge erred in refusing to allow an in camera review of the grand jury testimony; (4) the trial judge erred in denying Armstrong's motion to suppress identification testimony; (5) the trial judge erred in denying Armstrong's objection to hearsay statements introduced into evidence; (6) the trial judge erred by permitting the State to introduce certain character evidence; (7) the jury instruction on reasonable doubt denied Armstrong due process and a fair trial; (8) the trial judge erred in allowing the State

> to proceed on a felony-murder theory when the indictment gave no notice of the theory; and (9) Armstrong's right to effective assistance of counsel and equal protection was violated by the trial judge's refusal to appoint co-counsel. As to the penalty phase, Armstrong asserts that: (1) the trial judge formulated his sentencing decision before giving Armstrong an opportunity to be heard; (2) & (3) certain aggravating circumstances were duplicative and the trial judge erred in denying Armstrong's requested limiting instruction on duplicate aggravating circumstances; (4) & (5) the trial judge erred in refusing to find certain nonstatutory mitigating factors and in failing to consider certain nonstatutory mitigating factors in its sentencing order; (6) the death penalty is disproportionate in this case; (7) the trial court erred in not granting Armstrong's motion for a magnetic resonance imaging examination; (8) victim impact information was considered by the trial judge in sentencing Armstrong; (9) the trial judge improperly denied Armstrong's request for new counsel; (10) the trial judge erred in denying Armstrong's requested jury instruction that mitigating evidence does not have to be found unanimously; (11) the jury instruction given on sentencing minimized the jury's sense of responsibility, thus depriving Armstrong of a fair sentencing; (12) the trial judge failed to adequately define nonstatutory mitigating circumstances; (13) the trial judge failed to instruct the jury on the correct burden of proof in the penalty phase; (14) Florida's death penalty statute is unconstitutional; and (15) the aggravating circumstances used in this case are unconstitutional.

Armstrong, 642 So.2d at 734 & n.2 . This Court found no merit to any of his claims except for one. The trial court erred in not merging the aggravating factors of “committed to avoid

arrest" and "victim was a law enforcement officer." Id at 738. However the error was harmless beyond a reasonable doubt. Id.

Armstrong filed his initial motion for postconviction relief on March 18, 1997. His second amended motion was filed in April of 2000. A "Huff" hearing was conducted on December 15, 2000. An evidentiary hearing was held over a three day period commencing on March 21, 2001 and concluding on March 24, 2001. All relief was denied. This appeal follows.

SUMMARY OF ARGUMENT

Issue I - The trial court properly found the Johnson v. Mississippi error to be harmless. The court also correctly concluded that trial counsel provided effective assistance of counsel at the penalty phase.

Issue II - The trial court properly denied without an evidentiary hearing appellant's claims that trial counsel was ineffective at the guilt phase.

Issue III - The trial court correctly concluded that appellant had waived any further issue regarding outstanding public records requests.

Issue IV - The trial court properly found appellant's constitutional challenge to the penalty phase jury instructions was procedurally barred. The court also correctly found that appellant's claim that his sentence of death was disproportionate was procedurally barred.

Issue V - The trial court correctly found that appellant's constitutional challenge to the penalty phase jury instructions was procedurally barred

Issue VI - Appellant's claim that the state introduced nonstatutory aggravating circumstances was procedurally barred.

Issue VII - Appellant's claim that he was absent from a critical stage of the proceedings was procedurally barred and legally insufficient as pled.

Issue VIII - Appellant’s claim that his conviction and sentence are in violation of international law is procedurally barred.

Issue IX - Appellant’s constitutional claim that Florida’s death penalty scheme is cruel and unusual punishment is procedurally barred.

Issue X - Appellant’s challenge to the prohibition against juror interviews is procedurally barred.

Issue XI -Appellant’s claim that he is insane to be executed in legally insufficient as pled

Issue XII - Appellant’s claim that his trial was fraught with cumulative error is without merit.

ARGUMENT

ISSUE I

ARMSTRONG HAS NOT DEMONSTRATED THAT HE IS ENTITLED TO RELIEF UNDER JOHNSON v. MISSISSIPPI AS HE FAILED TO OVERCOME THE PROCEDURAL BAR; AND ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

In 1991, at the penalty phase of Armstrong's capital trial, the state presented evidence in support of the aggravating factor of "prior violent felony."[1] Three prior felonies were offered as proof of the existence of the aggravator. Two of those felonies involved the contemporaneous convictions for crimes against two additional victims. The first was for the attempted first degree murder of Officer Robert Sallustio. Sallustio was the partner of the slain officer John Greeney who along with Greeney responded to the robbery scene at Church's Fried Chicken. The second felony was for the robbery of Kenegral Allen, an employee of the Church' Fried Chicken. (ROA 2430). The third prior violent felony offered was Armstrong's 1985 guilty plea to indecent assault of a fourteen year old, Rose Flynch. (ROA 2433). Ms. Flynch testified at the penalty phase. (ROA 1838-1856). The trial court relied upon all three prior convictions in support of the aggravator. (ROA 2430).

In 1998 Armstrong's plea to the indecent assault was vacated. Consequently Armstrong amended his motion for

[1] 921.141(5)(b). Fla. Stat.

postconviction relief raising a claim pursuant to Johnson v. Mississippi, 486 U.S. 578 (1988). Armstrong asked the trial court to reverse his sentence of death based on the state's use of that now vacated guilty plea. Armstrong contended that the Johnson v. Mississippi violation in the instant case amounted to a "structural defect", and therefore, the error could not be considered harmless.[2] In response the state argued that this issue was procedurally barred as a challenge to the now thirteen year old guilty plea could have and should have been made at the time of Armstrong's capital trial. Irrespective of the procedural bar, the state also argued that any error in relying on the indecent assault conviction was harmless as (1) there was no undue emphasis placed on the indecent assault conviction; (2) there were still two much more serious violent felony convictions to establish the aggravator; (3), the jury was correctly instructed that any one of the three standing alone would satisfy the aggravator; and (4) the trial court could now consider as an additional prior violent felony, Armstrong's

---

[2] Additionally Appellant claims that the trial court's harmless error analysis is flawed because the state did not present the court with any evidence regarding the facts surrounding the prior robbery conviction. Appellant claims that the state relied only upon a certified copy of the conviction. **Initial brief at 13.** Appellant's argument is disingenuous and a misrepresentation of the record. The state over the defendant's objection, was allowed to present to the court not only a certified copy of the conviction but a copy of the entire clerk's file as well. (PCR 1441-1447). Therein, the details of the robbery conviction are documented. (SR-PCR 398-896).

conviction for an armed robbery that occurred thirteen days before the instant robbery/murder. Armstrong was convicted of the additional robbery six days after he was sentenced in the instant case. (PCR 715-728, SR-PCR 398-400).

Relying on Duest v. State, 555 So. 2d 849, 851 (Fla. 1990), the trial court rejected the state's argument that the issue was procedurally barred. However the trial court also rejected Armstrong's claim that the error amounted to a "structural defect" and therefore not subject to a traditional harmless error analysis. Additionally, in finding the Johnson error to be harmless, the trial court relied on the additional 1991 conviction for armed robbery of a convenience store. Initially the trial court expressed concern regarding its authority to consider the subsequent robbery conviction. The court was troubled by language in Rogers v. State, 783 So. 2d 980, 1001 (Fla. 2001) wherein this Court refused to "speculate" what evidence may come in at a subsequent hearing. (PCR-1442-1445). Id. However the court properly distinguished Rogers and found the Johnson v. Mississippi, error to be harmless:

> In analyzing the holding in Rogers, this Court notes that the Rogers Court was limited in its review to the record on direct appeal. The subsequent first-degree murder conviction was not a part of that record. Therefore, any consideration of the subsequent conviction by the Supreme Court would by necessity require speculation, which the Court said it could not do.

> The instant case presents an entirely different factual scenario. Armstrong, is currently back before this circuit court for a determination of is motion for postconviction relief. The circuit court has the authority to order an evidentiary hearing on the motion. Fla. R. Crim. P. 3.850(d). After holding a Huff hearing, this court ordered and conducted an evidentiary hearing. The state presented evidence that the Defendant had committed an armed robbery at a convenience store thirteen days prior to the robbery/murder in the instant case. See State's Exhibits 12 and 13. The same type of firearm was used in both crimes. A firearm was discharged in the commission of both crimes. The same co-defendant participated with the Defendant in the perpetration of both crimes. The Defendant was convicted of this armed robbery six days after he was sentenced to death for the murder of Deputy Greeney.
>
> This Court finds that the prejudicial effect of this subsequent conviction and the underlying facts substantial. Not only does this subsequent conviction again establish that the Defendant is a recidivist, the conviction also shows that the Defendant is a recidivist-robber who committed his last armed robbery thirteen days before he murdered John Greeney, during the course of another armed robbery.

(PCR 789-790). The trial court further explained that in assessing the impact of this "new" robbery conviction on the jury's recommendation it also took into account the impact of the jury's consideration of the (since vacated) indecent assault, the entire record below, as well as the mitigation evidence presented at the evidentiary hearing. (PCR 784, 788-790).

Armstrong contends that the trial court's analysis was legally flawed in two aspects. Relying on Rogers, supra, Armstrong contends that the Court erred in considering his subsequent conviction for armed robbery. Appellant alleges that the trial court's analysis was merely speculation and premised on erroneous assumptions. Additionally, he alleges that the trial court failed to consider the effect that the guilty plea for indecent assault had on the jury. The court's harmless error analysis amounted to an improper assumption that the jury would have viewed the robbery conviction as compelling as the guilty plea and would have done so irrespective of the additional mitigating presented at the evidentiary hearing. Armstrong further explains that since the jury did not know that the indecent assault conviction was invalid, and the judge specifically referenced the testimony of the victim Ms. Flynch in its order, the weighing process was skewed to the extent that the error now becomes a structural defect. Armstrong's arguments are legally erroneous. The trial court properly found that any error was harmless beyond a reasonable doubt.

In its analysis, the trial court correctly distinguished Rogers and properly considered the impact the subsequent robbery conviction would have on a jury. Armstrong's contention that the court improperly relied upon the robbery as it was nothing more than mere speculation is incorrect as trial courts as the

fact finders are required to assess the impact of "never before heard evidence" in collateral proceedings. Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997). That process is not considered a speculative task. To the contrary, evidentiary hearings in postconviction litigation is where all speculation dissipates and new proposed evidence is tested. It is tested for its credibility, and its relevancy. Indeed in most claims that are cognizable for postconviction review, trial courts are consistently required to assess what impact new evidence would have on a jury. For instance, in order to be granted a new trial based on newly discovered evidence, "the newly discovered evidence must be of such a nature that it wold probably produce an acquittal on retrial." Jones v. State, 591 So.2d 911, 915 (Fla. 1991). The trial court's decision that it could consider the additional robbery conviction in the harmless error analysis was correct.

In that analysis, the trial court explained its rationale for concluding that the additional armed robbery conviction would have a greater impact upon the jury than the prior indecent assault charge. (PCR 788-779). The court's reliance on the fact that Armstrong was a repeat robber was a reasonable consideration. The state would point out that in addition to the fact that appellant is a recidivist robber, Armstrong's propensity for robbing local businesses would further undermine

his proposed penalty phase theme that he fears police officers and his organic brain damage preclude him from being able to plan out non-routine events such as robberies. The trial court correctly considered the 1991 robbery conviction in its harmless error assessment and correctly determined that any error in relying on the 1985 indecent assault was harmless beyond a reasonable doubt. Cf. Blanco v. State, 452 So. 2d 520 (Fla. 1984)(finding remand for resentencing pointless when defendant was reconvicted of the vacated prior conviction as judge could again consider the conviction in aggravation); see also Preston, 564 So. 2d at 123 (Fla. 1990); Henderson v. Singletary, 617 So. 2d 313, 316 (Fla. 1993)(finding Johnson v. Mississippi claim to be harmless error given ample independent support for the aggravating factor); Buenoano v. State, 708 So. 2d 941, 952 (Fla. 1998)(same); Stano v. State, 708 So. 2d 271, 275 (Fla. 1998(same).

In further support of his argument that the Johnson v. Mississippi was not harmless, Armstrong relied on Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993), Preston v. State, 564 So. 2d 120 (Fla. 1990) and Rivera v. State, 629 So. 2d 105 (Fla. 1993). However the facts of all three cases are clearly distinguishable from the instant case.

The Eleventh Circuit found harmful error in Duest, based on the following: the jury had recommended death by a margin of

one, 7-5 and there was sufficient mitigation to preclude a judge's override of a jury's life recommendation; the jury requested to see the evidence in support of the prior violent felonies during their deliberations; the vacated charge was for armed assault with intent to commit murder which made Duest look like a recidivist killer; and there were no additional violent convictions to support the aggravating factor. Duest 997 F.2d at 1339-1340.

In granting postconviction relief on a Johnson claim in Rivera, this Court relied on the following: the vacated conviction was an assault on a police officer, which would be considered more prejudicial given the fact that Rivera's potential sentence of death was for the murder of a police officer; the prosecutor emphasized the similarities of the two crimes; the prior conviction became a feature of the case; three of six aggravating factors were vacated; and the jury had only recommended death by a margin of one vote. Rivera 629 So. 2d at 109.

Lastly in Preston, this Court found the Johnson error to be harmful based on the following: two of the four aggravating factors were vacated, including the "prior violent felony aggravator"; the jury's recommendation for death was by a margin of one vote; and the importance of the aggravator was emphasized by the prosecutor.

Initially, the state would note that in all three cases, the jury's vote for death was 7-5 and absent the suspect prior violent felony conviction, the entire aggravator was vacated. Obviously these two factors were essential components in finding harmful error. Notably both of these facts are absent in the instant case. The vote for death here was much more compelling, 9-3, and as discussed in greater detail below, there remained two separate prior violent felonies against two additional victims to satisfy the aggravating factor under consideration. Consequently, Armstrong's reliance on Duest Preston and Rivera are of no moment given the compelling factual distinctions between them and the facts of this case.

As noted above, the trial court stated that it considered the record below in assessing the impact of the indecent assault on the judge and jury. The record illustrates the following. First, the sentencing judge relied upon all three prior violent felonies in support of its finding of the "prior violent felony aggravtor," and not just the indecent assault. Secondly, a review of the prosecutor's closing argument reveals that the indecent assault conviction was never singled out or emphasized in any manner. Indeed it was the senseless murder of Officer Greeney that warranted imposition of the death penalty. It was simply mentioned like any other piece of properly admitted evidence would be referenced. If anything, the prosecutor

placed emphasis on the two obviously more violent convictions perpetrated against victims Allen and Sallustio:

> The first one is that the defendant has previously been convicted of a violent felony or the threat of use of violence and the first two I'd like to discuss with you and Judge Coker will instruct you that the two offenses of attempted murder in the first degree , the attempted murder of Deputy Robert Sallustio and the robbery of Kenegral Allen are both violent felonies and although they were contemporaneous convictions, that you can consider them as prior convictions because they are different victims.
>
> In other words, the offense you are considering now is the life or death recommendation for the death of Deputy John W. Greeney III. But there's another two victims, meaning Robert Sallustio and Kenegral Allen because there was a conviction involving offenses against them, you can consider them as previous violent convictions.
>
> The third one is the violent felony against Rose Flynch that happened back in January of 1985. You can take all of that into consideration and you will see and I submit to you, based on the testimony and the evidence, that there is no question, the State has proven beyond a reasonable doubt that aggravating circumstance, the defendant has previously been convicted of a violent felony, attempted murder of Robert Sallustio, the robbery of Kenegral Allen, and the indecent assault on Rose Flynch that you have heard this morning.

(ROA 1932-1933). Consistent with the state's closing argument and the trial judge's findings, is that this jury was specifically instructed that each of the three prior violent

felonies would be sufficient to satisfy the aggravator. (ROA 1948). Consequently, logic, and the harmless error analysis employed countless times by this Court dictates that since there were other prior convictions to satisfy the aggravator, and the jury was so instructed, the trial court was not being asked to speculate as to what the jury weighed in its deliberations. It is readily apparent that the aggravator was still applicable and the prior violent felonies were still very compelling. Any Johnson error should considered harmless beyond a reasonable doubt. See Moon v. Head, 15 Fla. L. Weekly Fed. C369, 373 (11th Cir. March 18, 2002)(distinguishing Johnson based on fact that prosecutor's closing argument placed the greatest emphasis on facts of the capital murder and reference to prior convictions amounted to only five pages of a forty-six page argument).

In further support of its argument,the state also relies on Owen v. State, 596 So. 2d 985, 990 (Fla. 1992). Therein the jury heard evidence regarding Owen's three separate convictions for murder, sexual battery and armed burglary of a fourteen year old girl. Those crimes were very similar in nature to the crimes for which he was on trial. A review of the direct appeal opinion regarding the suspect convictions, clearly depicts the horrific nature of the prior violent felonies. Owen v. State, 560 So. 2d 207 (Fla. 1987). Although all three of those convictions were latter vacated, this Court found the error to

be harmless given that there still remained one prior violent felony for attempted first degree murder. Owen, 596 So. 2d at 989-990. The state asserts that given the harmlessness attached to the jury's impermissible reliance on three horrific convictions including one for murder, there can be no doubt that reliance on an indecent assault charge in the instant case must also be considered harmless error. See also Occichone v. State, 768 So. 2d 1037, 1040 n. 3 (Fla. 2000)(finding no merit to claim that death sentence is unconstitutional in light of fact that a prior conviction was impermissible as there was a contemporaneous murder conviction which would support the "prior violent felony" aggravator).[3]

In order for this Court to find harmful error, it must conclude that the jury blatantly ignored the instructions regarding what would satisfy the prior violent felony aggravator and then deliberately refused to consider or weigh the contemporaneous robbery of Kay Allen or the contemporaneous attempted murder conviction of Sallustio.(ROA 1948). That analysis defies logic and is contrary to the tenets of a harmless error analysis. Cf. Sochor v. Florida, 504 U.S. 527 (1992)(explaining that if a jury has been properly instructed

[3] The trial court rejected this portion of the state's harmless error analysis since the state had not relied on any cases were the remaining prior violent felony was a contemporaneous conviction. The court was incorrect as Occichone was such a case.

regarding the elements required to satisfy the finding of the aggravator it must be presumed that a jury will follow the law). The trial court properly denied relief as an error in relying on the indecent assault charge was harmless error beyond a reasonable doubt.

Finally the state would also argue that the trial court should have found this claim to have been procedurally barred. In its order granting appellant an evidentiary hearing, the trial court delineated several issues for an evidentiary determination among them was the following: "Why the defendant waited until 1998 to initiate a challenge to his 1985 Massachusetts conviction for indecent assault and battery?" (PCR 644). Appellant never offered any response to the court's inquiry.

On the other hand the state responded as follows. Armstrong was represented by attorney John Miller at the guilty plea hearing. That same Mr. Miller had direct involvement in the capital proceedings as evidenced by a letter he sent to the state probation department regarding the circumstances of the assault. (SR-ROA 521-523). In fact, Miller's recitation of the facts was used in part to cross-examine the victim during her penalty phase testimony. (ROA 1849-1856). Additionally it should be noted that trial counsel, Edward Malavenda testified at the evidentiary hearing that he went to Boston in part to

investigate Armstrong's prior criminal record. (T 22-23, 46-49). Yet inexplicably, nothing was done until 1998. (PCR 1075-1077).

In 1998, fourteen years after he pled guilty to indecent assault, a Massachusetts attorney filed a motion to set aside the prior plea. (PCR 582-587). The factual basis for the motion was an affidavit by none other than former counsel, John Miller. (Id.). Miller testified at the 1998 hearing that according to his memory, the trial court offered to reduce the charge of rape to indecent assault during the probable cause hearing. Miller claims that his client never formally accepted the plea nor was he ever informed of his rights. (PCR 599). Yet, "inexplicably" a judgement and conviction for indecent assault was entered. Irrespective of the passage of time, Miller testified that he has a distinct memory of the proceedings from the plea hearing.[4] (PCR 608). Based on Miller's testimony and the Commonwealth of Massachusetts' inability to rebut the testimony, the trial court vacated Armstrong's plea in March of 1999. The Court specifically found

[4] On cross-examination, the Commonwealth of Massachusetts pointed out that Miller was an experienced attorney who represented well over a couple thousand criminal defendants. He is also knowledgeable regarding the charges of rape and indecent assault, yet inexplicably he waited until 1998 to bring this claim.(PCR 600). Miller acknowledged that he was aware of Armstrong's capital conviction and sentence. (PCR 607).

that Armstrong was not informed of his trial rights, nor did he formally plead guilty.[5]

The above details illustrate that the alleged deficiency in appellant's prior guilty plea were well known at the time of his capital trial. Indeed appellant's former counsel, Miller, had every opportunity to convey that information at Armstrong's murder trial. Armstrong fails to explain why he waited until 1998 to attack this guilty plea.[6] Under the facts of this case, it is clear that the Johnson v. Mississippi challenge could have been made prior to the capital trial. (PCR 582-613).

In upholding a similar procedural bar, this Court has found

> Eutzy concedes that he was aware of some of the facts underlying this claim but contends that a psychiatric opinion concerning his mental capacity at the time of the 1958 offense and his guilty plea to that offense was only recently obtained. With the exercise of due diligence, Eutzy's mental capacity at the time of the 1958 offense could have been ascertained prior to the expiration of the two-year period. Further, Eutzy's Nebraska conviction has been final for over thirty years. The fact that Eutzy is seeking collateral review of this conviction does not entitle him to relief under Johnson. Bundy, 538 So.2d at 447.

---

[5] Thus, the conviction was vacated due to a deficiency in the colloquy process and not due to insufficiency of the evidence.

[6] Armstrong's only attack regarding admissibility of the prior conviction at trial was a claim that it was not a felony. (ROA 1813-1815).

Eutzy v. State, 541 So. 2d 1143, 1146 (Fla. 1989). See also, Henderson, 617 So. 2d at, 316 (Fla. 1993)(finding Johnson claim to be procedurally barred since facts underlying challenge to prior violent felony were not raised within two years of when they were ascertained); Adams v. State, 543 So. 2d 1244, 1246-1247 (Fla. 1989)(same). Appellant's failure to meet his burden and demonstrate why this claim should not have been considered barred warrants imposition of that bar on appeal. Cf. Daniels v. United States, 532 U.S. __, 149 L. Ed. 2Ed 590 (2001)(upholding federal procedural bar on challenge to sixteen year-old state guilty plea in federal habeas proceedings were prior guilty plea is used as enhancement in federal trial).

ISSUE I B.

THE TRIAL COURT PROPERLY CONCLUDED THAT APPELLANT RECEIVED CONSTITUTIONALLY EFFECTIVE REPRESENTATION AT THE PENALTY PHASE OF HIS TRIAL

Armstrong alleges that trial counsel, Edward Malavenda, did not conduct the requisite 'through investigation' into his background in violation of Strickland v. Washington, 466 U.S. 668 (1984). The focus of appellant's complaint is that Malavenda failed to develop a mental health and family history. Malavenda also inexplicably did not present any mental health experts even though he had retained the services of two such professionals. **Initial brief at 17.** It was also unreasonable for counsel to rely "exclusively" on appellant's mother as a source of information concerning Armstrong's background. Had counsel conducted a proper investigation he would have uncovered compelling evidence regarding appellant's early childhood in Jamaica. A childhood that was marred by poverty, abuse by the step-father, physical ailments, and abuse by an oppressive and corrupt police department/local government.

In support of his claim, Armstrong presented the testimony of various family members and friends who recounted the debilitating conditions under which Armstrong suffered while he lived in Jamaica. Armstrong also presented the testimony of four doctors who opine that Armstrong's difficult childhood in Jamaica resulted in a variety of maladies including organic

brain damage and "Post Traumatic Stress Syndrome." These conditions form the basis for their conclusions that appellant's mental health problems establish the existence of the two statutory mental health mitigating factors.[7] Trial counsel's constitutionally deficient performance resulted in prejudice to Armstrong at the penalty phase of his trial entitling him to a new sentencing phase.

Armstrong's factual assertions are rebutted from both the original record on appeal and the evidentiary hearing as the trial court made explicit factual findings regarding what specific efforts were undertaken by trial counsel. (PCR 791-793, 796, 798-803). In denying all relief on this claim, the trial court concluded the following: "Based on all the findings above, it is this Court's conclusion that Edward Malavenda's representation of the Defendant fell within the wide range of reasonable professional assistance and counsel's performance was effective". (PCR 804). The trial court's factual findings must be affirmed on appeal. See Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999)(recognizing deference given to trial court's assessment of credibility and findings of fact); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997)(reasoning standard of review following Rule 3.850 evidentiary hearing is that if factual findings are supported by substantial evidence,

[7] 921.141 (6)(b)(f).

appellate court will not substitute its judgment for trial judge's on questions of fact, credibility, or weight). The trial court's legal conclusion regarding Malavenda's performance is subject to an independent *de novo* review. Stephen 748 So. 2d at 1034 (Fla. 1999).

In order to be entitled to relief on this claim, Armstrong must demonstrate the following:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 687 (1984). The Court explained further what it meant by "deficient":

> Judicial scrutiny of counsel's performance must highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 689 (citation omitted). The state asserts that the legal basis of Armstrong's claim is faulty. The entire focus of his argument centers on the actions or strategy that collateral counsel suggests should have or could been done and completely ignores what information was available at the time of trial, and what thought processes, strategies, and decisions followed from that information. The state asserts that the trial court's rejection of this claim was correct as the ability to create a more favorable or appealing strategy several years after the fact, does not translate into deficient performance at trial. Patton v. State, 784 So. 2d 380 (Fla. 2000)(precluding appellate court from viewing issue of trial counsel's performance with heightened perspective of hindsight); Rose v. State, 675 So. 2d 567, 571 (holding disagreement with trial counsel's choice of strategy does not establish ineffective assistance of counsel); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)(concluding standard is not how current counsel would have proceeded in hindsight); Johnson v. State, 769 So. 2e 999, 1001 (Fla. 2001)("Counsel's strategic decisions will not be second guessed on collateral attack."); Rivera v. State, 717 So. 2d 482, 486 (Fla. 1998).

At the evidentiary hearing, Malavenda detailed the efforts undertaken during his investigation, and the reasoning behind the tactical decisions employed. In preparation for trial,

Malavenda elicited the services of two mental health professionals, Dr. Ross Seligson[8] and neuropsychologist Dr. Antoinette Appel.[9] (T 52-56, 116, 119). Malavenda explained that in a capital case it is generally a good idea to employ such services. Additionally in this case, Malavenda felt it was necessary given Armstrong's history of head injuries. (T 16, 25). Malavenda engaged in numerous discussions with Armstrong's family members, especially his mother. His billing records indicate that he had spoken to her on at least twenty-one separate occasions.[10] (T 31, 48-49). In an effort to establish a basis for statutory and non-statutory mitigation, Malavenda focused on any information regarding mental health issues, hospitalizations, injuries etc. (T 51). Based on some of the information garnered from Armstrong and his mother, Malavenda traveled to Boston where the bulk of Armstrong's family resided. There he spoke to many family members, regarding Armstrong's family history. He also sought additional medical records from

---

[8] Seligson saw Armstrong on three separate occasions. Seligson did not uncover any evidence of organic brain damage, however he did recommend further nueropsychological testing to completely rule it out. (T 52-56, 119)

[9] Based on Seligson's recommendation for further nueropsychological testing, Malavenda hired Dr. Appel. (T 56, 116).

[10] The trial court noted that Malavenda expended a total of 825 hours in preparation for this trial. (PCR 792).

Massachusetts General Hospital[11], and he investigated Armstrong's prior criminal history. (T 22-23, 46-49). One of the places he decided not to go to was Jamaica. Malvenda explained his reasoning as follows

> QUESTION: You were asked on direct examination about your travel requests to go to Maryland and Jamaica. Do you recall what that motion was about?
>
> ANSWER: It was pretty much a catchall motion. I didn't want to have to come court again and request permission to travel to other places. I never intended to go to Jamaica.
>
> QUESTION: Why not?
>
> ANSWER: Because I had no information that would lead me to believe there was anything in Jamaica at that point, especially after I spoke to the family, I remember that we talked about look, I'll talk to witnesses, family members up in Boston. If anything comes out of that, maybe I can go to Jamaica and maybe substantiate this. Nothing came out of that. I got no additional information from the family or friends that would cause me to believe a trip to Jamaica is what I had to do."

(T 43-44).

[11] Armstrong's mother provided Malavenda with a 1984 hospital record of Armstrong from Massachusetts General Hospital. Concerned about Armstrong's dyslexia, he was tested for nuero-cognitive difficulties. (T 47).

His ultimate strategy was premised on talking to Armstrong, his mother and additional family members:

> I went to Boston. I met with the family.
>
> QUESTION: That's reflected in your billing statement?
>
> ANSWER: Yes. I was sort of disappointed with the information I could actually use, not just he was a good person and things like that. The mother made a big thing about the brain thing and the problems he had. I wasn't getting any of that information from any of the people that knew him. They were very positive about him, he could work, provide them with, financially helped a lot of there people. There was nothing in their telling me Lancelot Armstrong had some kind of severe brain dysfunction or that he had been abused as a child.
>
> I assume that CCR has information about how police treated him I Jamaica and things like that. I got no information from his family, friends or even Mr. Armstrong relating to anything, you know, nothing additional than I had gotten from his mother.

(T 93-94).[12] Malavenda stated that he never had any reason to disbelieve Armstrong or his family. (T 17, 31). At one point, Malavenda explained:

---

[12] The medical report from Massachusetts did not contain anything significant. As a matter of fact the report indicates that Armstrong did not have a history of seizures. (T 50).

> I had no reason to believe there was any additional information over there. Mrs. English and I, that's his mother, we had a great relationship. Talked a lot over the phone. Came here, we would talk. Had a lot of conversations. She had ample opportunities to provide me with all of this information. I certainly made it clear to them what type of information was looking for.
>
> QUESTION What about the defendant himself?
>
> ANSWER" Same. I would talk to Lancelot constantly. Sometimes I would see him just to see him, not to talk about the case. We had ample chances.

(T 95).[13]

Illustrative of how the penalty phase theme developed is the following excerpts from Malavenda"s testimony:

> "After I had conducted all of my investigations, talked to the witnesses, reviewed the medical, expert reports and things like that, it was my feeling or my strategy the best thing to do for Mr. Armstrong was to humanize him, try to make him look like a good person." I had an uphill battle. He had just been found guilty of killing a deputy sheriff in Broward County. Back then, we were not allowed to have a second chair. I have to now go from, you know, the guilt phase to the penalty phase, switch hats, acknowledge the jury has found him guilty; and you know the only thing that I really had to work with at that point was trying to make him look as good as possible and also to bring out some of the problems he had as a child, dyslexia. I brought out all of the good things. My purpose was to bring out all of

[13] Malavenda sought the advice of several local criminal defense lawyers regarding penalty phase strategy. One such lawyer was Hilliard Moldoph, Armstrong's current "expert." (T 84-85).

> the good things he had done in his life, people who knew him, relatives, pastors.
>
> QUESTION: The fact that he was a respected person?
>
> ANSWER" That's right. Not only that, that he, could work, he made a lot of people happy. Not only by helping them, things like that, also through work. That was my strategy.

(T 91-92). After reviewing the record on appeal as well as the testimony from the evidentiary hearing, the trial court made the following determination:

> The testimony of Ms. English and the eight other witnesses called by Mr. Malavenda on behalf of the Defendant during the penalty phase proceeding was designed to "humanize" the defendant. Mr. Malavenda testified that the purpose of such testimony was to present the Defendant in the most positive light possible to show the Defendant as a potentially productive member of society and as a source of income and guidance to his family. This Court finds that Mr. Malavenda's decision was sound trial strategy based on reasonable and diligent investigation of the Defendant's background.

(PCR 7896). The record supports the trial court's factual findings and legal conclusion.[14] Simply because Armstrong now attempts to place more emphasis on the negative aspects of his life, rather than positive, in no way casts doubt or detracts from trial counsel's presentation of mitigation at trial. Armstrong is not entitled to relief. Armstrong's attempt to

[14] In support of the evidence presented in mitigation, Mr. Malavenda requested that the jury be instructed on the individualized non-statutory mitigators. (ROA 2397-2404).

offer a different penalty phase theme today through different family members, does not entitle him to relief. Asay v. State, 769 So. 2d 974 (Fla. 2000) (observing that presentation of positive and loving aspects of defendant and family was reasonable irrespective of postconviction evidence that family life was marred by abuse and poverty); Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997)(denying claim of ineffective assistance of counsel at penalty phase since strategy was to "humanize" defendant and focus on positive aspects of life, therefore new information regarding emotional problems and deprived upbringing would have been in conflict with strategy chosen).

Notably, Armstrong does not present any evidence to even suggest that Malavenda was told by Armstrong himself or any other family member of the circumstances in Jamaica or that Malavenda was "relying" on the wrong family members as sources for mitigating evidence during his investigation. Armstrong is not entitled to relief. See Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000)(rejecting claim that attorney failed to properly investigate childhood background since defendant failed to inform trial counsel of such evidence); Carroll v. State, 815 So. 2d 601 (Fla. 2002)(precluding defendant from attacking counsel's investigation when defendant fails to respond to request for information); Strickland, 466 U.S. at 691 ("the

reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions") Occichone v. State, 768 So. 2d 990, 1001 (Fla. 20000("Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsels' strategic decisions").

The trial court also found that much of the information now being presented through family members was in large part cumulative to that which was presented at the penalty phase. (PCR 793-796). The record on appeal supports that conclusion.

At penalty phase, Armstrong presented the testimony of nine witnesses including Armstrong's siblings, his pastor, his mother, the mother of his child friends and employees. These witnesses recounted Armstrong's physical difficulties,[15] as well as his scholastic troubles, including his inability to read and write. During his childhood, Armstrong witnessed the brutal beatings of his mother at the hands of his step-father. Despite his tender years, Armstrong was always nurturing with his mother and "nursed" her back to health on several occasions. He provided spiritual guidance to his family, financial support for

[15] The physical aliments included a hematoma which resulted in brain hemorrhage, dyslexia, lesion on the brain, loss of two fingers when he was only ten, almost fatal stabbing by his brother. (ROA 1909-1917). Armstrong's family was so poor they could not afford the medical treatment for his conditions. (ROA 1917).

his mother's household, helped finance his sister's education, and provided emotional support for his siblings after their mother left the family in Jamaica and moved to the United States. (ROA 1860-1928, 2429-2436). This Court addressed the non-statutory mitigation as follows:

> Armstrong presented evidence from a number of witnesses in support of the following nonstatutory mitigating circumstances: (1) he had significant physical problems during childhood (he was dyslexic but a good student and had a brain hemorrhage when he was a baby); (2) helped others and had a positive impact on others (routinely assisted his grandmother, brothers and sisters, both financially and emotionally; was a good father and provider to his son; trained others to do carpentry work and was a positive influence on those he assisted); (3) was present as a child when his mother was abused and would come to her aid; (4) could be productive in prison (was an excellent carpenter and plumber); (5) is a good prospect for rehabilitation; (6) codefendant received a life sentence; (7) the alternative sentence is life imprisonment without the possibility of parole; (8) Armstrong is religious (attends church); and (9) Armstrong failed to receive adequate medical care and treatment as a child (had a brain hemorrhage when he was a baby but, due to finances, did not receive the medical attention he needed).

Armstrong, 642 So. 2d at 734. The overall picture portrayed of Armstrong at the penalty phase was that of a man who overcame various physical obstacles, poverty, and an abusive and broken home. In spite of his impoverished background, Armstrong was a loving devoted son to his mother, a surrogate father to his other siblings, a good father to his own child, a successful business man and a generous friend, employer, and neighbor. (ROA 1860-1928). **Initial brief at 34-36.** Armstrong's presentation of a more detailed account of Armstrong's earlier years in Jamaica and failing marriage in the United States does not form a basis for relief. See Van Poyck v. State, 694 So. 2d 686, 692 (Fla. 1997)(rejecting claim of ineffective assistance of counsel at penalty phase since jury was aware of most of the information being presented in collateral proceedings); Puiatta v. State, 589 So. 2d 231, 234 (Fla. 1991)(same). Presentation of this information in much greater detail nine years later does not establish that the original investigation and presentation was inadequate. See Chandler v. Dugger, 634 So. 2d 1066, 1069-1070 (Fla. 1994)(holding that more information regarding childhood background does render original penalty phase hearing unreliable); Glock v. State, 537 So. 2d 99 (Fla. 1987); Jennings v. State, 583 So. 2d 316, 321 (Fla. 1991)(rejecting notion that counsel is required to call every witness who may have information about an event);Cf. Atkins v. Dugger, 541 So. 2d

1165, 1166 (Fla. 1989)(finding counsel was not deficient for failing to present expert testimony where the record showed that counsel presented substantial evidence of defendant's intoxication); Sweet v. State, 810 So. 2d 854 (Fla. 2002)(rejecting claim of ineffective assistance of counsel as new information although more detailed was essentially cumulative); Gilliam v. State, 817 So. 2d 768 (Fla. 2002)(same).

The next specific area of criticism centers on Malavenda's "failure" to present mental health experts at the penalty phase. Appellant claims that his history of seizures[16], head injuries, and sever malnutrition were clear indications of organic brain damage which should have been presented to the jury. Mr. Malavenda recounted very specific reasons for not pursuing a mental health defense at the penalty phase.

Malavenda sought the assistance of two mental health professionals. The first one was Dr. Seligson, hired specifically to test/uncover information regarding penalty phase mitigation, was also unable to provide any compelling evidence to use as mitigation regarding statutory mitigators. (T 30, 32, 34 94, 96-97, 113-114). Seligson's report contains detailed

[16] Although appellant asserts that he has a history of seizures, the evidence completely contradicts that allegation. Appellant nor anyone else in his family ever told trial counsel that he suffered from seizures. Furthermore, the hospital records from Massachusetts as well as the Department of Corrections records both indicate that no history of seizures has ever been reported by appellant.

accounts of Armstrong's many head injuries, nose bleeds, and other childhood/adolescent accidents including various incidences with Jamaican police. Significantly however, Seligson concluded that Armstrong was not suffering from organic brain damage, he was not insane and he was not incompetent. Based on a variety of psychological tests, and three interviews, Seligson could only opine that Armstrong fit the statutory mitigating circumstance of 921.141 (5)(b), "The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired." Seligson's opinion was based on the following: "At the time of the alleged crime, Mr. Armstrong reports feeling his life was in danger from the law enforcement officer at whom the alleged crime was directed." (Dr. Seligson's report at p. 12). Additionally, Seligson's report documented Armstrong's long held suspicion of police in general[17] including his perception that the police in the instance case were unnecessarily bothering him the night of the murder. (T 53).

Following the advice of Dr. Seligson, Malavenda asked Dr. Appel to examine Armstrong for the express purpose of investigating the possibility that Armstrong was suffering from organic brain damage. (T 56, 116). Appel was provided a copy of Seligson's report. (T 56). Malavenda asked Appel to examine

[17] Armstrong recounted to Seligson an incident that occurred in Jamaica involving his brother.

Armstrong for competency, and sanity. He doesn't remember if she was specifically also asked to look for mitigation.[18] (T 16). In any event Appel testifying at the competency hearing, could only say that Armstrong was incompetent to stand trial based largely on the fact that he allegedly couldn't read and write and he has difficulty forming abstract categories. She suggested that his situation could be greatly enhanced with a reader. Appel also stated that there was a hematoma on the brain. (ROA 118-119, 124-125).[19]

Based on Malavenda's investigation into possible mental health mitigation, he made a decision not to pursue that line of defense at the penalty phase. First of all given the relatively weak nature of Seligson's findings he would not have been very helpful at the penalty phase. (T 33). Furthermore, Malavenda did not want the jury to hear any information regarding Armstrong's negative feelings about police officers. At best, Seligson would say that Armstrong was in fear for his safety based on circumstances which he himself created. The very

---

[18] Malvenda was unable to recall some specifics of his investigation based on the fact that CCRC without permission confiscated Malvenda's personal notes and has never returned them to him. (T 24, 27, 29, 41-43, 104-114).

[19] The state would remind the court that current counsel for Armstrong keeps insisting that he cannot read and write yet they also complain that he was unfairly denied access to the law library during the evidentiary hearing. (T 53). Additionally, Malavenda testified that Armstrong was able to read and write during his extensive encounters with him. (T 34, 98).

minimal value of that opinion would have been totally destroyed with Seligson's findings regarding Armstrong's dislike of police officers. Under no circumstances did Malavenda want to provide the jury with a clear motive for killing a police officer. (T 37-38, 52-54, 57, 86-87, 95-96).[20] Seligson's report would have done just that.[21]

The trial court also noted that Dr. Seligson conducted an evaluation of appellant over a three day period. Seligson found appellant to be sane, competent to stand trial and also found no evidence of organic brain damage. (PCR 799). Based on the state's presentation of Malavenda's testimony, and the doctor's report, the trial court concluded the following:

> This Court finds that when considering the Defendant's statements in conjunction with Mr. Malavenda's strategy of "humanizing" the Defendant, to make the Defendant look as good as possible to the jury, the decision not to call Dr. Seligson was within reasonable acceptable standards of professional assistance of counsel. As the State argued, "a consistent and repeated

---

[20] The record on appeal clearly establishes that Malavenda attempted to diffuse the damage of such information at the guilt phase. (ROA 760-770). The state certainly felt it was compelling given that the prosecutor ended presentation of his case-in-chief with that evidence.

[21] One area of inquiry developed at the evidentiary hearing that was not pursued before trial centered on the political unrest and abhorrent treatment suffered by Jamaican citizens, including appellant, at the hands of the Jamaican police. (PCR 1390-1418). Malavenda testified that this information would not have been useful to him at the penalty phase. Such information would have provided additional documentation of appellant's hatred of police officers.

> confirmation of Armstrong's hatred for police through the testimony of expert witnesses would not have resulted in a life recommendation."

(PCR 802). Malavenda's strategy was reasonable and cannot be considered constitutionally deficient. Carroll, supra(finding reasonable counsel's decision not to pursue mental health expert as witness may have wavered and would not have been very persuasive); Rogers v. Zant, 13 F.3rd 384, 387 (11th Cir. 1994)(explaining that it is reasonable strategy to decide not to investigate a certain line of defense irrespective of what it may uncover based on counsel's decision to avoid a certain course); Cf. Davis v. Singeltary, 199 F.3d 1471, 1478 (11th Cir. 1997)(upholding as reasonable trial strategy, counsel's decision not to present defendant's mental health history in order to keep from the jury, appellant's pedophillic tendencies); Marek v. Singletary, 62 F.3d 1295, 1300 (1th Cir. 1995)(finding trial counsel's decision not to present mitigation of appellant's childhood because of negative aspects including his homosexuality was reasonable strategy)[22]; Van Poyck v. Singeltary, 694 So. 2d 686 (Fla. 1997)(finding trial counsel's decision not to pursue mental health evidence based on negative aspects of doctor's report was reasonable strategy); Haliburton v. Singeltary, 691 So.2d 466, 471 (Fla. 1997)(same); Sweet v.

[22] The state would note that the trial attorney who made the decision to forgo mitigation in Marek based on negative aspects of same is Hillard Moldof, Armstrong's "expert witness."

State, 810 So. 2d 854 (Fla. 2002)(same); Gilliam (same) (finding trial attorney's strategy to limit testimony of mental health evidence based on premise that a jury would be unreceptive to negative aspects of appellant's life was reasonable); Sweet v. State, 810 So. 2d 854, 864 (Fla. 2002)(same).

With regards to the strategic decision not to utilize Dr. Appel for the penalty phase, Malavenda offered three specific reasons; (1) Appel had not been forceful in her assessment of brain damage during the competency hearing therefore she would not have provided compelling evidence at the penalty phase; (2) based on his experience with her, Mlavenda also feared that Appel was trying to "run the show", and, therefore, he was afraid of what she might say on the witness stand, and (3) her credibility would have been severely damaged based on the diametrically opposed positions of three other doctors who testified at the competency hearing.[23] (T 33). Malavenda clearly stated that his decision not to call her at the penalty phase had nothing to do with the alleged failure on his part to ask Appel to do a mitigation investigation/evaluation. He never had any intention of calling her for the penalty phase after her testimony at the competency hearing. Armstrong's attempt to argue that there was no reasonable strategic reason for not

[23] It is clear from the doctors reports that they were all aware of Armstrong's numerous head injuries, hematoma, dyslexia, and nose bleeds. (T 63-66).

using Appel at penalty is therefore incorrect. (T 33, 75, 78-82).

The record clearly supports all of Malavenda's reasoning. First, a review of Appel's competency hearing testimony illustrates that Armstrong's alleged brain damage was not going to be relevant to the penalty phase issue. Appel did advise Malavenda that an MRI was needed given her concern regarding Armstrong's brain functioning. (T 25) She explained that an MRI, could conceivably help in that it may provide "additional information which might lead to additional defenses." (ROA 125). However, on cross-examination, Appel was asked if Armstrong had any brain damage. Her response was as follows: "I am not telling you the head injury was responsible for any of this. I am telling you that if his mother's report is accurate, and that's why I said it's important, if that should become a bone of contention to get an MRI, that that might be responsible for his difficulty with reading and writing. There was no way I was trying to make any attribution other than that." (ROA 142). Malavenda explained that given Appel's testimony, which was less than compelling, along with the failure of any other doctor to diagnose brain damage, Malavenda didn't pursue an MRI nor any defense based on organic brain damage. (T 30, 72-74). The state asserts that given Appel's clear refusal to offer any nexus between Armstrong's potential brain damage and his actions

on the night of the murder, the complete lack of any other medical opinion to corroborate such a finding, Malavenda's decision not to call her was reasonable. See Van Poyck 694 So. 2d at 692 (finding reasonable counsel's decision not to pursue mental health defense since doctor stated that he had nothing helpful to offer).

Second, at the evidentiary hearing Malavenda characterized Appel as a "loose cannon and a frustrated lawyer." (T 33, 77-78, 117-118). He stated that she was more focused on Armstrong's ability vel non to waive his rights than she was on the issues Malavenda though was important. Appel went so far as to write out a script for Malavenda. A review of her performance/testimony at the evidentiary hearing demonstrates that Malavenda's fears/concerns were extremely valid.

Throughout her testimony at the evidentiary hearing, Dr. Appel offered gratuitous legal opinions/analysis on subjects ranging from Armstrong's invocation of his right to counsel, admissibility of evidence, attorney/client privilege, the attorney/confidential expert privilege, the varying standards of legal proof, and she even chastised the state for objecting to Armstrong's motion to perpetuate testimony. She consistently interrupted the attorneys, she was easily agitated when questioned regarding her findings and conclusions, raising her voice on several occasions, and she had no trouble directing the

flow of the questioning. Consistent with her dominating demeanor, Appel explained that her role was not just offering information on sanity, competency or mitigation, but that she was hired to assist in the preparation of a defense. (PCR 1195-1197, 1201, 1204, 1209, 1220, 1225, 1227-1229, 1231, 1233, 1235, 1237, 1238, 1246, 1242, 1252). She initiated her own investigation irrespective of whatever Malavenda did or did not instruct her to do. (PCR 1197, 1235). Not surprisingly, Appel proudly announced at the beginning of her testimony that she had enrolled in law school. (PCR 1193).

Malavenda's final reason for not calling Appel was based on her lack of credibility. Had Malavenda called Appel at penalty phase to say that Armstrong was suffering from organic brain damage, she would have been impeached with her own words at the competency hearing as well as the opinions of the three other doctors who did not find organic brain damage. (T 30, 33, 63, 72-87). [24]

After assessing the testimony of Malavenda's and Dr. Appel, the trial court made the following findings regarding Dr. Appel:

> During Dr. Appel's testimony before this Court, her demeanor changed and she became

[24] Armstrong has been tested three times since the trial. He received two CAT scans in 1991, and an EEG was done shortly before the evidentiary hearing. Consistently, all three tests do not show brain damage. Although Appel emphatically insists that an MRI should have been done then and one should still be now, she has never made that recommendation to current counsel. (PCR 1206, 1246, 1250).

> hostile and aggressive when refusing to admit to even the most obvious of established facts.

(PCR 800).
The trial court further observed:

> During her testimony, Dr. Appel was abrasive and appeared to be more interested in directing her comments as a future law student, rather than just answering the questions posed to her. Dr. Appel chastised the State for objecting and raised her voice inappropriately, interrupting the attorneys. This Court finds that there was a distinct likelihood that Dr. Appel would have alienated the jury in a manner detrimental to the defense.

(PCR 801). Based on Appel's "performance" the trial court determined, "This Court finds that Mr. Malavenda's strategic decision not to call Dr. Appel was reasonable and rational under all circumstances". (PCR 801). As recounted above, the record supports the trial court's factual findings and legal determination. Appel's performance at this hearing unquestionably corroborates Malavenda's assessment of his interactions with her. In a nut shell, Appel's own perception of her role as that of an advocate offering assistance for the defense, made it impossible for to even appear as a fair minded, rational, and neutral clinician. Such a palpable bias would have been evident to a jury. Malavenda's decision not to call this incredible witness was reasonable. See Tompkins v. Moore, 193 F.3d 1327, 1338-1339 (11th Cir. 1999)(rejecting claim of ineffective assistance of counsel for failing to call mental

health expert based on overwhelming bias of professional); Jones v. State, 528 So. 2d 1171, 1175 (Fla. 1988)(recognizing as valid trial strategy a decision not to call certain person based on unpredictable nature of the potential witness); Gilliam, (upholding determination that because postconviction expert's testimony was incredible, counsel was not ineffective e for failing to pursue same at trial).

In an addition to the Dr. Appel, and various family and friends, appellant also presented testimony of three mental health professionals. All three doctors opined that Armstrong suffers from organic brain damage and their findings would support findings of the two statutory mental health mitigators. However, the testimony of all three doctors was suspect at best and not worthy of serious consideration.

Dr. Terry Goldberg administered a battery of neuropsychological tests as well as an IQ tests in early 2001. (T 133-136). The doctor's report and testimony indicate that Armstrong suffers from moderate impairment to cognitive control resulting in impulsivity, inability to plan or develop a reasonable strategy in non-routine situations. (T 144, 151).

Although Goldberg claims that he was aware of the facts of the crime he had to concede on cross-examination that he didn't know the details. For instance, he was unaware of very basic details including where Armstrong obtained the gun, how many

victims Armstrong shot or the number of times Armstrong shot at his intended victims. (T 155-159). Goldberg also conceded that Armstrong, although not "mentally equipped" to handle non-routine situations, he was the one who created this non-routine situation. (T 159). In an attempt to diffuse the damage his ignorance of the facts could have on his overall assessment of Armstrong, Goldberg explained that his opinion was based primarily on the neuropsychological testing and the facts/background were of minimal significance.

Yet it is the facts of the instant case which strikingly reveal Armstrong's mind-set, thought processes, motivation and capabilities on the day of the crimes. Armstrong, with the help of a co-defendant planned to rob the Church's Fried Chicken after closing. He and Coleman arrived shortly before closing in an effort to elicit the aid of the store manager, Kay Allen. Armstrong unsuccessful in convincing Allen to cooperate waited outside in his car while Coleman forced her into the store to complete the robbery. When Officer Greeny arrived Armstrong did not panic, he followed the officers directions until Coleman provided the diversion Armstrong needed to obtain his gun. Right underneath his seat, in close proximity was a loaded 9 millimeter semi-automatic weapon. Armstrong was able to quickly reach for his own gun during the split second that Greeney had turned to look in Coleman's direction and was, therefore, most

vulnerable. Armstrong administered two fatal shots to Greeney and then immediately turned his attention to his second potential obstacle, Officer Sallustio. He engaged in a shoot out with Sallustio hitting him twice. Had it not been for Sallustio's backup weapon, he too could have been killed. Once Sallustio was out of site, Armstrong and Coleman made their getaway before back-up officers could arrive. Armstrong successfully made his escape out of South Florida. Armstrong, 641 So. 2d at 733. These facts completely undermined Goldberg's opinion.

The next mental health expert to testify was Dr. Thomas Hyde. Dr. Hyde, a behavioral neurologist who studies how diseases and the environment impact upon brain functioning. (T 166). Hyde administered a comprehensive interview with Armstrong, talked with his mother, reviewed numerous documents, including affidavits from three members of Armstrong's family from Jamaica, and he administered neuro-psychological evaluation. (T 171). Hyde opines that Armstrong seems to have a developmental brain dysfunction. (T 175, 183). Hyde testified that his examination suggests deficiency in that part of the brain that is responsible for executive functioning, math skills and memory.[25] (T 175-179, 183). He concluded that Armstrong's judgement, reasoning ability, and insight would be

[25] Inconsistent with Dr,. Appel, Hyde stated that Armstrong was competent to stand trial. (T 212).

impaired in stressful situations, and he would respond in a more emotional way. (T 184-185). Hyde concluded that Armstrong's dysfunction would result in a finding of the two statutory mental health mitigators. (T 189-191). Hyde stated, "As I have said before, I saw nothing in the record that I read that this was a crime planned with meticulous detail and timing and foresight with all contingencies throughout all aspects of the crime." (T 192). Hyde stated that there was some planning done however he was unaware who was responsible for that planning. (T 192).

On cross-examination Hyde acknowledge that Armstrong has had two normal CAT scans and very recently, a normal EEG. (T 188, 196, 216). Hyde conceded that the normal EEG is most likely indicative of the fact that the seizures he alleges he suffered terminated after childhood. (T 188, 216). When asked to identify which facts of the crime demonstrate that Armstrong has organic brain damage, he stated: (1) Armstrong was caught and (2) instead of fleeing when "things went badly he reacted." (T 206). When it became apparent that Hyde did not know the facts of the crime he stated that the facts were an exceedingly minor part of the evaluation. (T 215). Hyde qualified his response by explaining that the facts were minor in the sense that he had a voluminous amount of material. (T 219). Yet he was never able to recount any details of the facts. Hyde was unsure of

even the very basic facts, i.e., how many victims did Armstrong shoot. (T 206-208, 217-219).

The state readily admits that the two facts mentioned above are in fact present in the instant case. Armstrong did get caught and he chose to kill Officer Greeney rather than be arrested for robbery. However, the state asserts that these two general facts apply to every single case where a defendant is on trial for the murder of a police officer.

Armstrong's final expert was Dr. Richard Dudley. Dudley concludes that Armstrong suffers from cognitive difficulties and depression. (PCR 1261-1262). Armstrong has a history of abuse and neglect, head traumas and trauma associated with police brutality. (PCR 1262-1263, 1266-1267, 1277, 1280). These maladies make problem solving and decision making difficult for appellant. (PCR 1272, 1275). Armstrong's condition would justify a finding of the two mental health mitigators. (PCR 1274).

Dudley conceded that Armstrong, in spite of his cognitive deficiencies was able to teach himself basic carpentry skills, he started a business which generated enough money to support himself, his immediate and extended family, as well as his friends. (PCR 1269).

In assessing the credibility of these doctors, the trial court made the following findings:

> Through their testimony, it was apparent to this Court that none of the three experts called had an accurate understanding or grasp of the salient facts of the crimes for which the Defendant was convicted. All three doctors described the Defendant as having frontal lobe dysfunction which would have impaired the Defendant's ability to control his impulses. This would have also affected the Defendant's executive decisions, such as planning. This Court gives very little weight to the expert's conclusions because the facts of record have established that this was not a random, impulsive crime as the Defendant intended to rob Church's Chicken where his former girlfriend was assistant manager. The Defendant possessed a loaded firearm and made the conscious decision to commit the robbery at closing time which afforded the opportunity to obtain greater cash receipts. All of these facts strongly suggest that the Defendant had the ability to plan the robbery. All three experts opined that the shooting was impulsive. Again, this Court gives little weight to the experts' conclusion that the shooting was impulsive, because the Defendant, by plan, intentionally placed himself in this stressful situation where it was likely that the police would respond.

(PCR 803-804). The trial court also noted that appellant possessed skills which afforded him the opportunity to make a living as a business and carpenter which "required long range planning and were not the product of impulsive conduct." (PCR 804). In conclusion the trial court rejected appellant's claim that counsels' failure to obtain similar mental health witnesses to testify was deficient performance. (PCR 804). The state asserts that the trial court's conclusion was correct. See

Gilliam, (upholding trial court's denial of relief where court found expert's testimony to be deserving of little weight); Asay v. State, 769 So. 2d 974 (Fla. 2000) (upholding trial court's rejection of expert opinion as speculative given that experts were unfamiliar with significant facts of the crime); Bryant v. State, 785 So. 2d 422 (Fla. 2001)(upholding trial court's rejection of mental health expert's opinion as defendant's own actions during the robbery/murder belie testimony of expert); Walls v. State, 641 So. 2d 381, 390-391 (Fla. 1994)(recognizing that credibility of expert testimony increases when supported by facts of case and diminishes when facts contradict same); Foster v. State, 679 So. 2d 747, 755 (Fla. 1996)(same); Wournous v. State, 644 So. 2d 1000, 1010 (Fla. 1994)(upholding rejection of uncontroverted expert testimony when it cannot be reconciled with facts of crime); Sweet, 810 So. 2d at 866(upholding determination that new mental health experts' opinions that defendant did not possess requisite intent to satisfy "CCP" aggravating because such testimony did not comform to facts of the case).

In conclusion Armstrong's claim that trial counsel failed to properly investigate his background and therefore resulted in omission of significant non-statutory/statutory mitigation. is refuted from the record. To the contrary, much of the information presented in this motion is identical to the

evidence presented at trial. Armstrong does not explain why this evidence should not be considered cumulative.

Furthermore, the evidence now presented as mental health mitigation is incredible and not compelling. Additionally, although Armstrong would now like to criticize Malavenda's reliance on Armstrong's mother as a source for mitigation, there has been absolutely nothing presented at the evidentiary which establishes that Malavenda was aware or should have been aware that Ms. English allegedly was not the best source of information. Carroll, 815 So. 2d at 615(finding counsel not ineffective for failing to uncover a specific category of mitigation based on fact that neither appellant or family members that were interviewed relayed the information to defense counsel). In any event, it is clear from the record below that Malavenda talked to numerous family members, including other siblings. Simply because Armstrong would like to rewrite the script today does not translate into a deficiency in 1990. The trial court's denial of this claim must be affirmed.

ISSUE II

SUMMARY DENIAL OF APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF GUILT PHASE COUNSEL; NEWLY DISCOVERED EVIDENCE; AND PROSECUTORIAL MISCONDUCT WAS PROPER AS THE ISSUES WERE EITHER CONCLUSIVELY REBUTTED FROM THE RECORD OR LEGALLY INSUFFICIENT AS PLED

Appellant claims that trial counsel was ineffective for failing to challenge the in-court identification of appellant by state witness Bobby Norton. Armstrong alleges that Norton's identification was subject to attack because he also stated that he was (1) unsure whether he would be able to identify Armstrong again and (2) that he did not see Armstrong's face that night. Based on these two statements, Armstrong argues that trial counsel should have objected to Norton's identification testimony. The state argued that summary denial was proper given that the record conclusively establishes that Norton's identification was not unreliable and was properly admitted at trial.[26] In summarily denying relief, the trial court determined that had trial counsel challenged Norton's identification pre-trial it would not have been successful. Specifically the court determined that,

> All relevant facts necessary to assess the credibility of Norton were presented. Using the standard set forth in Strickland v.

[26] The state also argued that this issue was procedurally barred since a variation of it was raised on direct appeal. Armstrong v. State, 642 So. 2d 730, 734 n. 2 (Fla. 1994). The state maintains that position.

> Washington, 466 U.S. 668 (1984), this Court finds that the outcome of the case would not have been different had Mr. Malavenda objected to the identification made of the Defendant by Norton.

(PCR 647). The state asserts that the record below supports the trial court's findings.

During the pre-trial motion to suppress, the state presented the testimony of Deputy Sallustio, Katina Thomas, Genard Hamilton, and Nora Whitehead. The defense attempted to establish a consistent theme that any identification of Armstrong by these witnesses was tainted because his photograph had appeared on television and in the newspapers. (ROA 149-186). During cross-examination of Norton at trial this same argument was developed. The jury was aware of the fact that Norton was initially unsure of his identification. However the overall substance of Norton's testimony clearly demonstrates that had a clear view of Armstrong that evening. (ROA 620-623). Moreover Norton accurately picked Armstrong out of a photo line-up shortly after the murder. (ROA 621-623). Consequently, the record is clear that any challenge to Norton's in-court-identification pre-trial at the motion to suppress would have been futile.

The state would further note that even if trial counsel's performance was deficient in his failure to more aggressively attack the reliability of Norton's identification, Armstrong cannot establish that the outcome of the proceedings would have

been different under Strickland v. Washington, 466 U.S. 668 (1984). As already noted, there were four other eye witnesses who clearly and unequivocally identified Armstrong. (ROA 148-187, 626-776). Moreover, nowhere in these proceedings does Armstrong present any argument that he was not present at Church's restaurant that night.[27] Consequently, counsel's claim is totally void of merit. The trial court's ruling that Malavenda was not ineffective under Strickland was correct. (ROA 646-647). Summary denial is warranted. Engle v. State, 576 So. 2d 696, 700 (Fla. 1991)(finding that trial counsel's failure to object to inadmissible hearsay was not prejudicial as substance of evidence was presented through properly admitted testimony as well).

Armstrong next alleges that Mr. Malavenda was ineffective for failing to invoke the rule of sequestration until several eyewitnesses had already testified. Armstrong presents a vague assertion that, "[t]his gave the witnesses the opportunity to listen to the questions and answers and discuss the testimony with each other prior to facing the similar questions themselves." **Initial brief at 73-74.** The trial court summarily denied this claim finding that it was legally insufficient as pled. (PCR 647). The state asserts that the trial court's

[27] The state would also note that trial counsel conceded in closing argument that Armstrong was present at that crime scene that evening. (ROA 1720).

determination was proper. Merely asserting that witnesses were given the opportunity to listen to each other's testimony without alleging with any degree of specificity how Armstrong was prejudiced by this fact does not entitle him to relief. See Cain v. State, 758 So. 2d 1257(4th DCA 2000)(finding relief not warranted on issue of failure to invoke rule of sequestration where defendant failed to demonstrate prejudice). [28] See LeCroy v. State, 727 So. 2d 236, 239 (Fla. 1998) 1998)(upholding summary denial of motion were there is no factual support for conclusory claim); Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999)(upholding summary denial of claim of ineffective assistance of counsel since motion does not allege facts that are not conclusively rebutted by the record.); Mendyke v State, 592 So. 2d 1076, 1079 (Fla. 1992)(same).

Armstrong's next allegation of ineffectiveness alleges that Mr. Malavenda did not adequately challenge the reliability and ultimately the admissibility of DNA evidence. Relying on Frye v. United States 293 F.2d 1013, 1014 (D.C. Cir. 1923); Murray v. State, 692 So. 2d 157 (Fla. 1997) and Ramirez v. State, 651 So. 2d 1164 (Fla. 1995), Armstrong alleges that Malavenda failed to properly challenge the data base and protocol used by the BSO lab; and failed to adequately challenge the qualifications of

---

[28] For this Court's edification, the trial testimony of the "identification witnesses" was consistent with their testimony from the motion to suppress hearing. (ROA 148-187).

George Duncan, the state's serologist. Relying on the record, the trial court summarily denied relief. The court found that the requirements of Frye had been met through the state's experts, Dr. Tracey as Tracey opined that DNA testing had been accepted in the scientific community since the mid-seventies.[29] The court further concluded that counsel's performance was not ineffective under Strickland, (PCR 647-648). The court rejected Armstrong's reliance on case law which was not available at the time of trial. See Nelms v. State, 596 So. 2d 441 (Fla. 1992)(rejecting claim of ineffective assistance of counsel since trial counsel cannot be expected to anticipate changes in law); Way v. State, 568 So. 2d 1263 (Fla. 1990)(explaining that counsel cannot be ineffective for failing to object to hypnotically induced testimony since such evidence was admissible at the time of trial). Lastly, any reliance on the testimony of Duncan or Tracey did not change or undermine confidence in the outcome of the proceedings under the prejudice of Strickland, as the DNA evidence went solely to establish that the victim's blood was found in Armstrong's car. (PCR 648). The court noted: "There was ample other evidence establishing that when he was fatally shot Deputy Greeney was standing next to the Defendant." (ROA 890-891, 917-930, 950, 1622-1623). The

[29] Duncan had been previously qualified as an expert in DNA extraction. (ROA 1150-1154, 1166-1170, 1174-1176, 1184-1218). (PCR 647).

DNA evidence was merely cumulative." (PCR 648). The trial court's summary denial was correct as the record conclusively rebuts Armstrong's assertions against trial counsel.

The next allegation concerning trial counsel's performance was Malvenda's failure to object to improper bolstering of state's witnesses by the trial court's use of the witnesses' first names; and by trial counsel's failure to object to unreliable testimony of Detective Kammerer, an expert in latent fingerprints. **Initial brief at 79-81.** The state asserts that this issue is not properly before this Court, as it was not raised below. In his motion for postconviction relief, under the heading III.B. "Judicial Error", Armstrong presented a variety of challenges to the trial court's rulings. Armstrong alleged that the trial court's rulings denied him a fair adversarial testing. Included in that argument was the claim that the trial court erred in calling several witnesses by their first names and the trial court erred in allowing the testimony of Detective Kammerer. (PCR (PCR 316-321, 448-449). The state argued that the issue was procedurally barred as any challenge to the trial court's rulings could have and should have been raised on direct appeal. The court agreed and found this issue to be procedurally barred. (PCR 649). Now on appeal, Armstrong modifies the claim by shifting the focus to a claim of ineffective assistance of counsel for failing to challenge the

court's rulings rather than an independent challenge to the trial court's evidentiary rulings. Since this issue was not properly raised below, it is not properly before this court on appeal. See Occhicone v. State 570 So. 2d 902, 906 (Fla. 1990)(finding challenge to the sufficiency of the evidence to establish existence of factor not sufficient to preserve later constitutional challenge to jury instructions regarding aggravating factors);Cf. Freeman v. State, 761 So. 2d 1055, 1069-1070 (Fla. 2000)(finding bare assertion of ineffective assistance of counsel is a thinly veiled attempt to have underlying issue resolved on the merits and is therefore improper).

Armstrong challenges trial counsel's performance at the voir dire of his trial. He claims that (1) counsel was ineffective in failing to ensure that a reader was present for those proceedings; and (2) counsel was ineffective in failing to question or challenge Juror Baker. With regards to the first issue, the trial court determined that the issue was legally insufficient as pled, factually rebutted from the record and procedurally barred. (PCR 654). The trial court's ruling was correct.

First, Armstrong fails to explain how the presence of a "reader" during voir dire would have "enhanced" or otherwise aided in his ability to consult with is attorney. Relief is not

warranted. LeCroy v. State, 727 So. 2d 236, 239 (Fla. 1998) 1998)(upholding summary denial of motion were there is no factual support for conclusory claim); Engle v. State, 576 So. 2d 698, 700 (Fla. 1992) (ruling that motion is legally insufficient absent factual support for allegations).

Second, this claim is not cognizable in this motion as it is an issue which should have been raised on direct appeal. Kelly v. State 569 So. 2d 754, 756 (Fla. 1990)(holding that trial errors apparent from the record are not cognizable in a postconviction motion). Armstrong's conclusory allegation that trial counsel was ineffective is insufficient to overcome the procedural bar. See Freeman, 761 So. 2d at, 1069-1070(finding bare assertion of ineffective assistance of counsel is a thinly veiled attempt to have underlying issue resolved on the merits and is therefore improper).

Third, the record conclusively rebuts Armstrong's claim. Prior to voir dire, defense counsel specifically rejected the idea that a reader was required for jury selection. (ROA 191). Additionally, during voir dire Armstrong conferred with counsel on at least several occasions during the process. (ROA 326, 406, 437). Armstrong is not entitled to relief. Cf. Turner v. State, 530 So. 2d 45, 49-50 (Fla. 1987)(finding no prejudice in procedure where cause challenges were conducted in judge's chambers outside of defendant's presence since counsel and

defendant were able to confer prior to the exercise of challenges). Summary denial was proper.

With regards to Armstrong's claim that trial counsel should have pursued a challenge to juror Baker, the trial court determined that the issue was legally insufficient as pled and that the record did not contain any factual basis for the claim. (PCR 652). The state asserts that the trial court's determination were proper.

The crux of Armstrong's allegation is as follows, "This exchange demonstrates that Mr. Armstrong's counsel failed to pursue a line of questioning that likely would have revealed bias against Mr. Armstrong on an emotional basis or favor towards the state based on Ms. Baker's familiarity with Mr. Satz." **Initial brief at 83**. The state asserts that this claim is legally insufficient as pled. His hollow contention that questions by Malavenda regarding Ms. Baker's familiarity with Mr. Satz would "likely" have revealed a bias does not state a claim for relief. Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999)(upholding summary denial of claim of ineffective assistance of counsel since motion does not allege facts that are not conclusively rebutted by the record.); Mendyke v State, 592 So. 2d 1076, 1079 (Fla. 1992)(same).

In addition, the record demonstrates that Armstrong's factual assertion, i.e., Baker's familiarity with Statz, borders

on the absurd as it is a gross mischaracterization of the responses of Ms. Baker.

First, at the beginning of the voir dire process, the panel, including Ms. Baker, was asked if anyone knew Mr. Statz. With the exception of prospective juror, Mr. Trop, the collective response of the panel was "no." (ROA 203-204). Second, the questions and remarks posed by Mr. Statz to Ms. Baker regarding her knowledge of criminal law are identical to the questions posed to other members of the voir dire panel. A constant inquiry by the state was whether the panel knew anything about concepts in the law and could they put aside those views/conceptions and listen to the judge's instructions. (ROA 248, 252, 259, 264, 270, 281, 290, 333, 344, 359). The exchange between Mr. Statz and Ms. Baker under attack in this motion is identical to exchanges between Mr. Statz and other panel members:

> MR. STATZ: In that regard Mr. Gary, Judge Coker is the only one who knows what all the law is, and is able to rule on what the law is in this case. Now, everybody has some idea I am sure, as to what the law is?"
>
> MR. GARY: Yes.

(ROA 232). * * * * *

> MR. STATZ: So you are well aware of the differences between a civil case and a criminal case?

> MR. STURGESS: Yes.
>
> MR. STATZ: Civil cases, money damages, will disputes. A criminal case, obviously, you know about now. I am sure you knew anyway, that the state has the burden of proving the charges beyond a reasonable doubt?
>
> MR. STURGESS:Yes.
>
> MR. STATZ: And you heard that term before?
>
> MR. STRUGESS: Yes.

(ROA 363). The state asserts that these two excerpts, are identical to the "Baker exchange" and highlight the appropriate context of the state's inquiry/comments. No reasonable person would believe Ms. Baker somehow knew the prosecutor in this case. Trial counsel was not required to pursue such a frivolous line of inquiry. Summary denial by the trial court was proper.

In his next allegation, Armstrong alleges that he lacked the specific intent to commit first degree murder. His "mental disabilities" prevented him from having the requisite intent. Absent the requisite intent, Armstrong could have only been found guilty of felony murder and his participation in the robbery/murder must satisfy the dictates of Enmund v. Florida, 458 U.S. 7781 (9182) and Tison v. Arizona, 181 U.S. 137 (1987). **Initial brief at 83-84.** The trial court summarily denied relief as follows:

> The claim is legally insufficient as pled. The Defendant's level of participation was

> addressed on direct appeal and is therefore, procedurally barred.

(PCR 657). Armstrong fails to demonstrate how this ruling was incorrect. Armstrong does not state, describe or explain what "disabilities" he experienced that would call into question the overwhelming evidence of premeditation. Summary denial was warranted. LeCroy v. State, 727 So. 2d 236, 241 (Fla. 1999)(upholding summary denial of Brady and "IAC" issues since motion fails to present any specific facts in support of claims).

Additionally the evidence adduced at trial regarding Armstrong's level of participation has been described by this Court as follows:

> Armstrong next claims that the death penalty is not warranted in this case because codefendant Coleman received a life sentence. The facts of this case reflect that Armstrong shot Officer Greeney at least four times at close range even through Greeney never removed his gun from his holster to return fire. Further, as stated, the mitigating factors in this case are insufficient to outweigh the aggravating factors. This Court has repeatedly stated that, when the defendant is the shooter, the death penalty is not disproportionate even though a codefendant received a lesser sentence. Mordenti v. State, 630 So.2d 1080 (Fla.1994), cert. denied,--- U.S. ----, 114 S.Ct. 2726, 129 L.Ed.2d 849 (1994); Downs v. State, 572 So.2d 895

> (Fla.1990), cert. denied, --- U.S. ----, 112 S.Ct. 101, 116 L.Ed.2d 72 (1991).

Armstrong, 642 So. 2d at, 739. Armstrong failed to allege any facts that would entitle him to an evidentiary hearing on this claim. The trial court's summary denial was proper.

In a separate sub-issue, Armstrong alleges that the state withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). He further contends that to the extent the state did not withhold the alleged exculpatory evidence, trial counsel was ineffective for failing to present it to the jury under Strickland. The alleged exculpatory evidence are statements of an alleged material eye witness to the crime, Officer Ronnie Noriega from the Plantation Police Department. Pursuant to a public records request, Armstrong claims that he received from the Plantation Police Department documents pertaining to an internal investigation regarding Noriega's knowledge of this crime. Those documents include statements from Noriega regarding what he saw on the night of the murder of Officer Greeney. Armstrong now alleges that, "Noreiga's recollections of the crime differ substantially from the theory presented by the State and are both material and exculpatory to Armstrong." **Initial brief at 85.** Additionally Armstrong contends that Noriega's account of what he saw corroborates co-defendant Coleman's alleged confession that he was the one who

shot the officer from the restaurant door.[30] **Initial brief at 87.** The trial court summarily denied this claim and found the following:

> This Court finds that there was no Brady violation. The State did not withhold information regarding Noriega who was listed by the state as a witness and how was deposed by defense counsel. As with the State, the Defendant had equal access to Noriega. Further, this Court finds that Noriega's statements given to internal affairs do not inculpate Coleman nor do the statements contradict the State's theory.

(PCR 650). The record supports the trial court's findings. The state asserts that under either legal analysis, Brady or Strickland, an evidentiary hearing is not warranted. See Freeman 761 So. 2d at 1056(upholding summary denial of Brady and Strickland claims since defendant failed to make a *prima facie* showing that he is entitled to an evidentiary hearing).

In order to establish that a Brady violation occurred, appellant is required to prove

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor

---

[30] In a taped statement to police at the time of his arrest, Coleman provided details of the shooting. He said that Officer Greeney had holstered his gun and was attempting to handcuff Armstrong when Coleman fired a shot from inside the restaurant. At that point Armstrong was able to reach into his car, retrieve his gun and shoot Greeney. Once Greeney fell to the ground, Armstrong stood over him and shot him several more times. (SR-ROA 496).

> could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Mendyk v. State, 592 So. 2d 1076, 1079 (Fla. 1992); Hegwood v. State, 575 So. 2d 170, 172 (1991) (quoting United States v. Meros, 866 F.2d 1304, 1308 (11th Cir.), cert. denied, 493 U.S. 932 (1989)); Freeman supra.

A review of the record unequivocally demonstrates that the state did not withhold any information regarding this witness. Trial counsel, Edward Malavenda deposed Officer Noriega. (PCR 525-555). Additionally, the record on appeal reveals that on three separate occasions, the state listed Noriega's name in discovery. (SR-ROA 276, 347, 357). Consequently, Armstrong's allegation that the state withheld this information under Brady is patently false. Hegwood, 575 So. 2d at 172 (finding no Brady violation where defense had equal access to witness); Hunter v. State, 660 So. 2d 244, 250 (Fla. 1995)(rejecting Brady claim where record is undisputed that alleged withheld photos were presented to defense counsel at deposition); Scott v. State, 717 So. 2d 908, 912-913 (Fla. 1998)(same); Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993)(same); Melendez v. State, 612 So. 2d 1366, 1367-1368 (Fla. 1993)(same).

Furthermore, Armstrong has not established that the

substance of Noriega's statements were in any way exculpatory under Brady, nor are they of such a nature that had they been presented to the jury there is a reasonable probability that the results of the proceedings would have been different under Strickland. Armstrong has never provided any court with the actual substance of Noriega's statement nor does he offer any legal explanation regarding its significance. In addition to the deposition taken by defense counsel, Noriega gave two sworn statements to investigators on February 22, 1990 and February 23, 1990. (PCR 556-581). A summary of Noriega's three statements follows.

Noriega was driving past Church's Restaurant when he heard two shots. He looked over and saw two black males standing next to a blue Toyota. He then heard four more shots and he ducked for cover. At that point, he temporarily lost control of his patrol car. Once he regained his composure and control of his vehicle, the Toyota was gone. He immediately saw a Broward Sheriff deputy running to the aid of a victim on the ground in the restaurant's parking lot. Noriega was traveling approximately forty-five to fifty miles an hour at the time he witnesses these events.

Notably, Noriega was unable to provide any description of the two black men; he had no idea how long the victim had been laying on the ground; nor could he estimate how much time had

elapsed during this encounter. The state asserts that this very general and somewhat vague account of the final seconds of the criminal episode is no way material or exculpatory. Contrary to Armstrong's pleadings, this information neither implicates Coleman as the shooter nor does it in any way contradict the state's evidence presented at trial. To the contrary, Noriega's observations corroborate Sallustio's account of the final seconds. Sallustio testified at trial that eventually both Coleman and Armstrong were standing next to the Toyota. Sallustio fired several rounds at them and they eventually fled. (ROA 809, 857). Given the complete absence of any exculpatory information, summary denial of this claim was proper. See LeCroy v. State; 727 So. 2d 236, 238 (Fla. 1998)(upholding summary denial of Brady and Strickland claim since exculpatory nature of "evidence" is based on conjecture and speculation); Scott v. State, 634 So. 2d 1062, 1065 (Fla. 1993)(upholding summary denial where new evidence fails to exonerate defendant and is in contradiction to defendant's prior statements); Freeman 761 So. 2d at 1062-1063 (upholding summary denial of Brady and Strickland claims since the evidence was known to the defense and it would not have produced an acquittal at retrial).

Armstrong next argues that he was entitled to an evidentiary hearing regarding his claim that he has uncovered newly discovered evidence. Relying on Jones v. State, 591 So. 2d 911

(Fla. 1991) and Gunsby v. State, 670 So. 2d 920 (Fla. 1996), Armstrong alleges that co-defendant Wayne Coleman has confessed to another inmate that he, and not Armstrong, actually killed Officer Greeney. This new evidence was presented in two taped statements taken of inmate Anthony Cooper in 1997 in which he claims that Coleman admitted to him that "Coleman was in the doorway when he shot his weapon and killed the officer." **Initial brief at 88.** The trial court properly denied relief absent an evidentiary hearing. The court determined as follows:

> The physical evidence, eyewitness testimony, the Defendant's purchase of a nine-millimeter semiautomatic weapon during the month before the crime and the fact that the Defendant was seen with a nine-millimeter semi-automatic weapon right after the murder conclusively show, and this Court finds without question, that Lancelot Armstrong is the killer of Deputy Greeney. See Supreme Court analysis of physical evidence. Armstrong, 642 So. 2d at 737.

(PCR 651-652). The record conclusively supports the trial court's determination as this evidence is not of such a nature that it would probably produce an acquittal on retrial. Jones, 591 So. 2d at 915.

The physical evidence adduced at trial and unassailed in the motion for postconviction relief is that Officer Greeney's killer was standing no more than six to nine inches from Greeney when he was killed. Additionally, Greeney was standing next to Armstrong's car when he was killed. (ROA 890-891, 950, 917-930, 1622-1623). Second, the shots fired at Sallustio and the fatal

bullets to Officer Greeney were fired from the same gun, a nine-millimeter, semi-automatic weapon. (ROA 1614-1621, 1636). There were five spent casings from a 9 millimeter semi-automatic gun found in Armstrong's car. (ROA 1330-1340). Consequently, the killer had to be standing next to Armstrong's car at the time the fatal shots were fired. It was physically impossible for the killer to have fired the fatal shots from the restaurant. This Court characterized the relevant physical evidence as follows:

> A number of shell casings were recovered from the scene. All of the bullets removed from Sallustio and Greeney were fired from a nine-millimeter, semi-automatic weapon; Greeney had been shot from close range. Evidence reflected that Armstrong had purchased a nine-millimeter, semi-automatic weapon the month before the crime. Armstrong's prints were found in the blue Toyota as well as on firearm forms found in the car. Additional ballistics evidence reflected that the shots fired from the restaurant did not come from a nine-millimeter, semi-automatic weapon. This indicated that only someone near the car could have fired the shots that wounded Sallustio and killed Greeney. Additionally, testimony was introduced to show that Armstrong was seen with a nine-millimeter, semi-automatic gun right after the incident. Armstrong was convicted as charged.

Armstrong, 642 So. 2d at 737.(emphasis added). Consequently,

taking Armstrong's newly discovered evidence as true, that Coleman "confessed" to Cooper that he fired the fatal shot, such evidence would not have produced an acquittal at retrial. Indeed, the facts given by Coleman in his alleged "confession" are physically incompatible and inconsistent with the evidence adduced at trial. There is no reasonable probability that the outcome of the proceedings would have been different since the claim is conclusively rebutted from the record. Armstrong's request for an evidentiary hearing regarding this claim was properly denied. See Scott, 634 So. 2d at 1064 (Fla. 1993)(upholding summary denial of newly discovered evidence claim where evidence does not exonerate defendant); LeCroy v. Dugger, 727 So. 2d 236, 238 (Fla. 1999)(upholding summary denial of newly discovered evidence claim as there was "plethora of physical and circumstantial evidence" of defendant's guilt) cf. Blanco v. Dugger, 702 So. 2d 1250, 1252 (Fla. 1997)(upholding denial of claim of newly discovered evidence after an evidentiary hearing since evidence is totally inconsistent with evidence adduced at trial); Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324 (Fla. 1992)(upholding denial of newly discovered evidence of alibi where new evidence was in total contradiction of evidence presented at trial); compare Johnson v. Singletary, 647 So. 2d 106, 110 (1994)(remanding for an evidentiary hearing where challenged testimony is not rebutted by other evidence).

ISSUE III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM THAT HE DID NOT RECEIVE ALL THE PUBLIC RECORDS TO WHICH HE WAS ENTITLED

Relying on Porter v. State, 653 So. 2d 375 (Fla. 1995) and Muehleman v. State, 623 So. 2d 480 (Fla. 1993), Armstrong states that he never received public records from various state agencies. "A motion to compel disclosure of certain records was filed on March 5, 1997 but was never heard by the lower court." **Initial brief at 90.** Additionally, Armstrong alleges that records from the Repository are "illegible, incomplete, and truncated." **Initial brief at 91.** In rejecting this claim, the trial court determined that appellant's requests for documents pursuant to the public records laws was fully litigate and any outstanding arguments were waived. (PCR 645). That conclusion is supported by the record.

At a status hearing on March 30, 1999, two years after appellant filed his initial motion to compel production of records, the trial court advised all the parties that he was going to set the entire matter down for a hearing in order to dispose of all existing matters pertaining to public records issues. (PCR 856). In anticipation of the upcoming hearing the court granted several motions to compel. (PCR 855-857). Counsel then advised the Court that there would be no additional demands other than those that were just discussed and resolved. (PCR

856).

At the next court date on July 1, 1999, the trial judge conducted an extensive hearing on the outstanding public records issues. The court ruled on various agencies objections to the public records requests (PCR 861–889). The Court also granted appellant's request for a motion to compel issued to the Repository requesting that the provide all records that they had received up to that point. (PCR 890-891). At the conclusion of the hearing, counsel advised the court that she had uncovered an outstanding public records motion from March of 1997. (PCR 896). When questioned about why she was unprepared to resolve the issue on that day, counsel stated that she was unfamiliar with the document because she was not on the case in 1997. (PCR 897-900). The trial court determined that since counsel had not been prepared, and that he had already been very lenient with granting additional time to resolve all of the outstanding issues, he deemed that the prior outstanding motion to compel was waived. (PCR 900). Over the next several months the trial court held an additional seven hearings to ensure that the public records issues were resolved. (PCR 900-992). At the conclusion of the entire public records process, counsel informed the court of the following:

> I will say Your Honor, that whatever-what you have received, what has been sent to the Repository, pursuant to all of our requests and out Motion to Compel, and all the

> litigation we've been doing this past year, I've received all copies that have been sent to the Repository, but for what we've discussed today.

(PCR 993). At that point, the court with the agreement of appellant's counsel stated that it would now set a date certain for appellant to file his amended motion for postconviction relief. (PCR 993). Based on the recounted facts above, the state asserts that the this issue is both without merit and unpreserved given counsel's representations to the court below. Lopez v. Singletary, 634 So. 2d 1054, 1058 (Fla. 1993)(explaining that a an issue regarding public records must be pursued with the trial judge otherwise the issue will be deemed waived.)

ISSUE IV

ARMSTRONG'S CLAIM THAT HE IS INNOCENT OF THE DEATH PENALTY AND THAT HIS JURY RECEIVED UNCONSTITUTIONAL INSTRUCTIONS IS PROCEDURALLY BARRED AND REBUTTED FROM THE RECORD

Armstrong alleges that he is "innocent of the death penalty" pursuant to Sawyer v. Whitley, 112 S. Ct. 2514)1992). Specifically he alleges that; (1) the jury was given unconstitutionally vague instructions regarding the aggravating factors upon which it could rely; and (2) his sentence of death is disproportionate because there is a lack of aggravation and overwhelming evidence of mitigation. **Initial brief at 92.** The trial court summarily denied relief finding that these are issues which either could have or were actually raised on direct appeal. (PCR 654). A review of the issues litigated on direct appeal support the trial court's conclusions.

On direct appeal Armstrong presented numerous challenges to his death sentence including the following:(1) the aggravating factors relied upon in this case are unconstitutional;(2) the trial court erred in separately and independently finding two aggravating factors that were duplicative,(3) the trial court erred in denying a request for a limiting/doubling instruction regarding two separate aggravators,(4) the death sentence is not proportionally warranted in this case based on the fact that the co-defendant's participation was greater and he received a life

sentence; (5) the weakness of the aggravating factors and strength of the mitigating factors makes the sentence of death disproportionate, (6) the trial court erred in refusing to find and weigh non-statutory mitigation, (7) the trial court improperly relied upon the contemporaneous robbery of Kay Allen in support of two separate aggavating factors, Armstrong v. State,, 642 So. 2d 730, 734 (Fla. 1994). Relitigating the substance of these issues again in these proceedings is prohibited. See Rivera v. State, 717 So.2d 477, 480 n.2 (Fla. 1998)(finding claim to be procedurally barred as it is merely using a different argument to raise prior claim); Marajah v. State, 684 So. 2d 726, 728 (Fla. 1996)(finding it inappropriate to use collateral attack to relitigate previous issue). Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995)(same). The trial court's summary denial was proper.

ISSUE V

APPELLANT'S CLAIM THAT THE JURY WAS GIVEN UNCONSTITUTIONAL PENALTY PHASE JURY INSTRUCTIONS IS PROCEDURALLY BARRED

Armstrong makes three separate challenges to the penalty phase jury instructions/aggravating factors. The first is a challenge to all the jury instructions applicable to the aggravating factors found to exist in this case. He claims that they are unconstitutionally vague. The second is a challenge to the penalty phase instruction which improperly shifts the burden to appellant and force him to prove that should be sentenced to life. And the third is a claim that the felony-murder aggravating factor does not sufficiently narrow the class of death eligible defendants. The trial court found this claim to be procedurally barred as the issues were either raised or could have been raised on direct appeal. (PCR 654). The record supports the trial court's ruling.

On direct appeal Armstrong raised fifteen issues regarding sentencing. Armstrong v. State, 642 So. 2d 703, 734 & n.2 (Fla. 1994). They included challenges to the aggravating factors as well as a claim that the penalty phase instructions improperly shifted the burden of proof to the defendant. Id.

Given the fact that the "burden shifting" argument was raised and rejected on appeal, Armstrong fails to demonstrate why he is entitled to relitigate this issue. Marajah v. State,

684 So. 2d 726, 728 (Fla. 1996)(finding it inappropriate to use collateral attack to relitigate previously denied issue); Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995)(same).[31]

Armstrong's challenge the jury instructions applicable to the aggravating factors is also barred as it is an issue that could have been raised on direct appeal but never was. Turner v. State, 614 So. 2d 1075, 1081 (Fla. 1993)(upholding summary denial of constitutional challenge to jury instructions for failing to preserve issue at trial).

And finally, appellant's challenge to the constitutionality of the "felony murder" aggravating factor is also procedurally barred as it was an issue that could have been raised on direct appeal. Turner, supra. In any event this Court has repeatedly rejected this argument. Blanco v. State, 702 So. 2d 1250 (Fla. 1997); Freeman v.State, 761 So. 2d 1055, 1067 (Fla. 2000). Summary denial was proper.

[31] Morever this Court has repeatedly rejected this argument. Rutherford v. Moore, 774 So. 2d 634, n. 8 644(Fla. 2000); Demps v. State, 714 So. 2d 365, n. 8 368 (Fla. 1998); Johnson v. Moore, 27 Fla. L. Weekly S789, 791 (Fla. September 26, 2002).

ISSUE VI

ARMSTRONG'S CLAIM THAT THE STATE INTRODUCED NONSTATUTORY AGGRAVATING CIRCUMSTANCES IS LEGALLY INSUFFICIENT AS PLED

Armstrong makes a conclusory allegation that the state introduced irrelevant non-statutory aggravating evidence into the proceedings. He further alleges that the trial court relied upon several impermissible factors in its sentencing determination. Armstrong neither specifies what or where in the record that improper evidence or argument can be found. The trial court found the claim to be legally insufficient as Armstrong failed to present any factual support for the claim. (PCR 655). In his initial brief, Armstrong does not offer any factual or legal reason that would call into question the court's determination. Cf. LeCroy v. State, 727 So. 2d 236, 239 (Fla. 1998) 1998)(upholding summary denial of motion were there is no factual support for conclusory claim) ; Engle v. State, 576 So. 2d 698, 700 (Fla. 1992) (ruling that motion is legally insufficient absent factual support for allegations). See also Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing."); Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990) ("The second and third claims are devoid of adequate factual

allegations and therefore are insufficient on their face.”).

ISSUE VII

ARMSTRONG'S CLAIM THAT HE WAS ABSENT FORM CRITICAL STAGES OF HIS TRIAL IS LEGALLY INSUFFICIENT AS PLED, PROCEDURALLY BARRED AND WITHOUT MERIT

Armstrong alleges that he was effectively absent from a critical stage of his trial, i.e., voir dire process, since he was not provided a "reader" to assist him. To the extent trial counsel failed to secure the presence of a "reader," he rendered ineffective assistance of counsel. In summarily denying the claim, the trial court determined that it was legally insufficient as pled, procedurally barred and refuted by the record. (PCR 654). The trial court's ruling was correct.

Armstrong fails to explain how the presence of a "reader" during voir dire would have "enhanced" or otherwise aided in his ability to consult with is attorney. Relief is not warranted. LeCroy v. State, 727 So. 2d 236, 239 (Fla. 1998) 1998)(upholding summary denial of motion were there is no factual support for conclusory claim); Engle v. State, 576 So. 2d 698, 700 (Fla. 1992) (ruling that motion is legally insufficient absent factual support for allegations).

Second, this claim is not cognizable in this motion as it is an issue which should have bene raised on direct appeal. Kelly v. State 569 So. 2d 754, 756 (Fla. 1990)(holding that trial errors apparent from the record are not cognizable in a postconviction motion). Armstrong's conclusory allegation that

trial counsel was ineffective is insufficient to overcome the procedural bar. See Freeman v. State, 761 So. 2d. 1055 (Fla. 2000)(finding bare assertion of ineffective assistance of counsel does overcome procedural bar to review of the substantive underlying claim).

Third, the record conclusively rebuts Armstrong's claim. Prior to voir dire, defense counsel specifically rejected the idea that a reader was required for jury selection. (ROA 191). Additionally, during voir dire Armstrong conferred with counsel on at least several occasions during the process. (ROA 326, 406, 437). Armstrong is not entitled to relief. Cf. Turner v. State, 530 So. 2d 45, 49-50 (Fla. 1987)(finding no prejudice in procedure where cause challenges were conducted in judge's chambers outside of defendant's presence since counsel and defendant were able to confer prior to the exercise of challenges).

ISSUE VIII

ARMSTRONG'S CLAIM THAT HIS CONVICTIONS AND SENTENCE ARE A VIOLATION OF INTERNATIONAL LAW IS PROCEDURALLY BARRED

Armstrong alleges that he was deprived of his right to consult with Jamaican consular officials upon his arrest. The trial court determined that the issue was procedurally barred. (PCR 659). Armstrong has not presented any factual or legal argument that would call into question the trial court's ruling. Maharaj v. State, 778 So. 2d 944, 959 (Fla. 2000).

Furthermore, this Court has also rejected this claim based on a defendant's inability to establish that he has standing to make this challenge. Maharaj, 778 So. 2d at 959. Summary denial was proper.

ISSUE IX

ARMSTRONG'S CHALLENGE TO THE STATE'S METHODS OF EXECUTION IS LEGALLY INSUFFICIENT AND WITHOUT MERIT

Based on the executions of Pedro Medina, Judy Buenoano, Daniel Remeta, Leo Jones, and Allen Lee Davis, Armstrong argued to the trial court that use of the electric chair in Florida is cruel and unusual punishment. Armstrong also challenged the constitutionality of Florida's alternative method, execution by lethal injection. Armstrong did not offer any factual or legal support for his conclusory allegation against lethal injection as a method of execution. The trial court found the claim to be without merit and by reference to the state's response it also found the claim to be legally insufficient. (PCR 655). The state asserts that summary denial was proper. See Jones v. State, 701 So. 2d 76 (Fla. 1997); Buenoano v. State, 717 So. 2d 529 (Fla. 1998); Remeta v. Singletary, 717 So. 2d 536 (Fla. 1998); Provenzano v. Moore, 744 So. 2d 413, (Fla. 1999). Sims v. Moore, 754 So. 2d 657 (Fla. 2000).

ISSUE X

THE TRIAL COURT PROPERLY FOUND APPELLANT'S CHALLENGE TO THE RULE WHICH PROHIBITS JUROR INTERVIEWS TO BE LEGALLY INSUFFICIENT AND PROCEDURALLY BARRED

Citing to Florida Rule of Professional Conduct 4-3.5(d)(4), Armstrong alleges that this rule which prohibits juror interviews "impinges upon Mr. Armstrong's right to free association and free speech." **Initial brief at 98.** The trial court found this claim to be legally insufficient as pled and procedurally barred for failing to raise it on appeal. (PCR 655). The state assets that summary denial was proper. Gaskin v. State, 737 So. 2d 209, 520 n.6 (Fla. 1999)(finding procedurally barred a challenge to the rule which prohibits juror interviews to determine whether misconduct has occurred); Thompson v. State, 759 So. 2d 650, n.12 (Fla. 2000); Arbeleaz v.State, 775 So. 2d 909 (Fla. July 13, 2000)(same).

Additionally, summary denial is warranted since Armstrong has failed to plead a claim for relief under Rule 3.850. The Rules of Professional Conduct are promulgated by the Florida Supreme Court to regulate members of the Florida Bar. Armstrong is not a member of the Bar. Therefore, Armstrong does not have standing to challenge the applicability of a rule that does not govern him directly. Arbeleaz,(rejecting as legally insufficient a defendant's challenge to rule of professional conduct as appellant

does not have standing to do so).[32]

ISSUE XI

ARMSTRONG'S ALLEGATION THAT HE IS INSANE IS LEGALLY INSUFFICIENT AS PLED

Armstrong alleges that he is insane to be executed yet he also concedes that the claim is "not ripe for consideration", **Initial brief at 98.** Without any factual support, Armstrong raises the inadequate claim in an effort to "preserve" the claim for later review. The trial court rejected Armstrong's attempt and found the claim to be legally insufficient as pled. (PCR 657-658). The state asserts that summary denial was proper. See LeCroy v. State, 727 So.2d 236,239 (Fla. 1998)(upholding summary denial of motion were there is no factual support for conclusory claim) ; Engle v. State, 576 So. 2d 698, 700 (Fla.

[32] Moreover, the law allows juror interviews under certain circumstances. See Roland v. State, 584 So. 2d 68, 70 (Fla. 1st DCA 1991) (finding no criminal rule allowing for postverdict juror interviews, but noting application for such by motion "as a matter of practice"); Sconyers v. State, 513 So. 2d 1113, 1115 (Fla. 2d DCA 1987) (construing criminal rules to allow post-verdict juror interviews upon motion which makes a prima facie showing of juror misconduct); cf. Gilliam v. State, 582 So. 2d 610, 611 (Fla. 1991) (affirming denial of defendant's motion to conduct post-verdict interview of jurors where defendant failed to make prima facie showing of misconduct); Shere v. State, 579 So. 2d 86, 94 (Fla. 1991) (affirming denial of defendant's motion to conduct post-verdict interview of jurors); Fla. R. Civ. P. 1.431(h) ("A party who believes that grounds for legal challenge to a verdict exists may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to challenge."). If counsel is able to make a prima facie showing of misconduct, he can obtain juror interviews.

1992) (ruling that motion is legally insufficient absent factual support for allegations). See also Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing."); Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990) ("The second and third claims are devoid of adequate factual allegations and therefore are insufficient on their face."); Cf. Carroll v. State, 815 So. 2d 601, 623 & n.22 (Fla. 2002)(finding claim that defendant is incompetent to be executed is premature); Hall v. Moore, 792 So. 2d 447, 450 (Fla. 2001).

Additionally, in the future, if Armstrong is able to demonstrate good cause as to why he should be entitled to file an amendment or successive motion, that issue would be addressed at the appropriate time. See generally Florida R. Crim. Pro. 3.850 (f); See McConn v. State, 708 So. 2d 308 (2nd DCA 1998)(finding insufficient, defendant's request to amend postconviction motion based on allegation that it was "in the best interest of justice"). Summary denial was warranted.[33]

[33] Nor does filing an insufficient pleading preserve the claim for future consideration in federal court. Cf. Webster v. Moore, 199 F.3d 1256 (11th Cir. 2000)(ruling that tolling mechanism of federal habeas provision is not applicable unless state pleadings comply with state court limitations and requirements).

ISSUE XII

ARMSTRONG'S CLAIM THAT HE IS ENTITLED TO A NEW TRIAL BASED ON CUMULATIVE ERROR WAS PROPERLY DENIED AS THE CLAIM IS LEGALLY INSUFFICIENT AS PLED AND PROCEDURALLY BARRED

Armstrong claims that, he did not receive a fundamentally fair trial based on "the sheer number and types of errors that occurred in his trial..." **Initial brief at 99.** The trial court found this claim to be legally insufficient as pled, and procedurally barred. (PCR 653). The state asserts that summary denial was proper. See Zeigler v. State, 452 So.2d 537, 539 (Fla. 1984) ("In spite of Zeigler's novel, though not convincing, argument that all nineteen points should be viewed as a pattern which could not have been seen until after the trial, we hold that all but two of the points raised either were, or could have been, presented at trial or on direct appeal. Therefore, they are not cognizable under rule 3.850."), sentence vacated on other grounds, 524 So.2d 419 (Fla. 1988); Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994)(same); Rivera v. State, 717 So. 2d 477, 480 n.1 (Fla. 1998)(same); Occchicone v. State, 768 So. 2d 1037, 1040 (Fla. 2000); Freeman v. State, 761 So. 2d 1055, n. 2 1073(Fla. 2000); Valle v. State, 705 So. 2d 1331 (Fla. 1997); Jackson v. Dugger, 633 So. 2d 1051 (Fla. 1993); Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323-1324 (Fla. 1994); Melendez v. State, 718 So. 2d 746, 749 (Fla. 1989)

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm the trial court's denial of appellant's motion for postconviction relief.

Respectfully submitted,

CHARLIE CRIST
Attorney General

_____
CELIA A. TERENZIO
Assistant Attorney General
Fla. Bar No. 0656879
1515 North Flagler Drive
Suite 900
West Palm Beach, FL 33401-3432
(561) 837-5000

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Rachel Day, Esq. Office of the Capital Collateral Regional Counsel, 101 N.E 3rd Ave. #400, Fort Lauderdale, Florida 3301, this ____ day of January, 2003.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

_____
CELIA A. TERENZIO
Assistant Attorney General