IN THE SUPREME COURT OF FLORIDA

RICHARD M. COOPER,

Appellant,

vs. **CASE NO. SC01-2285**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

AMENDED ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

The appellant's brief is replete with assertions that are not supported by the record below. Some of these alleged facts fail to offer any record citation for support, and others provide record citations to the allegations and supporting documents in the postconviction motion, or to sources outside of the record, rather than to actual evidence presented. A few examples include:

"When he was awaiting trial for the murders, Richard Cooper was so mentally distraught that he mutilated himself, attempted suicide in jail and had to be placed on psychotropic medication." (Appellant's Initial Brief, p. 1, and p. 37, citing to ROA 612-613 [appendix to amended postconviction motion]; and at p. 28, without record citation). The following summarizes the only testimony presented at the evidentiary hearing about these assertions: Ky Koch testified at the evidentiary hearing that he recalled someone telling him around the end of the trial that Cooper had attempted suicide during the trial; he did not know if Cooper had been on any medications at the time, he thought he might have heard something about this after the fact, but he wasn't sure what he had heard or the source (PC. V7/1040-41). Cooper's brother, Donnie, testified that he recalled Cooper talking about suicide many times as they were growing up,

and Cooper may have cut his wrists at sometime (PC. V7/1156). Cooper's postconviction mental health expert, Dr. Brad Fisher, testified that he thought he had read in Cooper's jail records a reference to a suicide attempt, but that when he reviewed the records to try to locate the reference, he was not able to do so (PC. V8/1283). Mental health expert Dr. Sidney Merin confirmed that Cooper's jail records did not include any reference to a suicide attempt, although there were indications of self abuse and self destructive thinking; Cooper had told Merin that he did not believe in suicide, as he was concerned that he couldn't get to heaven that way, and he denied being suicidal (PC. V11/1660-61). There was no testimony presented regarding the use of psychotropic medication, and no other evidence regarding any self-mutilation or suicide attempt.

"In reality, Skalnik had, prior to Mr. Cooper's trial, testified against **ten** defendants." (Emphasis in original; Appellant's Initial Brief, p. 8, p. 28, and p. 35, all without any citations to the record). When first asserted at page 8, Cooper includes a footnote listing ten names with 1980 or 1981 case numbers, indicating that Skalnik had "testified"[1] in these cases. None of the records from any of these cases are before

[1]Cooper does not define what he considers to be "testimony" for purposes of this assertion. It is possible that Skalnik provided sworn statements to law enforcement in these cases.

this Court, and no testimony or other evidence regarding the extent to which Skalnik may or may not have testified as represented has been offered. In fact, Skalnik testified in his pretrial deposition on November 18, 1983, that he had previously testified in approximately three or four other cases over a period of two or two and a half years (PC. SV1/26); he testified at a pretrial hearing that he had testified in only about two or three other cases (DA. V5/496); and he testified at the evidentiary hearing that he had testified in other cases, but he did not recall how many (PC. V9/1415). Skalnik's testimony from these proceedings is the only competent evidence before this Court regarding the number of times he had testified prior to the Cooper trial, and it is all consistent.

Cooper also relies on extra-record material in claiming that Jeff McCoy testified in Terry Royal's trial that Walton exercised substantial control over the other defendants, and that Cooper had been the first to return to the car (Appellant's Initial Brief, p. 45). Records from the Royal trial are not properly before this Court in this case, and therefore reliance on this testimony is misplaced. Johnson v. State, 660 So. 2d 648, 653 (Fla. 1995).

The following statements from Cooper's brief do not include any citations to the record and are not in any way supported by

the evidence presented below:

"Koch obtained confidential information about Skalnik during his criminal representation of Skalnik." (Appellant's Initial Brief, p. 61). There is never any attempt to identify any alleged confidential information that may have been obtained. Both Koch and Skalnik testified at the evidentiary hearing, and neither even suggested that confidential information may have been exchanged. Skalnik had no recollection of the representation, and Koch only vaguely recalled there had been a brief representation (PC. V7/1019, 1044; V9/1518).

"First, Koch admitted under oath that he refrained from interviewing Skalnik prior to trial because of his prior representation." (Appellant's Initial Brief, p. 63, and p. 64). In fact, Koch testified directly to the contrary. When Koch testified that he had not gone to the jail to interview Skalnik privately about Skalnik's knowledge of Cooper's case, he stated that he would have felt awkward approaching any State witness currently in custody (PC. V7/1026-28). In fact, he stated directly that even if he did not know Skalnik at all, he would not have just gone to the jail to meet with any such witness privately (PC. V7/1027). Thus, Cooper's assertion that Koch did not go interview Skalnik "because of his prior representation"

is completely opposite to the only evidence on this point presented below.

The State takes issue with a number of other factual assertions presented in Cooper's brief, but given space limitations, will not attempt to dissect each one at this time but will address them as appropriate in the argument portion of this brief. In addition, the relevant facts are outlined below.

The facts of this case are recited in this Court's opinion on the direct appeal of Cooper's convictions and sentences, Cooper v. State, 492 So. 2d 1059 (Fla. 1986):

> In the early morning of June 18, 1982, the Clearwater Police Department and the Pinellas County Sheriff's Department received calls from eight-year-old Chris Fridella, pursuant to which several officers were dispatched to his residence. They found three men, one of whom was Chris's father, Steven, lying face down on the living room floor with duct tape binding their hands behind their backs. All were dead, apparently due to gunshot wounds. Medical testimony at trial established that the deaths had resulted from shotgun wounds in the range of three to six feet. The house had been ransacked, the victims' wallets had been emptied, and the television volume was turned to the maximum.
>
> Information received on January 15, 1983, from Robin Fridella, Steven Fridella's ex-wife, led police to appellant and accomplices Terry Van Royal and Jason Dirk Walton. Police contacted appellant and interviewed him on January 20, 1983, at which time he confessed. According to appellant, he, Walton, Royal, and Walton's younger brother, Jeff McCoy, had planned the robbery for a week. On June 17, 1982, they set out with ski masks, gloves and firearms in the trunk of the car, including two shotguns. Upon arrival at the house, McCoy stayed in the car while the other three entered the residence. One of the victims was

> asleep on the couch, one was in a bedroom, and Steven and Christopher Fridella were sleeping in the back bedroom. The adult victims were put on the living room floor with their hands taped. Chris Fridella was put in the bathroom. Appellant and Royal guarded the victims while Walton ransacked the house. One of the victims recognized Walton, who told his co-perpetrators they therefore would have to kill the adults. Walton's own gun misfired, and he ordered the others to shoot.
>
> After appellant and Royal fired their shotguns at the victims, the perpetrators ran out. Walton told appellant that one of the victims was not dead; appellant returned and shot Fridella a second time. Appellant stated that he had been drinking and smoking marijuana the day of the murders, but that he was aware of what he was doing. In a second statement given January 24, 1983, appellant stated that McCoy accompanied the others into the house but was ordered to return to the car prior to the shootings.
>
> The jury found appellant guilty of first-degree murder as charged and recommended the death penalty on all three counts. The trial court imposed sentences in accordance with the jury's recommendations, finding five aggravating and no mitigating factors.

At trial, Cooper was represented by attorneys Ky Koch and Ronnie Crider; the State was represented by Assistant State Attorneys Doug Crow, Bruce Young, and Allen Geesey. Trial was conducted January 10 - 14, 1984, before the Honorable William Walker.

In November, 1983, defense attorney Crider deposed State witness Paul Skalnik, a former cellmate of Cooper's (PC. SV1/1-27).[2] Crider noted that Skalnik looked familiar, and Skalnik

[2]References to the record will be as follows: the record on appeal from Cooper's direct appeal, Florida Supreme Court Case No. 65,133, will be designated as "DA." followed by the

indicated they had met when Crider was a prosecutor and Skalnik had a friend involved in theft and bad check charges (PC. SV1/2-3). Skalnik also knew Ky Koch; Koch had represented Skalnik once, on a reconsideration, and was also a client of an investigative firm for which Skalnik worked (PC. SV1/3). Skalnik knew that Koch's prior representation gave rise to an attorney/client privilege and he agreed to waive any confidentiality from that relationship (PC. SV1/4).

Skalnik had been sentenced to five years prison time on four counts of grand theft (PC. SV1/5). He did not have any other charges pending (PC. SV1/5). Although he had been sentenced back in March and April, he had not been to Lake Butler for classification; due to threats on his life, his attorney, Robert Pope, was trying to have his classification done at the jail (PC. SV1/5-6). The State Attorney's Office had not made any promises or indicated they could do anything to help with his housing situation; they made it clear from the beginning there were no promises in exchange for his cooperation (PC. SV1/6-7).

Skalnik stated that he and Cooper had been in the same cell

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appropriate volume and page number; the record on appeal in the instant postconviction case, Florida Supreme Court Case No. SC01-2285, will be designated as "PC." followed by the appropriate volume (supplemental volumes will be designated as "SV") and page number.

in the Pinellas County jail for two or three weeks when Cooper was first brought in from a facility in DeSoto County (PC. SV1/7-8, 10). Skalnik had no intention of assisting the State, but as Cooper talked about the case, Cooper seemed to consider it a big joke, and Skalnik figured he could take the information and pass it on and let the State handle it (PC. SV1/8-9). Skalnik took notes as they talked; he sat on his bunk, and Cooper thought he was writing letters (PC. SV1/8). Skalnik sent a request to speak with Det. Ed O'Brien, and gave the notes to him (PC. SV1/9). O'Brien was the first law enforcement officer Skalnik had spoken to about this case (PC. SV1/9).

According to Skalnik, when Cooper was first brought to his cell, Cooper asked if Skalnik knew who he was (PC. SV1/11). Skalnik said no, and Cooper said he was involved in the triple murders in High Point, thought to be gangland Mafia killings (PC. SV1/11). Skalnik asked a few questions as the discussions went along, but mostly Cooper just talked, numerous times (PC. SV1/9, 11). Cooper identified and described the other defendants involved (PC. SV1/11-12). He said that J.D. Walton had been ripped off by some guy of money and cocaine, and that he wanted it back (PC. SV1/12). They were armed with shotguns, and J.D. had a .22, but the .22 didn't work (PC. SV1/12, 15). They secured the men in the house and put a boy in the

bathroom; Cooper noted that the boy had been tied up, but did not have a bag over his head as had been reported in the paper (PC. SV1/13). J.D. tore up the house, ranting, and found only very little cash and a small quantity of cocaine (PC. SV1/13-15). They were wearing masks, and had sewn the eyes closed a little, as well as the mouth area; but Terry, wearing braces, had been recognized (PC. SV1/14). One of the victims was an epileptic, having a seizure (PC. SV1/15).

Skalnik stated that, during their first conversation, Cooper told him that he only fired two shots during the entire episode; but that in a later conversation, Cooper admitted he fired more than twice, but was not specific about the number of shots (PC. SV1/17). When Skalnik tried to clarify how many shots Cooper had fired, Cooper told him he only shot one, he was only taking responsibility for one (PC. SV1/20). After Cooper ran out of the house, someone yelled to him that the one he had shot on the end was getting up, so Cooper went back in, put another round in the chamber, and blew the guy's head off, then ran back to the car (PC. SV1/17).

Cooper told Skalnik that Walton had mentioned a plan to kill once before (PC. SV1/18). Cooper indicated that they had not had any drugs or alcohol prior to the murders, but that they smoked and drank afterwards (PC. SV1/18). They were in a prime

red Chevy Chevelle with a taillight out, not a truck as had reportedly been identified (PC. SV1/12, 18). Cooper also told him that he had taken the boy fishing a few days later, and the boy asked if Cooper knew that his father had been killed, to which Cooper responded generally as to having heard about it (PC. SV1/19). He mentioned that the victim with the son had begged for his life (PC. SV1/19).

Skalnik stated that Cooper was proud and bragging about his actions; Cooper told Skalnik that his brothers were in jail or had served time, and that Cooper had been in and out of trouble all his life (PC. SV1/20-21). Cooper told Skalnik that he was so young and young-looking that he did not think a jury would not convict him (PC. SV1/21).

Skalnik related at the deposition that Cooper has seen him, and yelled at him; a guy from Cooper's cell block came into Skalnik's cell block and threatened his life, yelling that Skalnik was a snitch against Cooper (PC. SV1/21). Skalnik indicated that he had also provided information to law enforcement about an alleged escape plan, involving Cooper's brothers, who were purportedly going to be in the courtroom during the trial with guns to break Cooper out (PC. SV1/23).

Skalnik thought he had six prior convictions, but noted that it might be seven (PC. SV1/24). Crider asked Skalnik how many

other defendants, total, in any cases, Skalnik had provided information about to the State, and Skalnik responded that Cooper was the 28th, and there had been 26 convictions, but that Skalnik had only actually testified in three or four cases over a span of two or two and a half years (PC. SV1/24-26).

The defense moved to suppress Cooper's statements to Skalnik prior to trial, asserting that Skalnik was a State agent deliberately eliciting incriminating statements from Cooper in violation of Cooper's right to counsel (DA. V2/159-60). A hearing was held on the motion on January 10, 1984 (DA. V5/474).

The defense called Skalnik as a witness, and Skalnik testified about his prior convictions and most recent incarceration (DA. V5/480-81). He acknowledged that he had been sentenced months earlier but still had not been sent to state prison (DA. V5/481). He admitted that he had provided information to law enforcement since November, 1982, on about 28 or 29 different people, including three people charged with first degree murder (DA. V5/482). He had been a police officer in Texas for about three years in the early 1970s, and had also worked as a private investigator (DA. V5/483, 502). Skalnik was asked about his procedures in contacting law enforcement when he had information, and details about his various meetings with Detective O'Brien (DA. V5/483-86). Skalnik had difficulty

remembering if he had provided the information on Cooper or a defendant Gaines first, and concluded that Cooper's information had been first (DA. V5/487-89). Skalnik was asked about the information that he had provided on other inmates, including Gaines and Kenneth Gardner, and about his practice of taking notes when he talked to defendants (DA. V5/489-91). Skalnik indicated that the 28 or 29 individuals he had provided information about were only involved in four to six cases at the most altogether (DA. V5/493-94). On cross examination, Skalnik stated that he had testified in two or three other cases, and that the reason that he had not been transferred to state prison was because his attorney had requested that he be held locally for classification (DA. V5/496-97). He stated that he was never told to listen for information and that he was acting on his own, he had not been paid a fee or received any benefit from his assistance (DA. V5/498, 502-03).

The State presented the testimony of Det. John Halliday, who confirmed Skalnik's testimony (DA. V5/511-518). The trial court denied the motion to suppress (DA. V5/531-32).

At trial, the State presented substantial details about the murders as recounted in Cooper's confession to Det. Halliday, including Cooper being the one to return to the house at Walton's command and shoot Fridella (DA. V7/915-30). Medical

testimony showed that the victims had been shot a total of six times; Fridella had been shot three times, and each of his wounds was fatal (DA. V7/847). The pellets and wadding removed from the bodies revealed that all three victims had been shot with the Savage shotgun which, according to Cooper's statement to police, was the gun Cooper carried; Fridella had also been shot by the Mossberg shotgun carried by Royal (DA. V7/916; V8/1093-98).

The State rested its case without calling Skalnik as a witness. Following trial, Cooper was convicted as charged (DA. V9/1340). At the penalty phase, the State presented the testimony of Skalnik, which was consistent with his pretrial deposition (DA. V11/1431-53). On cross examination, the defense brought out that, according to Cooper's statements, J.D. Walton was older and had been the ringleader; J.D. had shot the pistol several times, but it had misfired; Royal had fired first; there was no indication that Cooper knew any of the victims; and the plan that night was to get drugs and money (DA. V11/1455-56). Skalnik admitted that he was a former police officer that had provided information to law enforcement on nearly thirty defendants, including several charged with first degree murder; and that he was presently in jail on five counts of grand theft and remained in the county jail despite having been sentenced to

prison time months earlier (DA. V11/1456-57). He was asked about a prior charge of masquerading as a lawyer, and whether he enjoyed people believing that he was something he wasn't (DA. V11/1457-58). Detective Halliday was also presented, and testified that Skalnik's information about Cooper's statements regarding the ski mask led to the discovery of that evidence (DA. V11/1460-63).

The defense presented the testimony of Cooper's mother, Juanita Kokx. Ms. Kokx testified about Cooper's childhood. She described Cooper's father, including affairs that he had during their marriage and his physical violence (DA. V11/1464-72). He beat the children with a belt, leaving marks; did not show them affection or spend time with them (DA. V11/1468-69). Ms. Kokx stated that Cooper felt responsible for some of the violence in the family (DA. V11/73). However, Cooper loved his father and was very upset when the father lost his six-month battle with cancer, around the time Cooper turned sixteen (DA. V11/1473-74, 1477). Cooper lived with several of his siblings and ultimately came to live with her and her husband in January, 1982 (DA. V11/1475-77). When he got here, he tried to find a job, and they went out on the boat and bowling, trying to be a family (DA. V11/1476-77).

Ms. Kokx testified that Cooper was not assertive, and did

not show his emotions easily (DA. V11/1477). He had a very low opinion on himself, and she tried to encourage him to go back to school (DA. V11/1478). He had expressed to her that he was interested in doing this and making something of himself (DA. V11/1478). He was never violent or mean, and was very obedient (DA. V11/1479). He had a job for awhile but they had transportation problems, so he lost the job (DA. V11/1479-80). That was around the time he met Jeff McCoy and J.D. Walton (DA. V11/1480). Cooper and Jeff seemed to be good friends, but Ms. Kokx didn't really know Walton (DA. V11/1480).

Ms. Kokx identified a letter that had been returned to her house; Cooper had written the letter from jail to Jeff McCoy, using his mother's residence for the return address (DA. V11/1481). The letter was accepted into evidence, after a discussion about whether Cooper's statements of remorse in the letter would open the door to testimony about any lack of remorse (DA. V11/1482-86).

The jury recommended death sentences for each murder, by votes of seven to five, seven to five, and nine to three (DA. V11/189-196). At a sentencing hearing before the judge on March 14, 1984, the defense presented testimony from Dr. Sidney Merin, clinical neuropsychologist (DA. V4/398). Merin testified that Cooper had a markedly disturbed personality, including a

character disorder (DA. V4/400). Cooper's responses to Merin's exam were "typical" for Cooper's type of background, which was "horrendous" (DA. V4/400). Merin stated that Cooper's father was extremely, exceptionally abusive, both physically and verbally (DA. V4/400-01). He noted that Cooper had failed a number of grades in school, and grew up in a "chaotic and conflictive" background; at about age eleven, Cooper began to drink and use drugs (DA. V4/401). He started seeing a psychiatrist due to skipping school and described himself as nervous and scared (DA. V4/401). He was spending two to three hundred dollars a month on drugs, which led to extensive involvement in illegal activities, including what Cooper estimated to be about 150 episodes of shoplifting (DA. V4/401).

Merin described Cooper as "very much of a follower type," capable of reacting without thinking to domination, and then panicking (DA. V4/402). Cooper's easy suggestibility was attributed to the "terror filled years that he had with his abusive father" (DA. V4/402). Merin also noted that Cooper tried to cover up his inadequacies with an inferior, bullish behavior, and by attempting to be a braggart (DA. V4/403). He did not think that Cooper had any specific intent to kill when he entered the dwelling where the murders occurred, but felt

that the shooting was an impulsive, panicked reaction to Walton's emotional commands (DA. V4/403, 405). The shooting was a mindless act, preprogrammed by Cooper's early life and the conditions under which he grew up (DA. V4/405). Cooper had an antisocial personality, a borderline personality disorder, substance abuse disorder, and an isolated explosive disorder (DA. V4/406-07).

The trial court followed the jury recommendations and sentenced Cooper to death on all three murder convictions (DA. V2/243-48). The court found six aggravating factors: heinous, atrocious, or cruel; cold, calculated, and premeditated; murder to avoid arrest; murder for pecuniary gain; prior violent felony convictions; and murder during the course of a kidnaping (DA. V2/244-47). No mitigating factors were found (DA. V2/247-48). On appeal, this Court struck reliance on the kidnaping factor but upheld the other aggravators and the trial court's rejection of the substantial impairment and age mitigating factors; thus, the judgments and sentences imposed were affirmed. Cooper, 492 So. 2d at 1062-63. The United States Supreme Court denied certiorari review on February 23, 1987. Cooper v. Florida, 479 U.S. 1101 (1987).

Cooper's initial motion for postconviction relief was filed on February 22, 1989, and an amended motion was filed May 18,

1989 (PC. V1-V4). On August 11, 1992, Judge Walker issued an Order granting an evidentiary hearing on several claims and summarily denying others (PC. V5/810-817).

The case was subsequently reassigned to Judge Brandt Downey. Judge Downey held a number of status conferences and presided over the public records litigation. The evidentiary hearing commenced on September 3, 1999, and additional testimony was presented November 5, 1999; December 21, 1999; January 14, 2000; January 21, 2000; April 28, 2000; and June 23, 2000 (PC. V7-V12).

Defense trial attorneys Koch and Crider both testified at the evidentiary hearing. Ky Koch had worked at the State Attorney's Office, including work on capital cases, but had been in private practice for several years before agreeing to assist Ronnie Crider with Cooper's representation (PC. V7/1016-17). Koch did not think there had been any difficulty with money in the case, although he noted it would have been nice if the trial court had granted the defense motion for funds for an investigator (PC. V7/1018).

Koch recalled that he had briefly represented State witness Paul Skalnik during a violation of probation charge prior to the Cooper case; he had filed a motion for reconsideration on

Skalnik's behalf,[3] but another attorney took the case over before the motion was heard (PC. V7/1019, 1044). Koch was the one responsible for handling Skalnik for the defense (PC. V7/1021). Koch knew who Skalnik was and "what he was all about;" in preparation, the defense ran an NCIC check on Skalnik and deposed him (PC. V7/1022-24). Koch was confident the defense did much more in preparation, but could not recall the details (PC. V7/1026). According to Skalnik's deposition and trial testimony, he had assisted the State in 29 or 30 other cases, which was consistent with what the defense had been able to determine (PC. V7/1024). Although he suspected that Skalnik was getting some benefit or reward from the State, he was not able to find any evidence of such, and Skalnik had been sentenced to three years in prison (PC. V7/1025). The defense had thoroughly searched to try to learn as much as they could about Skalnik (PC. V7/1026). He did not attempt to speak with Skalnik privately; Koch explained that he would not have done this even if he had not known Skalnik, as he felt awkward approaching a State witness in custody (PC. V7/1027-28). Koch did not recall specifically having advised the court of his prior representation of Skalnik, but believed that he had done so; he

[3]Koch did not recall the motion, but reviewed a copy of it at the evidentiary hearing (PC. V7/1043).

knew that he had discussed this representation with Cooper and that Cooper understood and had no objection (PC. V7/1027, 1034-35).

Koch noted in hindsight, upon review of the transcript from the pretrial hearing, that his questioning of Skalnik's prior assistance to the State was limited to the period of time that Skalnik was incarcerated since 1982, and he did not recall why he did not ask Skalnik about earlier activities, as Koch knew at the time of questioning that Skalnik had been in the system prior to 1982 (PC. V7/1029-30). Koch noted that his cross examination of Skalnik's *trial* testimony was not limited in this regard (PC. V7/1047). According to Koch, he went after Skalnik aggressively and did not, in any way, hold back on questioning due to his prior representation (PC. V7/1048). Koch acknowledged that he maintained a file, approximately two inches thick, which he had prepared to use for Skalnik's cross examination; he recalled talking with Assistant State Attorney Crow about this after the State decided to rest its case without calling Skalnik during the guilt phase (PC. V7/1048). Part of the problem with Skalnik was that his testimony was corroborated by statements Cooper had made to the defense mental health expert, Dr. Merin, and by the police locating the ski mask in Cooper's stepfather's house, just where Skalnik said it would be

(PC. V7/1048-51).

Koch stated that he and Crider both worked to develop possible mitigating witnesses by talking to Cooper and to Cooper's mother, Juanita Kokx, on several occasions (PC. V7/1035, 1054). They explained the importance of finding mitigating witnesses and were given names and numbers to contact (PC. V7/1053). Cooper had lived in Florida less than a year prior to the murders, but Koch spoke with people in Texas, Arizona, and possibly Ohio, trying to find mitigation (PC. V7/1036-37, 1072). Most of the people he talked to were out of state, and no one had anything they could use (PC. V7/1036, 1054, 1074). Koch recommended to Cooper that he start attending chapel services at the jail in an attempt to create mitigation, but when Koch followed up on this with the jail ministry people, they could not help because Cooper had been disruptive and profane when he attended (PC. V7/1037, 1054).

The defense also retained Dr. Merin, and Koch met with Merin on a couple of occasions, although Crider was the attorney primarily responsible for that aspect of the case (PC. V7/1061, 1066). Koch felt that Merin was, and still is, the top mental health expert available (PC. V7/1049). Merin looked at all possible issues, including competency, sanity, and mitigation (PC. V7/1061). Koch and Crider together made a strategic

decision to present Dr. Merin to the judge before sentencing, but not to the jury (PC. V7/1061, 1066). Koch recalled that Merin's testimony would be damaging before the jury because Cooper had told Merin that he fired more shots than he had admitted in his confession to the police (PC. V7/1061-62).

Koch noted that, at the time of trial, Cooper seemed fully alert and understood the proceedings (PC. V7/1041, 1059, 1061). Koch believed, in hindsight, that there is more they could have done to develop mitigation; not that he could specifically identify anything else, but he takes it personally that he has a former client on death row and will always wonder what more could have been done (PC. V7/1055).

Ronnie Crider was also a former assistant state attorney, having left that office in February, 1983, after being there nearly four years (PC. V9/1358). He acknowledged that compensation for the case was not much, but noted that the money was not his primary motivation in taking the case (PC. V9/1361). It would have helped if the court had given them funds for investigation, but their request was turned down; they did receive funds to hire Dr. Merin as a mental health expert (PC. V9/1361-62).

Crider did not recall knowing anything about Skalnik, and testified that aspect of the case was basically left entirely to

Koch (PC. V9/1359). He was aware that Koch had previously represented Skalnik, but he never suspected that representation in any way limited or restricted Koch; to him the prior representation was not relevant, it was a non-issue (PC. V9/1360). He and Koch would have discussed the approach for Koch's cross examination, but Crider did not recall any details from that discussion (PC. V9/1360).

Crider discussed the defense efforts to develop family background mitigation (PC. V9/1354-58, 1376-77). They emphasized the importance of finding mitigation witness to Cooper and his mother, and names and contact information was provided (PC. V9/1355, 1376). Koch was making most of the calls but Crider made some as well; it was difficult to locate people because Cooper had lived in Ohio and Texas (PC. V9/1357). Crider recalled meeting with Cooper a lot of times to talk about his background, where he grew up, and his family (PC. V9/1355). Crider felt the defense did the best it could, but seeing what has been developed makes him think, in hindsight, they could have done more (PC. V9/1357). He could not specify what else could have been done; there was no strategic decision to avoid further investigation, but they were simply unable to find the people they needed (PC. V9/1357).

Crider had a lot of contact with Dr. Merin prior to trial;

Merin had an office across the street from Crider's, and they met there, as well as in Merin's Tampa office, and also spoke on the phone a number of times (PC. V9/1369). He did not recall what information he had provided to Merin, but he expected that if Merin needed any other information he would ask, and he didn't (PC. V9/1370-71). Crider had a lot of respect for, and familiarity with, Dr. Merin, and was aware that Merin had a lot of background information on Cooper, even more than the prosecutor developed at Merin's deposition (PC. V9/1372).

It was a strategic decision not to call Merin to testify before the jury in either the guilt or penalty phase, and a strategic decision to call Merin to testify before the judge for sentencing (PC. V9/1377-78). The concern with having Merin before the jury involved the fact that Cooper had told Merin that he fired four shots, and this information was too damaging to outweigh any benefit Merin could provide (PC. V9/1365). It wasn't just the number of shots, it was the totality of Cooper's statements to Merin, because it was pretty detailed and went beyond what Cooper had admitted to law enforcement (PC. V9/1365). In his view, the State had not been able to develop this, and he did not want to provide them a way to do so (PC. V9/1367). However, they wanted Merin for the judge because Crider considers a judge to be more detached, less susceptible

to an emotional argument than a jury, able to separate the wheat from the chaff (PC. V9/1367). Crider also believed that a judge could appreciate and consider the psychological mitigation more than a jury would (PC. V9/1368). The only factual defense available was to limit Cooper's culpability, and they tried to paint a picture of a young man, acting on impulse, using bad judgment at the direction and under the domination of Walton (PC. V9/1366). If he could keep out the fact that Cooper had shot all three victims, or reloaded, or removed the shotgun plug, he could argue Cooper was only responsible for one murder and reduce the culpability in the jury's eyes (PC. V9/1366-67). However, he would not expect the judge to accept this quasi-residual doubt type argument, so Merin would not be as harmful before the judge only (PC. V9/1368).

Other defense witnesses at the evidentiary hearing included Ralph Palmeroy, Donald Cooper, Peggy Jo Cooper-Chipman, and Lisa Harville. Palmeroy was the principal of Queen Creek Elementary School, which Cooper attended while living in Arizona (PC. V7/1081-82). Palmeroy testified that he spoke with Cooper often, and saw him everyday (PC. V7/1085). Cooper told Palmeroy that his father physically abused him, and once or twice Palmeroy observed red marks on Cooper's face and neck that Palmeroy believed were left from the abuse (PC. V7/1083-84). He

did not recall having ever seen more serious injuries, such as marks that had turned to bruises or shiners (PC. V7/1098). From what Palmeroy was told, the abuse included getting punished, hit, spanked, and even punched occasionally (PC. V7/1085). Palmeroy also knew of Cooper's father's reputation as a mean man and a heavy drinker (PC. V7/1083, 1091). Palmeroy did not think about calling the police and he did not notify child protective services because he did not believe the abuse was bad enough to warrant it; there were no resources for intervention unless the abuse was a more severe problem than what he observed, and he was concerned that further abuse would occur if an investigator showed up (PC. V7/1086, 1096-97).

Palmeroy had met Cooper's mother and felt like he knew the father from seeing him around town and at school for programs (PC. V7/1083, 1089). Palmeroy included a statement in his affidavit describing Cooper's mother as a religious fanatic because the Cooper boys told him that they were made to go to church when they didn't want to; Palmeroy believed the mother went to church several times a week to get away from the father (PC. V7/1103). He described Cooper as academically average, and did not believe that Cooper was retarded or borderline, but felt that Cooper had difficulty learning due to being deprived of experiences he could relate to (PC. V7/1087, 1099). Cooper's

older brother Phillip also attended the school, but Palmeroy only had a few occasions to speak with Phillip about their home situation because Phillip was a good student, never any kind of problem at all (PC. V7/1085, 1093).

Cooper's brother, Donnie, and his sister, Peggy, described their home life growing up (PC. V7/1113-1178). Donnie is five years older than Cooper, and Peggy is seven years older (PC. V7/1114, 1160). Cooper's mother, Juanita, was their stepmother (PC. V7/1116, 1161). Donnie had psychological and emotional problems in the past, but these did not interfere with his postconviction testimony; Peggy took medication for a panic disorder (PC. V7/1114, 1174). The family moved out to Arizona when Cooper was six years old, and about four years later Donnie and Peggy returned to Ohio to live with their mother (PC. V7/1115, 1125, 1160-61).

According to Donnie and Peggy, their father was a strict man and beat them a lot (PC. V7/1116, 1161). Donnie stated that, with seven kids in the family, one or the other was getting punched, made to stand in a corner, or sent to bed without dinner on a regular basis (PC. V7/1118). Peggy recalled their father making the children bend over and hold their ankles while he hit them with a belt or kicked them with his cowboy boots (PC. V7/1161). Donnie and Cooper were the ones that got beat

most often; Donnie stated that he and Cooper were very close, they felt like they were the ones that usually caused upset in the family (PC. V7/1118, 1163). Peggy stated that their father never took any interest in the children and would not have attended school programs, and that Cooper frequently went to school with deep, obvious bruises all over him that lasted for weeks (PC. V7/1171).

At one point Cooper came out to live with Donnie in Ohio (PC. V7/1125). While there, Cooper worked very hard at a job on a chicken farm and also did drugs, including marijuana, acid, downers, and huffing paint (PC. V7/1124-25). The drug use had started when Cooper was around eleven (PC. V7/1146). Peggy described Cooper as being upset when his parents divorced that his mother wanted to leave and not take him with her, but also recalled that at one point Cooper was going to live with his mom then changed his mind and decided to stay with their father (PC. V7/1171-72).

Donnie also testified that he and Cooper loved their father very much and felt very close to him; Donnie returned to Arizona when he heard his father had cancer, but when he got there, his father rejected him (PC. V7/1147-48). According to Donnie, their father's death in June, 1980, was devastating for Cooper (PC. V7/1147). Donnie admitted that he had also beaten Cooper

at times, causing injuries, trying to get Cooper to do things for him (PC. V7/1151). He recalled that Cooper talked about killing himself many times as they were growing up, and thinks Cooper had tried to cut his wrists (PC. V7/1156).

Peggy and Donnie were both aware of the charges in this case, although Donnie said he did not come down for the trial because no one bothered to involve him, and Peggy was not sure she ever heard about the trial (PC. V7/1148, 1176). Peggy noted that she had hated Juanita and did not make any effort to keep in touch with her or with Cooper (PC. V7/1176-78). She thought she was living in Ohio at the time of the trial, but she was not sure that Juanita would have known where she was living at that time (PC. V7/1177-78).

Lisa Harville had met Cooper in Ohio sometime around 1980, after his father's death (PC. V8/1187). Donnie did not approve of the relationship Cooper had with her (PC. V8/1188). Although she never met Cooper's father, she heard about his abuse; she also observed Donnie abusing Cooper frequently (PC. V8/1188). She had witnessed Cooper's extensive drug use, something Cooper did to escape reality (PC. V8/1192). Cooper moved to Florida to live with his mother in order to get away from Donnie's abuse; she spoke with him a few times, then lost contact (PC. V8/1193). He called her the night this happened, around 4:00 in the

morning (PC. V8/1194). He was crying and high, saying that someone had gotten shot and he was scared (PC. V8/1194-95). She didn't think it was true because it wasn't the Richie she knew; she thought he was just trying to get attention (PC. V8/1195).

On cross examination, Harville admitted that she wasn't sure about dates, but her relationship with Cooper only lasted a few months, just before he moved to Florida (PC. V8/1199-1200). She only talked to Cooper twice after he moved to Florida -- once from his mother's house, and then on the night of the murders (PC. V8/1208). She got married in 1982 and went on with her own life; at some point, she happened to see Cooper's brothers and they told her the phone call was true (PC. V8/1210). She stated that Donnie would get angry with Cooper over Cooper's drug use, as they all did, but that she understood he only used drugs to escape Donnie's cruelty (PC. V8/1202). She acknowledged that she was currently involved in a relationship with Donnie, which started when she was separated from her husband about six and half years ago (PC. V8/1212).

The defense also presented the testimony of clinical psychologist Dr. Brad Fisher (PC. V8/1217). Fisher reviewed the background information and essentially agreed with Dr. Merin's testimony from the sentencing hearing, although he disagreed

with Merin's conclusion about Cooper's potential for rehabilitation (PC. V8/1232-34, 1239, 1274-77). Fisher's primary conclusions were: that Cooper is the product of an abusive background, particularly from his father and brother Donnie; that Cooper has a dependent personality; that Cooper could adjust well to incarceration; and that Cooper had used drugs from an early age, which could cause neurological damage (PC. V8/1232-36). Fisher testified that Cooper was not psychotic and had no major disorder, and that his IQ testing was consistent with Merin's results (PC. V8/1232-33).

The State presented the testimony of Paul Skalnik, Kenneth Driggs, Elizabeth Wells, Doug Crow, and Dr. Sidney Merin. Skalnik testified that he had testified truthfully at Cooper's trial (PC. V9/1392, 1418). He related that the documents and pleadings he had signed and drafted after being transferred to prison in Arizona, indicating that he had been an agent for the State in this and other cases, were full of lies (PC. V9/1404-15). He explained that these pleadings were prepared when he was angry with the State, and he was cooperating with an attorney, Mark Evans, who was personally trying to secure relief for all death row inmates (PC. V9/1405-07; V10/1540-41). He did not believe that he had received any benefit from assisting the State in this case, and in fact felt that he had been treated

worse than if he had not provided information (PC. V9/1394; V10/1546).

Driggs and Wells were former CCR attorneys that had represented J.D. Walton, and had met with Terry Van Royal in prison during their investigation of Walton's postconviction matters (PC. V12/1770, 1801-02). Royal told them that Walton did not shoot anyone or command anyone else to shoot, and that the murders were all initiated by Cooper, who started yelling and shooting as Cooper, Walton, and Royal were getting ready to leave the house (PC. V12/1773-74, 1802-04). Both Driggs and Wells acknowledged that Royal has, over the years, made a number of different statements about the murders that cannot be reconciled; they did not use him as a witness (PC. V12/1800, 1813).

Assistant State Attorney Doug Crow testified that, due to ambiguity in Skalnik's statement at the pretrial hearing about the first time he assisted law enforcement, he spoke with defense counsel Koch following the hearing to make sure that Koch was aware that Skalnik had provided information during a prior incarceration (PC. V12/1824-25). Crow also testified that the State made a strategic decision not to use Skalnik in the guilt phase because the State's case was strong without his testimony, and the defense was well prepared to cross examine

Skalnik (PC. V12/1823-24). Dr. Sidney Merin had the opportunity to review all materials that were available in postconviction, and he reconfirmed his previous testimony from Cooper's sentencing (PC. V11/1656, 1675). He stated that some time after the trial, he became aware that Cooper had indicated that he had returned to the residence to fire the final shot, and he changed his mind from his trial testimony regarding Cooper's lack of premeditation (PC. V11/1657-59). But Merin felt that the same diagnostic results applied. He had thoroughly and completely interviewed Cooper during his evaluations, and the information he had observed from the postconviction material simply corroborated what Cooper had already told Merin about his family background (PC. V11/1662-65).

Merin also reviewed Dr. Fisher's postconviction testimony, and agreed with Fisher's conclusions except as to Cooper's potential for rehabilitation (PC. V11/1668-74). Merin felt his trial testimony was correct on this, although it failed to make the distinction between adapting and adjusting to prison, which is relevant here (PC V11/1671-73, 1681).

After the hearing, the court denied the remaining postconviction claims (PC. V15/2252-73). This appeal follows.

SUMMARY OF THE ARGUMENT

I. The court below properly denied Cooper's claims of misconduct by the State with regard to State witness Paul Skalnik. The State did not present perjured testimony, violate Cooper's right to counsel, or suppress any material, exculpatory information at the time of trial. The only arguable support for these claims is found in documents prepared by or for Skalnik years after Cooper's trial, which Skalnik expressly disavowed at the evidentiary hearing below. In addition, Skalnik's role in Cooper's sentencing was so minimal that, even without Skalnik's testimony, confidence in his convictions and sentences is not undermined.

II. Cooper is not entitled to any further relief with regard to his numerous requests for public records. His dissatisfaction with the State's refusal to provide additional identifying information with regard to documents and materials submitted to the lower court for an in camera review as to the applicability of public records exemptions does not give rise to a colorable claim for relief.

III. The court below properly denied Cooper's claim that his trial attorneys provided ineffective assistance of counsel. Cooper failed to establish that either of his attorneys operated under an actual conflict of interest which adversely affected

their performance, or that their performance fell below the standard of reasonableness. In addition, even if some deficient performance were suspected, no prejudice could be demonstrated.

IV. The court below properly denied Cooper's claim that his attorneys provided ineffective assistance of counsel at the penalty phase of his trial. The court considered postconviction evidence pertaining to Cooper's family background and mental condition, as well as the efforts to develop such mitigation at the time of trial. The factual findings made in the rejection of this claim are supported by competent, substantial evidence, and the legal conclusions are consistent with the applicable law.

V. The trial court's summary rejection of Cooper's other claims was proper. These claims were correctly found to be procedurally barred, insufficiently pled, or without merit, and no further consideration of these issues is warranted.

ARGUMENT

ISSUE I

THE "FOUL BLOWS" CLAIM

Cooper's first issue asserts that his convictions and sentences are tainted by "foul blows" allegedly made by the prosecution throughout trial. This issue primarily challenges the State's actions with regard to penalty phase witness Paul Skalnik. Specifically, Cooper claims that the State presented perjured testimony through Skalnik; violated Cooper's right to counsel by placing Skalnik, a government agent, in his cell to elicit incriminating statements; and withheld material, exculpatory material that could have been used to impeach Skalnik. These allegations will each be addressed in turn; as will be seen, Cooper has failed to demonstrate any error in the trial court's rejection of these claims.

The allegations within the claims in this issue were subjected to an evidentiary hearing. The denial of these claims involved the application of legal principles to the facts as found below; this Court must review the factual findings for competent, substantial evidence, paying deference to the trial court's findings, and review of the legal conclusions is de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998).

A. Giglio

Cooper's claim that the State violated Giglio v. United States, 405 U.S. 150 (1972), by failing to correct false testimony from witness Paul Skalnik, is without merit. Cooper identifies two instances where Skalnik allegedly lied in his testimony: 1) at the pretrial suppression hearing, Skalnik testified that he first met Detective Ed O'Brien some time prior to the summer of 1983, and when asked if this was "the first occasion that you provided information to law enforcement?" responded that, to the best of his knowledge, it was (DA. V5/487); and 2) during the penalty phase, Skalnik stated that he had not been promised anything in exchange for his testimony (DA. V11/1458). As will be seen, neither of these responses by Skalnik compel the granting of any relief under Giglio.

In order to establish a Giglio violation, the defendant must show: 1) that false testimony was presented; 2) that the prosecutor knew the testimony was false; and 3) that the statement was material. Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001).

Cooper's allegation of facts in support of this claim must be scrutinized with care. For example, Cooper's brief asserts that, at the pretrial hearing, "Skalnik testified that Cooper was the first defendant against whom he had testified," and that

Skalnik later amended this testimony to say that he had actually testified in two or three cases (Appellant's Initial Brief, p. 32, 39). Cooper asserts that Skalnik's testimony left the court with the false impression that this was the first case in which he had testified against a defendant, when in fact he had [allegedly] testified "against ten defendants in fifteen different cases" prior to meeting Cooper (Appellant's Initial Brief, p. 39).

The first problem with Cooper's claim is that Skalnik never testified at the hearing that this was the first time he had ever testified against a defendant. The only times Skalnik was asked about prior testimony was when he was asked by the defense if he had testified in Freddie Gaines' trial, to which Skalnik responded, "Yes, I did" (DA. V5/492), and on cross examination, when Skalnik was asked directly about testifying in other cases and stated that he had done so two or three times (DA. V5/496). The second problem with Cooper's claim is that there is no evidence to support his assertion that Skalnik testified against ten defendants or in fifteen trials prior to meeting Cooper. Although Cooper's brief provides a list of names and case numbers in which Cooper allegedly testified, the basis for this assertion is not disclosed and certainly no evidence from the evidentiary hearing below established that Skalnik had

previously testified ten times.

As to the assertion that Skalnik's indication that the first time he provided information to law enforcement was when he met Det. O'Brien in the summer of 1983, Cooper has taken this response out of context. Defense counsel's questioning at the pretrial hearing was limited to Skanlik's providing information to law enforcement since his incarceration of November, 1982;[4] and Cooper's attorney was, at times, only asking about defendants that Skalnik had provided information about that were charged with first degree murder (DA. V5/482-86). The prosecutor had repeatedly objected to the defense's failure to specify times and dates on the events described (DA. V5/483-84). The line of questioning resulting in Skalnik's response about the "first" time he had provided information to law enforcement had been restricted to Skalnik's actions since November, 1982 (DA. V5/484-87). Read in context, the question asked is reasonably limited to this time period. Skalnik had difficulty recalling whether the first information he had provided was on Cooper or a defendant names Gaines, but ultimately decided Cooper's information was provided first, although he had met Gaines before meeting Cooper (DA. V5/487-89).

[4]The limitation of the questioning is an allegation of deficiency repeatedly asserted in Cooper's claim of ineffective assistance of counsel.

The prosecutor, Doug Crow, never suggested to the court that Cooper's case was the first time that Skalnik had provided assistance to law enforcement. While Crow stated that Cooper was the first individual "in this" that he provided for, he was clearly qualifying that representation, and Crow subsequently elicited direct testimony that Skalnik had previously testified in other cases (DA. V5/492, 496). Crow testified at the evidentiary hearing that, due to Skalnik's ambiguity when he first assisted law enforcement, he spoke with defense counsel Koch following the hearing to make sure that Koch was aware that Skalnik had provided information during a prior incarceration (PC. V12/1824-25).

Thus, a careful review of the record demonstrates that Skalnik's testimony was not a lie, but an ambiguous answer to a qualified question. To the extent that any of the testimony needed clarification, it must be noted that Skalnik was, at the pretrial hearing, a defense witness, and that the defense had full knowledge of all Skalnik's prior activities from his pretrial deposition. Skalnik testified at the deposition that he had provided information on about 28 defendants, and had testified in three or four cases over a two or two and a half year period (PC. SV1/24-26).

At any rate, it is apparent that no amount of dissecting

Skalnik's pretrial, penalty phase, or postconviction testimony can affect the court's ultimate conclusion that Skalnik was not acting as a State agent when he provided information about Cooper's statements. When the totality of the testimony from the pretrial hearing is reviewed in context, it is clear that the trial court had an accurate understanding that Skalnik's assistance with this case was no isolated incident. As explained in the discussion below regarding Cooper's claim of a Henry/Massiah violation, the result of the pretrial hearing is not any different after all the facts have been fully litigated in postconviction.

Cooper's claim with regard to Skalnik allegedly lying in his penalty phase testimony is even less compelling. Cooper claims that Skalnik was lying when he stated that he did not expect to receive any benefit for his testimony. Cooper admits that there was no specific deal about any particular benefit, but asserts that Skalnik's posttrial statements demonstrate that Skalnik expected to receive a reward (Appellant's Initial Brief, p. 41). Cooper does not acknowledge that those very statements were entirely repudiated by Skalnik at the evidentiary hearing; Skalnik has repeatedly admitted that the posttrial pleadings in which he claimed to have been acting at the State's direction are lies (PC. V9/1405-15). He confirmed at the evidentiary

hearing that he had not been offered any promises in exchange for his testimony (PC. V9/1394-95).

In addition, Cooper's suggestion that Skalnik actually received substantial benefits for his testimony is refuted by the record. Cooper notes that Skalnik was able to avoid State prison time, but the testimony from the time of trial as well as the postconviction hearing clearly establishes that it was Skalnik's own attorney that kept Skalnik in the county jail for classification purposes, and that the State did not provide any assistance with this (DA. V5/496-97; V11/1456-57; PC. V9/1395-96; PC. SV1/5-7).

Thus, Cooper failed to establish the first element of a Giglio violation, because Skalnik's testimony was not proven to be false. Even if there could be any misinterpretation, however, it would not be material on the facts of this case. Skalnik's testimony does not provide the sole, or even primary support, for any of the five aggravating factors. In fact, each of the factors is well supported by Cooper's confessions to law enforcement, as admitted during the guilt phase (DA. V7/915-929). Death sentences easily would have been imposed even if Skalnik had never testified. And although the defense now focuses on the necessity of impeaching Skalnik's credibility, they faced a difficult hurdle with this at trial because

Skalnik's information was corroborated by other testimony and by the discovery of the ski mask.

On these facts, no basis for relief under Giglio has been offered. Cooper is not entitled to any relief on this claim.

B. Henry/Massiah

Cooper's claim that the State violated United States v. Henry, 447 U.S. 264 (1980), and Massiah v. United States, 377 U.S. 201 (1964), is similarly without merit. These cases hold that the State may not deliberately elicit incriminating information from a defendant in the absence of counsel. This Court has recognized that the "deliberately elicited" standard is only met when law enforcement take affirmative steps to secure incriminating statements. Rolling v. State, 695 So. 2d 278, 291 (Fla. 1997).

The trial court reviewed the correct legal standards and then denied this claim as follows:

> After carefully reviewing the case law and the record in the instant case, the Court finds Defendant's reliance on Henry to be misplaced; there is a significant distinction between the circumstances of Henry and those in the instant case. Henry's cellmate was acting as a government agent; he was a paid informant specifically commissioned to obtain incriminating evidence and to deceive Henry for that purpose. To the contrary, no such evidence has been presented to establish that such occurred in the instant cse.
>
> To being with, trial counsel for Defendant, Ky Koch, testified at the evidentiary hearing that he had initially attempted to prove that Skalnik was expressly commissioned by the government to obtain

incriminating statements (through a motion in limine/to suppress), but was unable to do so. [*See Exhibit 1: September 3, 1999 Transcript: pages 30-50*].

> State: In you direct testimony, you said that you were unable to prove that Skalnik was a plant in the jail. Just wasn't any evidence that you could find to confirm, you know, the suspicion that you had?
>
> Ky Koch: Yes sir. If I said that. I misspoke. I knew that Skalnik was in there for having violated a law somewhere. I knew that he wasn't simply there to obtain statements. I was concerned about him being a plant into Richard's cell. And I was unable to independently verify that.

At the various evidentiary hearings on the matter, the prosecutor, Doug Crow, testified that Skalnik had not acted as a state agent, was never offered anything in exchange for his testimony, never asked for anything in exchange for his testimony, and was never induced in any manner, shape, or form. [*See Exhibit 2: June 23, 2000 Transcript: pages 76-77*]. Skalnik himself, whose credibility was admittedly called into question after the 1989 affidavits were submitted (but who later attributed the inconsistent statements made in the 1989 affidavits to deceptive efforts made by Mark Evans of CCRC), testified that he was not a State witness, and that he did not think Defendant was intentionally and purposefully placed in the cell with him. [*See Exhibit 3: January 14, 2000 Transcript: pages 26-29*]; [*See Exhibit 4: January 21, 2000 Transcript: pages 52-58; 67-74*].

Defendant bears the burden of adducing evidence in support of his claims; he may not merely make conclusory statements and expect the Court to flush out the details during an evidentiary hearing or a final order. See Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). Because Defendant has failed to offer sufficient support to corroborate this otherwise conclusory claim, and because the evidence that was adduced at the evidentiary hearings refutes this claim, this claim is denied.

(PC. V15/2255-56). The court's factual findings are supported

by the evidence from the postconviction hearing held below, and its legal conclusions are supported by all relevant case law.

In the Rolling case, this Court recognized that the culpability of law enforcement depends on the extent of their role in securing the confession. The question of whether the defendant's right to counsel was violated "turns on whether the confession was obtained through the active efforts of law enforcement or whether it came to them passively." 695 So. 2d at 291. In this case, Cooper has not identified any active efforts by law enforcement to secure his statements to Skalnik. Indeed, the State had no reason to take such steps as Cooper had provided a detailed confession to the detectives. Rather than focus on law enforcement as Rolling teaches, Cooper's argument is based entirely on Skalnik's extensive activities as a chronic snitch.

Cooper has again failed to offer any basis for relief. No finding of a violation of Cooper's right to counsel is available on these facts, and Cooper is not entitled to relief on this claim.

C. Brady

Cooper also argues that the State violated Brady v. Maryland, 373 U.S. (1963), by failing to disclose information about Skalnik. The actual information which the State allegedly failed to disclose is not disclosed. As the court below found,

Cooper failed to establish that any material information regarding Skalnik was withheld from the defense. Cooper does not identify any particular fact allegedly withheld, but simply speculates that the boxes of documents maintained by the State Attorney's Office and provided to the court below as exempt from public records production for an in camera inspection should have been given to defense counsel prior to trial for the possible impeachment of Skalnik.

As to this claim, defense counsel Ky Koch testified that he knew about Skalnik's extensive history as a snitch; in addition, that history is consistently related in Skalnik's pretrial deposition, pretrial hearing testimony, penalty phase testimony, and evidentiary hearing testimony (PC. V7/1022, 1048). The defense had thoroughly investigated Skalnik and maintained a two-inch thick notebook in preparation for his cross examination (PC. V7/1047-48).

The court reviewed the relevant law and denied this claim:

> First, trial counsel for Defendant, Ky Koch, testified at the evidentiary hearing that at the time of trial, he knew that Skalnik had previously operated as a "snitch" for the State. [*See Exhibit 5: September 3, 1999 Transcript: pages 19-27*]. In fact, Skalnik's deposition testimony taken by Ky Koch at or about the time of trial reflects information to this effect. [*See Exhibit 6: Deposition of Skalnik from November 18, 1983*]. Second, there is a dearth of evidence in the record to suggest that Skalnik ever received anything of value from the State. The only indication that Skalnik ever received anything of value is offered in the form of pure speculation (i.e., conjugal visits, reduced sentence for three grand theft charges).

> Skalnik sufficiently explained at the evidentiary hearing that his trip outside the prison to eat dinner with his family was granted because he was not allowed the same contact visits as other inmates due to his solitary confinement, which was because of security reasons (death threats). [*See Exhibit 7: January 21, 20000 Transcript: pages 82-85, 95, 97-98, 102-103*]. Additionally, Skalnik himself offered unequivocal testimony that he did not receive anything of value from the State in exchange for his testimony. [*See Exhibit 8: January 21, 2000 Transcript: pages 89-40, 45-61, 69-75, 86-87, 99-103*].
>
> In conclusion, Defendant has failed to even meet the first prong of a legally sufficient Brady claim - that is, that the State withheld information. See Cherry, 659 So. 2d at 1073-74. Even assuming the existence of this evidence, and the failure of the State to disclose it, Defendant has offered nothing to show that a reasonable probability exists that the outcome would be any different. See Rose v. State, 774 So. 2d 629, 634 (Fla. 2000)(expounding on the final prong of a legally sufficient Brady claim). The fact remains that Skalnik was called only as a penalty phase witness. Moreover, the jury heard evidence that Skalnik had previously worked as a "snitch," and from this testimony was able to draw many of the inferences that form the basis of Defendant's claim. For these reasons, this claim is denied.

(PC. V15/2256-57). This ruling was correct. See Occhicone, 768 So. 2d at 1042 (Brady claim properly summarily denied where defendant knew of evidence allegedly withheld).

Of course, even if there was additional impeachment evidence not yet identified but relating to Skalnik's credibility which was not known to the defense at the time of trial, the court below properly concluded that there was no reasonable probability of a different outcome. Skalnik was impeached, although many of his statements were also corroborated from

other sources. More importantly, however, Skalnik was not a material witness. As previously noted, the death sentences in this case would clearly have been imposed even if Skalnik had never testified.

Cooper has failed to establish that any material information was withheld from the defense at the time of trial. No basis for relief has been offered, and this Court must deny this claim.

ISSUE II

THE PUBLIC RECORDS CLAIM

Cooper's next issue challenges the sufficiency of the State's response to Cooper's request for the disclosure of public records. Cooper's complaint involves the procedures used by the State in the submitting of materials withheld from disclosure as exempt and provided to the trial court for purposes of conducting an in camera review. Cooper asserts that the State has failed to comply with Section 119.07(2)(a), Florida Statutes, which requires the State to indicate "with particularity" the statutory basis for the exemption claimed. According to Cooper, this section must be interpreted to require a written index, identifying each submitted document, with sufficient information for the parties to be able to assess the applicability of the cited exemption; Cooper analogizes such an

index to the "privilege log" as required by Florida Rule of Civil Procedure 1.280(b)(5), governing the withholding of purportedly privileged material under civil discovery rules.

The court below refused to require the State to provide the additional indexing sought by Cooper (PC. SV5/742-745). A trial court's ruling on a request for the disclosure of public records is subject to an abuse of discretion standard of review. Mills v. State, 786 So. 2d 547, 552 (Fla. 2001). The record in this case fails to support any claim that the court below abused its discretion in denying the request challenged in this appeal.

The record reflects that Cooper filed a motion to compel requesting disclosure of public records maintained by the State Attorney's Office in June, 1995 (PC. SV2/289-299).[5] The State responded in a letter dated June 23, 1995, advising Cooper's counsel to schedule an appointment to review the records and outlining a number of statutory exemptions relating to many documents from case files where Paul Skalnik was a defendant or a possible witness (PC. SV3/371-375). Cooper's attorney reviewed the records on July 19 and 20, 1995, and on October 26, 1995, and thereafter requested and obtained copies of some of the material (PC. SV3/388-391). Records that had been withheld

[5]Although a number of requested records had been provided to Cooper's previous postconviction attorney, the State treated the 1995 request as a new and independent demand (PC. SV3/362-368). For additional correspondence and pleadings regarding public records requests and disclosures, see generally Supplemental Volumes 2 - 6 in the instant record.

from disclosure were provided to the judge so that an in camera review could be held to determine the validity of the exemptions claimed by the State (PC. V5/831-35, 870, 880-82; V6/947).

Cooper filed a memorandum in support of his motion to compel in February, 1996, and asserted, among other things, that he was entitled to have the State identify and describe each document claimed as exempt, including the author, date, subject matter, and to whom it was sent; the statutory citation to any exemption claimed; and the particular reason for the conclusion of exemption (PC. SV2/332-345, 333). The State's response, in addition to providing the statutory citations for the claimed exemptions, described the bases of the exemptions (PC. SV3/362-368). The response indicated that, for exemptions claimed as to victim identity, law enforcement officer home phone numbers and photographic identification, and confidential informant identity, the redacted documents had been disclosed to Cooper's attorney (PC. SV3/363). The sufficiency of the State's response to Cooper's public records demands was addressed at status hearings conducted on March 1, 1996 (PC. V5/865-902); May 3, 1996 (PC. V6/908-954); and July 16, 1996 (PC. V6/955-1001).

The only dispute regarding public records in this case is Cooper's continuing assertion that the documents provided for an in camera review be indexed and specifically identified, and that the State's response does not comply with the

"particularity" language of Section 119.07(2)(a). However, the relevant statutory exemptions as outlined and described in the State's response fully complied with the particularity requirement (PC. SV3/362-368). They are self-explanatory in nature and the basis for the exemption is facially apparent from the response; e.g., "The exemption relied on for 943.053 for confidential criminal justice information is applicable to NCIC-FCIC arrest records, commonly known as 'rap sheets' in the State Attorney's Office." (PC. SV3/366).

Cooper's concern that the State failed to describe with particularity the specific documents withheld and the basis for the withholding are unwarranted. There is no reason to judicially impose additional procedures for the submission of documents for an in camera inspection; this is a matter best "left to the conscientious judgment of our trial courts." Lorei v. Smith, 464 So. 2d 1330, 1332 (Fla. 2d DCA), rev. denied, 475 So. 2d 695 (Fla. 1985).

In Lorei, the Second District specifically declined to "engraft upon the Act the wholly pragmatic devices of 'specificity, separation, and indexing,'" from the federal case of Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), and upheld the trial court's refusing "to require indexing, itemizing or further discovery in the form of interrogatories." Cooper's assertion that the State's reliance on Lorei is misplaced due to

the 1984 statutory amendment to Chapter 119 is without merit;[6] while the amendment provided that a custodian must, when requested, identify the basis for the statutory exemption, it did not adopt any of the requirements discussed in Lorei.

The public records law does not require a custodian to provide indexing, lists, or inventory in responding to public records requests. Roesch v. State, 633 So. 2d 1, 2 (Fla. 1993); Wooten v. Cook, 590 So. 2d 1039 (Fla. 1st DCA 1991). The law has been consistently interpreted to require only what the State provided in this case - a written statement outlining the statutory basis for each exemption claimed. Cooper has provided no relevant authority which supports his assertion that Section 119.07(2)(a) requires the submission of additional information describing the documents provided to the court for the in camera inspection. Although he insists that such information is necessary to insure his meaningful participation in public records issues, the question as to the application of particular exemptions is one for the court and does not require participation by the defendant. His claim that the trial judge is not competent to make this determination without additional information from the State is without merit, as the court below was able to conclude that the exemptions claimed in this case

[6]Cooper's suggestion that the statutory amendment was in response to the Lorei decision (Appellant's Initial Brief, p. 52), is refuted by the fact that the statute was amended *prior to* the date of the decision.

were valid. His concern that he is being "forced to accept the State's blanket, self-serving assertion" of an exemption (Appellant's Initial Brief, p. 55), is unpersuasive since the judge is the appropriate party to validate the State's exemption claims. Thus, there is no basis in fact or law to require the burdensome, additional documentation he seeks with regard to the submitted materials.

Even if this Court had the authority to rewrite public records legislation to make it more burdensome for the State to withhold exempt documents, there would be no basis for requiring such new law to be satisfied in this case. The State has justifiably relied upon the current law and complied with every aspect of the statute. To change the law[7] and require the State to follow the procedures for civil privilege issues would unnecessarily delay these proceedings and provide no benefit to the parties or the criminal justice system.

Following the dictates of Walton v. Dugger, 634 So. 2d 1059 (1989), the court below held numerous hearings to determine the status of public records requests and conducted an in camera review of the documents that the State Attorney's Office had withheld as exempt from disclosure (PC. V5/831, 837, 848, 859, 865; V6/908, 955). The court reviewed the records and ordered

[7]Of course, current public records procedures in capital postconviction cases are governed by Florida Rule of Criminal Procedure 3.852, which does not require this information for documents claimed to be exempt.

them sealed pending completion of this Court's appellate review (PC. SV5/885). The sealed documents are before this Court, and this Court can certainly determine the legitimacy of the statutory exemptions claimed by the State and upheld by the judge below.

Cooper's indignant accusations of State misconduct in the response to his public records request in this case is unwarranted. The State followed the procedures this Court has outlined in disclosing records and submitting any withheld records for an in camera inspection. Characterizing the State's actions as "evasive" impugns the statutory directive to protect the confidentiality of information which is not to be disclosed to the public under Chapter 119. Although Cooper is quick to criticize the State for withholding records, implying bad faith and the need for further investigation and litigation, the State has a legal duty to protect the confidentiality of exempt records. This protection includes submitting any questionable documents to a court for an in camera review, as done in the instant case. This Court has encouraged state attorneys to "raise any defenses to the disclosure which they may deem applicable." Lopez v. Singletary, 634 So. 2d 1054, 1059 (Fla. 1993), quoting Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1992). Cooper's base attack on the State's actions in invoking applicable exemptions is unwarranted.

The court below was fully aware of the relevant case law and the purpose and scope of the in camera hearing. This Court has acknowledged that it "will not second-guess the trial court," in reviewing findings after an in camera hearing. Bryan v. Butterworth, 692 So. 2d 878 (Fla. 1997). On the facts of this case, no violation of Chapter 119 or this Court's case law concerning capital defendants' rights to public records has been demonstrated. No relief is warranted on this issue.

ISSUE III

THE INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL CLAIM

Cooper next presents the familiar argument that his trial counsel provided ineffective assistance of counsel. His argument on this issue alleges that both of his trial attorneys labored under prejudicial conflicts of interest, and that attorney Ky Koch was deficient with regard to the handling of witness Paul Skalnik. However, Cooper's claims do not offer any basis for relief.

Of course, claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient

and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695; Valle, 705 So. 2d at 1333; Rose, 675 So. 2d at 569.

Proper analysis of this claim requires a court to eliminate the distorting effects of hindsight and evaluate the performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment; the burden is on the defendant to show otherwise. Strickland, 466 U.S. at 689. Where the record is incomplete or unclear about counsel's actions, counsel must be afforded the presumption that he performed competently.

Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); Chandler v. United States, 218 F.3d 1305, 1361 n.15 (11th Cir. 2000). With these general principles in mind, Cooper's allegations will be addressed in turn.

A. DEFENSE COUNSEL RONNIE CRIDER

The only allegation in this issue with any possible relevance to Cooper's conviction, as opposed to his sentence, is the claim that trial attorney Ronnie Crider had a conflict of interest based on Crider's prior employment with the State Attorney's Office. Crider worked at the State Attorney's Office at the time of the murders and, according to Cooper, remained "friendly" with prosecutors and police officers investigating the case at the time he represented Cooper. This claim was summarily denied; this Court must affirm as the trial court properly applied the law and competent substantial evidence supports its findings. Diaz v. Dugger, 719 So. 2d 865, 868 (Fla. 1998), cert. denied, 526 U.S. 1100 (1999).

The direct appeal record reflects that the issue of Crider's prior employment was discussed with the trial judge at a pretrial conference on May 27, 1983 (DA. V3/317-318). At that time, the judge noted that Crider had been working at the State Attorney's Office at the time of the murders; Crider acknowledged that he had considered the possibility of any potential conflict, but that none existed since he had not been

involved in any aspect of the investigation and had no knowledge of the facts of the case (DA. V3/317). Cooper has not alleged any relevant facts to support the existence of any conflict other than those discussed in the direct appeal record, and the court below properly summarily denied this claim (PC. V5/813).

This issue could have been raised previously because the facts about Crider's prior employment were clearly known at the time of trial. Thus, the issue is barred. Jackson v. Dugger, 633 So. 2d 1051, 1055 (Fla. 1993) (trial court's denial of motion to withdraw based on conflict of interest was barred); Francis v. State, 529 So. 2d 670, 672 (Fla. 1988) (conflict of interest claim should have been raised on direct appeal).

In addition, Cooper has not even attempted to identify any conflicting interests under which Crider may have been operating. See Herring v. State, 730 So. 2d 1264, 1267 (Fla. 1998) (conflict of interest claim requires a factual showing of inconsistent interests; conflict which is merely possible or speculative is insufficient to impugn a criminal conviction). He states only that Crider remained friends with former colleagues, hinting that, as a matter of law, a former law enforcement officer or prosecutor must sever all ties with prior associates in order to represent criminal defendants. No legal authority supports this contention. Also, Cooper does not

identify any possible prejudice that could have resulted from Crider's prior employment. He has not suggested that there was any exchange of information which was harmful to the defense and would not have occurred absent Crider's prior employment. He also does not identify any record indication that Crider's performance was adversely affected by any possible conflict.

On these facts, no further judicial inquiry was necessary, and there was no apparent conflict which needed to be explained to Cooper. No deficient performance or prejudice is even implied by the facts outlined to support this claim. Summary denial was proper.

B. DEFENSE COUNSEL KY KOCH

The bulk of Cooper's argument on this issue focuses on the alleged conflict of Ky Koch, based on Koch's prior representation of witness Paul Skalnik. Cooper also attacks Koch's handling of Skalnik as deficient performance, allegedly demonstrating ineffective assistance of counsel even in the absence of any actual conflict. The allegations regarding Koch's alleged conflict and deficient performance were subjected to an evidentiary hearing. The denial of this claim involved the application of legal principles to the facts as found below; this Court must review the factual findings for competent, substantial evidence, paying deference to the trial court's findings, and review of the legal conclusions is de novo.

Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998).

1. conflict of interest

In order to show a violation of the right to conflict-free counsel, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); Freund v. Butterworth, 165 F.3d 839 (11th Cir. 1999) (en banc). Cooper has failed to demonstrate that Koch's prior representation of Skalnik created an actual conflict or that it adversely affected Koch's performance. The Cuyler Court noted that, "until a defendant shows that his counsel actively represented conflicting interests," he has not established a violation of the Sixth Amendment. 446 U.S. at 350. Skalnik was a former client who had waived any potential conflict, and Koch was not "actively representing" Skalnik. Even if some level of misconduct could be found in the situation, mere improper or unethical behavior does not automatically constitute ineffective assistance of counsel. See Downs v. State, 453 So. 2d 1102, 1109 (Fla. 1984).

The Freund case provides an extensive analysis of the Sixth Amendment concerns with conflicting interests under the scenario offered in this case, that is, a defense attorney's prior representation of a State witness. John Freund and John Trent

were codefendants charged with the first degree murder of a stabbing victim killed by Freund in Trent's apartment. The law firm that represented Freund at trial had extensive ties to John Trent, having represented Trent in various civil and criminal matters over a period of at least thirteen years. Trent and his employees shared office equipment with the law firm on a daily basis, and the partners in the firm were business clients of Trent's interior design business. Trent had also referred many friends to the firm, including one of the material witnesses to the murder. The firm had consulted with that witness, Eleanor Mills, on a cocaine trafficking charge which remained pending throughout Freund's trial. Although Trent did not testify at Freund's trial, his relationship with the law firm was relevant as Freund's attorneys did not pursue a defense which implicated Trent but adopted an insanity defense.

The Eleventh Circuit discussed the applicable law when a conflict of interest is alleged with regard to a prior legal representation. The court held that applying Cuyler's "actual conflict" prong in a successive representation case requires a defendant to show that either (1) counsel's earlier representation was substantially and particularly related to counsel's later representation of the defendant; or (2) that counsel actually learned particular confidential information during the prior representation that was relevant to the

defendant's later case. 165 F.3d at 859. The court noted that one of these must be established at a minimum, but that the actual conflict inquiry is fact-specific and, in a particular case, a showing of both substantial relatedness and confidential information may still not be enough to prove there were "inconsistent interests" as necessary in a successive representation case to warrant relief. Moreover, the substantially relatedness test is only met with a showing that the prior and successive representations involve the same subject matters. See Freund, 165 F.3d at 859; United States v. Kraft, 659 F.2d 1341, 1346 (5th Cir. 1981); United States v. Martinez, 630 F.2d 361, 362 (5th Cir. 1980), cert. denied, 450 U.S. 222 (1981).

Clearly, Cooper's case does not involve facts which support finding an actual conflict under this test. Although Cooper's brief cites to Freund in asserting that Cooper can meet the second prong of Cuyler, the "adverse affect," as that prong is discussed in Freund, Cooper completely ignores Freund when discussing the first Cuyler prong of actual conflict. Apparently, Cooper realizes that he cannot even arguably meet the actual conflict test of Freund, as he makes no attempt to do so. The facts of this case establish that Koch's representation of Skalnik was on a matter which that had been resolved prior to the murders being committed, and the subject matter of that

representation could not have been related to the subsequent murders. Nor is there any indication that confidential information was obtained during the prior representation. Thus, no actual conflict existed.

The cases which Cooper cites as a basis for finding an actual conflict on these facts are easily distinguishable. The fact that conflicts have been found based on a prior representation of a later State witness by defense counsel, as in Spaziano v. Seminole County, 726 So. 2d 772 (Fla. 1999), does not mean that an actual conflict necessarily exists each time the situation arises. The question in Spaziano involved the trial court's authority to appoint co-counsel in a capital postconviction case, at public expense, when the public defender's office had a conflict. Koch has never identified his prior representation of Skalnik as an actual conflict in this case. In Kolker v. State, 649 So. 2d 250 (Fla. 3d DCA 1994), the court found a potential, not an actual, conflict, following the test in Freund, where the prior and conflicted representations involved the same subject matter. Thomas v. State, 785 So. 2d 626 (Fla. 2d DCA 2001), and Lee v. State, 690 So. 2d 664 (Fla. 1st DCA 1977), both of which concerned the sufficiency of a trial court's response to defense counsel revelations about previously representing State witnesses; no analysis of finding an actual conflict is offered. In Foster v.

State, 387 So. 2d 344 (Fla. 1980), the conflict was based on simultaneous, not successive, representations. Thus, none of these cases provide guidance on answering the threshold question under Cuyler of whether an actual conflict exists.

To the extent that Cooper suggests or reads these cases to suggest that a per se actual conflict exists every time a defense attorney has previously represented a potential witness, no such rule is directly acknowledged in any case. And to the contrary, several cases have rejected the argument that an actual conflict existed on such facts. See Gorby v. State, 630 So. 2d 544, 546 (Fla. 1993) (former cellmate of defendant's had been represented by one of defense counsel's law partners; this Court noted that potential conflict did not develop into actual conflict), cert. denied, 513 U.S. 828 (1994); Bouie v. State, 559 So. 2d 1113, 1115 (Fla. 1990) (cellmate to whom defendant had confessed was client of same public defender's office representing the defendant; this Court noted that there was no conflict of interest, where Bouie and the cellmate were not codefendants, and their interests were neither hostile nor adverse to one another).[8]

Even if Cooper could establish an actual conflict on these

[8]Although Gorby and Bouie both involved situations where a law partner provided the previous representation giving rise to the alleged conflict, the representation by any member of the firm is the same as a representation by the defense attorney for purposes of assessing conflict. Freund, 165 F.3d at 863 n.33.

facts, prejudice is only presumed where an adverse affect is also demonstrated on the record. Cooper alleges such affect from counsel's alleged failure to aggressively cross-examine Skalnik. This argument is unavailing. First of all, the record demonstrates that Skalnik was aggressively cross examined by Koch. The only specific criticism in Cooper's brief notes when Skalnik testified at the pretrial hearing, Koch only questioned Skalnik about incidents occurring after November, 1982. Cooper does not identify any material evidence that would have been revealed had counsel questioned Skalnik any differently. Testimony from the evidentiary hearing did not establish any significant snitching activities by Skalnik prior to November, 1982.[9] At the pretrial hearing, Skalnik had testified that he had provided information to law enforcement on about 28 or 29 individuals, involving four, five or maybe six different cases, and that he had testified two or three times in other cases (DA. V5/482, 493-94, 496). Three of the individuals that he had provided information on had been charged with first degree murder (DA. V5/482). Had counsel asked about information which Skalnik may have provided prior to November, 1982, the responses

[9]Skalnik stated that, when he was in the old county jail in 1981, he made a drug buy under the supervision of a detective, but he did not recall whatever happened to the case; he also described having worn a body mike doing undercover work out on the street one time under the direction of Det. Richard Rusher, but as far as he knew the mike didn't work and the whole case fell apart (PC. V9/1417-18).

would not have provided a basis for granting the defense motion to suppress and excluding Skalnik's testimony.

Cooper's allegation that Koch refrained from attacking Skalnik's credibility before the jury is also refuted by the record. At trial, Koch's cross examination brought out that Skalnik was a former police officer that had provided information to various law enforcement agents regarding nearly thirty defendants, including several charged with first degree murder; that Skalnik was presently in jail serving state prison sentences for five grand theft convictions; and that Skalnik had remained in the county jail at his lawyer's request although he had been sentenced nearly a year earlier (DA. V11/1456-57). Counsel also brought out that Skalnik had previously been charged with "masquerading as a lawyer," telling people he was a lawyer when he was not; counsel then asked if Skalnik enjoyed people thinking he was something that he was not, which Skalnik denied (DA. V11/1457-58). In closing argument, counsel told the jurors that Skalnik was "selling his soul," and pointed out evidence which contradicted Skalnik's version of events; he questioned why, if Skalnik was so believable, the State did not use him in guilt phase (DA. V11/1597).

In addition, Cooper must link the alleged failures in Koch's treatment of Skalnik to Koch's prior representation of Skalnik. See Freund, 165 F.3d at 860; Porter v. Wainwright, 805 F.2d 930,

939-940 (11th Cir. 1986), cert. denied, 482 U.S. 918 (1987). Cooper attempts to establish this by asserting that Koch "admitted" that he declined to interview Skalnik because of his prior representation. As previously noted, this assertion is a misrepresentation of the record, since Koch testified that in fact he would not have privately interviewed Skalnik even if he had never known him, just because of the circumstances of Skalnik being a State witness currently in custody (PC. V7/1026-28).

Porter v. State, 653 So. 2d 374 (Fla. 1995), is strikingly similar to the instant case. In Porter, public records documents revealed that Porter's trial attorney was representing a State witness on an unrelated charge at the time the attorney undertook Porter's case. Counsel had stated in an affidavit that he had no independent recollection of the prior representation, but it was documented by court records from the witness's case. This Court found that the information about the prior representation did not constitute newly discovered evidence, but even if it did, Porter was not entitled to any relief because Porter failed to effectively allege that an actual conflict of interest affected the attorney's performance. 653 So. 2d at 378. Similarly, Cooper has failed to demonstrate any actual conflict that adversely affected Koch's performance in this case. He is not entitled to any relief on this issue.

2. deficient performance

Cooper also alleges that Koch's performance with regard to Skalnik was deficient even if no conflict of interest existed. According to Cooper, Koch's cross examination of Skalnik was deficient at the pretrial hearing because Koch failed to elicit relevant information about Skalnik's history of providing information to the State. He criticizes Koch's cross examination of Skalnik during the penalty phase for failing to elicit details about Skalnik's prior convictions. As will be seen, neither of these concerns provides a basis for relief under the Sixth Amendment.

As to Cooper's assertion that counsel was deficient with regard to presenting Skalnik at the pretrial suppression hearing, Cooper has not identified any material testimony that counsel failed to elicit. As noted above, the fact that the questioning of Skalnik was limited to his activities after November, 1982, is not significant since that was the time period when most of Skalnik's informing had taken place. Cooper suggests that counsel should have investigated Skalnik further, but fails to reveal any information that additional investigation may have disclosed. Cooper is also critical of Koch for failing to "privately" interview Skalnik at the jail, but has offered no basis to demonstrate that an attorney acts

unreasonably in securing information through a pretrial deposition rather than talking to someone privately off the record. It is entirely reasonable for an attorney to avoid placing himself in a compromising position by speaking privately to a possible witness of questionable credibility. Reasonable counsel would want a means of recording any statements that might be inconsistent with later trial testimony in order to have an opportunity to impeach the witness. Absent some indication that it might have made a difference, Koch's failure to go to the jail and speak with Skalnik privately does not constitute deficient performance or ineffective assistance of counsel.

Cooper's criticism of Koch's cross examination of Skalnik's penalty phase testimony is similarly unwarranted. The only specific allegation is that counsel failed to elicit details of Skalnik's prior convictions, other than bringing out that one prior charge had been based on Skalnik masquerading as a lawyer. Cooper fails to acknowledge that testimony as to the details of prior convictions are generally not admissible; proper impeachment is limited to the existence and number of prior convictions, and inquiry into the nature of the offenses is prohibited unless the door has been opened. Fotopolous v. State, 608 So. 2d 784, 791 (Fla. 1992); McCrae v. State, 395 So. 2d 1145, 1151 (Fla. 1980). Counsel's failure to pursue an

improper line of inquiry does not constitute deficient performance.

The court below outlined the postconviction testimony on this issue and discussed the relevant legal standards, then rejected this claim, finding:

> In conclusion, the Court finds that Defendant has failed to show that trial counsel's performance in investigating Skalnik was deficient. The testimony adduced at the hearings, together with deposition testimony taken at or about the time of trial, reveals that Ky Koch was intimately familiar with Skalnik, his previous dealing in and out of prison, and his reputation, and sufficiently investigated him as a witness before trial. For these reasons, this claim is denied.

(PC. V15/2259). The court's conclusions were correct.

At the hearing, Koch discussed having thoroughly investigated Skalnik (PC. V7/1023-26, 1047-48). He had discussed his prior representation of Skalnik with Cooper, and Cooper was accepting of Koch's representation and did not object to it (PC. V7/1034-35). Koch recalled that he did not hold back on questioning Skalnik in any manner; he maintained a folder, about two inches thick, with documents he used to prepare Skalnik's cross examination (PC. V7/1047-48).

The lower court's factual findings on this issue are supported by the record. In addition, any possible deficiency with counsel's handling of Skalnik did not prejudicially affect Cooper's case, for the same reasons discussed on materiality in the Skalnik claims addressed in Issue I. No actual conflict of

interest has been demonstrated with regard to either of Cooper's trial attorneys. No relief is warranted on this issue.

ISSUE IV

THE PENALTY PHASE INEFFECTIVENESS CLAIM

Cooper's next issue challenges the performance of his attorneys at the penalty phase of the trial. Once again, the court below conducted an evidentiary hearing on this claim. The denial of this claim involved the application of legal principles to the facts as found below; this Court must review the factual findings for competent, substantial evidence, paying deference to the trial court's findings, and review of the legal conclusions is de novo. Stephens, 748 So. 2d at 1029; Guzman v. State, 721 So. 2d at 1159.

Cooper specifically contends that his attorneys should have investigated, developed, and presented information about his childhood to show his jury that he was raised in a deprived and abusive environment. He also alleges that his attorneys should have investigated and presented mental health mitigation. Each of these concerns will be addressed in turn, but once again, Cooper has failed to demonstrate any error in the lower court's rejection of these claims.

A. FAMILY BACKGROUND MITIGATION

Cooper initially asserts that his attorneys were ineffective

for failing to present evidence of Cooper's deprived and abusive childhood in mitigation at the penalty phase. In denying this claim, the court below found:

> In sum, trial counsel and co-counsel testified that they thoroughly investigated and interviewed witnesses, that they spoke on several occasions with Defendant and his mother, and that they obtained names and leads and pursued those leads. Each testified, and the affidavits filed by each reflect such, that although in hindsight there may have been more that could have been done, the task of finding witnesses in mitigation proved considerably difficult due to Defendant's nomadic lifestyle. See Rose v. State, 675 So. 2d 567, 571 (Fla. 1996)("[t]he failure [of counsel] to investigate and present available mitigating evidence is a relevant concern along with the reasons for not doing so.").
>
> Turning to Defendant's presentation at the evidentiary hearings, Defendant (CCRC) offered testimony from several witnesses in an effort to develop this claim. The witnesses were as follows: Ralph Palmeroy, School Administrator for Morgan School District in Utah; Donnie Cooper, Defendant's brother; Peggy Jo Kirby, Defendant's sister; and Lisa Harville, friend to Defendant (November 5, 1999 Transcript). As to Ralph Palmeroy, his testimony established that he was working at Queen Creek Elementary School in Arizona where Defendant was a student in elementary school. The gist of his testimony was impoverished (i.e., Defendant was raised in mobile home trailer in the desert). [*See Exhibit 27: September 3, 1999 Transcript: pages 80-92*]. On cross-examination, he admitted that he never called Child Protective Services because the abuse was not sufficiently severe, and that he learned of the "physical abuse" through Defendant's own words. [*See Exhibit 28: September 3, 1999 Transcript: pages 94-104*].
>
> The gist of Donnie Cooper's testimony, Defendant's brother, was that Defendant regularly suffered physical abuse by their father, that Defendant often ran away from home to escape the abuse and the dysfunctional aspects of their home life, and that he and Defendant spoke several times about committing suicide. [*See Exhibit 29: September 3, 1999 Transcript: pages 112-125*].

The gist of Peggy Jo Kirby's testimony, Defendant's sister, was that Defendant suffered physical abuse numerous times throughout his childhood by their father. [*See Exhibit 30: September 3, 1999 Transcript: pages 173-177*].

The gist of Lisa Harville's testimony, who was Defendant's friend, was that Defendant had a drug abuse problem (sniffing paint, glue, gasoline, or smoked marijuana or "was tripping on acid"), and was physically abused by his father. [*See Exhibit 32: November 5, 1999 Transcript: pages 10-17*]. She also testified that Defendant called her immediately after the Highpoint murders and confessed to the murders - she testified that Defendant, whom she says was "high" when he called, uttered the words "I shot someone." [*See Exhibit 33: November 5, 1999 Transcript: pages 23-30*].

The gist of Jeff McCoy's testimony, who was a co-defendant in the instant case and who negotiated a plea agreement whereby he is currently serving three concurrent life sentences, was that Defendant was experiencing an "aggressive high" on the night of the murders due to smoking marijuana. [*See Exhibit 34: January 14, 2000: pages 1-17*]. On cross-examination, though, the State impeached Jeff McCoy with prior inconsistent statements - that is, Jeff McCoy had previously testified in depositions and in court that no drugs were involved on the night of the Highpoint murders. [*See Exhibit 34*].

In sum, the testimony adduced at the evidentiary hearing from defense witnesses revealed that Defendant suffered physical abuse by his father, lived through an impoverished childhood, had a history of substance abuse, and may have suffered some mental illness. Much of this testimony, however, is cumulative - certainly, the testimony concerning the physical abuse and the impoverished childhood is duplicative of Juanita Kokx's [mother's] testimony. [*See Exhibit 35: Excerpt from Penalty Phase Proceedings: Juanita Kokx's Testimony: pages 41-67*]; see Hill v. Dugger, 556 So. 2d 1385, 1389 (Fla. 1990).

Again, the question presented here is whether, in light of the additional mitigation, it is "reasonably probable, given the nature of the mitigation offered, that this altered picture would have led to the imposition of a life sentence, outweighing the multiple substantial aggravators at issue in this case." Rutherford v. State, 727 So. 2d 216, 226 (Fla.

> 1998). Based on Defendant's voluntary confessions, which were detailed and very specific, based on the multiple substantial aggravating factors that were found to be present in this case, and based on the mitigating evidence that was presented/argued (young age, remorse, willingness to confess/cooperate), it cannot be said that the presentation of additional nonstatutory mitigating evidence of Defendant's childhood abuse, drug use, impoverished means, or concerning possible mental illness would have outweighed the numerous and serious aggravating factors found to be present in this case. [*See Exhibit 36; Eleven-Page Transcript of January 20, 1983 Confession to Detectives Beymer and Halliday*]. See Asay v. State, 769 So. 2d 974 (Fla. 2000)(finding that mitigating evidence presented in postconviction proceeding consisting of severe beatings, deprivation of food, sexual abuse, poverty-stricken childhood, and history of alcohol abuse and "huffing solvents" would not have outweighed the multiple substantial aggravators).

(PC. V15/2267-69) (footnote omitted).

Once again, the court's analysis is supported by the evidence presented below and relevant case law. Both Ky Koch and Ronnie Crider testified about their efforts to develop meaningful mitigation to present to Cooper's jury (PC. V7/1035-39, 1053-55, 1067-74; V9/1354-58, 1372, 1375-77). The failure to present additional witnesses in the penalty phase was attributable to the difficulty of finding anyone that would be helpful to the defense (PC. V7/1036-37, 1053-54, 1074; V9/1357-58). They contacted the names provided to them by Cooper and his mother, but were unable to find anyone that could help (PC. V7/1035-36, 1053-54; V9/1357). Their job was impeded by the fact that Cooper had lived in several different states (PC.

V7/1036; V9/1357).

The postconviction testimony offered in support of this claim was not compelling. Although there is no doubt that Cooper had a difficult childhood and suffered some emotional and physical abuse at the hands of his father, there was no evidence of serious injury or other severe consequences. The extent of the abuse varied by witness, and there were significant inconsistencies with regard to descriptions of Cooper's home life. For example, principal Palmeroy stated that he saw Cooper on a daily basis, and while he observed some red marks "once or twice" corroborating Cooper's complaints of abuse, he did not see serious bruises or any indication of the kind of abuse that might warrant official intervention (PC. V7/1084, 1098). He also said that he saw Cooper's father at school programs, but Cooper's sister, Peggy, stated that their father did not attend school programs (PC. V7/1089, 1168). Peggy also testified that Cooper had obvious, deep bruises over all of his body (PC. V7/1173).

In addition, the testimony corroborated the trial attorneys' comments about the difficulty of finding mitigation witnesses. Peggy noted that she did not like Cooper's mother, Juanita, and that she did not have contact with Cooper or his mother after he moved to Florida; she acknowledged that they probably would not have known where she was living at the time (PC. V7/1176-78).

Lisa Harville had also lost touch; getting married in 1982 and going on with her own life for a time until she met up with Donnie after Cooper was already on death row (PC. V8/1210-13).

Of course, as the court below commented, there had been testimony about Cooper's deprived and abusive background presented to his jury through the testimony of his mother, Juanita Kokx (DA. V11/1463-1489; PC. V15/2268). Ms. Kokx testified that her marriage to Cooper's father soured when Cooper was about six years old; the father, Philip Cooper, was seeing another woman, "and he became quite violent" (DA. V11/1466-67). She recalled that once he kicked the windshield of a car in her face and took her in front of the young children while she was hysterical, saying look at your mother (DA. V11/1467). They separated for about six months, then reconciled and moved to Arizona to try to start over (DA. V11/1467). She stated that, while they lived in Ohio, Philip was a truck driver and away from home much of the time (DA. V11/1468). He never did things with the children; he did not take Cooper fishing, or to the movies, or to any such activities (DA. V11/1468). They lived in a mobile home in Arizona, and later bought their own property with a double-wide (DA. V11/1468). Things went well for awhile then, after about five years, Philip became involved with another woman and the violence started all over again (DA.

V11/1468-69).

She testified that Philip was very hard on the children, including Cooper, disciplining them with a belt; that the belt left marks; and that Philip was very much an authoritarian and used profanity toward the kids (DA. V11/1469, 1471). She sustained physical injuries due to confrontations with Philip that the children witnessed (DA. V11/1469-70). One time when Cooper was about eleven or twelve, Philip hit her so hard that he crushed the side of her face and she had to have surgery to put a plate in her face (DA. V11/1470-71). Cooper did not actually see the blow but heard her screaming and later sat with her following the surgery (DA. V11/1470-71). After her surgery, she took Cooper and one of his brothers and her daughter and moved to another town for several months (DA. V11/1471-72). Cooper and his brother wanted to go back to Philip, and she was having trouble keeping Cooper in school, so she let them go live with Philip; then she and Philip got together again for about two years, and then he started becoming violent again (DA. V11/1471-72).

When Cooper was about thirteen, Philip became very angry because he had seen Cooper in town and Cooper had run away from Philip (DA. V11/1471). Philip grabbed Juanita and was choking her and beating her head on the door; Cooper kept banging on the door until Philip finally opened it and she was able to get away

(PC. V11/1471). The police were called and tried to arrest Philip, but he was abusive toward the deputy and got away (DA. V11/1472-73). Philip turned himself in the next day and spent ten days in jail (DA. V11/1473). Cooper had witnessed the attempted arrest, and felt like everything that had happened was his fault, since his father's anger stemmed from Cooper running away when he was seen in town (DA. V11/1473). After that incident, she left Philip for good and moved to Florida (DA. V11/1472).

Ms. Kokx remarried and sometime later received a phone call from Philip indicating that he was dying from cancer (DA. V11/1473-74). Cooper and some of the other children were still living with Philip at the time (DA. V11/1474). Cooper was around sixteen at the time and stayed with his father through much of his illness, but Philip went back to Ohio about a month before his death, which was in June, 1980 (DA. V11/1474). Cooper went to Ohio for the funeral and stayed a couple of weeks, then returned to Arizona to live with an older sister and some of his brothers (DA. V11/1475). He returned to Ohio in the fall of 1981 and lived with one of his brothers, then moved to Florida to live with his mother in January, 1982 (DA. V11/1475-76). Ms. Kokx testified that Cooper loved Philip but at times was afraid of him; he was very hurt over his father's death and missed his father (DA. V11/1473, 1477).

Cooper attacks the court's conclusion that the postconviction evidence was cumulative to this testimony by focusing on the State's argument that no real mitigation had been presented and the trial court's finding no mitigation in imposing sentence. However, it is clear from the record that similar evidence was presented and considered by the jury and judge, which renders the postconviction evidence largely cumulative. It is apparent from Cooper's argument that his collateral attorneys would simply present his background evidence through different witnesses; this does not mean his trial attorneys were ineffective. To the extent that his trial attorneys testified below that they should have been able to develop more mitigation, their hindsight does not give rise to a finding of deficiency. Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (noting "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result"); Stano v. State, 520 So. 2d 278, 281, n. 5 (Fla. 1988) (noting fact that current counsel, through hindsight, would now do things differently is not the test for ineffectiveness).

Case law supports the finding that Cooper's trial attorneys provided reasonably competent assistance. In Ferguson v. State, 593 So. 2d 508, 510-511 (Fla. 1992), counsel's interviewing the

defendant and family members, and reviewing psychiatric reports, then putting the mother on as the only witness, was sufficient. See also, Jones v. State, 732 So. 2d 313, 316-318 (Fla. 1999) (counsel spoke with three family members that were not interested in helping the defendant, and presented a mental health expert but did not establish the statutory mental mitigation); Francis v. Dugger, 908 F.2d 696 (11th Cir. 1990), cert. denied, 500 U.S. 910 (1991) (decision to make impassioned argument for life and not to investigate family background not deficient).

Counsel in this case both testified that they followed the leads they were given, but were unable to find any witnesses that could be helpful for the defense (PC. V7/1036-37, 1053-54, 1074; V9/1357-58). Cooper has not shown any deficiency in their investigation; they developed the family background that they could, and pursued other reasonable sources of mitigation. The Constitution recognizes that lawyers can "almost always do something more," and do not enjoy the benefit of endless time, energy or financial resources. Rogers v. Zant, 13 F.3d 384, 387 (11th Cir.), cert. denied, 513 U.S. 899 (1994), quoting Atkins v. Singletary, 965 F.2d 952, 959-960 (11th Cir. 1992).

The evidence from Cooper's postconviction hearing failed to substantiate his claim of ineffective assistance of counsel with regard to the development of family background mitigation. This

Court must affirm the lower court's findings on this issue.

B. MENTAL HEALTH MITIGATION

Cooper's claim that his attorneys were ineffective for failing to develop appropriate mental health mitigation is similarly unpersuasive. Specifically, Cooper asserts that his attorneys failed to provide the necessary background information to the defense expert, Dr. Merin; and that Dr. Merin's evaluation was inadequate because Merin relied extensively on Cooper's self-report. These claims were refuted by the evidence presented below.

The court below denied this claim as follows:

> Third, the testimony and record establishes that Dr. Merin, who again testified on behalf of Defendant during the penalty phase and at the sentencing hearing on March 14, 1984, examined Defendant for purposes of a clinical evaluation on December 7-8, 1983, which was after a battery of psychological tests (i.e., six tests) were administered to Defendant. [*See Exhibit 14: April 28, 2000 Transcript: pages 25-28*]. In terms of his diagnosis, Dr. Merin specifically testified at the hearing that his original diagnosis, which was conveyed to the judge at the sentencing hearing, remained unchanged – that is, he found that Defendant suffered from antisocial personality disorder, borderline personality disorder, substance abuse disorder, and isolated explosive disorder (no longer separate diagnosis in Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) but currently subsumed within antisocial personality disorder). [*See Exhibit 15: April 28, 2000 Transcript: pages 29-30*]. Although Dr. Merin testified that, based on information later discovered, his opinion regarding premeditation had changed somewhat, he unequivocally stated that his conclusions given during the penalty phase and the sentencing hearing regarding differentiation - that Defendant did not suffer form any substantive neurological impairment that would

interfere with his ability to discern right from wrong - were accurate and were confirmed by a review of information later discovered. [*See Exhibit 16: April 28, 2000 Transcript: pages 31-33*]. Dr. Merin then testified that although some of the Pinellas County Jail records indicated that Defendant exhibited certain self-harming thoughts, Defendant did not subscribe to suicidal ideations because Defendant believed suicide to be morally wrong. [*See Exhibit 17: April 28, 2000 Transcript: pages 33-35*]. Dr. Merin also testified that he found the allegation concerning a specific suicide attempt to be unfounded and unproven. [*See Exhibit 17*].

Dr. Merin testified that he formed his opinions and diagnosis based on his interviews with Defendant, the self-report forms, the psychological tests, and the other information he had available to him, which included Defendant's traumatic childhood history (i.e., physical abuse), substance abuse (alcohol), lack of education, and criminal history. [*See Exhibit 18: April 28, 2000 Transcript: pages 36-41*]. Dr. Merin then countered Dr. Fisher's testimony - Dr. Brad Fisher was CCRC's forensic psychological expert hired for purposes of postconviction relief - by stating that he did not believe Defendant suffered from either dependent personality disorder or organic brain damage, and by admitting the he and Dr. Fisher disagree as to the suitableness of long-term rehabilitation for Defendant. [*See Exhibit 19: April 28, 2000 Transcript: pages 42-47*]. Dr. Merin concluded his testimony by testifying that none of the new information he had received would have changed his original opinion and diagnosis. [*See Exhibit 20: April 28, 2000 Transcript: pages 47-51*].

The claims raised at present bear remarkable similarity to those raised in Johnson v. State, 769 So. 2d 990 (Fla. 2000). . . .

The Court finds the same to be true here. Defendant has failed to show that Dr. Merin was negligent in his professional capacity, or that his psychological testing and assessment was lacking or fell below comparable testing performed by other mental health professionals at the time. Additionally, the State was correct in its closing argument when it observed that Dr. Fisher abandoned much of his report at the evidentiary hearing - if not directly, he did so by his failure to reiterate or inform the Court of his findings and how they proved

inconsistent with Dr. Merin's findings.

(PC. V15/2261-62).

Cooper's allegations are clearly insufficient to warrant any relief. Cooper does not identify any particular information which was not known to Dr. Merin; only new corroborating sources for what Merin already knew. He does not attempt to explain how any such information could have made a difference. He offers no specific facts to support his conclusion that Dr. Merin was not prepared and did not provide adequate assistance. See Occhicone v. State, 768 So. 2d 1037, 1050, n. 10 (Fla. 2000) (claim that counsel were ineffective for failing to provide mental health experts with background information without merit because Occhicone did not allege what information counsel failed to provide).

As noted previously, Dr. Merin testified before the judge about Cooper's childhood and background; Cooper has not identified any errors or omissions in the background testimony given by Merin at trial. Furthermore, he has not alleged how the provision of any additional background information would have affected Merin's opinions at the time of trial. In fact, Merin testified at the hearing that his opinion had not changed except that he now believed that Cooper had premeditated the murder. Cooper's new expert did not offer additional, favorable mental health testimony, but even if he did, this is not a basis

for relief. Engle v. Dugger, 576 So. 2d 696, 700-01 (Fla. 1991) ("This is not a case ... in which a history of mental retardation and psychiatric hospitalizations had been overlooked"); Correll v. State, 558 So. 2d 422, 426 (Fla. 1990); Hill v. Dugger, 556 So. 2d 1385, 1388 (Fla. 1990), cert. denied, 116 S. Ct. 196 (1995); Stano v. State, 520 So. 2d 278, 281 (Fla. 1988) ("That Stano has now found experts whose opinions may be more favorable to him is of little consequence").

Cooper's trial attorneys both explained their strategy reasons behind using Dr. Merin as a witness before the judge at a sentencing hearing but not before a jury (PC. V7/1049-50, 1061-62; V9/1365-69). They used him at a time calculated to give his testimony the maximum effect. Cooper's postconviction expert substantially confirmed the reliability of Merin's trial testimony (PC. V8/1232, 12391275-77).

Once again, no basis for finding a deficient performance has been offered. Trial counsel's retention and use of Dr. Merin was well within the bounds of reasonable assistance. No relief is warranted on this issue.

C. PREJUDICE

Cooper has also failed to demonstrate that any possible deficiency with regard to the mitigation presented by his trial attorneys could meet the standard for prejudice in this case. Cooper killed three victims in a ruthless home invasion to

secure drugs and money. This Court upheld five aggravating factors, and upheld the trial court's rejection of proposed mitigation. The evidence presented at the hearing below as "additional" mitigation was not substantial or compelling. Reliability in the correctness of the death sentences has not been undermined.

A review of comparable cases supports the court's conclusion below that there is no reasonable probability of a different result had Cooper's penalty phase included the evidentiary hearing testimony. For example, in Rutherford v. State, 727 So. 2d 216 (Fla. 1998), the jury had recommended death by a vote of seven to five; the judge had found three aggravating factors (during a robbery/pecuniary gain; HAC; and CCP) and the statutory mitigator of no significant criminal history. The judge had not found any nonstatutory mitigation, despite trial testimony of Rutherford's positive character traits and military service in Vietnam. Testimony was presented at the postconviction evidentiary hearing that Rutherford suffered from an extreme emotional disturbance and had a harsh childhood, with an abusive, alcoholic father. Yet this Court unanimously concluded that the additional mitigation evidence presented at the postconviction hearing would not have led to the imposition of a life sentence due to the presence of the three substantial aggravating circumstances. 727 So. 2d at 226. See also

Breedlove v. State, 692 So. 2d 874, 878 (Fla. 1997) (three aggravating factors of during a burglary, HAC, and prior violent felony overwhelmed the mitigation testimony of family and friends offered at the postconviction hearing); Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997) (no reasonable probability of different outcome had mental health expert testified, in light of strong aggravating factors); Tompkins v. Dugger, 549 So. 2d 1370, 1373 (Fla. 1989) (postconviction evidence of abused childhood and drug addiction would not have changed outcome in light of three aggravating factors of HAC, during a felony, and prior violent convictions).

In Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990), trial counsel had failed to present mitigating evidence that Buenoano had an impoverished childhood and was psychologically dysfunctional. Buenoano's mother had died when Buenoano was young, she had frequently been moved between foster homes and orphanages where there were reports of sexual abuse, and there was available evidence of psychological problems. Without determining whether Buenoano's counsel had been deficient, the court held that there could be no prejudice in the failure to present this evidence in light of the aggravated nature of the crime. The mitigation suggested in the instant case is much less compelling than that described in Buenoano, and this case is also highly aggravated. See also Mendyk v. State, 592 So. 2d

1076, 1080 (Fla. 1992) (asserted failure to investigate and present evidence of mental deficiencies, intoxication at time of offense, history of substance abuse, deprived childhood, and lack of significant prior criminal activity "simply does not constitute the quantum capable of persuading us that it would have made a difference in this case," given three strong aggravators, and did not even warrant a postconviction evidentiary hearing); Routly v. State, 590 So. 2d 397, 401-402 (Fla. 1991) (additional evidence as to defendant's difficult childhood and significant educational/behavioral problems did not provide reasonable probability of life sentence if evidence had been presented); LeCroy v. State, 727 So. 2d 236, 240 (Fla. 1998) (no deficiency or prejudice where counsel presented penalty phase witnesses describing defendant as a good boy from a good home, despite postconviction allegations of childhood abuse and neglect).

As noted in the cases above, in order to establish prejudice to demonstrate a Sixth Amendment violation in a penalty phase proceeding, a defendant must show that, but for the alleged errors, the sentencer would have weighed the aggravating and mitigating factors and found that the circumstances did not warrant the death penalty. Strickland, 466 U.S. at 694. The aggravating factors found in this case were: heinous, atrocious or cruel; cold, calculated, and premeditated; murder committed

to avoid arrest; murder committed for pecuniary gain; and prior violent felony convictions. Cooper has not and cannot meet the standard required to prove that his attorney was ineffective when the facts to support these aggravating factors are compared to the mitigation now argued by collateral counsel.

Thus, the investigation and presentation of mitigating evidence in this case was well within the realm of constitutionally adequate assistance of counsel. Trial counsel conducted a reasonable investigation, presented appropriate penalty phase evidence, and forcefully argued for the jury to recommend sparing Cooper's life. There has been no deficient performance or prejudice established in the way Cooper was represented in the penalty phase of his trial. On these facts, the appellant has failed to demonstrate any error in the denial of his claim that his attorneys were ineffective in the investigation and presentation of mitigating evidence or in any other aspect of the penalty phase litigation. No relief is warranted.

ISSUE V

CLAIMS SUMMARILY DENIED

Cooper's last claim asserts error in the summary denial of other issues. This Court must affirm where the trial court properly applied the law and competent substantial evidence

supports its findings. Diaz, 719 So. 2d at 868.

It must be noted at the outset that, although Cooper's brief offers a conclusory allegation that the court below erred in denying an evidentiary hearing on claims 3, 5b, 5c, 5d, 5f, 5g, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19, the argument in his brief only offers specific claims of error with regard to the denial of claims 3, 5, 7, 10, 18, and 19 (see Initial Brief of Appellant, pp. 92-100). The other claims are simply listed and discussed cumulatively as needing an evidentiary hearing because they related to the lack of an individualized sentencing (Claims 11, 12, 13, and 15), and the constitutionality of the sentencing scheme (Claims 8, 9, 14, 16, and 17). The failure to assert any argument with regard to these claims compels a conclusion that any possible error has been waived. Sweet v. State, 810 So. 2d 854 (Fla. 2002) ("because on appeal Sweet simply recites these claims from his postconviction motion in a sentence or two, without elaboration or explanation, we conclude that these instances of alleged ineffectiveness are not preserved for appellate review"); Peede v. State, 748 So. 2d 253, 256 n.5 (Fla. 1999); Shere v. State, 742 So. 2d 215, 217 n. 6 (Fla. 1999); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation

does not suffice to preserve issues, and these claims are deemed to have been waived.”). Furthermore, even if the rulings on these claims are considered, it is clear that they are all claims which could have been raised on direct appeal, and therefore summary denial due to the procedural bar was appropriate.[10]

A. CLAIM 3 - borderline mental retardation/competency

Cooper first identifies Claim III, which was summarily denied as time barred, as an issue which should have been developed at an evidentiary hearing. Claim III of the amended postconviction motion alleged that Cooper was incompetent to stand trial and that his defense attorney was ineffective for failing to secure a competency evaluation. According to the allegations, Cooper had been classified as a youthful offender months before his trial and was so depressed that he was mutilating himself and had to be medicated with Mellaril (PC. V1/156-157). Cooper asserted that counsel had a number of indications that something was seriously wrong, and if a competency hearing had been conducted, Cooper would have been found incompetent (PC. V1/157-158). Cooper cited from an affidavit prepared by his postconviction mental health expert, Dr. Brad Fisher, which concluded that Cooper’s longstanding

[10]These claims are also asserted in Cooper’s Petition for Writ of Habeas Corpus, Florida Supreme Court Case No. SC02-623, and the State hereby incorporates its response in that case to these claims as well.

intellectual and personality deficits would likely render him unable to understand the proceedings and that his behavior demonstrated that he was not functioning rationally (PC. V1/159).

The court below denied this claim as untimely (PC. V5/811). This ruling was proper because the issue, presented for the first time in an amended postconviction motion, was not presented within the two year time limit for filing postconviction motions. Cooper's convictions and sentences became final on February 23, 1987; his amended postconviction motion was filed on May 18, 1989. No attempt to explain the untimeliness of the claim, or to invoke the exceptions to the two year time limit, have ever been offered. Thus, this claim was barred. Pope v. State, 702 So. 2d 221 (Fla. 1997); Cave v. State, 529 So. 2d 293 (Fla. 1982); Eutzy v. State, 541 So. 2d 1143 (Fla. 1989); McConn v. State, 708 So. 2d 308, 310 (Fla. 2d DCA 1998) (en banc).

Cooper offers no authority to support his assertion that he should have been permitted to raise this claim, he just relies on the fact that his initial motion included a specific request for leave to amend should the continuing postconviction investigation lead to the development of any additional claims. A defendant cannot avoid the application of procedural rules by simply including a blanket statement seeking to amend a pleading

at any time. McConn, 708 So. 2d at 310 (motion for leave to amend "in the best interest of justice" insufficient). This is not a case where the amended motion was filed while Cooper was still within the time frame for filing his motion, as in Gaskin v. State, 737 So. 2d 509, 517-18 (Fla. 1999); nor it is a case where the new claim in the amended motion could be characterized as a refinement or enlargement of a timely filed claim, see Brown v. State, 596 So. 2d 1026 (Fla. 1992). Thus, the new Claim III raised in Cooper's amended motion was properly denied.

In addition, a substantive claim of incompetency is a direct appeal issue and therefore procedurally barred in postconviction proceedings. Patton v. State, 784 So. 2d 380, 393 (Fla. 2000); Johnston v. Dugger, 583 So. 2d 657, 659 (Fla. 1991). To the extent that Cooper alleges his attorney was ineffective for failing to secure a competency evaluation, his argument is refuted by the record since the defense retained a mental health expert prior to trial, and the expert had concluded that Cooper was competent to stand trial and had been competent at the time of the offense (PC. V7/1061; SV14/2449).

At any rate, any possible error in failing to grant an evidentiary hearing on this untimely claim would be harmless since the claim itself was substantially incorporated into Claim IV, alleging ineffective mental health assistance (PC. V2/160-66). Of course, Claim IV was an issue on which the trial court

permitted an evidentiary hearing, and a review of the testimony from the hearing demonstrates that evidence pertaining to Claim III was also presented and considered. For example, Ky Koch testified that the defense retained Dr. Merin to explore all aspects of the case, including competency (PC. V7/1061). He noted that, while there were times that Cooper did not fully comprehend his situation, by the time of trial Koch felt that Cooper understood what he was facing (PC. V7/1058-59). Ralph Palmeroy, the school principal, testified that Cooper had been academically average, or maybe a little below average, getting mostly Cs with some Bs and Ds thrown in (PC. V7/1087). Palmeroy did not believe that Cooper was borderline retarded, but thought that he had been deprived of experiences that made it difficult to learn (PC. V7/1099).

The expert quoted in the amended motion on this claim, Dr. Brad Fisher, testified at the evidentiary hearing but was never asked about any concerns related to Cooper's alleged incompetence (PC. 8/1217-1305). Fisher testified that Cooper had no major disorder and was not psychotic; although his IQ testing was consistent with Dr. Merin's, demonstrating Cooper's IQ was in the mid-70s and technically borderline, Fisher did not consider this significant and noted that Cooper was "street-wise" (PC. V8/1232-33, 1277). Dr. Merin disagreed with Fisher's suggestion that Cooper could be even borderline retarded,

although he agreed with the IQ score, because Merin believed that Cooper's vocabulary and syntax demonstrated a street-wise intelligence even if Cooper's academic intelligence was not at a high level (PC. V11/1663-64). Merin also noted that his review of Fisher's report and the jail records did not reference any suicide attempts; although some self-destructive thinking was evident, Cooper had denied being suicidal and told Merin that he would not harm himself because Cooper thought it was morally wrong to do so (PC. V11/1660-61).

The denial of this claim by Judge Walker in 1992 was never challenged in the years of postconviction litigation that followed, despite the fact that a new judge and new defense attorneys took over the case. No abuse of discretion has been shown by the denial of Cooper's attempt to present this claim in his amended petition. Huff v. State, 762 So. 2d 476, 481 (Fla. 2000). Given the evidence in the record and the testimony from the evidentiary hearing rebutting this claim, any possible error in summarily denying the claim as time barred when initially presented is clearly harmless. No basis for a remand for further consideration of this issue has been shown, and this Court must deny relief.

B. CLAIM 5 - ineffective assistance of counsel

Cooper next asserts that several allegations of ineffective assistance of counsel were improperly summarily denied. The

relevant allegations asserted counsel was deficient by 1) failing to object to violations of Caldwell v. Mississippi, 472 U.S. 320 (1985); 2) failing to object to victim impact evidence; 3) failing to object to a jury instruction on the penalty phase vote; and that counsel was rendered ineffective by the trial court's actions in 4) denial of a continuance for penalty phase; and 5) an undetected conflict of interest based on attorney Crider's prior employment at the State Attorney's Office.[11] Cooper does not address his claims specifically but simply asserts that because they involved allegations of ineffective assistance of counsel, they were appropriate for consideration in postconviction and should have been subject to an evidentiary hearing.

The law is well established that Cooper cannot avoid a procedural bar on direct appeal issues by presenting them under the guise of ineffective assistance of counsel. It is facially apparent that the claims recited in this subissue are improper attempts to recast a direct appeal issue into a claim of ineffective assistance of counsel, and therefore summary denial was appropriate. Asay v. State, 769 So. 2d 974 (Fla. 2000); Robinson v. State, 707 So. 2d 688, 699 (Fla. 1998). In addition, the court below considered the claims and determined

[11]The summary denial of the claim regarding Crider's alleged conflict with the State Attorney's Office was addressed in Issue III.A.

that no deficiency had been indicated as the objections which Cooper claims should have been lodged would not have been sustained (PC. V5/811-13). Thus, even if considered, these claims would have been rejected. No error has been demonstrated.

C. CLAIM 7 - court's failure to weigh sentencing factors

Claim VII of the amended petition asserted that Cooper was denied a reliable, individualized sentencing determination, as the requirement for a written sentencing order was violated because 1) specific written findings were not made as to each sentence, and 2) at the time the sentences were imposed, no specific findings were made and the court's oral comments were conclusory (PC. V2/236). Cooper asserts that summary denial of this issue was improper because the issue, as pled, included an allegation that the State had prepared the sentencing order, and that this claim could not have been raised on direct appeal. A review of the amended postconviction motion refutes this assertion. In fact, the claim asserted only that the trial court failed to properly weigh the aggravating and mitigating factors, clearly a direct appeal issue (PC. V2/235-239). The statement within Claim VII asserting that, "Finally, the identity of the sentencing order suggests that they may have been prepared by the Office of the State Attorney," was qualified by footnote 3, which stated that the State had not

fully complied with public records requests, and once it did so, "evidence of the involvement of the Office of the State Attorney in the preparation of the sentencing order may become apparent" (PC. V2/239).

An allegation that future record disclosures may indicate a possible postconviction claim is insufficient. See Maharaj v. State, 778 So. 2d 944 (Fla. 2000) (postconviction hearing not warranted on speculation). Cooper has never identified any facts which suggest that the State Attorney's Office had any involvement in the drafting of the sentencing order filed in this case. Absent specific factual allegations to support this claim, no evidentiary hearing was warranted, and this issue was properly summarily denied.

D. CLAIM 10 - right to jury sentencing

Cooper also asserts that his claim that Florida's capital sentencing statute unconstitutionally deprived him of his right to jury sentencing should have been considered because the United States Supreme Court is currently reconsidering the validity of Arizona's (judge-sentencing) death penalty statute. The fact that the United States Supreme Court is reviewing a claim similar in nature (on direct certiorari review) does not excuse Cooper from failing to raise the issue at the appropriate time. Regardless of the outcome of the decision in Ring v. Arizona, United States Supreme Court Case No. 01-488 (argued

April 22, 2002), any claim challenging the application of Florida's sentencing statute must have been presented to the trial court and on direct appeal. The assertion that Florida's capital sentencing statute violates the constitutional right to a jury trial was often alleged around the time of Cooper's trial and direct appeal. There are no new facts or law which legitimize this claim and therefore it is barred.

E. CLAIM 18 - sentencing statute unconstitutional as applied

Cooper also asserts that Claim 18, challenging the constitutionality of the death penalty as applied in this case, should not have been rejected as procedurally barred because it was not a per se challenge to the constitutionality of his sentence. He cites Jones v. Butterworth, 691 So. 2d 481 (Fla. 1997), as an example of a case where a postconviction claim that the death penalty was unconstitutional as applied was subject to an evidentiary hearing. Jones involved the constitutionality of Florida's electric chair as it functioned at that time; there were new facts, unavailable at the time of Jones's direct appeal, which pertained to the issue raised. Cooper's claim that the death penalty should not be applied due to his intellectual and neurological impairments did not rely on any facts which were not known or discoverable at the time of Cooper's trial. Thus, his claim was procedurally barred,

falling into the category of claims which must be presented prior to trial and on direct appeal. See Trushin v. State, 425 So. 2d 1126 (Fla. 1982) (challenge to constitutionality of statute as applied must be raised at trial and on appeal). Therefore, no error is shown in the summary denial of this issue.

F. CLAIM 19 - newly discovered evidence

Cooper's final allegation in this issue asserts that the court should have permitted an evidentiary hearing on his claim that newly discovered evidence established that Cooper did not fire the last and fatal shot which killed Steven Fridella. Claim XIX was initially presented in an amended petition filed on August 26, 1998 (PC. SV6/1077-1081). The "newly discovered evidence" identified in the motion were two affidavits from Cooper's codefendants, Jeff McCoy [3/23/95] (PC. SV7/1297-99), and Terry Royal (PC. SV7/1301-1304), both of which had been notarized on March 23, 1995. McCoy's affidavit asserted that he heard more shots after Cooper was already running toward the car, and after the last series of shots that Terry Royal, then Jason Walton, came outside and got in the car (PC. SV7/1298). Royal's affidavit stated that he had been the one to return to the house and fire the final two shots, killing Fridella (PC. SV7/1303).

The trial court's denial of Cooper's request to amend his

postconviction motion that had already been pending for eight years is reviewed for an abuse of discretion. Huff v. State, 762 So. 2d 476, 481 (Fla. 2000). Cooper has never explained why this claim, supported only by affidavits available since March, 1995, was not presented to the court until August, 1998. The claim is clearly untimely, and no abuse of discretion is demonstrated in the denial of this amendment.

In addition, there is no reasonable claim that this information could not have been obtained with due diligence. Cooper's codefendants were obviously known to everyone. While Jeff McCoy was not available at the time of Cooper's trial, the possibility of his future availability was discussed on the record. According to Cooper, McCoy's testimony was available from Terry Royal's later capital trial (Appellant's Initial Brief, p. 45).

Although this claim was denied as untimely, both McCoy and Royal testified at the evidentiary hearing below with regard to the allegations presented in this subissue. McCoy attested to the truth of his affidavit; he also confirmed the truth of all of his prior testimony, including that given in the Walton and Royal trials (PC. V9/1429-32, 1444). He also stated that he heard all of the shots fired at the same time (PC. V9/1442). He was impeached by prior inconsistent statements he had made in previous testimony about the murders, and acknowledged that his

memory would have been better at the time the prior testimony was given, as this testimony was based on everything he had been trying to forget (PC. V9/1433-44). He also testified that everyone was acting independently, not following orders, and that Walton was not the type to give orders (PC. V9/1445).

Royal testified but indicated his desire to only discuss questions related to Walton's dominance over the codefendants (PC. V9/1449). When the court directed him to answer other questions, he refused to adopt his affidavit and indicated that he had initially signed it, but then asked to have it withdrawn after further consideration (PC. V9/1452, 1455-56). He stated that most of the affidavit had been fabricated to make him and Cooper look good, and that at the time he signed the affidavit, he believed that if he lied he might be able to help get Cooper, and maybe even Walton, off (PC. V9/1459). He specifically denied that he had shot anyone that night (PC. V9/1453, 1457). He saw Cooper shoot one victim and he thought that Walton had been the one to shoot the other two victims (PC. V9/1457-58). He claimed that he had written a letter to CCRC several years earlier, telling them that the affidavit was not true (PC. V9/1460).

Other testimony at the evidentiary hearing included testimony by former CCR attorneys Ken Driggs and Elizabeth Wells (PC. V12/1769-1817). Driggs and Wells had interviewed Terry Van

Royal in December, 1990, while they were representing J.D. Walton and investigating Walton's postconviction claims (PC. V12/1770, 1801-02). Royal told them at that time that Walton did not shoot anyone and did not command anyone else to shoot; that the murders were all initiated by Cooper, who started yelling and shooting as Cooper, Walton, and Royal were getting ready to leave the house (PC. V12/1773-74, 1802-04). Both Driggs and Wells acknowledged that Royal has, over the years, made a number of different statements about the murders that cannot be reconciled (PC. V12/1800, 1813). They decided not to use him as a witness for Walton (PC. V12/1813).

Therefore, despite the summary denial, the record reflects that Cooper had the opportunity to develop the evidentiary basis to support his Claim XIX, but that the evidence as presented failed to substantiate his claim. On these facts, no error has been demonstrated and the rejection of this claim below must be upheld.

CONCLUSION

The law is well established that these claims were all properly summarily denied. Case law amply supports the summary rejection of these claims, and this Court must affirm the denial of relief entered below.

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's denial of postconviction relief must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Mark S. Gruber, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida, 33619; Robin L. Rosenberg, Esq. and Rachel E. Fugate, Esq., HOLLAND & KNIGHT LLP, Post Office Drawer 810, Tallahassee, Florida 32302-0810, this _____ day of January, 2001.

CERTIFICATE OF TYPE SIZE AND STYLE

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

COUNSEL FOR APPELLEE