IN THE SUPREME COURT OF FLORIDA

RICHARD HAROLD ANDERSON,

Appellant,

vs. **CASE NO. SC01-24**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS[1]

A. The Trial:

This Court affirmed Anderson's judgment and sentence on direct appeal. Anderson v. State, 574 So. 2d 87 (Fla. 1991). The facts can be summarized from that decision.

> Anderson's conviction rested primarily upon the trial testimony of his girlfriend, Connie Beasley. Beasley testified at trial that in 1987 Grantham had offered her $30,000 in exchange for her sexual favors. She rejected Grantham's offer but told Anderson of the proposal. Beasley testified that Anderson believed Grantham was rich and would return from a gambling trip to Las Vegas with a lot of money. Anderson told her to agree to spend one night with Grantham for $10,000. Anderson and Beasley prearranged for her to get Grantham drunk, after which Anderson would rob him. Beasley agreed to implement the plan by meeting Grantham on May 7, 1987, when he returned from Las Vegas. Following drinks and dinner, Beasley lured Grantham to Anderson's apartment. Anderson arrived later, ostensibly to return Beasley's car and to request a ride. Grantham agreed to drive Anderson, and Anderson insisted that Beasley join them. While in the car, Anderson shot Grantham four times and left Grantham's body in a wooded area. He then drove to the Tampa Airport, abandoned the car, and returned with Beasley to the apartment. He cut open Grantham's satchel and found $2,600.
>
> The state also presented the testimony of two of Anderson's business acquaintances. David Barile testified that Anderson had

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[1] Appellee will refer to the record on appeal in the direct appeal by the designation "DAR" and will refer to the instant record on the appeal from the order denying post-conviction relief by the designation "R".

> told him the day after the murder that he had shot a man four times and dumped his body in the woods. Larry Moyer testified that Anderson had said on June 2, 1987, that he and his girlfriend "wasted a guy that was supposed to have a million dollars, and he only had $3,000." A firearms expert testified that four discharged .22-caliber cartridge casings found in Grantham's car had been fired from a pistol recovered from the Hillsborough River. Florida Department of Law Enforcement ("FDLE") agents recovered the pistol near the bridge where, according to Beasley, Anderson had thrown it. (Id. at 89-90)

The Court then addressed appellant's claim that the indictment should have been dismissed because it was based upon her perjured testimony before the grand jury.

> During her trial testimony, Beasley admitted that her grand jury testimony differed from her trial testimony. When she appeared before the grand jury on July 15, 1987, she minimized her role in the killing and said that Grantham had been killed outside of her residence. She told the grand jury that Anderson and Grantham went for a ride while she remained in Anderson's apartment. When Anderson returned alone, he had blood all over the front of his shirt and on his hands, and his eyes were wild. She charged that Anderson admitted killing Grantham and threatened to kill her unless she helped to take Grantham's car to Tampa Airport.
>
> After testifying before the grand jury, Beasley told a different story to FDLE agents. She told the agents on July 16 that Anderson walked into the apartment while Grantham was trying to rape her. Anderson pulled Grantham away, told her to get dressed, and forced Grantham into the car at gunpoint. Beasley also stated that she told agents that she saw Anderson shoot Grantham

four times.

> On July 24, Beasley negotiated a plea to third degree murder with a maximum sentence of three years. Beasley told the prosecutor that she was present when Anderson shot and killed Grantham in accordance with a prearranged plan. She told the same story at trial. Anderson argues that because the state knew prior to trial that Beasley's grand jury testimony was perjured and did nothing to correct the testimony, the indictment should have been dismissed. (Id. at 90)

After reviewing the pertinent case law, this Court concluded:

> However, this principle is unavailing in Anderson's case because Beasley's grand jury testimony, although false in part, was not false in any material respect that would have affected the indictment. In every statement Beasley made, she consistently accused Anderson of the murder. Before the grand jury, she accused Anderson, but claimed he was alone when he murdered Grantham. At trial, she again accused Anderson, but switched her role in the murder from non-participant to unwilling, after-the-fact accomplice. Although Beasley's role changed, Anderson's did not. Here, we are not faced with subsequent testimony that can be said to remove the underpinnings of the indictment. On the contrary, Beasley's later testimony would have strengthened the probability of an indictment because she was an eyewitness to the murder. Thus, Beasley's perjurious grand jury testimony could have had no factual bearing on the grand jury's decision to indict Anderson for the murder. *Cf. Giglio*, 405 U.S. at 154, 92 S.Ct. at 766 ("'the false testimony could [not]...in any reasonable likelihood have affected the judgment of the [petit] jury,'")(quoting *Napue*, 360 U.S. at 271, 79 S.Ct. at 1178)).

> Nor are we faced with any deliberate subornation. This is not a case where the state knowingly presented false testimony to the grand jury. For these reasons, we reject Anderson's first claim. (Id. at 92)

As this Court well knows, Connie Beasley testified at some length before the jury and admitted that she had lied originally to law enforcement authorities, that she had in fact lied to the grand jury, and that she gave untrue statements on July 16 after the grand jury appearance but insisted that her trial testimony was truthful. Beasley testified at trial she had lied to FDLE agents because she was scared and didn't want to admit her involvement (DAR 540-541). She was interviewed several times the night of her arrest and she lied again. She stated that she had testified before the Grand Jury and those statements were not consistent with the statements she was now making in Court. She did not tell the Grand Jury the complete truth because she was scared and did not want to admit her involvement (DAR 542-44). She admitted having lied to FDLE agents (DAR 569-70). She lied to FDLE the first couple of times to protect herself and she was scared. She made up lies to cover herself and acknowledged that she was involved but lied (DAR 579-582). She repeated that she lied to the Grand Jury (DAR 587-93). Beasley further acknowledged that she met with FDLE agents the day following her Grand Jury testimony, on July 16 and lied to them (DAR 597-609).

B. The Evidentiary Hearing:

After appellant insisted below that an evidentiary hearing was needed to establish the claim that the prosecutors knowingly presented perjured testimony, the lower court granted a hearing and reminded the parties that that was the issue to be considered (R4, 25 - R4, 164). At the evidentiary hearing, no witness testified that the prosecutor knowingly used perjured testimony before the grand jury. Prosecutor John Skye who tried the case did not handle the grand jury proceedings because of a scheduled vacation. He prepared some notes and asked Mr. Atkinson to handle the grand jury proceeding (R4, 8-9). He went on vacation and was not present at the grand jury (R4, 15). Before trial, defense counsel Fuente deposed Beasley and she admitted in the deposition that she had not told the grand jury the same thing. Judge Graybill later provided a copy of her grand jury testimony to both Skye and Fuente and denied the defense motion to dismiss the indictment (R4, 15-19). Skye did not knowingly encourage or allow Atkinson to present perjured testimony to the grand jury and he did not know that what Beasley was going to tell the grand jury was not going to be her final story (R4, 20). The grand jury testimony would not have been available until Judge Graybill ordered it (R4, 34).

Former prosecutor Skye testified that prior to going on vacation he prepared hand written notes to assist Mr. Atkinson

who was going to cover for him at the Grand Jury proceeding. He identified at the hearing state Exhibit 1, the first eight pages of which he wrote on July 10, 1987, (R4, 8-9) and these summarize Beasley's taped interviews to FDLE agents. Skye identified the last four pages of the exhibit as largely notes he took of his interview with Beasley on July 22 or 27 (R4, 38-39).

On January 16, 2001, the trial court entered an order correcting and supplementing the Post-conviction Record (R3, 560-564) explaining that although the exhibit was used and considered by the Court as part of Skye's testimony and the state hand submitted Exhibit 1 to the Clerk, there was no formal introduction of it. This Court in its order of October 4, 2001, has ordered the exhibit to be supplemented and made part of the record and appellant has concurred. See Supp. Record PP. 3-14

Judge Simms' order recites that apparent extraneous notes in the margin were not written or placed in the margin by Mr. Skye but to the contrary appear to be file notes of James Walsh, predecessor post-conviction counsel for Anderson (R3, 562-563).

Former prosecutor Lee Atkinson testified that John Skye asked to assist in presenting the case to the Grand Jury because he was unavailable. Atkinson did not knowingly put on perjured testimony to the grand jury (R4, 40-44). He added that at no time in his career did he intentionally, knowingly or

inadvertently put on perjured testimony to a Grand Jury or trial court (R49). Special agent Manuel Pondakos of FDLE didn't remember meeting with prosecutors for the Grand Jury. There was no consensus Beasley would lie to the Grand Jury and he had no reason to fear she would do so (R4, 73-74). It is not unusual when questioning a witness during an investigation for the witness to be reluctant to be forthcoming (R4, 75).

Leroy Parker, senior crime lab analyst with FDLE Orlando Regional Crime Lab, was not informed by anyone that Beasley gave perjured Grand Jury testimony (R5, 111). Ray Velboom, lead FDLE agent in the Anderson investigation, described his interviews with Beasley on June 4 and July 1 (R5, 126-142). Prosecutor Atkinson did not tell him what Connie Beasley testified to at the Grand Jury, on July 15, 1987 and he is not aware of Atkinson telling any FDLE agent of her testimony; nor did Velboom ask Atkinson or Skye what her Grand Jury testimony was (R5, 170-171). Velboom did not hear her trial testimony (R5, 171).

FDLE Agent Davenport was present when Beasley was interviewed by FDLE agents on July 16, 1987 (R5, 188-89). He was not aware of her Grand Jury testimony (R189). He was not present during her taped interviews on July 1, (R191). Davenport indicated that Beasley minimized her involvement and her explanation of appellant's motive changed, first describing an attempted rape by Grantham and then that the killing was for

money (R192-193). Davenport reiterated that he was not aware of what Beasley's Grand Jury testimony was; he has not seen a transcript of her Grand Jury testimony (R197-198). He was not concerned about her truthfulness about Anderson's involvement in the murder. Prior to the Grand Jury testimony, he did not feel she was going to commit perjury and he did not hear anyone suggest she was going to commit perjury (R199).

The trial court entered its order denying relief on August 25, 2000 (R3, 533-538). The Court incorporated its prior order denying relief on claims for which there was no evidentiary hearing it had entered on May 7, 1999 (R3, 498-502). In the Final Order, the trial court found:

> (1) that Connie Beasley Hunt did lie to the Grand Jury on July 15;
> (2) that the State Attorney directly and through the imputed knowledge of the FDLE had surmised that Beasley Hunt had not been totally truthful and her story had evolved from the first interview. That at the time the witness testified before the Grand Jury her testimony as far as the Defendant's involvement was consistent. She was trying to minimize her involvement but her basic testimony concerning the actions of the Defendant were true.
> (3) that the State Attorney in good faith believed the witness was going to testify truthfully and in good faith presented her testimony to the Grand Jury;
> (4) that the subsequent determination after the indictment was returned that the witness had lied in some particulars to the Grand Jury is not a factor. This decision is based on the situation as it was known to the State Attorney's Office at the actual time of the Grand Jury proceeding;

(5) that at least one day after the Grand Jury testimony the FDLE agents knew that Connie Beasley Hunt had committed perjury before the Grand Jury and that said knowledge is then chargeable to the State Attorney's Office;[2]

(6) that all subsequent statements of Beasley Hunt did not lessen the role of the Defendant or reduce the role of the Defendant in the murder and mainly went to the degree of her actions in the case;

(7) the better practice would have been to return to the Grand Jury and get a new indictment;

(8) that had the State Attorney gone back in front of the Grand Jury they would again have received a first degree murder indictment against Defendant Anderson;

(9) there is absolutely no evidence or basis to believe the end result of an indictment and a conviction for first degree murder would have been different. (R3, 536-537)

Anderson now appeals.

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[2] As will be argued in the brief Appellee respectfully submits that a finding that FDLE agents knew Beasley had committed perjury is totally and completely contrary to the testimony of all witnesses who testified on the subject at the evidentiary hearing, is totally unsupported by the record and cannot be sustained factually or legally. That finding should be overturned by this Court.

SUMMARY OF THE ARGUMENT

ISSUE I: The trial court correctly denied relief on the claim of prosecutorial misconduct and the alleged knowing use of perjured testimony at the Grand Jury by witness Beasley. The lower court's finding that FDLE agents knew of the perjury is completely and totally unsupported by the record - every witness who testified on the point specifically testified to the contrary. No one knew beforehand that Beasley would commit perjury at the Grand Jury. The trial court correctly denied relief - as this Court did on direct appeal - since her false statements would not have made a difference. Premeditation is shown in her trial testimony and that of witnesses Barile and Moyer. Remaining misconduct claims must be rejected; the appellant did not urge their consideration at the Huff hearing and in any event were claims that could have been raised on direct appeal.

ISSUE II: Trial counsel was not ineffective at penalty phase for the failure to recite the mitigating evidence he was prepared to offer. Anderson had refused to permit the presentation of mitigating evidence. See Waterhouse v. State, __So. 2d__, 26 Fla. L. Weekly S375 (Fla. 2001). The

remaining claims of ineffective assistance are meritless and no evidentiary hearing was required.

ISSUE III: The cumulative error claim must be rejected since there are no individual errors and appellant has failed to meaningfully brief the claim.

ISSUE IV: The lower court correctly denied appellant's corpus delicti claim as this Court previously determined the evidence was sufficient to convict of first degree murder. If appellant is presenting a different claim, relief should be denied for the failure to have asserted it on direct appeal.

ISSUE V: The lower court correctly denied relief in claims relating to penalty phase jury instructions. Such claims must be raised on direct appeal and are not cognizable on post-conviction motions.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT RELIEF SHOULD BE DENIED ON THE CLAIM OF PROSECUTORIAL MISCONDUCT.

The standard of review when reviewing a trial court's ruling following an evidentiary hearing is that so long as the trial court's findings are supported by competent, substantial evidence the reviewing court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court. Melendez v. State, 702 So. 2d 1250, 1252 (Fla. 1997); Demps v. State, 462 So. 2d 1074 (Fla. 1984).

A. The Claim of the prosecutor's alleged knowing use of perjured testimony before the Grand Jury.

At the Huff hearing below, on March 9, 1999, Anderson argued:

> "...we believe this is a case where the state knowingly presented false testimony to the Grand Jury. I think we should have our opportunity to present to the Court at an evidentiary hearing those facts that will demonstrate that the state did improperly present the testimony." (Emphasis added) (R 6, 300-301)
>
> * * * * *
>
> THE COURT: ..."but you want to reopen the evidence and have the Court rule on whether or not they did it knowingly?"
> MR. WALSH: That is correct, for you.

> THE COURT: That would require presentation of Mr. Skye, Mr. Atkinson and whoever else.
> MR. WALSH: That's right. This is strictly a factual question, you Honor. That has never developed at the trial level. (emphasis supplied)(R6, 301-02).

At the evidentiary hearing, the Court reminded the parties:

> "The issue is whether at the time the testimony was presented to the Grand Jury the state attorney knew it was perjured. That's the issue that I granted an evidentiary hearing on. Is that basically correct?
> MS. WILLIAMS: Yes, sir.
> THE COURT: Okay.
> MR. STRAIN: That's my understanding also, your Honor." (R4, 25)

Every state agent witness who testified below denied knowing that Connie Beasley had or would commit perjury before the Grand Jury. (1) Former prosecutor Skye who tried the case but was on vacation at the time of the Grand Jury presentation of evidence and was not present there (R4, 15) did not knowingly encourage or allow prosecutor Mr. Atkinson to present perjured testimony to the Grand Jury or know that what Beasley was going to tell the Grand Jury was not going to be her final story (R4, 20). (2) Former prosecutor Lee Atkinson presented the case to the Grand Jury and did not knowingly put on perjured testimony R4, 43-44, 49). (3) FDLE agents Lee Roy Parker, Ray Velboom and James S. Davenport all denied knowing what Beasley's Grand Jury testimony was since they were not present and did not have access to it and thus could not know whether it was perjured

(R5, 110-111, 170-171, R189, 197-199).

At the closing argument following the evidentiary hearing, it appears that Anderson's post-conviction counsel conceded the prosecutors were not aware of perjury:

> "MR. STRAIN: But other than that in the various items of disbelief, if you will, I do not doubt Mr. Skye's and Mr. Atkinson's testimony that they did not knowingly present perjured testimony." (emphasis supplied) (R 6, 240)

Having failed to prove what he was required to prove appellant then changed his argument, below and here to the vicarious argument that the prosecutor is charged with knowledge of FDLE agents. But the testimony of all the FDLE agents was that they did not know she committed perjury.

As noted, appellant failed in his burden of proof to show that the prosecutor knowingly presented perjured testimony at the Grand Jury; that assertion was affirmatively refuted by all the witnesses at the hearing. The contention that the state became aware that Beasley had lied to the Grand Jury is accurate since everyone involved in the case subsequently became aware of that fact. After taking Beasley's deposition, trial defense counsel learned of it and obtained the Grand Jury testimony to use to impeach Beasley. In cross-examination, prosecutor Skye became aware of it since he dealt with it at the time of trial, the jury was made aware of it since on both direct and cross-examination Beasley admitted that she had lied to the Grand

Jury; and finally, this Court was aware of it since it was the first legal issue the Court addressed when considering the direct appeal and this Court affirmed the judgment and sentence. Anderson v. State, 574 So. 2d 87 (Fla. 1991). As this Court ruled then:

> "...Before the Grand Jury, she accused Anderson, but claimed he was alone when he murdered Grantham. At trial, she again accused Anderson, but switched her role in the murder from nonparticipant to unwilling, after-the-fact accomplice.
>
> Although Beasley's role changed, Anderson's did not. Here, we are not faced with subsequent testimony that can be said to remove the underpinnings of the indictment.
>
> On the contrary, Beasley's later testimony would have strengthened the possibility of an indictment because she was an eyewitness to the murder. Thus, Beasley's perjurious Grand Jury testimony could have had no factual bearing on the Grand Jury's decision to indict Anderson for the murder {citations omitted}. Nor are we faced with any deliberate subornation. This is not a case where the state knowingly presented false testimony to the Grand Jury. For these reasons, we reject Anderson's first claim."
>
> Id at 92.

Nothing has changed to alter this Court's prior resolution and appellant's attempt to litigate anew a claim previously considered and rejected is an impermissible use of the 3.850 vehicle. See Cherry v. State, 659 So. 2d 1069 (Fla. 1995); Medina v. State, 573 So. 2d 293 (Fla. 1990). Nothing has changed because the testimony adduced below conclusively

establishes that the prosecutors did not know Beasley would lie to the Grand Jury and the law enforcement officers did not know that she had lied or would lie to the Grand Jury. When it was ultimately discovered that she had, the trial court and this Court considered the matter and denied relief. Anderson may not re-present the same contention, or even present it in a different form successively or like some sporting contest in a best of five tournament in the hopes that eventually his rejected argument will find a sympathetic audience.

The lower court's findings in paragraphs 3 and 4 at (R3, 537) that the State Attorney in good faith believed the witness was going to testify truthfully and in good faith presented her testimony to the Grand Jury and that the subsequent determination after the return of the indictment that the witness had lied in some particulars to the Grand Jury is not a factor, based on the situation as it was known to the State Attorney's Office at the time of the Grand Jury proceeding are correct. The finding in the Corrected Order of January 16, 2001, as to Paragraph 5 that at least one day after the Grand Jury testimony the FDLE knew that Connie Beasley Hunt had committed perjury before the Grand Jury (R3,558) is <u>not</u> correct and is <u>not</u> supported by the testimony at the hearing. While it may be true that Beasley subsequently told them things which altered or were inconsistent with what she had previously told

them, no FDLE agent could testify that they knew her Grand Jury testimony was false since they were not present and did not know what she testified there.(R5, 111,170-71, 189, 197-199).

Appellant points to Skye's testimony. Skye testified that he became aware of the non-conformity of her Grand Jury testimony with her subsequent recitation "very, very close to the time of trial. I'm not sure if it was the Friday before the Monday trial. It might have been like the Monday before the Monday trial"(R4,15). While she had given several interviews, Skye also pointed out that Beasley was extensively cross-examined by Mr. Fuente on the issue of her lying. In addition to her interviews with FDLE there was her deposition and Grand Jury testimony and "Mr. Fuente had everything that I had that Ms. Beasley had ever said" (R4,19)

The trial record confirms this. Beasley testified at trial that she was interviewed several times on the evening of her arrest, July 1, 1987 (DAR V.4, 543). She stated that she had lied to agents as she had earlier lied to Agent Velboom at the auto dealership because she was scared and did not want to admit her involvement. Also, her statements to the Grand Jury were not consistent with her trial testimony, she admitted. She did not tell the Grand Jury the complete truth (DAR 540,543). The first time she told the same thing as her present testimony was July 24.(DAR 544) On cross-examination she admitted that on her

July 1 arrest she spoke to FDLE agents for six to eight hours (DAR 567) and although given an opportunity to tell the truth to them, she admittedly lied. (DAR 569) She agreed that she had told FDLE that Anderson simply had told her he killed Grantham (DAR 575). At one point she told them concerning the whereabouts of the victim's body that the only thing she knew was where Anderson said it was and that she had gone out on her own to try and find the place. She admitted having lied to protect herself (DAR 578,580). Beasley admitted talking to FDLE the day after the Grand Jury, and she had another session with prosecutor Skye on July 24, 1987 (DAR 584). She reiterated that she had lied under oath to the Grand Jury (DAR 587). She admitted telling the Grand Jury that she did not see appellant with a gun when he left the residence with Grantham and that when appellant returned he had blood all over him, and that it was a lie if she told the Grand Jury appellant admitted killing him and threatened to kill her if she didn't do what he said (DAR 589-90). She lied to the Grand Jury about being forced to go to Tampa Airport (DAR 590-91). She walked out of the Grand Jury knowing she had lied (DAR 593). The day after her Grand Jury appearance, on July 16, 1987, she wanted to tell FDLE agents she knew more than she'd been telling (DAR 597). She did tell them a lie on July 16; it was not true that Grantham was on top of her when appellant walked in angry (DAR 600-01). She

lied to FDLE agents about details (DAR 603-04). On redirect examination, she explained that she told FDLE on July 16 that she was present when Anderson shot Grantham four times, before any plea agreement was reached and she had no opportunity to review her Grand Jury testimony. (DAR 610-11). All of this was known to the jury who heard her testimony and by this Court when it affirmed the judgment and sentence.

As to Agent Davenport's evidentiary hearing testimony(and he did not know her Grand Jury testimony (R5,189)), his view that she minimized her involvement during her interviews and that she told a version about Grantham's attempted rape merely reaffirms the testimony that came out at trial, i.e. that Beasley admittedly had told lies previously but that her present testimony was truthful. And Davenport was not concerned about her truthfulness as to appellant's involvement in the murder (R5, 199). In short, the evidentiary hearing testimony elicited nothing that was not known before at trial. Post-conviction motions are not to be used as second appeals. Lopez v. Singletary, 634 So. 2d 1054 (Fla. 1993); Medina v. State, 573 So. 2d 293 (Fla. 1990); Cherry v. State, 659 So. 2d 1069 (Fla. 1995). Using a different argument to re-litigate a claims previously asserted on direct appeal is inappropriate. Quince v. State, 477 So. 2d 535, 356 (Fla. 1985); Teffeteller v. Dugger, 734 So. 2d 1009, 1018 (Fla. 1999).

Appellant's suggestion that aside from the Beasley testimony there can only be a conviction for second degree murder is meritless. Quite apart from Beasley, evidence of premeditation is found in appellant's admissions to David Barile and Larry Moyer. Anderson told Barile that he was in trouble with the police, that he shot and killed a guy. When Barile asked him why, appellant responded for the money; the victim supposedly had a large sum of cash on him and it turned out that he didn't. Instead he had two or three thousand dollars. Anderson admitted picking him up at the airport and shooting him four times (DAR 5, 637-38) Larry Moyer testified that when he saw appellant on June 2, 1987 he stated to Anderson "I heard you killed a guy" and Anderson responded ,"We wasted a guy. We wasted a guy that was supposed to have a million dollars and he only had $3,000" (DAR 9, 1240-41). Moreover, cellmate Kenneth Gallon testified that when a television news report came on showing Connie Gilliard Beasley, appellant pointed his finger like a gun and said, "Boom, bitch, you're dead".(DAR Supp. R25, 3474-75). He offered to pay $3000 to have her killed (DAR 3476).

The lower court correctly ruled as this Court had previously that the Grand Jury would have indicted Anderson on first degree murder even if Beasley had not lied to them. Appellant's claim is meritless.

B. The lower court did not err in denying relief or an evidentiary hearing on other prosecutorial misconduct sub-

claims.

Appellant next asserts that while the lower court did grant an evidentiary hearing on his claim that the prosecutor knowingly allowed false Grand Jury testimony by witness Connie Beasley, the lower court should also have held a hearing on the claim that Mr. Gallon attempted to suborn perjury by soliciting false incriminating testimony of Mr. Tony House and Mr. Bernard Walker against appellant. He also claims the state failed to disclose a September 18, 1987 letter from Mr. Gallon's defense counsel Daniel M. Hernandez. For the reasons stated below relief must be denied.

(1) The instant claim was implicitly abandoned by appellant's failure to urge an evidentiary hearing on it at the Huff hearing.

At the March 9, 1999 Huff hearing, appellant stated that "the two major claims are ineffectiveness of counsel both at the penalty stage and at the guilt stage" (R6, 255). Additionally, he alleged that there was prosecutorial misconduct in the pre-trial stage, for two main reasons: the pen register and the wiretap application assertedly was not supported by probable cause.

Anderson maintained that Connie Beasley's Grand Jury perjury "essentially is the basis for Claim I, the prosecutorial misconduct" (R6, 259). Appellant then turned to his discussion of a claim of guilt phase ineffective counsel (candidly

acknowledging that counsel did an excellent job of putting forth all their motions)(R6, 259), to his discussion of penalty phase ineffectiveness of counsel (R6, 260-262) and to a variety of unrelated claims (proof of corpus delicti, failure to find mitigation, jury instructions, cumulative error and death by electrocution)(R6 262-66). Appellant returned to talk about pen registry and wiretaps (R6, 267-268) and the Beasley perjury (R269-274), FBI lab work which "I really don't see anything there at all" (R275), corpus delicti, failure to find mitigation, instruction on advisory opinion, double dipping as aggravators (R275-279) as well as electrocution and cumulative error at trial (R284).[3] The Court inquired whether there was "anything else on any of these at all" (R300), and appellant reiterated that the state knowingly presented false testimony to the Grand Jury (R300-02).

The court then informed the parties that it would give "an additional 10 days from today's date to present me any additional argument they want as far as the Huff case portion of this" (R6, 302). And finally, the Court stated:

> "THE COURT: Okay. Anything else from Mr. Walsh?
> MR. WALSH: No, your Honor. It will probably be a day, two days, Thursday before I can

[3] It was noted that counsel was charged with failing to do a sufficient investigation of Mr. Gallon to make his testimony much less believable (R286-287).

get the note to the Court." (R302)[4]

Nowhere at the Huff hearing did appellant contend that an evidentiary hearing was required on the Gallon or House prosecutorial misconduct he now urges. Appellee submits that Anderson abandoned it by not arguing it as a basis for holding a hearing (R6 252-305). Nor did appellant follow up with any subsequent further request for a hearing.

On May 7, 1999, the lower court granted an evidentiary hearing on the issue whether the state attorney's office knowingly presented perjured testimony to the Grand Jury (Vol. 3, R498). The Court noted that no new allegations had been provided at the conclusion of the 60 day period for newly discovered evidence, and also rejected the guilt phase ineffective counsel claim since the trial testimony showed strong and effective cross-examination of Beasley and Gallon (R3, 499). Since the purpose of a Huff hearing is to permit the capital defendant the opportunity to urge what issues require an evidentiary hearing and since that opportunity was given and since appellant did not urge his present contention required a hearing, the lower court did not err reversibly in failing to conduct an evidentiary hearing on this current assertion. See Asay v. State, 769 So. 2d 972, 982 (Fla. 2000)("we would at the very least expect counsel to state a separate claim with some

[4] The note referred to the prosecutor's alleged awareness of perjured testimony in front of the Grand Jury (R274).

specificity, as opposed to adding a phrase to a sentence of another unrelated claim.")

(2) Secondly and alternatively, relief must be denied because the claims were known at the time of trial and any alleged prosecutorial misconduct could have been raised as an issue in direct appeal.

The direct appeal record reflects that during the trial in February of 1988, prosecutor Skye placed on the record that after Kenneth Gallon had given a statement on August 5, 1987 and testified at the bond hearing on August 11, 1987, prosecutor Skye was contacted by Gallon's attorney Danny Hernandez who advised that Gallon had information on other offenses (not with respect to appellant Anderson). Skye related that later Hernandez contacted him to relate that Gallon wanted to talk to him and that Skye sent investigator Hurd to interview Gallon concerning information on Tony House and others. Skye stated that in October or November he saw Gallon about information on House. He made no promises of any sort with Gallon with respect to the Anderson case, and that he would talk to him about other cases after the Anderson trial (DAR 13, 1772-75). The defense indicated a desire to depose Gallon, Detective McNamara and Investigator Hurd (DAR 1781-82). The court recessed to allow such discovery (DAR 1783). Thereafter, defense counsel indicated they had talked to Gallon, McNamara and Hurd (DAR 1986). Their depositions can be found at DAR, Vol. XXI (R3090-3152).

The trial court issued an invitation that the court would put Gallon back on the stand if the defense desired to further cross-examine him (DAR 1804-1809). The court called Gallon back to the witness stand (in the jury's absence) and the defense declined further cross-examination (DAR 1809-10). Mr. Gallon's trial testimony of February 11, 1988 is located at DAR. Supp. Vol. XXV R 3454-3553.

Any complaint that appellant now advances as to improper prosecutorial misconduct by assistant state attorney Skye regarding a communication by Gallon's attorney Mr. Hernandez or on matters regarding Mr. House are not cognizable in a post-conviction challenge since they were matters of record that could have been urged on direct appeal if appellant so desired, and they were not.

Similarly, the assertion that Mr. Gallon attempted to suborn perjury by soliciting false testimony of Tony House and Bernard Walker against Anderson is merely another challenge that could have been argued on direct appeal. At trial defense witness House testified that Gallon had attempted to recruit him to be a witness against Anderson. He was examined and cross-examined at length about his contrary statements he had given to the defense and to the state (DAR 11-1612-51; DAR 12, 1656-73). The jury heard his testimony and were exposed to defense Exhibit 1A and Exhibit 17 (DAR 11, 1647-48; DAR12, 1703-05). Anderson

could have presented his assertion that Gallon tried to influence House on direct appeal if he so desired; he may not initiate such a complaint collaterally in the same or different form. See Cherry, supra, Medina, supra.

ISSUE II

WHETHER THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT PENALTY PHASE.

A trial court may summarily deny a claim of ineffective assistance of counsel where the claims are procedurally barred claims because they were or could have been urged on direct appeal, or inappropriately couched in ineffective assistance of counsel language. Asay v. State, 769 So. 2d 974, 989 (Fla. 2000)

A. Denial of hearing on the claim of counsel's failure to present mitigating evidence.

As this Court well knows, the direct appeal record reflects (DAR 2166-69), and this Court quoted from the transcript on direct appeal, Anderson v. State, 574 So. 2d 87, 94-95 (Fla. 1991), that trial counsel did investigate and was prepared to offer mitigating evidence in penalty phase but was precluded from doing so by his client, Mr. Anderson. This Court opined:

> "The record shows that Defense Counsel Mark Ober initiated the following colloquy:
>
> > MR. OBER: Judge, at this time, I would like to announce to the Court and certainly allow the Court, for the limited purpose of this inquiry, to address Mr. Anderson, but based on my involvement in this case and also with the assistance of Mr. Ashwell, we have uncovered many witnesses that I feel could testify in Mr. Anderson's behalf, favorably to him, during the second phase.

And I would cite the names of those individuals which we have found. That would be Dr. Robert M. Berland; William Anderson, who is Mr. Anderson's father; Helen Anderson, his mother; David Anderson, his brother; Vickie Barber, his sister; Griffin Simmons, a sister of his; also a Joyce Wilson, a witness; and his son, Kyle Anderson.

In addition to that, we have gone to the correctional institute of individuals that-of individuals in the system who know Mr. Anderson based on his past incarceration, one Chaplain William Hanawalt, Major Sammy Hill, who is a correctional officer at Zephyrhills Correctional Institute and Superintendent Ray Henderson at the Department of Corrections in Lauderhill, Florida.

Additionally, there are other witnesses including employers and employees of Mr. Anderson, his friends, including Kay Bennett, who I believe could lend some assistance to Mr. Anderson during this portion of the proceeding.

After very great detail with him in the presence of [two witnesses], myself, and Mr. Anderson, over the portion of time that I've been involved in this, he has never wavered in his desire not to have any of these people testify during the course of this second phase proceeding. I have told him that I believe it to be in his best interest, and I'm announcing that for the record.

And he has commanded me not to call these individuals because that is his desire.

THE COURT: You wish to question Mr. Anderson concerning what you just said, Mr. Ober?

MR. OBER: Mr. Anderson, you heard my statement to Judge Graybill. Is there anything that you would like to add to that?

> Do you concur in the statements I made or do you disagree with them, or do you, at this time, want any individuals, those I mentioned or anyone else that, perhaps, we hadn't discussed, who will assist you in this second phase proceeding?
> THE DEFENDANT: I concur with the statements you made.
> MR. OBER: And-
> THE DEFENDANT: I would rather not have any witnesses testify on my behalf that you mentioned or that could, in fact, be called.
> THE COURT: Mr. Anderson, are you on any kind of drugs or medication that would affect your ability to understand what's going on today?
> THE DEFENDANT: No, sir, not at all.
> THE COURT: All right. Mr. Ober, you put it on the record. Mr. Anderson has responded."

Obviously, if trial counsel Ober had been constitutionally derelict in failing to proffer and state what the mitigating witnesses would say, this Court, at that time, would have so commented. This Court didn't do so because the Constitution did not and does not so require.[5]

In Waterhouse v. State, __So. 2d__ 26 Fla. L. Weekly S375 (Fla. 2001), this Court recently affirmed a summary denial of post-conviction relief where the defendant similarly contended that there should have been an evidentiary hearing on the claim of ineffective assistance of counsel for the failure to present

[5] Significantly at the Huff hearing below appellant did not specify any deficiency respecting whether any other mitigating witness should have been discovered and presented; rather, the complaint was only that it would have been proper had counsel proffered what the witnesses would have said (R6, 295).

mitigating evidence. This Court stated:

> "In **Koon v. Dugger**, 619 So. 2d 246, 250 (Fla. 1993), *quoted with approval in Chandler v. State*, 702 So. 2d 186, 199 (Fla. 1997), we outlined the procedure which must be followed when a defendant waives the presentation of mitigating evidence. The procedure was detailed as follows:
>
> > Counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes
> >
> > there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these mattes with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.
>
> *Koon*, 619 So. 2d at 250. The underlying purpose for this framework is to protect against "the problems inherent in a trial record that does not adequately reflect a defendant's waiver of his right to present any mitigating evidence." *Id.* Although *Koon* is technically inapplicable to this case because the penalty phase proceedings below occurred some three years prior to the *Koon* decision becoming final, *see Allen v. State*, 636 So. 2d 1312, 1314 (Fla. 1995)(same), it should be noted that a review of the record in this case demonstrates that the end sought by the *Koon* decision (i.e., a clear record as to defendant's waiver of the presentation of mitigating factors) was actually accomplished in this case. That is, Waterhouse made it abundantly clear that he was waiving his right to present mitigating evidence. Specifically, Waterhouse unequivocally asserted:
>
> > Mr. Hoffman could have presented at least a half a dozen factors in mitigation, but I wouldn't let him do

> that because I don't feel that he should be up here begging you.
> I shouldn't be up here begging you for my life. It goes against my moral principals (sic] and, furthermore, spares my family the embarrassment, the trauma.
>
> Moreover, this was not simply a case where a defense attorney latched on to a defendant's refusal to present mitigating evidence."
>
> (Id. at 376)

The Court added:

> "...because the only reason why mitigating evidence was not presented was entirely due to Waterhouse's conduct, we cannot deem defense counsel deficient for failing to present such evidence. Thus, we conclude that the trial court correctly denied an evidentiary hearing as to this claim." Id. at 376.

Appellant argues that in Waterhouse the Court observed that the record had contained an affidavit of Dr. Fred Berlin and after trial Waterhouse refused to meet with the court appointed Dr. Charles Wheaton. The argument misses the point. Quite apart from the fact that trial counsel Ober was acting in 1988, years prior to the evolving refinements of Koon, supra, even if the trial court had allowed a hearing to have trial counsel Ober recite what mitigating testimony he would have presented through witnesses Dr. Robert M. Berland, William Anderson (appellant's father), Helen Anderson (appellant's mother), David Anderson (appellant's brother), Vicki Barber (appellant's sister), Griffin Simmons (a sister), Joyce Wilson (a witness) and Kyle

Anderson (appellant's son), friend Kay Bennett, Chaplain William Hanawalt, correctional officer Major Sammy Hill, and Department of Corrections Superintendent Ray Henderson, employers and employees, but was precluded from doing so by the command of Anderson, there can be no resulting prejudice to satisfy the second prong of the Strickland v. Washington, 466 U.S. 668 (1984) inquiry. Since appellant cannot satisfy both prongs - deficiency and prejudice - he cannot obtain relief. As in Waterhouse there is no error in the lower court's denial of an evidentiary hearing.[6]

(B) Whether the lower court erred in denying an evidentiary hearing on ineffective assistance of counsel sub-claims.

The lower court correctly denied relief summarily on the claims argued in Paragraphs 5-14 of Claim IV below at R3, 471-473.

As to the claim in Paragraph 5, the failure to object to the CCP aggravating factor during the court's instruction at DAR 2755-56, appellee would note that this trial took place in 1988, years prior to the decisions in Espinosa v. Florida, 505 U.S. 1079, 120 L.Ed. 2d 854 (1992)(which related to the instruction on the HAC aggravator) and Jackson v. State, 648 So. 2d 85 (Fla. 1994). Thus, it would not be surprising if trial counsel were

[6] Appellant may not manipulate the legal system by choosing not to put on available evidence at the sentencing portion of trial, then opt to do so in a post-conviction proceeding. See e.g., Waterhouse v. State, 596 So. 2d 1008, 1014 (Fla. 1992).

unable to anticipate such decisions.[7] In any event, the decisions after Jackson require that challenges to the CCP instruction as unconstitutionally vague mandate that there must be a specific objection at trial or request for an alternative instruction at trial and the issue must be raised on appeal. See Walls v. State, 720 So. 2d 221, 223-224 (Fla. 1997); Brown v. State, 755 So. 2d 616, 622 (Fla. 2000); Waterhouse v. State, __So. 2d__, 26 Fla. L. Weekly S375, 380-381 (Fla. 2001); Crump v. State, 654 So. 2d 545, 540 (Fla. 1995). Additionally in Waterhouse, supra, the Court disposed of the related ineffective counsel claim thusly:

> "Within this claim, however, Waterhouse argues that defense counsel rendered ineffective assistance during this penalty phase proceeding by not objecting to the CCP instruction on vagueness grounds and by failing to submit a limiting instruction. In Downs v. State, 740 So. 2d 506, 518 (Fla. 1999), this Court rejected an identical argument and reasoned that because the CCP instruction given at the time of Downs' re-sentencing was the standard jury instruction which had been approved by this Court, see Brown v. State, 565 So. 2d 304, 309 (Fla. 1990), defense counsel could not be deemed ineffective, pursuant to Strickland, for not objecting. The same reasoning applies in this case since the CCP instruction given at Waterhouse's second penalty phase was the standard instruction, which had been held valid by this Court. Accordingly, defense

[7] Appellee notes that trial counsel did object to the CCP factor, that every first degree murder contains the element of premeditation and that the record is nebulous concerning anything above and beyond that necessary for a premeditated murder to occur. (DAR 2213)

> counsel's performance was not deficient under the standards set forth in Strickland. See also Harvey v. Dugger, 656 So. 2d 1253, 1258 (Fla. 1995)(holding that counsel may not be deemed ineffective under Strickland for failing to object to jury instruction where this Court previously upheld validity of the instruction); Mendyk v. State, 592 So. 2d 1076, 1080 (Fla. 1992)("When jury instructions are proper, the failure to object does not constitute a serious and substantial deficiency that is measurably below the standard of competent counsel."). As a result, we determine that the trial court correctly denied an evidentiary hearing as to his claim." (Id. at S381)

See also Lambrix v. Singletary, 641 So. 2d 847, 848-849 (Fla. 1994)(claim procedurally barred even though limiting instruction had been requested since not raised on appeal and appellate counsel not ineffective since the Court would have rejected Espinosa claim on appeal); Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993); Glock v. Moore, 776 So. 2d 243, 255 (Fla. 2001).

Trial counsel was not deficient and the prejudice prong cannot

be satisfied.

As to the claim in Paragraph 6, the failure to object to the instruction on the prior violent felony aggravator - trial defense counsel did not object and appellant's mere assertion that the instruction was not understandable to the average juror is legally insufficient and wrong. Trial counsel was not required to assert a meritless claim. See Teffeteller v.

Dugger, 734 So. 2d 1009 (Fla. 1999); Parker v. State, 611 So. 2d 1224 (Fla. 1992).

As to the claim in Paragraph 7 - the failure to argue credibility of guilt phase witnesses at penalty phase - such a claim is legally deficient in that it fails to allege either deficiency or prejudice by counsel. To the extent that Anderson is suggesting some type of "residual doubt" argument, this Court has rejected it. See King v. State, 514 So. 2d 354 (Fla. 1987); Accord, Tafero v. Dugger, 520 So. 2d 287, 289, n 1 (Fla. 1988); White v. Dugger, 523 So. 2d 140 (Fla. 1988); Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988); Chandler v. State, 534 So. 2d 701, 703 (Fla. 1988)(a re-sentencing is not a retrial of the defendant's guilt or innocence); Hitchcock v. State, 578 So. 2d 685, 690 (Fla. 1990); Waterhouse v. State, 596 So. 2d 1008, 1011 (Fla. 1992); Preston v. State, 607 So. 2d 404, 411 (Fla. 1992); Bogle v. State, 655 So. 2d 1103, 1107 (Fla. 1995); Sims v. State, 681 So. 2d 1112, 1117 (Fla. 1996).

As to the claim in Paragraph 8, there is neither deficient performance nor resulting prejudice in trial counsel's penalty phase argument that appellant "was employed, was making good money and living a law-abiding life" (DAR 2249). Appellant failed to allege facts requiring an evidentiary hearing. See Sireci v. State, 773 So. 2d 34 (Fla. 2000)(allegations that trial counsel's failure to raise appropriate objection or

otherwise preserve issue for review were legally and facially insufficient to warrant relief where defendant failed to allege how he was prejudiced by counsel's failure to object or raise asserted error).

In Paragraph 9(a)-(d), appellant contended trial counsel was ineffective in failing to object to prosecutorial closing argument at DAR 2230-33. The first complaint - that appellant, unlike the victim, will still get up every morning (DAR 2232) - is insubstantial. The record reflects that trial counsel Mr. Ober rather than object chose to use the argument to his advantage in the rebuttal closing statement that he "echoed" prosecutor Mr. Skye to let the punishment fit the crime and:

> "Mr. Skye would have you believe that life in the Florida State Prison is an insignificant penalty. Mr. Anderson testified previously that he's 39 years old. The only other option available to Judge Graybill is life with no eligibility of parole for 25 years. He will be 64 years old when he's eligible for parole. And you know that the parole authorities will consider the fact that he's been previously convicted in 1974" (DAR 2251-52).

Ober then added in reply to the prosecutor:

> "I believe the part of Mr. Skye's argument went to, one is enough; two is enough. Is not society protected by Mr. Anderson being locked in a cage for the rest of his life?" (DAR 2253)

Counsel's reminder that civilized society places a "very high value on human life" (DAR 2253) was an adequate response to

the prosecutor's argument and the Constitution did not require him to interpose an objection instead of responding to it as he effectively did.

Appellee would add that this trial occurred in 1988 and it was not until three years later in 1991 that this Court reversed a conviction for the seemingly tautological observation that homicide victims can't see the sun rise while prisoners can in Taylor v. State, 583 So. 2d 323 (Fla. 1991). This Court has recently refused to find a trial counsel ineffective for failure to object to a similar comment when the trial antedated the Taylor decision and where trial counsel turned the argument to his advantage rather than merely to interpose an objection. See P.A. Brown v. State, 755 So. 2d 616 (Fla. 2000)[8]

The trial court properly denied summarily relief for the allegations in Paragraphs 10 and 11 since the assertions are conclusory, provide no factual content and do not describe any specific action or conduct. Appellant does not identify what the deficiency was in allowing the jury allegedly to consider factors outside the scope of evidence and the law or in failing to ask for unnamed curative instructions. His failure to specify such deficiencies or to allege how prejudice occurred is

[8] Similarly trial defense counsel competently responded to the prosecutorial argument and noted Anderson had admitted his culpability in the 1974 murder by entering a plea and receiving a sentence (DAR 2251) and that in the instant case Connie Beasley similarly should be deemed guilty of murder and that she had received a lesser punishment (DAR 2250-51).

fatal. See, Waterhouse v. State, __So. 2d__, 26 Fla. L. Weekly S375, 376 (Fla. 2001)(affirming summary denial of post-conviction motion and observing that a petitioner bears the responsibility of alleging specific facts which demonstrate a deficiency in performance which prejudiced the defendant); Asay v. State, 769 So. 2d 974, 982 (Fla. 2000)(considering the conclusory nature of the allegations, we find that the claims were legally insufficient and thus the trial court did not commit error in refusing to grant an evidentiary hearing as to these claims); Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998)(where the motion lacks sufficient factual allegations, it may be summarily denied; a summary or conclusory allegation is insufficient to allow the trial court to examine the specific allegations against the record); Mann v. State, 770 So. 2d 1158 (Fla. 2000)(evidentiary hearing not required as to certain aspects of trial counsel's performance where record refuted contentions); Freeman v. State, 761 So. 2d 1055 (Fla. 2000); Thompson v. State, 759 So. 2d 650 (Fla. 2000); Sireci v. State, 773 So. 2d 34, 39-40, n 9-11 (Fla. 2000). Additionally, appellant's failure to identify error and to brief it in this Court should be deemed a waiver. Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990); Teffeteller v. Dugger, 734 So. 2d 1009, 1020 (Fla. 1999).

As to the claim in Paragraphs 12 and 13 that counsel did not

properly prepare mitigation that has been addressed in Argument Section II (A), supra; counsel did prepare mitigation but appellant precluded its presentation (DAR 2166-69). The record further reflects that counsel ably argued the mitigation to the jury that was suggested by the evidence (DAR 2233-2254).

As to the claim in Paragraph 14, the record refutes the claim; trial counsel did argue to the jury the disproportionality of death for him in comparison to the punishment for Beasley. Trial counsel argued that Beasley did what Anderson did, that Beasley had set up the plan, that Beasley was equally as guilty as Anderson and that she faced only a maximum of three years imprisonment and avoided even a life sentence and urged "a fair and just application of all the factors in this case, Connie Beasley, included" (DAR 2247, 2249, 2250-51, 2254).

ISSUE III

WHETHER CUMULATIVE SUBSTANTIVE AND PROCEDURAL ERRORS DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR TRIAL.

In Claim X of his Third Amended Motion to Vacate, Anderson without specifics generally asserted that there had been numerous errors committed in the trial.[9] (R3, 486-489) In the

[9] This was essentially verbatim of Claim XXIII in the Second Amended Motion to Vacate. (R2, 314-316) The State had responded to that issue in the Response to Second Amended Motion to Vacate arguing that no factual specifics had been made and that such alleged errors should have been raised on direct appeal. (R2,

court's order of May 7, 1999, granting in part and denying in part an evidentiary hearing, relief was summarily denied (R3, 501), and in the final order denying relief on August 25, 2000 the court again denied relief as stated in its previous order. (R3, 538)

Since appellant has failed to brief and explain what the alleged cumulative errors are and the impact on the case, this claim must be deemed waived. See Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("Merely making reference to arguments below without further elucidation does not suffice to preserve issues and these claims are deemed to have been waived") Teffeteller v. Dugger, 734 So. 2d 1009, 1020 (Fla. 1999) Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So. 2d 958, 960 (Fla. 4 DCA 1984).

Finally, appellee denies that there is any error requiring the granting of relief. Since the individual alleged errors are without merit, the cumulative error contention must fail. See Downs v. State, 470 So. 2d 506, 509, n 5 (Fla. 1999); Freeman v. State, 761 So. 2d 1055, 1068-69 (Fla. 2000); Mann v. State, 770 So. 2d 1158, 1164 (Fla. 2000); Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998).

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ISSUE IV

WHETHER THE LOWER COURT ERRED WHEN IT DENIED AN EVIDENTIARY HEARING ON THE ISSUE OF THE ALLEGED FAILURE TO ESTABLISH CORPUS DELICTI OF MURDER IN THE FIRST DEGREE.

Appellant asserted in Claim V of his Third Amended Motion to Vacate that the state had failed to prove the corpus delicti for murder in the first degree.[10] (R3, 474-77) In the order of May 7, 1999, the court ruled that the issue was litigated on direct appeal and that the issue was not cognizable in a Rule 3.850 proceeding (R 3, 500).

In his caption to this argument, Anderson states he is presenting this argument pursuant to the dictates of Sireci v. State, 773 So. 2d 34, 41, n 14 (Fla. 2000). In that footnote, the Court expressed a concern that voluminous claims - many of them improperly raised or procedurally barred - can detract focus from arguably meritorious claims and suggested that if issues are being raised solely for purposes of "preserving an issue" they should be so designated. The Court concluded:

> "We will consider the issues preserved for review in the event of a change in the law if counsel so indicates by grouping these claims under an appropriately entitled heading and providing a description of the substance."

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[10] This was Claim X in the Second Amended Motion to Vacate (R2, 261-264) and the state's response to this motion notes that the claim was litigated on direct appeal and decided adversely to appellant in Anderson v. State, 574 So. 2d 87 (Fla. 1997)(R2, 338).

If appellant is intending to "preserve" his corpus delicti issue for further review elsewhere on the sufficiency of the evidence, the appellate record is available and it would seem he is therefore - to the extent he relies on Sireci, supra, - abandoning any claim that the lower court erred in failing to grant an evidentiary hearing. Moreover, his current argument fails because appellant does not explain either the error committed by the lower court or any resulting prejudice to him.

Appellant's suggestion that the trial court's failure to cite the direct appeal decision is fatal must be deemed meritless if not frivolous since the trial court's order states that:

> "a. This issue was litigated on Direct Appeal and the Florida Supreme Court has ruled there was sufficient corpus delicti." (R 3, 500)

In this Court's decision affirming the judgment and sentence reported as Anderson v. State, 574 So. 2d 87 (Fla. 1991) the Court concluded:

> "We have reviewed the record and find substantial competent evidence to support the conviction of first degree murder". *Id.* at 94

Obviously, if there existed sufficient evidence to support a conviction for first degree murder, a fortiori, the corpus delicti requirement was satisfied. And this Court's responsibility in capital cases includes the requirement to

determine the sufficiency of the evidence to sustain a first degree murder judgment, irrespective of whether such an argument is advanced by counsel.[11]

Appellant contends that buried among his assertions in Claim V below (appellee notes that the caption contains no reference to an assertion of ineffective assistance of counsel - R3 474) is a suggestion that trial counsel may have been deficient. Anderson acknowledged in his motion that Anderson "moved for judgment of acquittal at the close of the state's evidence and again at the close of all evidence, arguing that the corpus delicti of first degree murder had not been proven (DAR 1458-71, 1875)(R3, 474).

[11] If the corpus delicti issue is deemed separate from sufficiency of the evidence to support a conviction for first degree murder, it was an issue that could have been urged on direct appeal and the failure to do so constitutes a procedural bar and precludes initial consideration in a Rule 3.850 motion to vacate.

ISSUE V

WHETHER THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON THE ADVISORY ROLE AND BURDEN-SHIFTING ISSUES IN THE PENALTY PHASE JURY INSTRUCTIONS.

Appellant complained below about the jury being told its role was merely advisory (Claim VII) and that the instructions shifted the burden to appellant (Claim IX of the Third Amended Motion to Vacate).[12] (R3, 478-79, 481-86) At the Huff hearing on March 9, 1999, Anderson's counsel admitted that claim IX was "pretty much boilerplate". (R6, 265)

The lower court summarily denied relief on Claims VII and IX, noting that the instruction issues could have been raised on direct appeal. (R3, 501) The jurisprudence in this state is well established that challenges to jury instructions - whether of a constitutional nature or not - must be asserted on direct appeal or they are procedurally barred. This Court has been explicit that post-conviction challenges to the constitutionality of jury instructions will not be entertained unless there has been both an objection on constitutional grounds at trial for preservation of appellate review and the issue must have been asserted on the direct appeal. See generally, Atwater v. State, _So. 2d_, 26 Fla. L. Weekly S395

[12] The corresponding claims are numbered XVIII and XXII in the Second Amended Motion. (R2, 297, 309-14) The state's response maintained the claims were procedurally barred. (R2, 346-347, 349)

(Fla. 2001); Waterhouse v. State, _So. 2d_, 26 Fla. L. Weekly S375, 381, N 9 & 10 (Fla. 2001); Ventura v. State, _So. 2d_, 26 Fla. L. Weekly S361, 368 N 5 & 6 (Fla. 2001); Porter v. State, _So. 2d_, 26 Fla. L. Weekly S321, 322 (Fla. 2001); Pope v. State, 702 So. 2d 221, 223 (Fla. 1997); Lambrix v. Singletary, 641 So. 2d 847 (Fla. 1994). This Court should decline appellant's invitation to discard the enforcement of its procedural bar jurisprudence. Additionally, appellant's reliance on the footnote in Sireci v. State, 773 So. 2d 34 (Fla. 2000) would seem to constitute an abandonment of the contention that the lower court should have conducted an evidentiary hearing.

Finally, not only is the claim procedurally barred, but it is meritless. There is no constitutional invalidity in the mention of the jury's advisory role and there was no impermissible burden shifting. See Harich v. Wainwright, 844 F. 2d 1464 (11th Cir. 1988)(en banc); Davis v. Singletary, 119 F.3d 1471, 1482 (11th Cir. 1997).

CONCLUSION

Based on the foregoing arguments and authorities, the lower court's order denying post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to, Robert T. Strain and April Haughey, Assistant CCRC, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 this _____ day of November, 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