IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-457

MICHAEL ALLEN GRIFFIN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Defendant was charged, in an indictment filed on May 2, 1990, in the Eleventh Judicial Circuit of Florida in and for Miami-Dade County, Florida, case number F90-16875C, with: (1) the first degree murder of Off. Joseph Martin, (2) the armed burglary of Carlos Munoz's occupied hotel room, (3) the grand theft of Mr. Munoz's property, (4) the grand theft of Richard Marshall's car, (5) the aggravated assault of Off. Juan Crespo, (6) the theft of Off. Daphne Mitchelson's badge and (7) the possession of a firearm by a convicted felon. (R. 1-4)[1] The crimes charged in counts 1, 2, 3, 5 and 7 were alleged to have been committed on April 27, 1990. The crime charged in count 4 was alleged to have been committed between April 23 and 28, 1990. The crime charged in count 6 was alleged to have been committed between February 25, 1990 and April 28, 1990. On December 13, 1990, the State entered a nolle prosequi on count 5 and filed an information charging Defendant with the attempted first degree murder of Off. Crespo. (R. 5, 934) Count 7 was severed from the remaining counts. (R. 934)

Prior to trial, Defendant moved to suppress his statement.

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[1] The symbol "R." are will refer to the documents and transcripts contained in the record from the direct appeal, Florida Supreme Court Case No. 77,843. The symbol "PCR." will refer to the record from this appeal.

(R. 80-81) The trial court held an evidentiary hearing on the motion to suppress on December 6, 1990, and denied the motion. (R. 640-736) the matter proceeded to trial on January 28, 1991. (R. 6) On February 8, 1991, the jury found Defendant guilty as charged on all counts. (R. 515-20) The trial court adjudicated Defendant in accordance with the jury's verdicts. (R. 489-91) The penalty phase commenced on February 13, 1991. (R. 61) On February 14, 1991, the jury recommended that Defendant be sentenced to death by a vote of 10 to 2. (R. 612)

On March 7, 1991, the trial court followed the jury's recommendation and sentenced Defendant to death. (R. 497-13) In aggravation, the trial court found Defendant had been convicted of a prior violent felony, the murder had been committed during the course of a burglary, the murder was committed to avoid a lawful arrest merged with the fact that Off. Martin was a police officer in the lawful performance of his duties and the murder was committed in a cold, calculated and premeditated manner (CCP). (R. 502-09) In mitigation, the trial court found the Defendant's age of 20, Defendant's remorse, Defendant's poor family background and Defendant's learning disability. (R. 509-11)

The facts adduced at trial were:

> On April 27, 1993, Griffin, Samuel Velez, and Nicholas Tarallo determined to commit a burglary.

> They left Tarallo's apartment in Griffin's father's Cadillac and drove to the location of a white Chrysler LeBaron where they switched cars. Griffin had previously stolen the Chrysler, and he used the vehicle during burglaries. Once in the Chrysler, the three proceeded to search for an appropriate target. After driving around, the trio approached an apartment building in Broward County. Nothing happened at this location, and as they left, Griffin suggested they go to the Holiday Inn Newport where Griffin had committed successful burglaries in the past. Upon arriving at the Holiday Inn, Griffin and Velez exited the car, entered a hotel room, and stole a cellular phone and purse. The three then left the Holiday Inn. Tarallo drove while Griffin and Velez divided the stolen property.
>
> While leaving the Holiday Inn and returning to the Cadillac, the three observed a police car. Griffin panicked and told Tarallo to turn, speed up, and turn several more times. During these maneuvers, another police car, driven by Officers Martin and Crespo, spotted the Chrysler, noticed the three men acting suspiciously, and began to follow. At this point, Tarallo tried to pull over but Griffin stated that he would not go back to jail and ordered Tarallo to continue to evade the police. Finally, Tarallo was able to pull over and attempted to exit the vehicle. As he got out, Griffin began shooting at the police, killing Officer Martin. After an exchange of gunfire, Tarallo and Velez exited the vehicle and surrendered to Officer Crespo. Griffin fled in the Chrysler and was eventually apprehended.

Griffin v. State, 639 So. 2d 966 (Fla. 1994).

Defendant appealed his convictions and sentences, raising 6 issues:

> I.
>
> THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S OBJECTION TO, AND IN DENYING THE DEFENDANT'S MOTIONS FOR MISTRIAL BASED ON, THE STATE'S INTRODUCTION OF EVIDENCE OF UNCHARGED CRIMINAL ACTIVITY, WHERE THE

STATE DID NOT COMPLY WITH THE PROCEDURAL REQUIREMENTS OF SECTION 90.404(B), FLORIDA STATUTES, AND WHERE, IN ANY EVENT, SUCH EVIDENCE BECAME A FEATURE OF THE CASE OR WAS IRRELEVANT, THEREBY DENYING THE DEFENDANT'S RIGHT TO DUE PROCESS AND TRIAL BY IMPARTIAL JURY AS GUARANTEED HIM BY THE FLORIDA AND UNITED STATES CONSTITUTIONS.

II.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS WHERE THE EVIDENCE ESTABLISHED THAT THE POLICE DELIBERATELY PREVENTED THE DEFENDANT FROM RECEIVING NECESSARY MEDICAL TREATMENT UNTIL AFTER THEIR INTERROGATION WAS COMPLETED, IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FLORIDA AND UNITED STATES CONSTITUTIONS.

III.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO IMPANEL A NEW JURY FOR SENTENCING WHERE THE GUILT PHASE JURY HAD HEARD SUBSTANTIAL EVIDENCE OF UNCHARGED CRIMINAL ACTIVITY WHICH WOULD HAVE BEEN INADMISSIBLE IN THE PENALTY PHASE AND THE DEFENDANT'S RIGHT TO AN IMPARTIAL SENTENCING RECOMMENDATION WAS PREJUDICED THEREBY, DENYING HIM HIS RIGHT TO TRIAL BY IMPARTIAL JURY AS GUARANTEED HIM BY THE UNITED STATES AND FLORIDA CONSTITUTIONS.

IV.

THE TRIAL COURT ERRED IN RESTRICTING THE DEFENDANT'S INTRODUCTION OF MITIGATING EVIDENCE, THEREBY DENYING HIM HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS.

A. THE TRIAL COURT ERRED IN PREVENTING THE DEFENDANT FROM ELICITING FROM SEVERAL PENALTY PHASE WITNESSES EVIDENCE OF HIS REMORSE, A NON-STATUTORY MITIGATING CIRCUMSTANCE.

B. THE TRIAL COURT ERRED IN PREVENTING THE DEFENDANT FROM INTRODUCING A NEWSPAPER ARTICLE WRITTEN BY A WITNESS WHO TESTIFIED DURING THE PENALTY PHASE.

V.

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING FACTOR THAT THE HOMICIDE WAS COMMITTED WHILE THE DEFENDANT WAS IN THE COMMISSION OF A FELONY, TO-WIT: BURGLARY, WHERE THE EVIDENCE SHOWED THAT THE BURGLARY WAS TECHNICALLY AND LEGALLY COMPLETE.

VI.

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WHERE THE EVIDENCE DID NOT SHOW HEIGHTENED PREMEDITATION OR PLANNING AS CONTEMPLATED UNDER THE STATUTE.

Initial Brief of Appellant, Florida Supreme Court Case No. 77,843. This Court affirmed Defendant's convictions and sentences. *Griffin*, 639 So. 2d at 972. Defendant sought certiorari review in the United States Supreme Court, which was denied on March 6, 1995. *Griffin v. Florida*, 514 U.S. 1005 (1995).

On March 6, 1997, Defendant filed a motion to compel public records. (PCR-SR. 2-11)[2] In this motion, Defendant asserted, *inter alia*, that the Metro-Dade Police Department had not complied with his public records requests. *Id.*

On March 19, 1997, Defendant filed his first motion for post conviction relief. (PCR-SR. 16-55) This motion was incomplete, consisting mainly of headings for claims, followed by the

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[2] Concurrent with the filing of this brief, Appellee is filing a motion to supplement the record. Reference to the documents contained in this supplemental record will be by the symbol "PCR-SR." The page numbers used for the supplement record are an approximation.

paragraph:

> This is a claim that regularly arises in capital Rule 3.850 proceedings. However, undersigned counsel has not yet had time to adequately investigate and prepare in order to plead this claim with more specificity. Under the circumstances explained in Claims I and II, this is the best that can be done at this point in time.

(PCR-SR. 30-46) The motion claimed that it could not be more complete because CCR was underfunded and because public records had not been received (PCR-SR. 16-30) However, the motion did not identify any particular agency that had not complied with a public records request or to whom a public records request had even been made. (PCR-SR. 16-55)

On March 20, 1997, Defendant filed public records requests that he had made to a number of agencies including the Metro-Dade Police Department. (PCR-SR. 56-211) Defendant received numerous responses and objections to these requests. (PCR-SR. 212-247) Thereafter, this Court entered various orders tolling time periods and granting stays, which remained in effect until October 1, 1998.

On October 29, 1998, Defendant filed his amended motion for post conviction relief. (PCR-SR. 252-351) Defendant still claimed that this motion was incomplete due to funding problems at CCR and the alleged failure to provide public records. *Id.* One of the agencies from whom Defendant asserted he had not

received public records was the Metro-Dade Police. (PCR-SR. 264-65) On December 24, 1998, the Metro-Dade Police Department filed a letter that it had sent to Defendant on December 22, 1998, clarifying the charges for the compliance with his requests. (PCR-SR. 352-74)

On December 29, 1998, Defendant sent additional public records requests to numerous agencies including the Metro-Dade Police Department. (PCR-SR. 375-502) Several of the agencies were sent multiple requests. *Id.* Defendant again received numerous objections and responses to the requests, including an objection from the Metro-Dade Police. (PCR-SR. 503-54) After a hearing on April 7, 1999, the trial court granted some agencies objections, denied others and granted an in camera inspection. (PCR-SR. 555-64) Thereafter, Defendant served two additional requests for public records on the Metro-Dade Police. (PCR-SR. 565-74) After more filings indicating that agencies had complied, Defendant was informed by letter that all internal affairs and personnel files had been submitted to the repository on August 30, 1999. (PCR-SR. 575-602)

On July 21, 1999, Kenneth Malnik, who had been lead counsel in Defendant’s case, resigned from CCRC-South. (PCR-SR. 603-05) As a result on August 27, 1999, Mr. Malnik was appointed as registry counsel. (PCR. 31)

After the public records issues had been resolved, the trial court set October 20, 1999, as the due date for the filing of Defendant's second amended motion for post conviction relief. (PCR-SR. 603-05) However, on October 4, 1999, Defendant moved to extend the due date to November 26, 1999, and the trial court granted the extension. (PCR-SR. 603-06) On November 12, 1999, Defendant again moved for an extension of time to file the second amended motion until December 10, 1999. (PCR-SR. 607-09) The trial court again granted the extension. (PCR-SR. 610)

On December 10, 1999, Defendant finally filed his second amended motion for post conviction relief, raising 31 claims:

> I.
>
> [DEFENDANT] WAS DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION BY THE LACK OF FUNDING AVAILABLE TO FULLY INVESTIGATE AND PREPARE HIS POST CONVICTION PLEADINGS DUE TO THE UNPRECEDENTED WORKLOAD ON PRIOR COUNSEL AND STAFF, AND HIS NEW COUNSEL IS HAMPERED BY A LACK OF FUNDING FOR INVESTIGATION, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS UNDER THE UNITED STATES CONSTITUTION, AND IN VIOLATION OF SPALDING V. DUGGER.
>
> II.
>
> [DEFENDANT] IS BEING DENIED HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE ACCESS TO CERTAIN FILES AND RECORDS PERTAINING TO [DEFENDANT] HAS NOT BEEN DISCLOSED, IN VIOLATION OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.852, AND [DEFENDANT] CANNOT PREPARE AN ADEQUATE 3.580 [sic] MOTION UNTIL HE HAS RECEIVED THESE PUBLIC RECORDS. THEN HE MUST BE AFFORDED DUE TIME TO REVIEW THESE MATERIALS AND AMEND.
>
> III.

[DEFENDANT'S] CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE NO ADVERSARIAL TESTING OCCURRED DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL, NEWLY DISCOVERED EVIDENCE, AND/OR IMPROPER RULINGS OF THE TRIAL COURT, IN VIOLATION OF [DEFENDANT'S] RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHT [sic] AND FOURTEENTH AMENDMENTS.

IV.

[DEFENDANT] WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY BY PREJUDICIAL PRETRIAL PUBLICITY, BY THE LACK OF A CHANGE OF VENUE, BY THE DUAL JURY TRIAL CONDUCTED CONCURRENTLY WITH SAMUEL VELEZ' TRIAL AND BY THE EVENTS IN THE COURTROOM DURING THE TRIAL. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THIS REGARD AND/OR THE TRIAL COURT ERRED.

V.

[DEFENDANT'S] CONVICTIONS ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AS ESTABLISHED BY NEWLY DISCOVERED EVIDENCE.

VI.

[DEFENDANT] WAS DEPRIVED OF A FAIR TRIAL BECAUSE OF EXCESSIVE SECURITY MEASURES AND SHACKLING OF [DEFENDANT'S] PERSON AT TRIAL. TO THE EXTENT THAT TRIAL COUNSEL FAILED TO OBJECT, FAILED TO KNOW THE LAW, AND FAILED TO ARGUE EFFECTIVELY, TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

VII.

[DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WERE VIOLATED BY COUNSEL'S INEFFECTIVENESS DURING THE VOIR DIRE WHETHER DUE TO COUNSEL'S DEFICIENCIES OR BEING RENDERED INEFFECTIVE BY STATE ACTION.

VIII.

[DEFENDANT] WAS DENIED A FAIR TRIAL AND A FAIR, RELIABLE AND INDIVIDUALIZED SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE PROSECUTOR'S ARGUMENTS AT THE GUILTY/INNOCENCE AND PENALTY PHASES

PRESENTED IMPRESSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. DEFENSE COUNSEL'S FAILURE TO RAISE PROPER OBJECTIONS WAS DEFICIENT PERFORMANCE WHICH DENIED [DEFENDANT] EFFECTIVE ASSISTANCE OF COUNSEL.

IX.

[DEFENDANT] WAS DENIED HIS RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND MENTAL HEALTH EXPERTS AT THE GUILT/INNOCENCE AND SENTENCING PHASES OF HIS CAPITAL TRIAL, WHEN CRITICAL INFORMATION REGARDING [DEFENDANT'S] MENTAL STATE WAS NOT PROVIDED TO THE JURY AND JUDGE, ALL IN VIOLATION OF [DEFENDANT'S] RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

X.

[DEFENDANT] DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF ANY RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TO THE EXTENT TRIAL COUNSEL FAILED TO INVESTIGATE THE CIRCUMSTANCES SURROUNDING [DEFENDANT'S] STATEMENTS, FAILED TO KNOW THE LAW AND FAILED TO ARGUE EFFECTIVELY, AND/OR FAILED TO OBJECT, COUNSEL WAS INEFFECTIVE.

XI.

[DEFENDANT] IS INNOCENT OF FIRST DEGREE MURDER.

XII.

[DEFENDANT] IS INNOCENT OF THE DEATH PENALTY. [DEFENDANT] WAS SENTENCED TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XIII.

[DEFENDANT] WAS ABSENT FROM CRITICAL STAGES OF THE TRIAL IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XIV.

[DEFENDANT'S] SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE

PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO [DEFENDANT] TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING [DEFENDANT]. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THESE ERRORS.

XV.

[DEFENDANT'S] GUILTY VERDICT AND JURY RECOMMENDED DEATH SENTENCE ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE TRIAL COURT ERRONEOUSLY INSTRUCTED [DEFENDANT'S] JURY ON THE STANDARD BY WHICH THEY MUST JUDGE EXPERT TESTIMONY. THE JURY MADE DECISIONS OF LAW THAT SHOULD HAVE BEEN WITH THE PROVINCE OF THE COURT.

XVI.

[DEFENDANT'S] SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR BECAUSE THE JURY RECEIVED INADEQUATE GUIDANCE CONCERNING THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED. FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XVII.

[DEFENDANT'S] DEATH SENTENCE IS PREDICATED UPON AN AUTOMATIC AGGRAVATING CIRCUMSTANCE, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS. TO THE EXTENT TRIAL COUNSEL FAILED TO KNOW THE LAW, FAILED TO ARGUE EFFECTIVELY, AND/OR FAILED TO OBJECT, TRIAL COUNSEL WAS INEFFECTIVE.

XVIII.

[DEFENDANT'S] EIGHTH AMENDMENT RIGHT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND AND/OR CONSIDER THE MITIGATING CIRCUMSTANCES SET OUT CLEARLY IN THE RECORD. TO THE EXTENT, TRIAL COUNSEL FAILED TO KNOW THE LAW, FAILED TO ARGUE EFFECTIVELY, AND/OR FAILED TO OBJECT, TRIAL COUNSEL WAS INEFFECTIVE.

XIX.

THE TRIAL COURT ENGAGED IN IMPRESSIBLE EX PARTE CONTACT WITH THE STATE AND TRIAL COURT'S SENTENCING

ORDER DID NOT REFLECT AN INDEPENDENT WEIGHING OR REASONED JUDGMENT, CONTRARY TO FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS, TO THE EXTENT, TRIAL COUNSEL FAILED TO KNOW THE LAW, FAILED TO ARGUE EFFECTIVELY, AND/OR FAILED TO OBJECT, TRIAL COUNSEL WAS INEFFECTIVE.

XX.

[DEFENDANT'S] DEATH SENTENCE IS FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO THE STATE'S INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENT UPON NON-STATUTORY AGGRAVATING FACTORS. DEFENSE COUNSEL'S FAILURE TO OBJECT OR ARGUE EFFECTIVELY CONSTITUTED INEFFECTIVE ASSISTANCE.

XXI.

[DEFENDANT'S] SENTENCING JURY WAS MISLED BY COMMENTS, QUESTIONS, AND INSTRUCTIONS THAT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY OBJECTING.

XXII.

[DEFENDANT] IS DENIED HIS FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSING HIS POST CONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING [DEFENDANT'S] LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

XXIII.

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTO IS UNCONSTITUTIONALLY VAGUE. [DEFENDANT'S] SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

XXIV.

[DEFENDANT'S] RIGHTS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN THE JURY AND JUDGE WERE PROVIDED WITH, AND RELIED

UPON, MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN SENTENCING [DEFENDANT] TO DEATH IN VIOLATION OF JOHNSON V. MISSISSIPPI.

XXV.

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT EXECUTION BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES [DEFENDANT'S] RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER THE FLORIDA CONSTITUTION.

XXVI.

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE, BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY. TO THE EXTENT COUNSEL FAILED TO KNOW THE LAW, FAILED TO ARGUE EFFECTIVELY, AND/OR FAILED TO OBJECT, COUNSEL RENDERED INEFFECTIVE ASSISTANCE.

XXVII.

[DEFENDANT] WAS DENIED A PROPER DIRECT APPEAL OF HIS CONVICTIONS AND SENTENCES, INCLUDING HIS SENTENCE OF DEATH, CONTRARY TO FLORIDA LAW AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, DUE TO OMISSIONS IN THE RECORD. TO THE EXTENT COUNSEL FAILED TO KNOW THE LAW, FAILED TO ARGUE EFFECTIVELY, AND/OR FAILED TO OBJECT, COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

XXVIII.

[DEFENDANT'S] TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

XXIX.

[DEFENDANT'S] SENTENCING JURY WAS INACCURATELY, VAGUELY AND OVER BROADLY INSTRUCTED ON THE DURING THE COMMISSION OF A FELONY AGGRAVATING CIRCUMSTANCE, WHICH DID NOT APPLY AS A MATTER OF LAW, AND THE COURT'S CONSIDERATION OF THE FACTOR DID NOT CURE THE ERROR, ALL IN VIOLATION OF [DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNTIED STATES CONSTITUTION. TO THE EXTENT TRIAL AND

APPELLATE COUNSEL FAILED TO PROPERLY LITIGATE THIS ISSUE, [DEFENDANT] RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

XXX.
[DEFENDANT] IS INSANE TO BE EXECUTED.

XXXI.
[DEFENDANT] WAS DENIED A FAIR AND IMPARTIAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE ANALOGOUS PROTECTIONS WITHIN THE FLORIDA CONSTITUTION, BECAUSE THE TRIAL COURT PERMITTED THE STATE TO INTRODUCE GRUESOME AND SHOCKING PHOTOGRAPHS.

(PCR. 32-167) In the public records claim, Defendant complained that the trial court's prior ruling with regard to the disclosure of personnel and internal affairs files of Detectives Crawford, Garafalo and King was preventing him for fully investigating his claims. (PCR. 40-42) However, Defendant did not allege why the trial court's prior ruling was erroneous. *Id.*

On January 3, 2000, the State filed its response to the motion. (PCR. 168-227) The State asserted that claims VI, VIII, X-XVIII, XX-XXIII, XXVI-XXIX and XXXI should be summarily denied, as procedurally barred. (PCR. 183-94) It averred that claims I-V, VII, XXIV, XXV and XXX were facially insufficient. (PCR. 195-217) Finally, the State agreed to an evidentiary hearing on claims IX and XIX. (PCR. 217-25)

On March 3, 2000, the trial court held a *Huff* hearing. (R.

22-23) On May 5, 2000, the trial court issued an order granting an evidentiary hearing on claims IX and XIX and summarily denying the remainder of the claims. (R. 251-55) It found that claims VI, VIII, X-XVII, XX-XXIV, XXVI-XIX and XXXI were procedurally barred. *Id.* Claim XXX was found not to be ripe. *Id.* The remainder of the claims were found to be facially insufficient, conclusively refuted by the record or both. *Id.*

At the evidentiary hearing, Defendant first called Dr. Ernest Bordini, a neuropsychologist. (PCR. 270-71) Dr. Bordini testified that he had done evaluations in 5 to 7 capital cases previously. (PCR. 271-79) He first became involved in this matter in the spring or summer of 2000. (PCR. 279-80) As part of his evaluation, Dr. Bordini conducted a clinical interview with Defendant and reviewed Defendant's school, medical and prison records, deposition of his family members, police reports and witness statements. (PCR. 280-81) He also relied upon tests performed by Dr. Hyman Eisenstein. (PCR. 284-85) Dr. Eisenstein had given Defendant the WAIS, on which Defendant had score 102 or 103. (PCR. 285-86) This score was consistent with information from Defendant's school records. (PCR. 286-87) Dr. Bordini also believed that the pattern of performance on the test was consistent with some psychomotor difficulties that had been noted. (PCR. 287) He asserted that problems with

psychomotor skills are one of the first places where neuropsychological problems are seen and that the tests of psychomotor skills are very sensitive for brain damage. (PCR. 287) Based on this pattern, Dr. Bordini asserted that this pattern indicated some difficulty with visual spatial perception, motor skills, attention and working memory. (PCR. 289)

The result on the Wechsler Memory Scale showed that the auditory recognition memory was below recall memory. (PCR. 286) Dr. Bordini stated that this pattern was sometimes associated with malingering and that no formal testing of malingering had been done. (PCR. 286)

In addition to relying on Dr. Eisenstein's testing, Dr. Bordini conducted his own testing. (PCR. 288) Two of those tests were specifically to determine if Defendant was malingering, and Dr. Bordini saw no signs of malingering. (PCR. 288) The battery of tests that Dr. Bordini performed were the Wechsler Memory Scale III, which Dr. Eisenstein had already done, the Halstein Reitan test and the California Verbal Learning Test. (PCR. 291-92)

Because of the pattern on the WAIS, Dr. Bordini tested Defendant's sensory perceptual skills. (PCR. 289) He found that Defendant had difficulty recognizing the fingers on his left

hand and shape placed in his left hand. (PCR. 290) These results indicated to Dr. Bordini that Defendant had something wrong with the right side of his brain. (PCR. 290)

Dr. Bordini next performed the Tactile Performance Test. (PCR. 291) Defendant had a fair amount of difficulty in this test with his left hand, which caused Defendant to become frustrated. (PCR. 291) Dr. Bordini also found that Defendant had problems with motor persistence, which was consistent with frontal lobe problems. (PCR. 291) He found that Defendant demonstrated a severe level of impairment on some tests of visual memory but was normal on others. (PCR. 292-94)

Dr. Bordini also found that Defendant's ability to check appropriate and inappropriate responses was severely impaired. (PCR. 294) In tests of executive functioning, Defendant's results varied from normal to severe impairment. (PCR. 295) Dr. Bordini opined that overall Defendant's executive functioning measured at least low impairment and probably moderate impairment. (PCR. 295)

Dr. Bordini also found impairment in abstract reasoning, which he believed was indicative of frontal lobe damage. (PCR. 295-96) Defendant also showed mild perservation on figures and moderate perservation in learning a list of words. (PCR. 296-97) Again, Dr. Bordini opined that this was indicative of

frontal lobe damage. (PCR. 297) He also observed difficulties in impulse and anger control. (PCR. 298-99) In Dr. Bordini's opinion, these finding of visual spatial perception problems and lack of impulse control were confirmed by Defendant's school records. (PCR. 299-300)

Dr. Bordini believed that Defendant's father's alleged alcoholism, his mother's history of mental illness, and the alleged difficulty of Defendant's birth were risk factors from neuropsychological problems in Defendant. (PCR. 300-01) He also felt that a report of a skull fracture was a risk factor. (PCR. 301) He asserted that there was a question about whether Defendant was a shaken baby based on an alleged broken collarbone. (PCR. 301)

Dr. Bordini opined that Defendant suffered from attention deficit hyperactivity disorder, a conduct disorder and intermittent explosive disorder. (PCR. 309-16) He believed that Defendant could be treated for these problems with therapy and drugs. (PCR. 316-17) He also diagnosed Defendant as suffering from bipolar disorder not otherwise specified. (PCR. 318-21) Dr. Bordini felt that this diagnosis was supported by his interview with Defendant, Defendant's school records and the results of the MMPI administered by Dr. Eisenstein. *Id.* He also opined that Defendant had antisocial personality disorder.

(PCR. 321-23)

Dr. Bordini had seen a report from Dr. Haber in which she had found antisocial personality disorder as well. (PCR. 323-24) However, he believed that Dr. Haber had conducted an insufficient clinical interview with Defendant. (PCR. 324-25)

Dr. Bordini believed that Defendant was abused and neglected as a child. (PCR. 326-28) The school records, Defendant's statements and the deposition of Defendant's father lead Dr. Bordini to believe that Defendant was raised in a cold, unpredictable environment with his family. (PCR. 328) He admitted that during the time Defendant lived with the Montejos, he had a stable, loving family setting. (PCR. 328-29) Shortly after Defendant returned to his own family, Defendant's mother left and was in contact with Defendant for years. (PCR. 329) Life with Defendant's father was chaotic due to the father's drinking, womanizing and fighting. (PCR. 329) Dr. Bordini believed that this environment alone would cause a mood disorder. (PCR. 330-31) He found evidence of these problems in Defendant's school records and believed that the failure to have properly diagnosed and treated Defendant at that time was detrimental to him. (PCR. 331-32) Dr. Bordini believed that Defendant became severely emotionally handicapped while in school and should have been placed in a residential treatment

facility. (PCR. 333)

Dr. Bordini opined that Defendant was acting under several emotional disturbance at the time of the murder. (PCR. 334) In reaching this opinion, Dr. Bordini relied upon the fact that Defendant had been on a two day crime spree before the murder. (PCR. 334-35) He believed that Defendant's behavior was both purposeful and impulsive as a means of retaliating against world for the death of his brother to AIDS and the shooting of his partner in crime. (PCR. 335-37) He also stated that the fact that Defendant preyed on victims of opportunity and panicked at the sight of the police shows that he was emotionally distressed. (PCR. 337-42)

Dr. Bordini had also seen a police report of an incident where someone had attempted to touch Defendant's genitals and had masturbated in front of Defendant when Defendant was 12. (PCR. 326-27) Dr. Bordini believed that the major effect on Defendant of this incident was not the incident itself but his family's reaction to the incident. (PCR. 327)

Dr. Bordini had reviewed Dr. Ansley's report and disagreed with her conclusions. (PCR. 301-09) He felt that Dr. Ansley had not conducted adequate testing, had improperly rejected Dr. Eisenstein's test results and had not conducted an adequate clinical interview. *Id.*

On cross, Dr. Bordini admitted that Defendant said that he began stealing from the Montejos when he lived with them. (PCR. 483) When he was caught, he was spanked. (PCR. 484) Defendant described his father as a warm person who helped him with his school work, indulged Defendant with toys and trips and was fair and understanding. (PCR. 485) Defendant's father was very lenient with him and only punished Defendant 2 or 3 times. (PCR. 487) As a result, Defendant believed he could get away with anything. (PCR. 487)

Defendant stated that his use of drugs and alcohol was minute. (PCR. 486) He stated that he avoided drugs and alcohol to stay in shape. (PCR. 489-90) Dr. Bordini admitted that Defendant's prior claim of having a problem with substance abuse was a lie to get a lesser sentence. (PCR. 526-28)

Defendant told Dr. Bordini that he first came in contact with the criminal justice system for carrying a concealed weapon at age 10 or 11. (PCR. 486-87) He progressed to joyriding and then stealing cars. (PCR. 488) Defendant made between $25,000 and $35,000 stealing cars. (PCR. 488) Defendant had sucessfully eluded the police before while stealing cars. (PCR. 489) He also shoplifted, ran away and lied. (PCR. 491) He was arrested for assault and battery and admitted to phycially harming 3 or 4 other people. (PCR. 493) At 14, Defendant was placed in a

juvenile facility. (PCR. 492) At 15, Defendant was placed in a halfway house and then enrolled in a juvenile intervention program. (PCR. 492-93)

By the age of 16 or 17, Defendant routinely carried a .9mm semiautomatic and had used a stun gun to disable a guard at an automotive dealership while stealing a car. (PCR. 493) By this time, Defendant had been tranferred to the adult system. (PCR. 494) By the time Defendant killed Off. Martin, he had been placed on probation and served three incarcerative sentences. (PCR. 493-94) After his last release from prison, Defendant became involved with a gang and started being involved in gunfights and threatening people with guns. (PCR. 494-95) Defendant became a leader in the gang. (PCR. 495)

Dr. Bordini admitted that Defendant had stated that he initially did well in school. (PCR. 496) However, he became a behavioral problem, talking excessively, fighting and being suspended. (PCR. 496)

Dr. Bordini had read the PSI but had not realized that Defendant had committed a nearly identical burglary to the one he committed the night he killed Off. Martin two years earlier. (PCR. 497-500) Dr. Bordini had discounted Defendant's statement about killing the police rather than returning to jail because he considered them confusing. (PCR. 500-01)

Dr. Bordini had reviewed Defendant's prison records. (PCR. 501-03) These records showed a long history of problems with autority figures. *Id.* Defendant had claimed to have been hospitalized for being struck with a fishing pole while with the Montejos. (PCR. 503) However, Dr. Bordini found no records to support the alleged hospitalization and never spoke to the Montejos about it. (PCR. 503-05)

Dr. Bordini admitted that the results of his observations of Defendant in the mental status examination were mainly normal. (PCR. 506-08) Dr. Bordini stated that Defendant had reported "some fragments of hallucinations" that were not "particularly meaningful." (PCR. 511) Dr. Bordini denied that Defendant's self-esteem was fair to positive but admitted that he had reported it as such. (PCR. 512)

Among the behavior problems noted in Defendant's school records were aggression toward other students, threatening other students, lying and bringing weapons to school. (PCR. 515-16) Defendant's father did participate in a conference with Defendant's school about him and did authorize certain testing. (PCR. 517-18) By that time, Defendant was characterized as having no control over his behavior, knowing right from wrong and was remorseless. (PCR. 518-19) They indicated that Defendant's inappropriate behavior is goal-oriented. (PCR. 519)

On November 10, 1982, Defendant was suspended from school for throwing a chair at a teacher and teacher's aid. (PCR. 523) Despite being placed in emotionally handicapped classes, Defendant remained disruptive and abusive and aggressive toward others. (PCR. 522-24) On October 4, 1983, Defendant was again suspended from school for wrestling with a teacher who was trying to stop Defendant from attacking another student. (PCR. 524) In 1984, he was suspended 3 times for physical attacks on teachers and students and once for bringing drugs to school. (PCR. 524-25)

Defendant's EEG from 1988 was normal. (PCR. 534) Dr. Bordini admitted that Defendant's performance on the WAIS-III, the Reitan-Klove Sensory-Preceptual Examination, the grip strength, the finger to nose, the Reitan Aphasia, WMS-III, Seashore Rhythm Test and the Speech Sound Perception Test, the Rey Fifteen Item Test, the CVLT word list, and the TPT memory and localization test were all average or above average. (PCR. 542-52)

Dr. Bordini claimed that Defendant's alleged attention problem and his alleged problems with executive functioning did not cause Defendant to be unable to plan and execute his plans. (PCR. 552-69) Instead, it caused Defendant to be motivated to do inappropriate things. *Id.*

Maryann Griffin, Defendant's 58 year old mother, testified that she had been on disability for mental problems for about 10 years at the time of the evidentiary hearing. (PCR. 347-48) She had been being treated for mental illness periodically since the age of 12. (PCR. 353)

At the age of 32, she met Clarence Thomas Griffin through her job. (PCR. 352) She believed that he was divorced at that time and began an romantic relationship with him. (PCR. 352-53) Eventually, she married Mr. Griffin and became pregnant. (PCR. 353-54) Mr. Griffin urged her to have an abortion, but she refused because she was afraid to do so. (PCR. 354-55) During her pregnancy, she experienced mental problems, which were not severe. (PCR. 355) After Defendant was born, Ms. Griffin became depressed. (PCR. 355-56) Ms. Griffin did change Defendant's diapers, keep him clean and dress him nicely when he was in her care. (PCR. 356-57) However, Mr. Griffin kept taking Defendant to a babysitter because of her depression but he continued to live in her house. (PCR. 356-57) During this time, Mr. Griffin did not assist Ms. Griffin in caring for Defendant because he was not home. (PCR. 357) Mr. Griffin would either be at work or out drinking and gambling. (PCR. 357) Ms. Griffin characterized Mr. Griffin as an alcoholic and stated that he would say bad words to her when drunk. (PCR. 358)

When Defendant was about 5 years old, Mr. Griffin would slap Defendant hard across the face if Defendant was too loud. (PCR. 359) When Defendant was 7 or 8, the family's house burned down because Mr. Griffin fell asleep holding a lit cigarette. (PCR. 360) Defendant was home at the time of the fire and sustained some scratches in being removed from the house through a broken window. (PCR. 360)

In addition to drinking, Mr. Griffin also smoked marijuana and told Ms. Griffin that he took pills. (PCR. 361) Mr. Griffin also gambled and would lose thousands of dollars. (PCR. 361) Mr. Griffin was initially a good provider for his family but his business circumstances changed and he was not being paid money owed him. (PCR. 360)

Ms. Griffin separated from Mr. Griffin when Defendant was about 8 because of Mr. Griffin's drinking. (PCR. 361-62) Defendant remained with his father, and Ms. Griffin lost touch with him. (PCR. 362) Ms. Griffin was next in contact with Defendant after he had been convicted and sentenced. (PCR. 362)

No one contacted Ms. Griffin at the time of trial. (PCR. 363) However, Ms. Griffin claimed that she had tried to find Defendant during the time that she was not in contact with him. (PCR. 363-64)

On cross, Ms. Griffin admitted that she had abandoned and

had not tried to contact another of her children. (PCR. 364-65) Ms. Griffin initially testified that she lived with Defendant and Mr. Griffin after the fire. (PCR. 365-66) However, she later stated that she did not know if Defendant had problems sleeping after the fire because she had not lived with him. (PCR. 367) She was impeached with her deposition testimony that she had lived with Defendant and that he had no problems sleeping. (PCR. 367-69)

She then admitted that her memory was poor due to her mental problems. (PCR. 369-70) She also stated that she is frequently confused. (PCR. 370) She has been diagnosed with manic depression and schizophrenia and lives in an assisted living facility because she is incapable of caring for herself. (PCR. 370-73)

Ms. Griffin stated that Defendant's birth was normal and that Defendant was a normal, healthy child with no mental or substance abuse problems when she lived with him. (PCR. 374) During that time, Defendant did well in school and was smart. (PCR. 375) Defendant never required medical treatment as a result of being slapped by his father, and Ms. Griffin never reported any of these incidents as child abuse. (PCR. 375-76) Ms. Griffin never sought mental health treatment for Defendant and characterized him as a good, happy-go-lucky child, who was

well dressed in clean clothing. (PCR. 376-77) The times when Defendant was slapped by his father were when Defendant was misbehaving. (PCR. 377) She never saw Defendant being abused and did not abuse him herself. (PCR. 377)

Defendant originally only stayed at the Montejo's home when his parents were working. (PCR. 378) If Mr. and Ms. Griffin were busy in the evening or traveling out of town, Defendant would stay overnight. (PCR. 378) Ms. Griffin knew the Montejos, trusted them to watch her child and believed that they were fond of Defendant and treated him like their own. (PCR. 378-80) Mr. Griffin paid the Montejos to babysit Defendant. (PCR. 380) Around the age of 5 or 6, Defendant started spending more time at the Montejo's home then his own and moved in with them when he was about 8. (PCR. 380-82) However, Defendant had moved back with his family before the fire. (PCR. 381) Ms. Griffin did not remember a time when they stopped paying the Montejo's for babysitting Defendant and had never heard of the Montejo's desire to adopt Defendant. (PCR. 383)

At the time of Defendant's trial, Ms. Griffin was in a hospital in North Carolina. (PCR. 384-86) She had been hospitalized because she had been in a diabetic coma. *Id.*

Mario Montejo testified that Defendant was brought to his home when he was about 6 months old to be babysat by Mr.

Montejo's wife Raquel. (PCR. 390-91) Defendant continued to be cared for by the Montejos for 9 years. (PCR. 392) When the Montejo's first started babysitting Defendant, Defendant would be in their care for about 4 hours at a time during working hours. (PCR. 392) Overtime, the amount of time spent with the Montejos expanded to the full working day, then some overnights were added and finally Defendant was living with them. (PCR. 392) Mr. Montejo stated that they agreed to keep Defendant longer because they came to love him. (PCR. 392)

Mr. Montejo stated that Defendant was fed and taken care of by his parents but that his mother was not affectionate. (PCR. 392-93) During the time Defendant was living with the Montejos, his family would visit him there, but as time went on, the visits became less frequent. (PCR. 394) He claimed that the visit, which only lasted about an hour, had decreased to once a month before Defendant learned to walk. (PCR. 394-95) He stated that Defendant's parents were not affectionate to Defendant during the visits but that they did bring Defendant clothes, toys and material things. (PCR. 395)

Mr. Montejo claimed that Defendant's parents were initially responsible about paying for Defendant's care but that after about 2 years, they would only pay sporadically. (PCR. 395-96) Attempts to obtain payment were met with excuses. (PCR. 396)

Mr. Montejo stated that he observed Mr. Griffin to be intoxicated several times. (PCR. 396-97) He also believed that Ms. Griffin was drinking. (PCR. 397)

Mr. Montejo stated that he and his wife arranged for Defendant to be enrolled in school and were responsible for seeing to Defendant's medical care. (PCR. 397-98) Mr. Montejo stated that Ms. Griffin's mother had wanted the Montejos to adopt Defendant when he was about 7, but his parents wanted custody of him. (PCR. 398) When Defendant was between 9 and 10, the Montejos placed Defendant in the care of his grandmother. (PCR. 399) They did so because Defendant's parents would not consent to an adoption and were not paying for Defendant's care. (PCR. 401)

Mr. Montejo stated that he considered Defendant to be a son and that Defendant was close to Mr. Montejo's extended family. (PCR. 399-400) Defendant did well in school and was intelligent. (PCR. 400) In second grade, Defendant was the teacher's pet until Defendant introduced the Montejo's as his parents. (PCR. 400) Thereafter, the teacher almost threw Defendant out of her class and began sending complaints home about Defendant. (PCR. 400) The Montejos addressed the situation with the principal, Defendant was removed from that class and Defendant's school performance was again good. (PCR. 400)

About a year after Defendant went to live with his grandmother, the Montejos arranged for Defendant to join them on a trip to Disney World. (PCR. 401) At that time, Mr. Montejo noticed that Defendant was rowdy and disobedient. (PCR. 401)

Mr. Montejo stated that he testified at the penalty phase. (PCR. 402) Prior to testifying, he had spoken to an investigator and had been deposed. (PCR. 402-03) However, he had not spoke to Defendant's attorney before being called at trial. (PCR. 403) Mr. Montejo did not feel that his testimony at the penalty phase was complete because counsel did not ask enough questions and because he was upset. (PCR. 403-04)

Mr. Montejo admitted that his wife was unable to testify at either the trial or the evidentiary hearing because of her health. (PCR. 405-06) He stated that Defendant was raised in a warm, loving family environment without physical or substance abuse during the 10 years Defendant lived with them. (PCR. 408-13) During this time, Defendant was healthy and showed no signs of mental or emotional problems. (PCR. 414) Defendant did well and behaved in school and did not exhibit an violent tendencies. (PCR. 414-15)

Mr. Montejo admitted that he had been to Mr. and Ms. Griffin's home, which was nice and well supplied. (PCR. 417) Mr. Montejo admitted that Mr. Griffin was more affectionate to

his children that Ms. Griffin. (PCR. 417) He also acknowledged that all of Defendant’s material needs were met and exceeded by his parents. (PCR. 418) Mr. Montejo stated that the idea of the adoption was proposed by Defendant’s grandmother and was not his or his wife’s idea. (PCR. 421) After Defendant’s parents had refused to have him adopted, Defendant remained with the Montejos for many months. (PCR. 422)

Mr. Montejo admitted that both he and his wife were extensively interviewed prior to trial by an investigator who worked for Defendant’s attorney and that the investigator took extensive notes of those interviews. (PCR. 425-27) He admitted that his testimony at the evidentiary hearing was basically the same as his testimony at trial. (PCR. 427-28) He acknowledged that he was testifying because he wanted to get Defendant off death row. (PCR. 428)

Stephen Minnis, a three time convicted felon, testified that he met Defendant when Defendant was 15 years old. (PCR. 431-32) At the time they first met, Defendant was with a group of people in a public park making an excess amount of noise, such that the park officials turned off the lights at the park and tried to remove the group. (PCR. 432-33) Mr. Minnis went to the park officials and got the lights turned back on and the group was allowed to stay. (PCR. 433) Mr. Minnis later assisted this

group in settling a dispute with the park and city officials. (PCR. 433-34)

Through these activities, Mr. Minnis noticed Defendant, who was treated as an outcast by the rest of the group. (PCR. 435) Eventually, Defendant began to attach himself to Mr. Minnis and started to visit his house frequently. (PCR. 435-37) During this time, Defendant indicated that his father did not care about him and that he did not like to be at home. (PCR. 436-37) If Mr. Minnis told Defendant to go home, Defendant was roaming the streets instead. (PCR. 437) Mr. Minnis met Defendant's father and always saw him either drinking or drunk. (PCR. 437-38) Mr. Minnis believed that Defendant's step-mother ignored Defendant and that his father thought Defendant was a lost cause. (PCR. 438) Defendant engaged in bad behavior to be considered cool. (PCR. 440)

Defendant joined an auto-theft ring and earned the nickname Auto despite his lack of proficiency at stealing cars. (PCR. 440) Mr. Minnis did not consider Defendant to be a leader and noticed that he was self-conscious about his appearance. (PCR. 441)

Shortly before the murder, Mr. Minnis observed an incident between Defendant and some police officers. (PCR. 442-43) During this incident, the police were attempting to disburse a

group of teenagers loitering in a parking lot. (PCR. 443) Defendant and the rest of the group were mouthing off to the police, and one of the officers allegedly threatened Defendant's life. (PCR. 443)

Mr. Minnis stated that he was called by Defendant's attorney and asked to come to the trial. (PCR. 444) Mr. Minnis claimed that he came, went into the courtroom during proceedings and was told to wait in the hall. (PCR. 444) He claimed that while he was waiting, he was approached by police officers and was threatened. (PCR. 445-46) Mr. Minnis stated that he left the courthouse, did not ever talk to Defendant's attorney again and never told anyone that he had been intimidated. (PCR. 446-47)

On cross, Mr. Minnis admitted that he had been dishonorably discharged from the military. (PCR. 449) He never noticed any signs of mental illness in Defendant. (PCR. 450-51) Mr. Minnis knew that Defendant's father provided for his needs and was not physically abusive to Defendant. (PCR. 452-53) However, Defendant's father disapproved of Defendant's lifestyle and wanted Defendant to get an education. (PCR. 453-54) During the time Defendant knew Mr. Minnis, Defendant never held a full time job. (PCR. 454)

Mr. Minnis admitted that Defendant knew Off. Matin before he killed him. (PCR. 457-62) An incident had occurred between

them over a girl Defendant liked. *Id.* However, Mr. Minnis denied that this angered Defendant. *Id.* Defendant knew that Off. Martin was one of the officers that had stopped him before he shot Off. Martin. (PCR. 462-63) Mr. Minnis never told anyone about the alleged intimidation. (PCR. 466-68) In fact, Mr. Minnis stated that he told his wife to tell the defense he was unavailable. (PCr. 468-69)

Charles Griffin, Defendant's half-brother, testified that he had previously been convicted of 3 felonies. (PCR. 597-98) Charles' brother Robert died of AIDS in 1987. (PCR. 598-99)

Charles stated that he first met Defendant's mother, who was pregnant with Defendant, when she came to his mother's home with his father. (PCR. 601-02) By that time, Charles' parents were divorced. (PCR. 601) Charles remembered his father caring for Defendant, and stated that Defendant's mother would argue with their father because she wanted a nanny to care for Defendant. (PCR. 603) Charles visited Defendant on a few occasions at the Montejos when Defendant was 4 or 5. (PCR. 607-08) Charles believed that the Montejos treated Defendant well and loved him. (PCR. 608)

Charles claimed that after Defendant came to live with his father and his father's girlfriend, the family would have drugs open and available in the house. (PCR. 611) When Defendant was

alone, he would talk to himself and seemed to be pretending to be at the Montejos' home. (PCR. 611-12) Charles also claimed that Defendant mouthed words after saying them. (PCR. 612-13) He asserted that Defendant's mother acted as if Defendant was not her child and called him names. (PCR. 613-17) Charles and Defendant once saw Defendant's mother exit a massage parlor and expose her buttocks and saw a picture of her with another man. (PCR. 617-20)

Charles characterized his father as an alcoholic. (PCR. 662) On two occasions, Defendant's father drove drunk with Defendant and Charles in the car and sideswiped the baracades on the side of the road. (PCR. 622-25) Charles stated that he would take Defendant and Charles to bars to eat and would not want to leave when they wanted to do so. (PCR. 625) Charles also stated that his father would occasionally leave them at the bar and that they would end up being cared for by barmaids. (PCR. 625) Charles stated that he only knew of one time when his father struck Defendant. (PCR. 630-31) Charles stated that his father also gambled and abused pills. (PCR. 632)

Charles stated that Defendant lived with Charles' mother at one time. (PCR. 627-30) However, Charles' mother sent Defendant back to his father because of his misbehavior. *Id.* Charles claimed that Defendant's step-mother also had a drinking

problem. (PCR. 633) She would spend the money Defendant's father gave her to care for the children and the house on alcohol. (PCR. 633-34) At this point, Charles claimed that Defendant stopped going to school because his clothes were not clean. (PCR. 635)

Charles stated that at the time of Defendant's trial, he was living at his father's home. (PCR. 639) He claimed that he would have testified if he had been asked but that he was never asked. (PCR. 638-39)

On cross, Charles stated that Defendant lived with his parents until he was 2 or 3. (PCR. 651) However, he admitted Defendant could have been 4 or 5. (PCR. 651-52) Charles claimed that Defendant did not do well in school. (PCR. 653) Charles stated that Defendant lived with his father and girlfriend in Jensen beach and then moved back to Miami with his father and mother after he left the Montejos' home. (PCR. 656) Charles stated that these moves probably occurred when Defendant was between 7 and 8. (PCR. 656-57)

Charles first stated that he was in Georgia at the time of Defendant's trial, and then claimed to have been in Miami. (PCR. 662-63) Charles admitted that he was not speaking to his father at that time. (PCR. 663-65) Charles also claimed that his father discouraged him from testifying. *Id.*

Penny Brill, an Assistant State Attorney, testifed that she drafted the State's sentencing memo. (PCR. 895-96) The memo was prepared because Judge Snyder had asked both sides to do so. (PCR. 903-04) Ms. Brill sent a copy of the memo to Defendant's attorney, even though she did not reflect service on counsel in the memo. (PCR. 905) Ms. Brill stated that the State's sentencing memo differed from the final sentencing order in that the sentencing order addressed mitigation, assigned weight to the aggravating factors and found that the aggravation outweighed the mitigation. (PCR. 907-08)

Ms. Brill had practiced before Judge Snyder. (PCR. 899-900) As such, she knew that he had a tendency to move cases rapidly. (PCR. 899-900)

The State called Dr. Jane Ansley, a neuropsychologist. (PCR. 669-85) In reaching her opinion, Dr. Ansley reviewed Defendant's prison records, Dr. Eisenstein's raw test data, Dr. Bordini's raw test data, Dr. Eisenstein's deposition, Dr. Bordini's deposition, his direct testimony from the evidentiary hearing, Dr. Bordini's report, Defendant's prison records and Defendant's school records. (PCR. 686-87, 705) She also conducted a clinical interview with Defendant. (PCR. 687) Because Defendant had already been given a number of tests, had been through a clinical interview with Dr. Eisenstein and had

become upset while being tested by Dr. Eisenstein, Dr. Ansley decided to rely upon Dr. Eisenstein's information, to truncate the personal interview and to select tests that Defendant had not taken that were specific to problems noted in Dr. Eisenstein's information. (PCR. 688-92) In reviewing Dr. Bordini's data, Dr. Ansley saw some evidence of the practice effect, an improvement caused by having seen the questions already. (PCR. 692-93)

After reviewing all this information and conducting her own testing, Dr. Ansley opined that Defendant did not have any major neuropsychological impariment. (PCR. 693) She found no evidence of brain damage in the history. (PCR. 694) The incident described to Dr. Bordini in which Defendant was allegedly hit by a fishing pole was uncorroborated and insufficient to have caused brain damage. (PCR. 694) She found no evidence of a seizure disorder. (PCR. 694-95) The prior descriptions of a seizure disorder were the result of poor record-keeping and contradicted by testing. (PCR. 694-95) The alleged fainting episode was caused by Defendant's blood being drawn. (PCR. 695)

The results of the testing on Defendant were almost all in the average range. (PCR. 695-96) While Defendant's performance did vary within the average range, they did not indicate an

impairment. (PCR. 696) Dr. Ansley saw no evidence of inconsistency between Defendant's right and left sides. (PCR. 696-97) She discounted Dr. Bordini's finding of a left side problem because Defendant had performed in the above average range in the test relied upon to support this finding when Dr. Eisenstein had given it. (PCR. 697) She found no pattern to the results of Defendant's testing. (PCR. 697) Dr. Ansley explained that the reason Defendant had done badly on some tests given by Drs. Eisenstein and Bordini was that Defendant became angry during the testing and was not concentrating. (PCR. 698) Dr. Ansley stated that Defendant had no frontal lobe impairment or impairment in executive functioning. (PCR. 699-700) Dr. Bordini misinterpreted the test result to find this problem. *Id.*

In evaluating Defendant's personality, Dr. Ansley relied upon Dr. Eisenstein's administration of the MMPI, Defendant's history, and her interview with Defendant. (PCR. 700-01) She diagnosed Defendant as having mixed personality disorder with narcissistic and antisocial features. (PCR. 701-02) She rejected Dr. Bordini's finding of ADHD because it was inconsistent with the findings by the doctors who evaluated Defendant as a child and Defendant's test results. (PCR. 703-04) She asserted that a finding of Intermittent Explosive

Disorder was incorrect because it can only be diagnosed if there is no other explanation for aggressive behavior. (PCR. 704) Because Defendant was diagnosed with conduct disorder as a child and antisocial personality disorder as an adult, his aggresive behavior is otherwise explained. (PCR. 704-05) Moreover, people with Intermittent Explosive Disorder are remorseful after an episode, and Defendant is not. (PCR. 705)

She stated that Defendant did not qualify for Bipolar Disorder because Defendant had never had any major depressive episodes by Dr. Bordini's own admission. (PCR. 705-06) Dr. Ansley also found no evidence of hypermanic episodes. (PCR. 706-07) Dr. Ansley also disagreed with Dr. Bordini's finding of a cognitive disorder, as such disorders result from a psychological effect of a medical condition and there was no medical condition. (PCR. 708) Dr. Ansley did find some evidence of a learning disability. (PCR. 708-09)

Dr. Ansley stated that there was nothing in Defendant's school records and clinical interviews to suggest that a neuropsychological evaluation was necessary. (PCR. 712-16) The record and interview present no signs of neuropsychological impairment. (PCR. 717-18)

Andrew Kassier, Defendant's trial counsel, testified that he had been practicing law for 9 years at the time he was

appointed in this case. (PCR. 792-93) He had worked both as an assistant public defender and as a private practitioner. (PCR. 793-94) While with the Public Defender's Office, Mr. Kassier had defended first degree murder cases. (PCR. 794) He had also served as a training attorney at the Public Defender's Office and Executive Assistant Public Defender. (PCR. 794-95) As a result of this experience, Mr. Kassier was well aware of the law regarding defense in a capital case and had been deemed qualified to handle such cases. (PCR. 795-97) He had defended other capital defendants prior to this matter. (PCR. 797-98)

Mr. Kassier hired a private investigator and a mental health expert to assist him. (PCR. 793) The mental health expert was Merry Haber, whom Mr. Kassier had known and worked with for years. (PCR. 798-802) Dr. Haber was familiar with the issue of mitigation and was recommended to Mr. Kassier by other defense lawyers as one of the best mental health experts for mitigation. (PCR. 802-03)

The investigator Mr. Kassier chose was Al Fuentes. (PCR. 803) Mr. Kassier had Mr. Fuentes obtain Defendant's school records and provided them to Dr. Haber. (PCR. 803-04) Dr. Haber interviewed Defendant for the purpose of identifying mitigation. (PCR. 804-05) Dr. Haber reported back to Mr. Kassier that she was not able to find anything in mitigation. (PCR. 805-06)

Instead, she found that Defendant was antisocial. (PCR. 809) Having reviewed the school records, she did not recommend additional evaluation or testing of Defendant. (PCR. 806) Mr. Kassier was aware of the use of neuropsychologists and would have requested the appointment of one if there had been any indication that one was needed. (PCR. 806-08) After considering the evidence, Mr. Kassier decided not to present it because he felt it would be more harmful than beneficial. (PCR. 809)

Mr. Kassier was aware that Defendant's mother was alive and had discussed her with Defendant's father during his extensive interviews. (PCR. 809-10) Mr. Kassier decided not to use Ms. Griffin as a witness because of her mental illness and the fact that she was not around Defendant when he was growing up. (PCR. 810-11)

Mr. Kassier had Mr. Fuentes look for Charles Griffin, and Mr. Fuentes reported that he could not locate him. (PCR. 811-13) Mr. Kassier also did not think that Charles would have been a good witness because Charles was not raised with Defendant and saw Defendant little when Defendant was growing up. (PCR. 813) Mr. Kassier did not believe that Charles could provide information that was not already available from Defendant's father. (PCR. 814)

Mr. Kassier was also aware of Defendant's father's

girlfriend Linda. (PCR. 814) He did not call her as a witness because her testimony about Defendant would have been negative. (PCR. 814-15)

Mr. Kassier was aware that Mr. Minnis had been interviewed as a witness for the penalty phase. (PCR. 817) Mr. Fuentes had indicated that Mr. Minnis was unavailable to testify. (PCR. 817) When Mr. Minnis showed up during the trial, Mr. Kassier asked him to wait outside the courtroom so that Mr. Kassier could speak to him because the rule had been invoked. (PCR. 817-18) However, Mr. Minnis had disappeared when Mr. Kassier went to talk to him. (PCR. 818) Mr. Kassier sent Mr. Fuentes to bring Mr. Minnis back to the courthouse. (PCR. 818-19) However, they were unable to have Mr. Minnis return. (PCR. 819)

Mr. Kassier asked Defendant for the names of potential penalty phase witnesses, which Defendant provided. (PCR. 819-20) However, Mr. Kassier did not recall Charles' mother ever being mentioned. (PCR. 819-20)

Judge Snyder requested sentencing memos from both sides. (PCR. 820-21) Mr. Kassier knew that Judge Snyder used his memo in evaluating mitigation. (PCR. 821) Mr. Kassier was aware that Ms. Brill had prepared the State's sentencing memo, which he had seen. (PCR. 823)

Mr. Kassier stated that he had provided his file to CCR when

they were representing Defendant in 3 boxes. (PCR. 824-26) Mr. Kassier subsequently reviewed the box that Defendant's counsel had provided the State as his file and found that things were missing. (PCR. 826-27)

On cross, Mr. Kassier admitted that he had been suspended from the practice of law for 2 years at the time of the evidentiary hearing. (PCR. 832-34) He was working as a paralegal and was going to seek reinstatement when his suspension was over. (PCR. 834) Mr. Kassier did not expect anyone from the State Attorney's Office to support his application for reinstatement when he filed it. (PCR. 839) He also did not plan on citing his testimony in this matter in his application. (PCR. 839-40) Mr. Kassier did not recall having been the subject of any bar complaints at the time that he represented Defendant. (PCR. 840)

Mr. Kassier stated that this matter went to trial about 9 months after he was appointed. (PCR. 841-42) Mr. Kassier stated that he did receive Dr. Haber's written report 2 days before the penalty phase began. (PCR. 842-43) However, Mr. Kassier was already aware of Dr. Haber's opinion through a conference with her before the report was sent. (PCR. 843-46) Mr. Kassier stated that he would have asked for another expert, even at the last minute, if he had thought it would have been helpful.

(PCR. 846-47)

Mr. Kassier had provided Dr. Haber with police reports and discovery documents about the circumstances of Defendant's arrest and the crime. (PCR. 848-50) He had discussed the results of whatever testing Dr. Haber had done on Defendant. (PCR. 851) Both Mr. Kassier and Dr. Haber had extensive experience in developing mitigation, and Dr. Haber's evaluation was directed at doing so. (PCR. 852)

After the trial was over, Mr. Kassier heard from Defendant that Mr. Minnis had allegedly been intimidated. (PCR. 859-60) Mr. Kassier asserted that Mr. Fuentes also claimed that someone had attempted to intimidate him. (PCR. 860-61) Mr. Kassier did not bring this issue to Judge Snyder's attention because Mr. Fuentes was not intimidated and did not wish to make a big deal out of it. (PCR. 862-63)

In deciding what witnesses to call, Mr. Kassier met with Mr. Montejo personally. (PCR. 865) He also prepared Mr. Montejo to testify. (PCR. 865) However, he did not meet Ms. Griffin. (PCR. 864-65) Mr. Kassier's strategy for the penalty phase was to argue that Defendant had a good life with the Montejos and a traumatic life with his father. (PCR. 866) If Defendant had claimed to have been the victim of sexual abuse, Mr. Kassier would have investigated the claim. (PCR. 866)

On redirect, Mr. Kassier stated that he had made the decision not to call Dr. Haber well before the penalty phase began. (PCR. 870) Dr. Haber had begun work in the case in October 1990 and reviewed record that had been provided. (PCR. 871) Mr. Kassier had not provided Dr. Haber with the records of Defendant's juvenile incarceration because they were harmful. (PCR. 872) Dr. Haber's bill also reflected that she had spoken to Defendant's father. (PCR. 872-74)

Mr. Kassier was familiar with Judge Snyder and how he ran his courtroom. (PCR. 874) Judge Snyder was known for bringing matter to trial quickly. (PCR. 874-75) While this was the first time Mr. Kassier had actually tried a penalty phase, he had experience in preparing a case for a penalty phase previously. (PCR. 875-76) Defendant never told Mr. Kassier about the alleged incident where a person touched his genitals, even though Mr. Kassier had asked about abuse. (PCR. 877-78)

Mr. Kassier personally spoke to the penalty phase witnesses to prepare them to testify. (PCR. 879) Mr. Kassier also had Mr. Fuentes and a law clerk help prepare witnesses. (PCR. 979-80)

After considering this evidence, the trial court denied the remaining 2 claims. (PCR. 257-62) The trial court found that Mr. Kassier had conducted an appropriate investigation and had made valid strategic decision regarding the calling of witnesses

and that the new information was incredible, cumulative and harmful. *Id.* The court also found that there had been no ex parte communication in the preparation of the sentencing order and that the trial court had properly prepared the sentencing order.

This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied the claim of ineffective assistance of counsel at the penalty phase. The lay witnesses were either unavailable or testified at the penalty phase. Moreover, their testimony was cumulative to the evidence presented at the penalty phase. Counsel did investigate Defendant's mental health and made a strategic decision not to present that evidence. Further, the witness called by the defense was incredible.

The lower court properly denied the claim regarding the sentencing order. No ex parte communication occurred, and the trial court did independently find and weigh the aggravators and mitigations. Moreover, counsel did have the opportunity to present argument and evidence, and the law regarding the procedure for sentencing does not apply retroactively.

The lower court properly allowed Defendant ample time to file his motion for post conviction relief. Moreover, public

records were properly provided to Defendant. Further, the alleged *Brady* violation that these records would have supported is meritless as Defendant had, and presented, this evidence at the time of trial.

The lower court properly summarily denied the claim of ineffective assistance at the guilt phase. Counsel properly cross examined the State's witnesses. There is no reasonable probability that the trial court would have granted a motion to disqualify had one been made. Moreover, counsel did not concede his client's guilt to first degree murder.

The trial court properly denied the claim that counsel was ineffective for failing to move for a change of venue. Counsel did move for a change of venue, and that motion was properly denied.

The lower court properly denied the claim that counsel was ineffective for failing to object to Defendant being shackled, as the record conclusively shows that Defendant was not shackled. The lower court properly denied the claim that counsel was ineffective during voir dire, as he did appropriate question the venire and there is no reasonable probability that a challenge for cause would have been granted. The lower court properly found the issue regarding the comments in closing to be barred. As counsel did move to suppress Defendant's confession

and the State did not present the confession, the lower court properly rejected the ineffectiveness claim regarding the motion to suppress. The lower court also properly rejected the ineffectiveness claim regarding Defendant's presence, as he was present.

The lower court properly rejected the claims regarding the jury instructions, aggravating circumstances and the alleged innocence of the death penalty. Florida's capital punishment law is constitutional, and this claim is barred. The claim regarding the jury interviews is also barred. The claim that Defendant is insane to be executed is premature. The claim regarding the introduction of photographs is barred and meritless. The claim of ineffective assistance of appellate counsel is not properly presented in these proceedings and meritless. As there were no errors, the claim of cumulative error was properly denied.

ARGUMENT

I. THE LOWER COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE.

Defendant first asserts that the lower court erred in denying his claim of ineffective assistance of counsel for failing to investigate and present mitigating evidence.[3]

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[3] In this, and every other issue, in the brief, Defendant attempts to adopt the allegations plead in his motion for post

Specifically, Defendant asserts that his counsel failed to investigate his mental health properly and failed to locate and present Defendant's mother and half-brother. However, the lower court properly found that Defendant had not proven either that counsel was deficient or that he was prejudiced.

In denying the claim after the evidentiary hearing, the lower court found:

> Contrary to the well stated allegations in defendant's rather complete motion, the evidence presented does not support a conclusion that trial counsel, Andrew Kassier, provided ineffective assistance of counsel. In fact, the evidence does not support most of the allegations in this count of the Motion. [Fn2.]
>
> As the State correctly argues, in order to prevail on such a claim the defendant must first show "that counsel's performance was deficient. This requires showing that counsel made errors so serious that [he] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. . . ." *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, (1984). In making this determination, the court must be mindful of the tendency to allow hindsight to distort the true perspective of counsel at that time. *Id.* at 689.
>
> Despite defendant's assertions to the contrary,

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conviction relief as part of his argument. However, this Court has ruled that such attempted adoption of arguments from pleading filed below is insufficient to present an issue for appeal and that issues attempted to be raised in this manner are waived. *Anderson v. State*, 27 Fla. L. Weekly S580 (Fla. Jun. 13, 2002); *Duest v. Dugger*, 555 So. 2d 849, 952 (Fla. 1990). As such, any issues that are not specifically raised in the brief should be deemed waived.

the credible evidence does not support a conclusion that the defendant suffers or suffered from any organic brain damage or, for that matter, any significant mental illness of which counsel's failure to present could be called an omission of constitutional magnitude. To the contrary, the evidence shows that after obtaining numerous records pertaining to the defendant through the use of a private investigator, Mr. Kassier had the defendant evaluated by a well-trained and highly respected psychologist for the purpose of analyzing possible avenues of mental-health mitigation. Dr. Merry Haber, whose credentials with the criminal justice system are too numerous to mention, determined - after interviewing the defendant on two occasions, interviewing his father and reviewing his school records and other documentation - that mental health mitigation testimony would do more harm that good. [Fn.3]

In essence, the defendant, like a large portion of the criminal element, suffered from antisocial personality disorder with narcissistic tendencies. Dr. Haber did not suggest that there would be any benefit from having the defendant evaluated by a neuropsychologist. Moreover, Mr. Kassier testified that he gladly would have asked the court for such an expert if Dr. Haber had seen any such benefit. Mr. Kassier also testified that there was nothing in his numerous conversations with the defendant that suggested the need for neuropsychological evaluation. [Fn.4]

After making reasonable efforts to develop information for this tactical decision, Mr. Kassier determined that calling Dr. Haber as a witness would do more harm than good to the defendant's case. The concept that "death is different" is as true as the ides that "hindsight is 20/20." After a very careful examination, the evidence presented reflects that Mr. Kassier's decisions regarding the presentation of mental-health mitigation were reasonable under the circumstances and not deficient in any way, let alone in the context of a Sixth Amendment analysis.

Moreover, if a neuropsychological evaluation had been conducted, there is no credible evidence that it would have been beneficial to the defendant. In fact, the evidence is to the contrary. The more credible

testimony in that field came from Dr. Jane Ansley, a well respected clinical psychologist who specializes in neuropsychology. [Fn.5] Dr. Ansley aptly pointed out that in evaluating the defense's claim you look for a neurological event in his history -- hospitalization for such or a head injury. No such history exists.. The only reference to anything that could be remotely suggestive of such was the defendant's own claim that he was hit in the head wit a fishing pole when he was young but suffered no loss of consciousness -- a far cry from the type of neurological event that would support such a claim. Further, the defendant himself denied having any history of seizures. The only problem reflected in his history is fainting, such as when drawing blood. His EEG is normal.

The defendant scored in the average range in a great majority of his test. There was no suggestion or evidence of brain impairment and while Dr. Bordini found problems with his left hand (indicating a possible right brain problem) the defendant scored higher than average on tests administered by another defense doctor and relied upon by both Dr. Bordini and Dr. Ansley. According to Dr. Ansley, the greatest error would be to give a battery of tests, the majority of which show normal results, and select out a couple of abnormalities as evidence of a problem, ignoring the other results that show that no problem exists. Here, there was no pattern of abnormality. Dr. Ansley also failed to find any "red flags" that would have suggested to Dr. Haber that a neuropsychological evaluation might be warranted. Dr. Ansley's well reasoned response to Dr. Bordini's claims of mental impairment are found to be credible and convincing.

Further, if presented to the jury, the testimony of Dr. Bordini would have lent itself to an interpretation that the defendant was violent and anti-social. As the State correctly points out, this would have countered the defense's reasonable attempt to portray him as a basically good child who would have done well if he had not been removed for the care of the Montejo family. In fact, the testimony of other witnesses such as Peggy Eckman, a friend of the defendant since his teenage years, and Judy Baran, a friend of defendant's family, would have clashed with

Dr. Bordini's assessment. Ms. Eckman described the defendant as "very sweet" and a "nice person" who was not violent pr threatening to anyone. Ms. Baran testified that the defendant was comforting and sympathetic to her and her son during a period of difficulty with her husband. There is obviously an irreconcilable conflict between this testimony and Dr. Bordini's portrayal (based in large part on the defendant's assertions) that the defendant carried a 9mm firearm since the age of 16, was a leader of a gang because he was "so crazy," and acted out of cold logic, without remorse. [Fn.6]

With respect to lay witnesses, Mr. Kassier asked the defendant for information that might be used in mitigation and the names of witnesses who could testify concerning his background and upbringing. These names were given to his investigator for follow-up. Many of the claims now raised were simply not provided by the defendant to his attorney, despite appropriate inquiry.

It is suggested by the defense that the defendant's mother, Marianne Griffin, should have been called to testify at trial by the defense. Ms. Griffin testified at the hearing on this Motion and it is clear that she continues to suffer from mental illness. She has been diagnosed as manic-depressive and schizophrenic. To say her memory is poor would be a huge understatement. She certainly would not have been a helpful witness, given her proclivity to become confused and contradict herself as reflected in her hearing testimony. This conclusion is consistent with Mr. Kassier's testimony that he made a strategic decision to not call her as a witness because he felt that she would not do well on the stand. Further, the evidence supported the conclusion that the defendant's mother was unavailable for trial, due to the fact that at the time she was residing in North Carolina with her brother because of her declining health.

The defendant's half-brother, Charles Griffin, would have been able to add some details about the defendant's upbringing. However, in many respects this additional testimony was cumulative and Mr. Kassier was advised that Charles Griffin, who lived in Georgia, was unavailable to testify. Since the defendant spent his formative years with the Montejos, Charles Griffin's testimony was of limited value.

Mr. Montejo testified at trial and, although he expressed a wish that Mr. Kassier had asked him more questions, the additional mitigating testimony that could be elicited from further questioning was more than negated by the positive testimony concerning the rather normal and loving upbringing the defendant experienced while residing with the Montejos during those crucial years. Moreover, Mrs. Montejo, who the defense again claims should have been called to testify at trial, was at the time, and still remains, unavailable due to a very serious heart condition that could be fatal if she were called to testify, given her great affection for the defendant. It was this health concern that kept her from testifying at the original penalty phase.

Witness Steven Minnis was, frankly, a double edged sword. Mr. Minnis would testify concerning having first met the defendant when the defendant and some friends were dancing in the park. During their discussions, the defendant stated that he felt that his father did not care about him. In exchange for the limited benefit his testimony would provide regarding his affection, conversations and association with the defendant, Mr. Minnis also would have acknowledged matter that impact on the defendant in a negative fashion. For example, the defendant's nickname of "Otto"["auto"], of which he was proud, was deprived from his penchant from stealing cars. And the defendant had prior "run-ins" wuth the victim officer, In that respect, his testimony would also have provided the State with further evidence of a possible motive for the shooting. It should also be noted that the defense did try to call Mr. Minnis as a witness. However, Mr. Minnis, who had come to court and was waiting outside in the hallway before testifying, left the courthouse and returned home - instructing his wife to tell the defense attorney that he was not home when they called to find him. [Fn.7]

In summary, this Court finds that attorney Andrew Kassier was not deficient or ineffective in his representation of the defendant as argued in the Motion, including but not limited to his alleged failure to investigate and present certain background and mental health mitigation or the witnesses alleged. [Fn.8]

* * * *

For the reasons set forth above, including the conflicting and damaging information that would have surfaced in the testimony, the defendant has also failed to show the requisite prejudice discussed in *Strickland*. That is, even if the actions of Mr. Kassier were in any way deficient, which this court must emphasize that it does not so find, there is no reasonable probability that the introduction of the testimony presented, proffered or argued would have led the jury to have recommended a life sentence in this case.

* * * *

Fn.2 It must also be noted that although it is common to include, in an abundance of caution, all conceivable allegations in a post-conviction motion, the evidence actually presented at the hearing in support of the motion may, as here, fall well short of addressing all matters raised. In short, it is impossible to respond to allegations raised and unaddressed in the evidence. They are simply unsupported and relief is denied.

Fn.3 In some respects, the proffered testimony is contradictory on crucial issues or implied certain damaging factors, such as the defendant's knowledge that Officer Martin was present, that defendant's possible motivation for shooting Officer Martin, etc. . . ., and would have clearly been more damaging than helpful to the defense.

Fn.4 While Mr. Kassier may not be a mental health expert, the courts often rely on counsel to point out the need for evaluations of their clients based upon their communications and contacts. In many ways, an attorney has a much greater opportunity than a visiting doctor to observe the behavior, and changes in behavior, of his client. This input should certainly not be ignored.

Fn.5 The defense retained Dr. Ernest Bordini who also testified at the evidentiary hearing. Dr. Bordini's testimony was rejected in large part because it lacked credibility in content and presentation.

Fn.6 Interestingly, Al Fuentes, the private investigator who became close to Michael Griffin as he helped to prepare the defense, found the defendant to be a remorseful individual.

Fn.7 Mr. Minnis explains that he felt imtimidated by officers in the hallway and decided to leave.

> Although, based on his answers and explanations Mr. Minnis does not appear the type of person easily intimidated by officers - let alone who would leave the courthouse without complaining to the judge or defense counsel - it is unclear how his failure to remain at the courthouse could be blamed on Mr. Kassier.
> Fn.8 It should be noted that much of the testimony of lay witnesses was cumulative to testimony presented at trial.

(PCR. 258-62)

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

Defendant first appears to claim that the lower court improperly rejected his claim that his counsel was ineffective for failing to call Charles Griffin. Defendant seems to claim that Charles' testimony would have supported findings that Defendant was neglected, physically and sexually abused as a child as mitigation. The lower court rejected this claim finding that Charles was unavailable to testify at the time of

trial and that his testimony was cumulative and of little value as he was not raised with Defendant.

The lower court's finding that Charles was unavailable to testify at the time of trial is supported by competent, substantial evidence. Charles admitted that he was living in Georgia at the time and not communicating with his father. (PCR. 662-65) Counsel stated that he attempted to locate Charles but was unable to do so. (PCR. 811-13) As Charles was unavailable, the lower court properly determined that counsel was not ineffective for failing to call him. *See State v. Riechmann*, 777 So. 2d 342, 354 (Fla. 2000).

Moreover, Charles' testimony would not have supported a claim that Defendant was physically or sexually abused. Charles stated that he only knew of one occasion when Defendant was ever hit by his parents. (PCR. 630-31) The only testimony given concerning sexual abuse was stricken because it concern alleged sexual abuse of Charles before Defendant was born by a grandfather who was dead by the time Defendant was born.[4] (PCR. 599-601, 605-07) Because the testimony did not concern

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[4] Counsel testified that he inquired about sexual abuse and Defendant provided no information that he had ever been sexually abused. As such, the lower court properly found that counsel was not ineffective for failing to present a police report in which Defendant had claimed that a person had tried to fondle him. *Strickland*.

Defendant, the testimony was properly stricken and does not show that Defendant was sexually abused. *Hill v. State*, 515 So. 2d 176, 177-78 (Fla. 1987). As such, the lower court properly rejected these claims of ineffective assistance. *See Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983)(burden on defendant to prove claim).

With regard to the alleged evidence of neglect, the lower court properly found that this evidence was cumulative. At trial, Defendant's father testified that Defendant had to be hospitalized as an infant because of neglect, that Defendant was cared for by a full time babysitter because his mother would not care for him and that his father was rarely home, and that Defendant rarely saw his parents. (R. 3643-48) Mr. Griffin stated that Defendant attended numerous schools because the family moved a lot. (R. 3651) Mr. Griffin admitted to having had a drinking problem in the past. (R. 3653) Betty Dobe testified that Defendant and his father had to live in their car for a period of time and in a seedy hotel for another period of time. (R. 3678, 3682-83) She believed that Defendant had no one to care for him and that Defendant's father was an alcoholic. (R. 3680-81) Randy Gage testified that Defendant never had anyone who loved him. (R. 3701) Brenda Waters, Defendant's special education teacher, testified that Defendant was

emotionally handicapped, which would be consistent with coming from a poor family background. (R. 3721-24) Judy Baran testified that Defendant's step-mother spent money on things for herself and left nothing in the home. (R. 3733) She stated that Defendant's step-mother was an addict who left her child in Defendant's care while she went out on the town. (R. 3734) She believed that Defendant's family did not care for him. (R. 3735-38) Based on this testimony, the trial court found as mitigation "Defendant's traumatic childhood, having been abandoned first by his natural mother, shortly after birth, and then by his natural father, an alcoholic, followed by a forced permanent separation from his foster parents at the age of seven (7) through the actions of his natural father, and finally, living under deplorable conditions with his alcoholic father throughout the remainder of his childhood." (R. 511) As evidence of neglect was presented and neglect was found as mitigation, the lower court properly found that counsel was not ineffective for failing to present this cumulative evidence. *State v. Riechmann*, 777 So. 2d 342, 356 (Fla. 2000).

Defendant next contends that his counsel was ineffective for failing to call his mother. The lower court rejected this claim finding that she was unavailable, that counsel made a strategic decision not to call her and that she was a poor witness because

of her lack of memory.

The lower court's finding that Ms. Griffin was unavailable is again supported by competent, substantial evidence. Ms. Griffin stated that she was hospitalized in North Carolina at the time of trial. (PCR. 384-86) As such, the lower court properly denied this claim. *See Riechmann*, 777 So. 2d at 354. Moreover, counsel did testify that he made a strategic decision not to call Ms. Griffin because of her mental health and lack of knowledge of Defendant. (PCR. 810-11) A review of Ms. Griffin's evidentiary hearing testify shows that the decision was proper. The claim was properly denied. *Haliburton v. State*, 691 So. 2d 466, 471 (Fla. 1997). Moreover, Ms. Griffin denied that Defendant was physically abused and her testimony about Defendant's father's problems was cumulative to the evidence presented. As such, the lower court properly rejected this claim. *Riechmann*, 777 So. 2d at 356; *Smith*, 445 So. 2d at 325.

Defendant next complains about counsel's failure to investigate and present mental mitigation. However, Mr. Kassier testified that he did investigate Defendant's mental health, that he hired Dr. Haber, who evaluated Defendant and reviewed school records, had documentation about the crime and interviewed Defendant's father, and that he decided not to present the testimony as a matter of strategy. (PCR. 793-809,

842-52, 870-74) He stated that he did not provide her with the records of Defendant's prior incarcerations as a matter of strategy. (PCR. 872) This testimony and Dr. Ansley's testimony that no further testing was indicated provide ample support for the lower court's rejection of this claim. *Strickland*.

Moreover, the lower court found that Dr. Bordini was incredible. (PCR. 258-62) This finding was amply supported by the record, as Dr. Bordini's testimony was contrary to the test results and the facts of the matter. It was also contradicted by Dr. Ansley's testimony. Under these circumstances, the lower court properly rejected the testimony. *Walls v. State*, 641 So. 2d 381 (Fla. 1994). As Dr. Bordini's incredible testimony was the only basis presented by Defendant for the finding of mental mitigation, the lower court properly rejected this claim. *Smith*, 445 So. 2d at 325.

Defendant next complains about the manner in which counsel questioned Mr. Montejo. At trial, Mr. Montejo testified to the circumstances under which Defendant lived in his home and was returned to his family. (R. 3743-52) As the lower court found, the additional testimony for Mr. Montejo would have been cumulative. As such, it properly denied the claim. *Riechmann*, 777 So. 2d at 356.

Finally, Defendant complains about the failure to call Mr.

Minnis. However, as the lower court found, Mr. Minnis was unavailable because he left the courthouse and hid from counsel. (PCR. 444-47) As such, the lower court properly rejected this claim. *See Riechmann*, 777 So. 2d at 354. Moreover, as the lower court noted, Mr. Minnis' testimony was largely cumulative to the other evidence presented at the penalty phase. As such, the claim was properly rejected. *Id.* at 356. Finally, as the lower court noted Mr. Minnis provided testimony that Defendant had a previous run-in with Off. Martin and had previously acted in a manner that indicated that he did not fear the police, as had been counsel's theme throughout trial. As such, the lower court properly rejected this claim and determined that counsel was not ineffective for keeping this harmful information from the jury. *Breedlove v. State*, 692 So. 2d 874, 878-78 (Fla. 1997). The denial of this claim should be affirmed.

Defendant's reliance on *Ragsdale v. State*, 798 So. 2d 713 (Fla. 2001), and *Rose v. State*, 675 So. 2d 567 (Fla. 1996), is misplaced. In each of those cases, the defendants had proved that there was available credible mitigation that went unpresented because counsel did not investigate. Here, counsel did investigate and presented available mitigation. The witnesses from the evidentiary hearing were unavailable, presented cumulative evidence and were specifically found to be

incredible. As such, *Ragsdale* and *Rose* are inapplicable to this case.

II. THE LOWER COURT PROPERLY DENIED THE CLAIMS REGARDING THE SENTENCING ORDER.

Defendant next contends that the trial court erred in denying his claim that the sentencing order was the result of an ex parte communication between the State and the trial judge. Defendant also appears to argue that the trial court did not follow the proper procedure in sentencing Defendant and that trial counsel was ineffective for failing to object to the manner in which the sentencing occurred. However, these issues are procedurally barred

In denying this claim after the evidentiary hearing, the trial court found:

> In Claim XIX, the defense alleges misconduct on the part of the State and the trial judge as a result of an *ex parte* communication in the preparation of the Sentencing Order. Contrary to the allegations in the Motion, the evidence does not support such a conclusion.
>
> Prior to sentencing, the trial judge asked the State and defense to provide sentencing memoranda discussing aggravating and mitigating factors. Although the State neglected to indicate service on opposing counsel in its memorandum, the evidence shows that it was sent to, and received by, Mr. Kassier. At the hearing on the Motion, the evidence failed to establish that any impropriety occurred. To the contrary, the evidence revealed that there was no improper *ex parte* communication between the State and the trial judge. As to the contents of the sentencing order, the State correctly points out that "there is

> no prohibition against a trial court's use of a party's sentencing memorandum, even if it is verbatim." *Phillips v. State*, 70[5] So. 2d 1320 (Fla. 1997). While it may be much better practice to avoid such a procedure for obvious reasons, the party who has prepared a well thought-out and convincing memorandum should not be punished solely because it was so successful in convincing the court to follow its reasoning.

(PCR. 262)

While Defendant appears to contend that the trial court erred in finding that no *ex parte* communication had occurred, the trial court's finding on this claim is supported by competent, substantial evidence and should be affirmed. At the evidentiary hearing, both Ms. Brill and Mr. Kassier testified that the trial judge had asked both parties to submit sentencing memos with the full knowledge of both parties. (PCR. 820-21, 903-04) Ms. Brill stated that she had served a copy of the State's memo on defense counsel but had failed to so indicate on the memo. (PCR. 905) Mr. Kassier testified that he had received a copy of the State's sentencing memo. (PCR. 823) Under these circumstances, the trial court properly found that no *ex parte* communication had occurred.

The cases relied upon by Defendant do not compel a different result. In *Rose v. State*, 601 So. 2d 1181, 1182-83 (Fla. 1992), the State had conceded an evidentiary hearing in its response to the motion for post conviction relief. Thereafter, the State

submitted a proposed order summarily denying the motion. The order was not served on the defendant's present counsel. This Court concluded that because the order was contrary to the State's position, it must have been the result of an *ex parte* communication. In *State v. Riechmann*, 777 So. 2d 342, 351-53 (Fla. 2000), the prosecutor and trial judge had admitted at an evidentiary hearing that the prosecutor had written the sentencing order at the *ex parte* request of the trial judge. In *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), defense counsel had actually walked in on an *ex parte* conference between the prosecutors and the trial judge during which a sentencing order was being drafted. Here, there was no admission or direct evidence that an *ex parte* communication had occurred. Moreover, there is no reason to speculate that one had occurred, as there is direct testimony that no such communication occurred. As such, these cases are inapplicable to this matter.

Defendant next appears to claim that the lower court still should have granted him relief because counsel did not object to the trial court's use of the State's sentencing memorandum in his order. He contents that this amounted to the delegation to the State of the duty to write the sentencing order and to the failure to independently weigh the aggravating and mitigating circumstances in violation of *Patterson v. State*, 513 So. 2d

1257 (Fla. 1987). However, in *Patterson*, the trial court had generally stated at the sentencing hearing that it was sentencing the defendant to death without indicating which aggravators and mitigators it had found. It had then directed the State to prepare the order.

Here, the trial court received a sentencing memorandum from the State outlining the facts of the case and the aggravating factors it thought were proven and why. It also received a list of mitigating circumstances from Defendant that he thought he had established. Both of these documents were received before sentencing. While the sentencing order did borrow language from the State's sentencing memo, it was not a verbatim copy of the memo. Significantly, the sentencing order assigned weight to the aggravators, considered the mitigation and determined that the aggravators outweighed the mitigators. As such, the use of language from the State's sentencing memo does not show that the trial court failed to independently determine and weigh the aggravators and mitigators in deciding that a death sentence was appropriate. *See Morton v. State*, 789 So. 2d 324, 332-34 (Fla. 2001)(use of language from prior sentencing order did not show that trial judge did not independently weigh circumstances); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985)("[E]ven when the trial judge adopts proposed findings

verbatim, the findings are those of the court and may be reversed only if clearly erroneous.”). The claim was properly denied.

With regard to Defendant’s claims that the trial court did not permit additional argument on the aggravating and mitigating circumstances after the jury had returned its recommendation, that the trial court pronounced sentence immediately after Defendant’s statement and that counsel was ineffective with regard to these issues, the issues were not raised in Defendant’s motion for post conviction relief before the trial court. (PCR. 120-22) In order for a claim to be properly presented in a post conviction appeal, it must first have been presented to the lower court in the post conviction motion. *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988)(post conviction claim raised for first time on appeal and never presented to the circuit court was procedurally barred on appeal). As such, this claim is not properly before this Court and should be denied.

Moreover, issues regarding whether the trial court improperly limited argument or should have recessed the proceeding after Defendant’s statement are issues that could have and should have been raised on direct appeal. As such, they are barred in post conviction proceedings. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245

(1991). The trial court’s denial should be affirmed.

While Defendant argues that he never had the opportunity to present argument, the record reflects that Defendant was given the opportunity to do so. During his guilt phase closing argument, counsel argued that the killing was not in the course of a burglary and was a panicked act. (R. 3458-82, 3492-94) During the penalty phase charge conference, Defendant argued about the applicability of the aggravating circumstances. (R. 3772-78) During his closing argument, Defendant argued the mitigating circumstances that he believed were proven. (R. 3813-29) At the conclusion of the penalty phase, the State suggested that the trial court should set a hearing before sentencing during which Defendant could present additional evidence to the trial court. (R. 3839) Defendant indicated that he had not decided whether he wanted such a hearing and indicated that he would inform the court the next week. (R. 3839) At the beginning of the sentencing hearing, the trial court permitted Defendant to present any argument or evidence he wished. (R. 3844) As Defendant did present argument and had the opportunity to present any other argument he wished, the trial court cannot be faulted for failing to give Defendant the opportunity to present argument.

To the extent that Defendant contends that it violated

Spencer to sentence Defendant immediately after he made his statement, Defendant is not entitled to relief. In *Armstrong v. State*, 642 So. 2d 730, 737-38 (Fla. 1994), this Court considered the issue of whether it was error for a trial court to allow a defendant to be sentenced immediately after he gave his statement. This Court held that "any defendant who was sentenced before our decision in *Spencer*, and who was provided a full and fair opportunity to present evidence at the sentencing hearing, cannot challenge, absent a showing of prejudice, a sentencing order on the grounds that the trial judge prepared the order before the sentencing hearing." *Id.* at 738. Here, the sentencing hearing occurred in March 1991. *Spencer* was not issued until March 18, 1993. Defendant, as noted above, had the opportunity to present any evidence or argument he wished. Defendant had not alleged any prejudice. As such, this claim should be denied.

To the extent that Defendant contends that further argument should have been presented or that counsel should have objected to the procedure used, Defendant has not asserted what other argument could have been made nor has he asserted that there is a reasonable probability of a different result if argument had been presented or an objection had been made. As such, Defendant's is not entitled to relief. *Strickland*. The lower

court's order should be affirmed.

III. THE LOWER COURT PROPERLY DENIED THE PUBLIC RECORDS CLAIMS.

Defendant next contends that he is entitled to relief because of problems with public records disclosure and the timing of his filing of his motion. Defendant appears to contend that the attorney who represented him in the lower court had to file a final motion to vacate within 6 months of beginning work on the case, that the lower court improperly refused to require disclosure of public records regarding Det. Garafalo, Det. King, Det. Crawford and Off. Crespo. He seems to contend that the records concerning the detectives would have revealed evidence of the abuse of Defendant's codefendants and that the records regarding Off. Crespo would have revealed evidence about the bullet holes in his police car. However, the lower court properly denied relief.

While Defendant asserts that the attorney who filed his second amended motion for post conviction relief had only represented him for 6 months before filing the motion, this is untrue. Mr. Malnik had during his time with CCR before he resigned and was appointed as registry counsel. Moreover, Mr. Malnik had initially agreed to an October 20, 1999 filing date, which was already approximately 60 days after all public records had been disclosed, and was given two further extension.

Moreover, the record shows that Defendant was provided with the public records to which he was entitled including personnel and internal affairs files from the Metro-Dade police, which employed all of the officers Defendant presently names. Further, Defendant was fully aware of the alleged mistreatment of Defendant and his codefendants and presented this evidence, which was not even alleged to have been perpetrated by the named officers, and evidence of the shots fired by Off. Crespo at trial. (R. 741-86, 791-846, 849-52, 856, 859, 872-73, 2519, 2524-25) As such, the public records could not have supported the *Brady* claim that Defendant was seeking to raise. *See Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000)("Although the "due diligence" requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.")(quoting *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000)). As such, the lower court properly denied these claims.

IV. THE LOWER COURT PROPERLY SUMMARILY DENIED THE CLAIMS OF INEFFECTIVE ASSISTANCE DURING THE GUILT PHASE.

Defendant next contends that the lower court should have granted an evidentiary hearing on his claims of ineffective assistance of counsel at the guilt phase of trial. Specifically, he contends that counsel failed to properly cross examine Nicholas Tarallo and Off. Crespo, failed to advise Defendant of the possibility of moving to recuse the judge, and conceded his guilt. However, the lower court properly summarily denied these claims.

With regard to the cross examination of Tarallo, Defendant contends that counsel should have impeached Tarallo with his suppression hearing testimony that his statement was coerced and the portion of his plea agreement that set forth what version of his testimony was truthful. He further contends that counsel's cross examination made Tarallo appear sympathetic. However, this claim was properly summarily denied because counsel did explore these areas and the responses indicated that further questioning in this area would have been fruitless. Moreover, counsel did not make Tarallo appear sympathetic.

During his direct testimony, Tarallo stated that he was beaten by the police. (R. 2519) On cross, counsel emphasized that Tarallo was beaten into unconsciousness. (R. 2524-25) He brought out that Tarallo was scared at the time he made the statement. (R. 2530) He inquired if Tarallo's statement was not

made in an attempt to exculpate him. (R. 2535-37) However, Tarallo insisted that his statement was truthful. (R. 2535-37) Counsel brought out that the charges of first degree murder and attempted first degree murder of a law enforcement officer were reduced as part of the plea agreement. (R. 2540-45) While counsel did question Tarallo about his age and desire to avoid a severe punishment, these questions were asked in the context of explaining the benefit that Tarallo received for accepting his plea. (R. 2540-46)

As can be seen from the foregoing, counsel did bring out the alleged beating and fear that were alleged at the suppression hearing to have caused the statement to be involuntary. When counsel attempted to question the truthfulness of the statement to Det. Garafalo, Tarallo repeatedly insisted it was truthful. As this was the statement that was defined as truthful testimony under the plea agreement, little, if anything, would have been gained by asserting that Tarallo had to testify consistently with this statement to be considered truthful.[5] As such, the lower court properly found that counsel was not ineffective in his cross examination of Tarallo. *Strickland*. The summarily denial should be affirmed.

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[5] In fact, when Velez's counsel asked about this issue, Tarallo stated that his statement was truthful. (R. 3257)

With regard to the cross examination of Crespo, Defendant contends that counsel should have questioned Off. Crespo regarding his state of mind after the shooting, the timing of his formal statement, his consultation with an attorney and the presence of the two bullet holes in his car. Defendant asserts that counsel could have used the answers to these questions to claim that Off. Crespo fired the first shot by accidently discharging his weapon into his own car door. However, as this theory is contradicted by the testimony of Off. Crespo, Tarallo and the physical evidence, the lower court properly denied this claim.

During his direct testimony, Off. Crespo stated that he did not see who fired the first shot but that it sounded as if it came from the passenger's side of Defendant's car, where Defendant was. (R. 3032) During cross examination, Off. Crespo stated that he was sure that he did not fire the first shot. (R. 3081) However, he admitted that he did not see who fired the first shot. (R. 3081-82) He stated that the sound of the shot came from where Defendant was. (R. 3082) During his testimony Tarallo stated that he heard the first gunshot come from next to him where Defendant was. (R. 2514-15) The two bullets found inside Off. Crespo's car had been fired into the car through the driver's door by Off. Crespo. (R. 2926-30, 3170-

71) The angle at which they entered the car was from rear of the car. (R. 3194) Counsel then presented a hypothetical to account for these bullet holes by placing the firing of these shot after Off. Martin had been shot and as Defendant was fleeing. (R. 3197-98) Given that asking Off. Crespo the questions Defendant asserts should have been asked would not have led to support for the theory Defendant wanted to present, there is no reasonable probability of a different result. *Strickland*. The lower court properly summarily denied this claim.

With regard to the alleged failure to advise Defendant of the possibility of moving to disqualify the trial judge, Defendant appears to contend that the lower court improperly summarily denied this claim by determining that there was no reasonable probability that such a motion would have been successful. However, the United States Supreme Court has made it abundantly clear that the appropriate test for the prejudice prong of an ineffectiveness claim is whether, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*. This Court has also repeatedly stated that counsel cannot be deemed ineffective for failing to raise an nonmeritorious issue. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995);

Hildwin v. Dugger, 654 So. 2d 107, 111 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). As such, the lower court properly evaluated whether a motion to disqualify on the grounds alleged by Defendant would have been meritorious in rejecting this claim. It should be affirmed.

Moreover, the lower court properly concluded that there was reasonable probability of success on a motion to disqualify. The first alleged evidence of bias was a statement that the trial judge had made to Defendant when he accepted a plea agreement and placed Defendant on probation in a prior matter in 1987. However, this comment would not have formed the basis for a successful motion to disqualify, as it was merely an expression of Judge Snyder's impression based on the evidence before him at the time. *See Rivera v. State*, 717 So. 2d 477, 480-81 (Fla. 1998); *Jones v. State*, 446 So. 2d 1059, 1060 (Fla. 1984); *Oates v. State*, 619 So. 2d 23 (Fla. 4th DCA 1993). The second claim of bias is based on an alleged friendship between the trial judge and the victim's father. However, Defendant did not allege that counsel was ineffective for failing to move to disqualify on this basis below. (PCR. 43-45) Instead, Defendant bases this claim on a question that he attempted to ask Mr. Kassier at the evidentiary hearing, which the lower court refused to permit because the issue had not been plead. (PCR.

857-58) As this issue was not raised below, it is not properly before this Court, and the claim should be denied. *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988). The denial of the claim should be affirmed.

With regard to the concession of guilt, this claim was properly summarily denied. In *State v. Williams*, 797 So. 2d 1235, 1241 (Fla. 2001), this Court cited with approval a series of cases that hold that conceding guilt to lesser offenses is a proper tactical decision, when the State has overwhelming evidence of guilt. As that is what occurred here, the claim was properly summarily denied.

During his opening statement, counsel stated that he was not contesting that Defendant had committed a burglary or that he had stolen a car. (R. 2370-71) However, he argued that the killing of Off. Martin was not premeditated and that the burglary was already completed. (R. 2371-75) Instead, he contended that Defendant fired randomly in response to shots from the officers. (R. 2375-79) The overwhelming evidence of these crimes was Defendant's confession, the testimony of Tarallo, the testimony of Off. Crespo, the testimony of Richard Marshall that his car was stolen, the proceeds of the burglary that were found in the possession of Velez and Defendant, the presence of Defendant's fingerprint at the scene of the burglary

and in the stolen car and the presence of a shoe print from Defendant's shoes at the scene of the burglary. Given this overwhelming evidence of Defendant's guilt of burglary, grand theft auto and having fired the shots, counsel was not ineffective for admitting these facts while claiming that Defendant was not guilty of first degree murder or attempted first degree murder. *See Williams*, 797 So. 2d at 1241. The claim was properly summarily denied.

V. THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM OF INEFFECTIVE ASSISTANCE FOR FAILING TO MOVE FOR A CHANGE OF VENUE.

Defendant next asserts that the trial court improperly summarily denied his claim that his counsel was ineffective for failing to move for a change of venue based upon the publicity that the case received. However, the trial court properly denied the claim because it is meritless.

Immediately before voir dire commenced, counsel moved for a change of venue because of the adverse publicity. (R. 957-59) The trial court responded that if a fair jury could not be selected, it had made arrangement to pick a jury in a different area of the State and bring that jury to Dade County to try the matter. (R. 959-60) As counsel did move for a change of venue, he cannot be deemed ineffective for having failed to do so. *Strickland*.

Even if counsel had not moved for a change of venue, he would still not have been ineffective, as there is no reasonable probability that such a motion would have been granted. *See Strickland*.

> The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and pre-conceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977); *see also Rolling v. State*, 695 So. 2d 278, 284 (Fla. 1997). In applying this test, a trial judge must evaluate two prongs: (1) the extent and nature of the pretrial publicity; and (2) the difficulty encountered in actually selecting a jury. *Rolling*, 695 So. 2d at 285.

Here, there was no difficulty in seating a jury. The trial court inquired if any of the veniremembers had been exposed to pretrial publicity. (R. 979-83, 987, 1869-71) Of the 76 veniremembers, only 19 had heard of the case. *Id.* Those people were questioned about the publicity individually. (R. 1019-73, 1875-89) Of these 19 veniremembers, three were excused for cause based upon publicity, one was excused for cause based on her views on the death penalty, and one was excused for cause based

on his bias against the police. (R. 1021, 1040, 1073, 1877, 1883) Of the remaining 14, twelve only vaguely remembered what they had read or heard and one remembered reading about the use of dual juries. (R. 1021-32, 1034-38, 1041-61, 1875-76, 1877-80, 1884-89) All 14 stated that they had not formed an opinion about the case and would set what they had read and decide the case only on the facts. (R. 1021-38, 1041-61, 1875-76, 1877-80, 1884-89) In fact, Defendant indicated that the only two veniremembers he would request to be excused for cause because of there exposure to publicity were the two of the three who were so excused. (R. 1061-62)

As the Florida Supreme Court has stated:

> To be qualified, jurors need not be totally ignorant of the facts of the case nor do they need to be free from any preconceived notion at all:
>
> > To hold that the mere existence of any preconceived notion as to the guilt of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.
>
> *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S. Ct. 1639, 1642-43, 6 L. Ed. 2d 751 (1961). Thus, if prospective jurors can assure the court during voir dire that they are impartial despite their extrinsic knowledge, they are qualified to serve on the jury, and

> a change of venue is not necessary. *Davis*, 461 So. 2d at 69. Although such assurances are not dispositive, they support the presumption of a jury's impartiality. *Copeland*, 457 So. 2d at 1017.

Rolling, 695 So. 2d at 285. As all of veniremembers that were not stricken for cause stated that they had not formed an opinion regarding the case and readily agreed to set aside what they had heard, there was no basis to change venue. As such, counsel cannot be deemed ineffective for failing to request a change of venue, and the claim should be summarily denied. *See Patton v. State*, 784 So. 2d 380, 389-90 (Fla. 2000).

VI. THE LOWER COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE SHACKLING OF DEFENDANT.

Defendant next contends that the lower court should have granted an evidentiary hearing on his claim that his counsel was ineffective for failing to object to his being shackled during trial. However, the lower court properly denied this claim as the record affirmatively shows that Defendant was not shackled.

During the middle of voir dire, the trial court informed the parties that corrections had just informed it that they had information that Defendant was planning an escape. (R. 1962-67) The trial court indicated that it had authorized the placement of a brace on Defendant’s leg, which would not be visible and

which would prevent Defendant from running. (R. 1962-65) Defendant did not seek to contest the information but requested that additional security be provided outside the courtroom and that he not be required to wear the brace. (R. 1965-66) The trial court stated that greater security would also be used, that none of these measures would be implemented until the next day and that Defendant could research the issue and present any argument he wanted the next morning. (R. 1966-67)

The following morning, Defendant asked the court not to require the wearing of the leg brace because of the physical discomfort and psychological effect of wearing such a device. (R. 2069-70) He claimed that the allegation of an escape attempt was based on a rumor and that he had not planned an escape. (R. 2070-73) The trial court responded that the information he had been given corroborated the allegation of the escape attempt. (R. 2073) However, the trial court decided that it would not require the wearing of a leg brace and instead stated that he would increase the number of security personnel present in the courtroom. (R. 2073-75)

One morning counsel reported that a juror had entered the courtroom at a time when he should not have done so. (R. 3094-96) At that point, Defendant was present, and the shackles used while transporting the inmates were in the process of being

removed. *Id.* The juror was immediately removed from the courtroom. *Id.* Counsel asked the trial court to inquire if the juror had seen anything, and the trial court agreed to do so. *Id.* On inquiry, the juror stated that he entered the courtroom, saw Defendant was present and was immediately removed from the courtroom. (R. 3102-03) He did not see anything unusual on Defendant because he did not have time to look. *Id.* As a result, the trial court refused to take any other action. *Id.*

Given that the trial court affirmatively indicated that he had decided not to place physical restrains on Defendant, that the passage relied upon by Defendant indicated that the shackled were only used when transporting Defendant when the jury was not present and that the sight of Defendant in shackles would have been unusual, the record conclusively shows that Defendant was not shackled during trial. As Defendant was not shackled, counsel cannot be deemed ineffective for failing to object to him being shackled. *Strickland*. The claim was properly summarily denied.

VII. THE LOWER COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT COUNSEL WAS INEFFECTIVE DURING VOIR DIRE.

Defendant next contends that the trial court should have summarily denied his claim that his counsel's assistance during voir dire was ineffective. He contends that counsel was

deficient for failing to question the venire about their views in favor of the death penalty, failing to question the venire about mitigation and failing to challenge Ms. Cabrera either for cause or peremptorily.

With regard to the claim that counsel was ineffective for failing to question the venire about their view in favor of the death penalty, the lower court properly summarily denied this claim because it is facially insufficient and conclusively refuted by the record. In his motion, Defendant alleged that his counsel's questioning "was inadequate," and that his counsel failed to "ask whether they had any predilections in favor of the death penalty." (PCR. 77) However, Defendant did not allege any facts regarding what questions should have been asked or how the failure to ask the unalleged questions caused a reasonable probability that the jury would have been different, much less that the results of the trial would have been different. In *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998), this Court held "where the motion lacks sufficient factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied." As such, a claim may be summarily denied where it is based merely on conclusory allegations. *Id.* As the allegations here were extremely conclusory, the lower court properly summarily denied

this claim.

Moreover, the record reflects that the venire was in fact extensively questioned about their views in favor of the death penalty, resulting in the exclusion of veniremembers on that basis. During its questioning, the State inquired about views both for and against the death penalty. (R. 1137-44, 1048-49, 1163-64, 1165-67, 1170, 1561, 1565-67, 1569, 1571-72, 1580, 1588-89, 1601, 1926-62, 1968-2018) During his questioning, defense counsel inquired whether veniremembers would recommend death based solely on the fact that a police officer was killed. (R. 1180-81, 1197, 1615, 1616-17) He asked if veniremembers would be able to consider mitigation after having found Defendant guilty. (R. 1182-83) He questioned veniremembers about whether they thought that the death penalty was underused. (R. 1184-86, 1192, 1195, 1216) He inquired if veniremembers would automatically recommend the death penalty upon conviction. (R. 1184-89, 1190-91, 1198-99, 1212, 1607-08, 1621, 1627, 2032-33, 2040-41) He asked veniremembers if they were predisposed to impose the death penalty. (R. 1194, 1197, 1218-19, 1220, 1609, 2028-34) He inquired if anyone believed that life imprisonment was insufficient punishment. (R. 1199-1206, 1215, 1224, 1632) He asked if he would have to convince the veniremembers that life was an appropriate sentence if Defendant was convicted.

(R. 1610) As a result of these questions, eight veniremembers (Ms. Peck, Mr. Fischer, Mr. Bell, Ms. White, Ms. Jewett, Ms. Dorsey, Ms. Sills and Ms. Hoffman) were excused because of their strong views in favor of the death penalty. (R. 1065-73, 1211-12, 1524, 1610-14, 1617, 1618, 1620, 1628, 1644-48, 1993-96, 2022) As counsel did question the venire about their "predilections in favor of the death penalty," counsel cannot be deemed ineffective for failing to do so. *Strickland*. The claim was properly summarily denied.

With regard to the claim that counsel was ineffective for failing to question the venire about mitigation, the lower court properly summarily denied this claim as facially insufficient. The entirety of Defendant's allegation on this claim in the trial court was "[defense counsel] failed to ask whether they had any predilections . . . against certain types of mitigation. Counsel was therefore ineffective for failing to guard against the likelihood that [Defendant] would be sentenced to death by jurors . . . who would not properly consider penalty phase evidence." (PCR. 77) As this conclusory allegation is insufficient to require an evidentiary hearing, the lower court properly summarily denied the claim. *Ragsdale*, 720 So. 2d at 207.

In a belated attempt to increase the specificity of the

claim, counsel alleges in this court that counsel failed to ask specifically about mental mitigation. However, it is inappropriate to add new allegations on the appeal from the denial of a motion for post conviction relief. *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988). As such, the denial of this claim should be affirmed.

Moreover, counsel did inquire into the jury's feeling regarding the issues he planned to present in mitigation. Defense counsel also asked the venire if the punishment should be tailored to the offender. (R. 1436-37) He specifically asked if mental illness might be a reason for a lesser punishment. (R. 1437-38) He inquired if any of the veniremembers had ever been though any emotionally difficult situations in their lives, particularly family problems, and stressed the importance of having family support. (R. 1469-86, 1490-1503, 1796-98, 1810, 1813, 1815-16, 2225-27, 2232-35, 2236-37, 2241-47, 2251-55, 2275-76, 2287-91) As counsel did question the venire about the area that he planned to present in mitigation, he cannot be deemed ineffective for failing to do so.

Finally, Defendant contents that his counsel was ineffective for failing to excuse Ms Cabrera. However, the lower court properly denied this claim as moving to exclude Ms. Cabrera for cause would not have been successful and counsel did excuse her

with a peremptory.

During voir dire, Ms. Cabrera indicated that she had been an intern in the State Attorney's Office, assigned to that courtroom from January to April 1990. (R. 7, 964, 1197, 1272) She stated that she was a college student and hoped to join the FBI or go to law school after she finished. (R. 1270) She stated that she could set aside her prior internship with the State Attorney's Office and decide the case only on the facts and the law. (R. 1273) She would not favor the State. (R. 1273)

Ms. Cabrera's fiancé and her friends worked in law enforcement. (R. 1359-60) She stated that she would not allow the fact that the victim was a police officer to affect her judgment consciously. (R. 1360) She stated that it might have a subconscious effect. (R. 1360) She stated that she would decide the case based on the law and the facts. (R. 1360-62) She stated that she would put aside her relationship with law enforcement officers. (R. 1362) On questioning by the defense, Ms. Cabrera stated that the fact that she was engaged to a law enforcement officer might enter her thoughts during this case but stated that it would not affect her ability to be fair. (R. 1426-27) Ms. Cabrera was excused peremptorily. (R. 1533)

Given that Ms. Cabrera repeatedly stated that she would

follow the law and that her prior relationship with the State Attorney's Office and her present relationships with law enforcement officer would not affect her ability to be fair, any challenge for cause would have been properly denied. *Bryant v. State*, 656 So. 2d 426, 428 (Fla. 1995). As counsel cannot be deemed ineffective for failing to raise an nonmeritorious issue, counsel cannot be deemed ineffective for failing to challenge Ms. Cabrera for cause. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. Since he did excuse Ms. Cabrera peremptorily, he cannot be deemed ineffective for failing to do so. *Strickland*. The denial of the claim should be affirmed.

Relying upon *Thompson v. State*, 796 So. 2d 511, 516-17 (Fla. 2001), Defendant asserts that the trial court applied the wrong standard in determining that he had not sufficiently alleged prejudice. However, *Thompson* shows that the lower court properly conducted the prejudice inquire. In denying the claim, the lower court stated while Ms. Cabrera may have given an equivocal response during voir dire, she was adequately rehabilitated and that her equivocal response was insufficient to serve as a basis for a cause challenge. (PCR. 254-55) In *Thompson*, the lower court had denied the claim because the evidence was "more than sufficient" to sustain the convictions.

Id. In determining that the analysis was incorrect, this Court looked at whether what the veniremember had said was sufficient to remove her for cause and whether she was adequately rehabilitated. *Id.* As this was precisely what the lower court analyzed in rejecting this claim, Defendant's reliance on *Thompson* is misplaced, and the denial of the claim should be affirmed.

VIII. THE LOWER COURT PROPERLY DENIED THE CLAIM REGARDING THE COMMENTS IN CLOSING.

Defendant next asserts that his counsel was ineffective for failing to object to comments in the State's guilt and penalty phase arguments. However, the lower court properly summarily denied this claim.

This Court had held that claims regarding comments in closing, including claims of ineffective assistance of counsel for failing to object to comments in closing, are procedurally barred in post conviction proceedings. *Robinson v. State*, 707 So. 2d 688, 697-99 (Fla. 1998). As such, the claim was properly summarily denied.

During his guilt phase closing argument, Defendant asserted that Off. Crespo's testimony about the shooting was untrue. (R. 3484-90) Ths comment invited the State's brief reply that Off. Crespo had always been consistent in his testimony. (R. 3536)

Broge v. State, 288 So. 2d 280 (Fla. 4th DCA), *cert. denied*, 295 So. 2d 302 (Fla.), *cert. denied*, 419 U.S. 845 (1974); *see Barwick v. State*, 660 So.2d 685 (Fla. 1995); *Ferron v. State*, 619 So. 2d 506 (Fla. 3d DCA 1993); *Shaara v. State*, 581 So. 2d 1339 (Fla. 1st DCA 1991); *Schwarck v. State*, 568 So. 2d 1326 (Fla. 3d DCA 1990). As such, the State's argument was proper as a fair reply and counsel was not ineffective for failing to raise this nonmeritorious issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

With regard to the comments regarding whether the alleged mitigation caused the commission of a crime, this Court has noted that alleged mitigation that is unconnected to the commission of the crime may be rejected or that lack of connection may reduce the weight given to such mitigation. *See Gonzalez v. State*, 786 So. 2d 559, 564-67 (Fla. 2001). As such, the State's comments that the jury should consider the connection between the commission of this crime and the alleged mitigation were not improper. Moreover, these comments were brief, comprising only 6 lines in the State's 23 page closing. (R. 3790-3813) The State presented overwhelming evidence of 4 aggravating circumstances, including CCP and murder of a law

enforcement officer, which are particularly weighty. *Morton v. State*, 789 So. 2d 324, 331 (Fla. 2001); *Armstrong v.* State, 642 So. 2d 730 (Fla. 1994). In contrast, the mitigation was relatively weak. Under these circumstances, these brief comments did not contribute to the imposition of the death sentence in this matter. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). As such, the lower court properly found that counsel was not ineffective for failing to raise this meritless claim. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

With regard to the comments that Defendant was a victim, most of Defendant's penalty phase witnesses claim that Defendant had been the victim of his circumstances. In fact, the theme of Defendant's penalty phase presentation was that Defendant would not have killed Off. Martin if he had only been allowed to remain in the loving environment of the Montejo home. As this was the nature of the mitigation presented, the State's comments characterizing the evidence as such was merely a fair comment on the evidence. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). As such, counsel was not ineffective for failing to raise this meritless issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Relying on *Gore v. State*, 719 So. 2d 1197 (Fla. 1998),

Defendant asserts that these comments impressibly shifted the burden to him to establish mitigation. However, *Gore* involved comments during the guilt phase and urged the jury to convict Defendant even if the State had not carried its burden of proof. Here, the comments were made in the penalty phase and concerned mitigation, which was presented by Defendant. As such, *Gore* is inapplicable.

With regard to the last comment, counsel did object and moved for a mistrial. (R. 3811) As counsel did object, he cannot be deemed ineffective for failing to do so. *Strickland*. The claim was properly denied.

IX. THE LOWER COURT PROPERLY DENIED THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS HIS CONFESSION.

Defendant next asserts that the lower court should have granted an evidentiary hearing on whether his counsel was ineffective for failing to move to suppress his confession. He contents that counsel should have argued that his waiver of his constitutional rights was invalid because he was injured and allegedly mentally ill. However, the lower court properly summarily denied this claim because counsel did move to suppress and the State did not introduce the confession at trial.

Prior to trial, counsel filed a motion to suppress Defendant's confession. (R. 80-81) At the hearing on the motion

to suppress, counsel argued that the statement was involuntary because Defendant was beaten and because Defendant was injured at the time the statement was taken. (R. 729-34)

The State presented evidence that Defendant had received medical treatment prior to questioning, was conscious, alert, did not appear to be under the influence of medication or illicit substances and denied being under the influence. (R. 665, 667-68, 674-76) Defendant did not claim to be in distress over his injuries. (R. 675) After receiving his *Miranda* warnings, Defendant waived his rights and confessed. (R. 667-74) Defendant was not threatened or coerced into waiving his rights and did not claim that he had previously been threatened or coerced. (R. 671-73) Before giving his formal sworn statement, Defendant was taken to the hospital and treated for his injuries but was not medicated. (R. 676-79) Defendant never claimed to be in pain. (R. 679-80, 683)

Counsel presented evidence that Defendant groaned at time when he was with the police. (R. 692) He also presented photographs of Defendant's condition on the night of the crime. (R. 689-94) Counsel presented evidence that Defendant appeared to be in physical distress. (R. 695-96) He presented evidence that the police did not immediately take Defendant to the hospital for treatment. (R. 697-701) Defendant testified that

he was bitten by dogs and beaten at the time of his arrest and that he had been shot during the crime. (R. 708-10) Defendant claimed that he was in and out of consciousness as a result of his injuries. (R. 712)

After considering this evidence, the trial court denied the motion to suppress. (R. 736) However, at trial, the State elected not to introduce the confession. When Defendant complained on direct appeal that the trial court had erred in denying the motion to suppress, this Court found the claim meritless and noted that the confession had not been introduced. *Griffin v. State*, 639 So. 2d 966, 972 & n.4 (Fla. 1994).

As counsel did move to suppress the confession, he was not ineffective in failing to do so. *Strickland.* Moreover, since the State did not seek to introduce the statement at trial, there is no reasonable probability that any failure of counsel with regard to suppression of the confession affected the outcome of the trial. As such, the lower court properly summarily denied this claim.

X. THE LOWER COURT PROPERLY DENIED THE CLAIMS REGARDING THE CCP INSTRUCTION, THE ALLEGED BURDEN SHIFTING AND THE ALLEGED INNOCENCE OF DEATH.

Defendant next asserts that the lower court should have granted him an evidentiary hearing on his claims that his

counsel was ineffective for failing to object to the jury instruction on CCP, for failing to claim that the penalty phase jury instructions shifted the burden of proof and for failing to object to a comment by the trial court about voting in the penalty phase. He also asserts that he is innocent of the death penalty. However, the lower court properly summarily denied these claims.

With regard to the CCP instruction, the instruction given at Defendant's 1991 trial was later held invalid in *Jackson v. State*, 648 So. 2d 85 (Fla. 1994). However, this Court has repeatedly held that a defendant is only entitled to relief on this claim if counsel objected to the instruction and the issue was raised on direct appeal and that counsel was not ineffective for failing to object to the instruction in the trial occurred before *Jackson* was issued. *See Waterhouse v. State*, 792 So. 2d 1176, 1196 (Fla. 2001). As counsel did not object, the issue was not raised on direct appeal and the trial occurred before *Jackson*, the lower court properly denied this claim.

With regard to the alleged burden shifting, claims that the jury instructions shifted the burden of proof and claims regarding comments by the State are claims that could have and should have been raised on direct appeal. *Owen v. State*, 773 So. 2d 510, 515 n.11 (Fla. 2000); *Asay v. State*, 769 So. 2d 974, 989

(Fla. 2000); *Demps v. Dugger*, 714 So. 2d 365 (Fla. 1998); *Robinson v. State*, 707 So. 2d 688, 697-99 (Fla. 1998). As such, the lower court properly denied these claims as procedurally barred.

Moreover, the courts have repeatedly rejected the claim that the instruction improperly shifts the burden of proof. *San Martin v. State*, 705 So. 2d 1337, 1350 (Fla. 1997); *Kennedy v. State*, 455 So. 2d 351 (Fla. 1984). As such, the claim was properly summarily denied.

With regard to the claim regarding the trial court comment on voting in the penalty phase, this issue was not raised below. As such, it is not properly before this Court. *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988)(post conviction claim raised for first time on appeal and never presented to the circuit court was procedurally barred on appeal).

With regard to the alleged innocence of the death penalty, this claim is devoid of merit and was properly denied. To prove a claim of actual innocence of the death penalty, a defendant must show "based on the evidence proffered plus all record evidence, a fair probability that a rational fact finder would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." *Sawyer v. Whitley*, 505 U.S.

333, 346 (1992)(quoting *Sawyer v. Whitley*, 945 F.2d 812 (5th Cir. 1991)). The Court further noted that "the 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error." *Id.* at 347. In applying this test to Florida's sentencing law, the Eleventh Circuit stated:

> a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates <u>all</u> of the aggravating factors found to be present by the sentencing body. That is, but for the constitutional error, the sentencing body <u>could not</u> have found <u>any</u> aggravating factors and thus petitioner was ineligible for the death penalty.

Johnson v. Singletary, 938 F.2d 1166, 1183 (11th Cir. 1991)(en banc). This formulation was cited with approval in *Sawyer*. *Sawyer*, 505 U.S. at 347 & n.15.

Here, the trial court found four aggravating circumstances: prior violent felony, during the course of a burglary, avoid arrest merged with murder of a law enforcement officer and CCP. As noted above, Defendant claim regarding CCP were properly rejected. While Defendant asserts that his prior violent felony conviction should be set aside, it has not been, and this issue

was not raised on direct appeal. As such, this aggravator remains valid. *Buenoano v. State*, 708 So. 2d 941, 952 (Fla. 1998); *Stano v. State*, 708 So. 2d 271, 275-76 (Fla. 1998). Further, Defendant's attacks on the during the course of a burglary and avoid arrest aggravators are meritless. *See* Issues XIII & XIX, *infra*. As such, Defendant has not shown that there are no applicable aggravators in this case, and the claim was properly summarily denied.

XI. THE LOWER COURT PROPERLY DENIED THE CLAIM REGARDING DEFENDANT'S RIGHT TO BE PRESENT.

Defendant next contends that the lower court should have granted an evidentiary hearing on his claim that his counsel was ineffective for failing to ensure his presence throughout trial. However, the lower court properly summarily denied this claim.

Defendant bases this claim on alleged problems with the configuration of the courtroom and the use of dual juries. However, in *Boyett v. State*, 688 So. 2d 308 (Fla. 1996), this Court noted that the appropriate definition of "presence" is that the defendant is physically in the courtroom and has the opportunity to be heard through counsel. As Defendant does not even allege that he was not physically in the courtroom or that he was not heard through counsel, the lower court properly rejected the claim of ineffective assistance. *Kokal*, 718 So. 2d

at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The denial should be affirmed.

XII. THE LOWER COURT PROPERLY DENIED THE CLAIM REGARD THE EXPERT WITNESS JURY INSTRUCTION.

Defendant next asserts that lower court should have granted an evidentiary hearing on his claim that his counsel was ineffective for failing to object to the standard jury instruction on expert testimony. However, the lower court properly denied this claim, as this Court has repeatedly rejected this claim. *See Thompson v. State*, 759 So. 2d 650, 665 & n.10 (Fla. 2000).

XIII. THE CLAIMS REGARDING THE JURY INSTRUCTIONS ON AGGRAVATORS, THE ALLEGED AUTOMATIC AGGRAVATOR AND THE FAILURE TO FIND MITIGATING WERE PROPERLY DENIED.

Defendant next contends that the trial court erred in denying his claim that the trial court improperly instructed the jury on the aggravating circumstances, that an automatic aggravating circumstance was considered and that the trial court erred in rejecting his claims of mitigation. However, the lower court properly summarily denied these claims.

Claims regarding the alleged vagueness of aggravating circumstances, the constitutionality of aggravating circumstances and the failure to find mitigation are all claims

that could have and should have been raised on direct appeal. *See Thompson v. State*, 759 So. 2d 650, 667 (Fla. 2000); *Valle v. State*, 705 So. 2d 1331, 1335 (Fla. 1997). As such, the lower court properly found them to be procedurally barred. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991).

Moreover, Defendant does not assert on which aggravating factors were alleged vaguely instructed, why the instructions were vague or what mitigation the trial court failed to properly consider. As such, the claims were also properly denied as facially insufficient. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

Finally, this Court has rejected the claim that the jury instruction on during the course of a felony, prior violent felony, and avoid arrest.[6] *Floyd v. State*, 808 So. 2d 175, 186 (Fla. 2002)(during the course of a felony); *Gaskin v. State*, 737 So. 2d 509, 513 n.7 (Fla. 1999)(prior violent felony); *Wike v. State*, 698 So. 2d 817, 822 (Fla. 1997)(avoid arrest). This Court has repeatedly rejected the claim that during the course of a felony is an unconstitutional automatic aggravator. *E.g.*, *Sims v. State*, 681 So. 2d 1112 (Fla. 1996), *cert. denied*, 520

[6] The issue of the vagueness of the CCP instruction was addressed in Issue X, *supra*.

U.S. 1199 (1997); *Kearse v. State*, 662 So. 2d 677 (Fla. 1995); *see also Lowenfield v. Phelps*, 484 U.S. 231 (1988). As such, the denial of this claim should be affirmed.

XIV. THE LOWER COURT PROPERLY SUMMARILY DENIED THE *CALDWELL* CLAIM.

Defendant next contends that the lower court improperly denied his claim that the jury was instructed in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and that his counsel was ineffective for failing to raise this claim. However, these issues are procedurally barred because it could have and should have been raised on direct appeal. *Oats v. Dugger*, 638 So. 2d 20, 21 & n.1 (Fla. 1994). Moreover, informing the jury that their recommendation is advisory is a correct statement of Florida law and does not violate *Caldwell*. *Dugger v. Adams*, 489 U.S. 401, 407 (1989); *Combs v. State*, 525 So. 2d 853, 855-58 (Fla. 1988). The claim was properly summarily denied.

XV. THE LOWER COURT PROPERLY DENIED THE CLAIM REGARDING JURY INTERVIEWS.

Defendant next asserts that the bar rules prohibiting counsel from contacting juror is unconstitutional. However, the lower court properly summarily denied this claim. This Court has repeatedly held that this is a claim that could have and should have been raised on direct appeal. *Young v. State*, 739

So. 2d 553, 555 n.5 (Fla. 1999); *Ragsdale v. State*, 720 So. 2d 203, 204-05 n.1 & 2 (Fla. 1998). As such, it is procedurally barred in a post conviction motion.

XVI. THE LOWER COURT PROPERLY DENIED THE CLAIM THAT FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Defendant next contends that Florida's death penalty statute is unconstitutional. However, this claim was properly summarily denied. The issue is procedurally barred because it could have and should have been raised on direct appeal. *Byrd v. State*, 597 So. 2d 252 (Fla. 1992). Moreover, this Court had repeatedly rejected this claim as without merit. *Johnson v. State*, 660 So. 2d 637, 647-48 (Fla. 1995); *Wuornos v. State*, 644 So. 2d 1012, 1020 & n.5 (Fla. 1994); *Fotopoulus v. State*, 608 So. 2d 784, 794 & n.7 (Fla. 1992); *Arango v. State*, 411 So. 2d 172, 174 (Fla. 1982). The denial of the claim should be affirmed.

XVII. THE LOWER COURT PROPERLY DENIED THE CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE BECAUSE THE RECORD WAS INCOMPLETE.

Defendant next asserts that he received ineffective assistance of counsel on direct appeal because the record on appeal was not complete. However, the lower properly denied this claim because issues of ineffective assistance of appellate counsel are not properly raised in a motion for post conviction relief. *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000). Moreover, the claim is facially insufficient because Defendant does not allege what issues he was prevented from raising

because of the unrecorded sidebar conference, the typographical error or the lack of transcripts of some pretrial hearings. *See Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000); *Ferguson v. Singletary*, 632 So. 2d 53, 58 (Fla. 1993). The claim was properly summarily denied.

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

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

XIX. THE LOWER COURT PROPERLY DENIED THE CLAIM REGARDING THE AVOID ARREST AGGRAVATOR.

Defendant next contends that the lower court should have granted an evidentiary hearing on his claim that his counsel was ineffective for failing to object to the avoid arrest aggravating factor. However, the lower court properly summarily denied this claim.

First, Defendant asserts that this aggravator is invalid because it is an automatic aggravator like the during the course of a felony aggravator. However, the claim that the during the course of a felony aggravator is an improper automatic aggravator has been repeatedly rejected. *E.g.*, *Sims v. State*, 681 So. 2d 1112 (Fla. 1996), *cert. denied*, 520 U.S. 1199 (1997); *Kearse v. State*, 662 So. 2d 677 (Fla. 1995); *see also Lowenfield v. Phelps*, 484 U.S. 231 (1988). As such, this analogy only shows that the lower court properly rejected this claim.

Defendant next asserts that the aggravator does not genuinely narrow the class of death eligible defendants. Defendant's crime did not become a first degree murder because he killed a police officer and not all first degree murders involve the killing of a police officer. As such, the application of this aggravator does limit the class of death-eligible defendants. The lower court properly rejected this claim.

Finally, Defendant contends that the inclusion of this aggravator resulted in a impressible doubling of aggravators. However, the trial court merged the avoid arrest and murder of a law enforcement officer aggravators. (R. 504-06, 508-09) As such, no improper doubling occurred. *See, e.g.*, *Gaskin v. State*, 737 So. 2d 509, 516 n. 13 (Fla. 1999). The claim was properly

summarily denied.

XX. THE LOWER COURT PROPERLY DENIED THE CLAIM THAT DEFENDANT IS INSANE TO BE EXECUTED.

Defendant next asserts that he is insane to be executed. However, this claim cannot be raised until an execution is imminent. *See Herrera' v. Collins*, 506 U.S. 390, 405-06 (1993)("[T]he issue of sanity [to be executed] is properly considered in proximity to the execution."); *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997)(same), *aff'd*, 523 U.S. 637 (1998). Here, Defendant's execution is not imminent; no warrant had been issued for his execution, and no date has been set. As such, this claim is not ripe for adjudication at this juncture and was properly summarily denied.

XXI. THE LOWER COURT PROPERLY DENIED THE CLAIM REGARDING THE PHOTOGRAPHS.

Defendant next contends that the lower court improperly summarily denied his claim that the trial court abused its discretion allowing the State to introduce gruesome photographs. However, this claim was properly summarily denied.

Claims regarding a trial court's ruling on the admissibility of evidence are claims that could have and should have been raised on direct appeal. As such, these claims are procedurally barred in post conviction proceedings. *Francis v. Barton*, 581

So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). The lower court therefore properly summarily denied this claim.

Moreover, contrary to Defendant's contention, the State only introduced two autopsy photographs and Off. Martin had already been transported to the hospital before the crime scene photos were taken. (R. 3061-62, 3206-07) The first autopsy photograph was used for the legal identification and to assist the medical examiner in describing the nature of Off. Martin's wounds and the cause of his death. (R. 3063, 3216-18) The second was also used by the medical examiner to better describe the injury to Off. Martin's neck. (R. 3219) the admission of photographs for those purposes is not an abuse of discretion because the test for admissibility is relevance, not necessity. *Hertz v. State*, 803 So. 2d 629 (Fla. 2001); *Pope v. State*, 679 So. 2d 710, 713 (Fla. 1996); *Jones v. State*, 648 So. 2d 669, 679 (Fla. 1994); *Straight v. State*, 397 So. 2d 903 (Fla. 1981). The claim was properly summarily denied.

CONCLUSION

For the foregoing reasons, the order denying the motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **Michael V. Giordano,** 412 East Madison Street, Suite 824, Tampa, Florida, this 24th day of June, 2002.

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CERTIFICATE OF COMPLIANCE

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

point font.

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