

IN THE SUPREME COURT OF FLORIDA

DENNIS SOCHOR,

Appellant,

vs.

Case No. 01-0885

STATE OF FLORIDA,

Appellee.

-----/

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

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST JR.
ATTORNEY GENERAL

CELIA A. TERENCE
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO.: 0656879
1515 FLAGLER DRIVE.
SUITE 900
WEST PALM BEACH, FL. 33401
(561) 837-5000

ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iv
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
ISSUE I	
THE TRIAL COURT PROPERLY FOUND THAT TRIAL COUNSEL RENDERED CONSTITUTIONALLY ADEQUATE PERFORMANCE AT THE PENALTY PHASE OF HIS TRIAL	7
ISSUE II	
THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM THAT THE STATE WITHHELD EVIDENCE IN VIOLATION OF A <u>BRADY</u>	30
ISSUE III	
THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISQUALIFY THE COURT	44
ISSUE IV	
THE TRIAL COURT'S SUMMARY DENIAL OF APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE AT THE GUILT PHASE WAS PROPER	47
ISSUE V	
THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO JURY INSTRUCTIONS REGARDING THE AGGRAVATING FACTORS	55

ISSUE VI	
	APPELLANT'S CLAIM THAT HE IS INNOCENT OF THE DEATH PENALTY AND OF FIRST DEGREE MURDER IS PROCEDURALLY BARRED AND WITHOUT MERIT 61
ISSUE VII	
	APPELLANT'S CHALLENGE TO THE RULE WHICH PRECLUDES JUROR INTERVIEWS IS PROCEDURALLY BARRED 62
ISSUE VIII	
	APPELLANT'S CONSTITUTIONAL CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE WAS PROPERLY DENIED 63
ISSUE IX	
	APPELLANT'S CLAIM THAT HIS TRIAL WAS TAINTED WITH NUMEROUS ERRORS WHICH AS A WHOLE RENDERED THE PROCEEDINGS UNFAIR IS PROCEDURALLY BARRED, LEGALLY INSUFFICIENT 64
CONCLUSION 65
CERTIFICATE OF SERVICE 65

TABLE OF CITATIONS

Cases Cited

Ake v. Oklahoma, 470 U.S. 68 (1985) 38

Aldridge v. State, 503 So. 2d 1257 (Fla. 1987) 50

Arbeleaz v. State, 775 So. 2d 909 (Fla. July 13, 2000) . . 62

Armstrong v. State, 642 So. 2d 730 (Fla. 1994) 33, 34

Asay v. State, 769 So. 2d 974 (Fla. 2000) 42

Atkins v. State, 541 So. 2d 1165 (Fla. 1989) 57-59

Atkins v. State, 663 So. 2d 624 (Fla. 1995) 38

Blanco v. State, 702 So. 2d 1250 (Fla. 1997) 60

Brady v. Maryland, 373 U.S. 83 (1963) 5, 30, 34, 36, 47, 48

Bruno v. State, 807 So. 2d 55 (Fla. 2001) 9, 22, 23, 31

Bryan v. State, 641 So. 2d 61 (Fla. 1994) 51

Buenoano v. State, 708 So. 2d 941 (Fla. 1998) 31, 35, 63

Burns v. State, 699 So. 2d 646 (Fla. 1997) 59

Bush v. Wainwright, 505 So. 2d 409 (Fla. 1987) 43

Caldwell v. Mississippi, 472 U.S. 320 (1985) 59

Carroll v. State, 815 So. 2d 601 (Fla. 2002) 36, 41

Chandler v. Dugger, 634 So. 2d 1066 (Fla. 1994) 56-58, 64

Chastine v. Broome, 629 So. 2d 293 (Fla. 4th DCA 1993) 44, 45

Cherry v. State, 659 So. 2d 1069 (Fla. 1995) 10, 16, 53

Cherry v. State, 781 So. 2d 1040 (Fla. 2000) 11, 24, 27

Correll v State, 558 So. 2d 422 (Fla. 1990) 59, 60

Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993) 11, 12

<u>Demps v. Dugger</u> , 714 So. 2d 365 (Fla. 1998)	58
<u>Downs v. State</u> , 740 So. 2d 506 (Fla. 1999)	22, 58
<u>Dragovich v. State</u> , 492 So. 2d 350 (Fla. 1986)	44
<u>Duest v. Dugger</u> , 555 So. 2d 849 (Fla. 1990)	52
<u>Engle v. State</u> , 576 So. 2d 696 (Fla. 1991)	12, 23, 42, 52
<u>Finney v. State</u> , 27 Fla. L. Weekly S785 (Fla. September 26, 2002)	23
<u>Fischer v. Knuck</u> , 497 So. 2d 240 (Fla. 1986)	46
<u>Francis v. State</u> , 529 So. 2d 670 (Fla. 1988)	21
<u>Freeman v. State</u> , 761 So. 2d 1055 (Fla. 2000)	53, 57, 59, 60, 64
<u>Gaskin v. State</u> , 737 So. 2d 209 (Fla. 1999)	62
<u>Gilliam v. State</u> , 582 So. 2d 610 (Fla. 1991)	62
<u>Harvey v. Dugger</u> , 656 So.2d 1253 (Fla. 1995)	51, 56-59, 61
<u>Hegwood v. State</u> , 575 So. 2d 170 (1991)	31
<u>Heiney v. State</u> , 620 So. 2d 171 (Fla. 1993)	11
<u>Hildwin v. State</u> , 654 So. 2d 107 (Fla. 1995)	11
<u>Hill v. State</u> , 515 So. 2d 176 (Fla. 1987)	26
<u>Jackson v. State</u> , 599 So. 2d 103 (Fla. 1992)	45
<u>Johnson v. State</u> , 660 So. 2d 637 (Fla. 1995)	58
<u>Johnson v. State</u> , 769 So. 2d 990 (Fla. 2000)	41
<u>Johnston v. Dugger</u> , 583 So. 2d 657 (Fla. 1991)	25
<u>Jones v. State</u> , 701 So. 2d 76 (Fla. 1997)	63
<u>Jones v. State</u> , 732 So. 2d 313 (Fla. 1999)	12
<u>Knight v. Dugger</u> , 574 So. 2d 1066 (Fla. 1990)	34

<u>Koon v. State</u> , 619 So. 2d 246 (Fla. 1993)	56, 57
<u>Linehan v. State</u> , 476 So. 2d 1262 (Fla. 1985)	40
<u>Livingston v. State</u> , 441 So. 2d 1083 (Fla. 1983)	45
<u>Marajah v. State</u> , 684 So. 2d 726 (Fla. 1996)	51, 56, 61
<u>Mendyk v. State</u> , 592 So. 2d 1076 (Fla. 1992)	31, 53
<u>Mills State</u> , 603 So. 2d 482 (Fla. 1992)	27, 29
<u>Occhicone v. State</u> , 768 So. 2d 1037 (Fla. 2000)	10, 22, 64
<u>Patton v. State</u> , 784 So. 2d 380 (Fla. 2000)	10, 23
<u>Pendelton v. State</u> , 348 So. 2d 1206 (4 th DCA 1977)	50
<u>Phillips v. State</u> , 608 So. 2d 778 (Fla. 1992)	34, 39, 41
<u>Provenzano v. Dugger</u> , 561 So. 2d 546 (Fla. 1990)	12, 22, 42
<u>Provenzano v. Moore</u> , 744 So. 2d 413 (Fla. 1999)	63
<u>Quince v. State</u> , 477 So. 2d 535 (Fla. 1985)	51
<u>Reaves v. State</u> , 639 So. 2d 1 (Fla. 1994)	40
<u>Remeta v. Dugger</u> , 622 So. 2d 452 (Fla. 1993)	23
<u>Remeta v. Singletary</u> , 717 So. 2d 536 (Fla. 1998)	63
<u>Rivera v. State</u> , 717 So. 2d 482 (Fla. 1998) 10, 40, 51, 56, 61, 64	
<u>Roland v. State</u> , 584 So. 2d 68 (Fla. 1st DCA 1991)	62
<u>Rose v. State</u> , 617 So. 2d 291 (Fla. 1993)	11, 22, 42
<u>Rose v. State</u> , 675 So. 2d 567 (Fla. 1996)	10, 11, 54
<u>Routly v. State</u> , 590 So. 2d 397 (Fla. 1991)	22, 27, 50, 53
<u>Rutherford v. State</u> , 727 So. 2d 216 (Fla. 1998)	22
<u>Sawyer v. Whitley</u> , 112 S.Ct. 2514 (1992)	61
<u>Sconyers v. State</u> , 513 So. 2d 1113 (Fla. 2d DCA 1987)	62

<u>Shere v. State</u> , 579 So. 2d 86 (Fla. 1991)	62
<u>Sims v. Moore</u> , 754 So. 2d 657 (Fla. 2000)	63
<u>Sims v. Singletary</u> , 622 So. 2d 980 (Fla. 1993)	59
<u>Sireci v. State</u> , 773 So. 2d 34 (Fla. 2000)	34
<u>Sochor v. State</u> , 619 So.2d 285 (Fla. 1993)4, 49, 51, 52, 55-57, 59, 61	
<u>State v. Lara</u> , 581 So. 2d 1288 (Fla. 1991)	11
<u>Stephens v. State</u> , 748 So. 2d 1028 (Fla. 1999)	9
<u>Stephens v. State</u> , 748 So. 2d 1028 (Fla. 1999)	31
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)7, 10, 16, 47, 48, 50, 53	
<u>Teffeteller v. Dugger</u> , 734 So. 2d 1009 (Fla. 1998)	53
<u>Thompson v. State</u> , 25 Fla. L. Weekly S346 (April 13, 2000)	58
<u>Thompson v. State</u> , 553 So. 2d 153 (Fla. 1989)	50
<u>Thompson v. State</u> , 759 So. 2d 650 (Fla. 2000)	62
<u>Tompkins v. State</u> , 549 So. 2d 1370 (Fla. 1989)	28
<u>Turner v. State</u> , 614 So. 2d 1075 (Fla. 1992)	59
<u>Valle v. State</u> , 705 So. 2d 1331 (Fla. 1997)	64
<u>Van Poyck v. State</u> , 694 So. 2d 686 (Fla. 1997)	34
<u>Walsh v. State</u> , 418 So. 2d 1000 (Fla. 1982)	50
<u>White v. State</u> , 559 So. 2d 1097 (Fla. 1990)	25, 53
<u>White v. State</u> , 729 So. 2d 909 (Fla. 1999)	36
<u>Williams v. Taylor</u> , 120 S. Ct. 1495 (2000)	7
<u>Zeigler v. State</u> , 452 So. 2d 537 (Fla. 1984), <u>sentence vacated on other grounds</u> , 524 So. 2d 419 (Fla. 1988)	64

Statutes Cited

921.141(5), Fla. Stat. 59

921.141(5)(b), Fla. Stat. 55

921.141(5)(d), Fla. Stat. 55

921.141(5)(h), Fla. Stat. 55

921.141(5)(i), Fla. Stat. 55

921.141(6)(b), Fla. Stat. 20

921.141(6)(f), Fla. Stat. 20

Fla. R. Civ. P 1.431(h). 62

Other Authority Cited

Florida Rule of Professional Conduct 4-3.5(d)(4) 62

IN THE SUPREME COURT OF FLORIDA

DENNIS SOCHOR,

Appellant,

vs.

Case No. 01-0885

STATE OF FLORIDA,

Appellee.

-----/

PRELIMINARY STATEMENT

Appellant, DENNIS SOCHOR, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the direct appeal record will be by the symbol "ROA" reference to postconviction pleadings will be by the symbol "PCR," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SPCR[vol.]" or "ST[vol.]" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The state accepts appellant's rendition of the case and facts but would only add the following excerpt from this Court's opinion on direct appeal:

Testimony at trial established that, on December 31, 1981, the victim, an eighteen-year-old female, and a friend went to a lounge located in Broward county to celebrate New Year's Eve. During the course of the evening the friend became ill. Sochor and his brother, Gary, helped the victim escort her friend outside to her car. Promising her that she would return soon, the victim returned to the lounge.

Early the next morning the friend awoke in the car, discovered the victim missing, and called the police. The police obtained a photograph taken that night which showed an unidentified man sitting at the bar near the victim. The photograph was shown on television, and, several days later, that man was identified as Sochor. The police talked with Sochor's roommates who said that he had left suddenly when he saw his picture on television. They also told police that Sochor's brother, Gary, had been visiting him and had recently returned to Michigan. The police interviewed Gary who implicated his brother in the victim's disappearance and voluntarily returned to Florida to attempt to locate her body. In May 1986 authorities arrested Sochor in Georgia on an unrelated offense and extradited him to Florida where a grand jury indicted him on charges of first-degree murder and kidnapping. The victim's body has never been recovered.

At trial Gary gave the following testimony. He went to the lounge on New Year's Eve with his brother who spent the evening talking with the victim and her friend. When it came time to leave, the victim and his

brother were kissing in the lounge parking lot while Gary waited in the truck. Several minutes later, she agreed to go to breakfast with them. They left the parking lot with Sochor driving his employer's truck, Gary in the passenger seat, and the victim seated between them. Sochor drove to a secluded spot nearby and stopped the truck. Gary remembered the victim screaming for help and seeing Sochor on top of her with her hands pinned down on the ground. He yelled at him and threw a rock over his head. In response Sochor stopped assaulting the victim, turned and looked at Gary like a man "possessed," angrily told him to get back in the truck, and resumed his assault. A while later Sochor got in the truck with Gary and drove home. The next morning Gary found a woman's shoe and sweater and a set of keys in the truck. He hid the keys. Later he noticed that the truck had been cleaned and the articles removed. When told about the keys, Sochor became upset and demanded their return, which Gary did. A few days later Gary returned to Michigan.

The state also introduced Sochor's three taped confessions which it played to the jury. In these statements Sochor said that he met the victim that night at the bar and spent the evening talking with her. He remembered kissing her in the lounge parking lot and wanting to have sex. When she refused, they argued and he grabbed her. When she hit him, he became angry and choked her. He thought that he killed her and drove to a secluded area where he disposed of the body. He said that Gary was not with him when this happened. When he awoke the next morning, he remembered feeling that something terrible had happened. He thought he had raped "another girl." He also stated that he found several woman's articles in the truck which he put in the trash. When he saw his picture on television, he took his employer's truck and drove to Tampa. (FN1) From there he went to New Orleans where he stayed for some time

before moving to Atlanta where he was arrested.

The jury convicted Sochor of both kidnapping and first-degree murder and, by a vote of ten to two, recommended the death penalty. The trial judge sentenced Sochor to death, finding four aggravating, (FN2) and no mitigating, circumstances. Sochor now appeals, claiming errors in both the guilt and sentencing phases of his trial.

Sochor v. State, 619 So.2d 285, 287-288(Fla. 1993).

SUMMARY OF ARGUMENT

Issue I - After conducting an evidentiary hearing the trial court correctly found that appellant received the effective assistance of counsel at the penalty phase. The factual findings made by the judge are supported by the record and the legal conclusions were a correct application of the law.

Issue II - After conducting an evidentiary hearing on a portion of this claim, the trial court properly denied all relief. Appellant failed to establish that the state withheld any exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963) or that trial counsel was ineffective at the guilt phase. All factual findings made by the trial court are supported by the record and the legal conclusions are a correct application of the law.

Issue III - The trial court properly denied the motion to disqualify as it was legally insufficient on its face.

Issue IV - The trial court properly denied summarily appellant's challenge to trial counsel's performance during pretrial and guilt phase stages. Additionally, appellant's challenge to the County's method of appointing public defenders; the propriety of appellant's confession were also properly denied without a hearing

Issue V - The trial court properly denied without a hearing, appellant's constitutional challenge to the penalty phase jury instructions.

Issue VI -Appellant's claim that he is innocent of first degree murder and of the death sentence was properly denied as legally insufficient and procedurally barred.

Issue VII - Appellant's constitutional challenge to the prohibition against counsel interviewing jurors was properly denied as procedurally barred and legally insufficient.

Issue VIII - Appellant's challenge to the method of execution in Florida is procedurally barred.

Issue IX - Appellant's claim of cumulative error was properly denied as legally insufficient as pled and procedurally barred.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY FOUND THAT TRIAL COUNSEL RENDERED CONSTITUTIONALLY ADEQUATE PERFORMANCE AT THE PENALTY PHASE OF HIS TRIAL

Sochor claims that trial counsel, Charles Rich, made no meaningful attempt to investigate Sochor's mental health background or familial history in preparation for the penalty phase of his trial. Rich's alleged shortcomings amounted to a constitutional violation of Strickland v. Washington, 466 U.S. 668 (1984) and Williams v. Taylor, 120 S.Ct. 1495 (2000). The focus of Sochor's criticism is the notion that Mr. Rich failed to conduct the requisite "thorough investigation" into appellant's background. Specifically Sochor alleges that trial counsel should have provided to mental health experts that were retained prior to trial¹, information regarding Sochor's drug and alcohol abuse, his prior psychiatric hospitalization, the years of physical abuse he endured by his father, and various head injuries he suffered. If doctors had this information available to them, they would have been able to testify regarding Sochor's substance abuse and manic-depressive disorder which would have formed the basis for statutory mitigation. Sochor alleges a comparison of the evidence presented at the penalty phase with

¹ Psychologist Patsy Ceros-Livingston and psychiatrist Dr. Zager testified at the guilt phase of trial. (ROA 648-741). Their reports were also introduced at the penalty phase.

the evidence presented at the evidentiary hearing will demonstrate that trial counsel provided deficient performance. The record demonstrates that only four lay witnesses and no experts testified at the penalty phase. Their testimony was superficial and they were not adequately prepared. Appellant argues that in contrast with trial counsel's performance, postconviction counsel has now presented compelling and significant penalty phase evidence which was uncovered and developed after a thorough investigation. An investigation appellant assumes was not undertaken by trial counsel.

Sochor's evidentiary hearing presentation included the same four penalty phase witnesses that did testify at trial, in addition to several other family members and friends. Sochor also called two mental health professionals who opined that he suffered from various mental health deficiencies including organic brain damage, manic depressive disorder and poly-substance abuse.

After comparing the trial evidence against the evidence presented at the evidentiary hearing, the trial court made the following determinations with regard to trial counsel's performance; trial counsel did make reasonable effort to present mitigation at the trial and, the new evidence presented at the evidentiary hearing was either not compelling or merely cumulative. (PCR 1148).

With respect to the non-compelling nature of the new evidence, the trial court noted that Sochor in the past has been described as a malingerer with selective amnesia. (PCR 1147). Moreover Dr. Ceros-Livingston, a defense witness at trial and state witness at the evidentiary hearing opined at the hearing that she would not have changed her original diagnosis regardless of any additional/new information. The court further recognized that as a matter of law simply because you may be able to present a more favorable or detailed history at a later date does not in and of itself establish that counsel's performance was deficient. (PCR 1146-1148).

With respect to the non-statutory mitigation, the trial court determined that the additional witnesses and testimony was cumulative and unproductive. (PCR 1149). Furthermore the testimony of appellant's brother Blain, and sisters Lisa and Melanie, siblings who did not testify at the original trial, was less significant given that they were much younger than appellant and were still very young when appellant had left the home permanently. (PCR 1149-1150). As will be detailed below, the trial court's findings are supported by the record.

The standard of review regarding the trial court's legal conclusion that counsel was not ineffective is two-pronged: the appellate court must defer to the trial court's findings on factual issues and must review the trial court's ultimate

conclusions *de novo*. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); Bruno v. State, 807 So. 2d 55, 61-62 (Fla. 2001).

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

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

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

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

Id. at 689 (citation omitted). Moreover, the ability to create a more favorable or appealing strategy several years after the fact, does not translate into deficient performance at trial.

Patton v. State, 784 So. 2d 380, 391 (Fla. 2000)(precluding appellate court from viewing issue of trial counsel's performance with heightened perspective of hindsight); Rose v. State, 675 So. 2d 567, 571 (Fla. 1996) (holding disagreement with trial counsel's choice of strategy does not establish ineffective assistance of counsel); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)(concluding standard is not how current counsel would have proceeded in hindsight); Rivera v. State, 717 So. 2d 482, 486 (Fla. 1998); Occhicone v. State, 768 So. 2d 1037, 1048(Fla. 2000)("Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions.").

In support of his claim, Sochor relies on Rose v. State, 675 So. 2d 567 (Fla. 1996); Hildwin v. State, 654 So. 2d 107 (Fla. 1995); State v. Lara, 581 So. 2d 1288 (Fla. 1991); Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993); and Heiney v. State, 620 So. 2d 171 (Fla. 1993). However, the factual premise for concluding that trial counsel was deficient in all those cases was the complete failure of counsel to conduct any investigation into mitigation. Rose 675 So. 2d at 571; Heiney, 620 So. 2d at 173; Hildwin 654 So. 2d at 110; Cherry v. State, 781 So. 2d 1040, 1049 n. 1 (Fla. 2000)(distinguishing Rose since trial counsel's failure to present mitigating evidence of drug abuse was not predicated upon lack of investigation but because the evidence

at trial did not support the proposed mitigation); Lara 581 So. 2d at 1289; Deaton, 635 So. 2d at 8. In contrast, and discussed in greater detail below, the evidence adduced at the evidentiary hearing as well as the evidence presented at trial clearly demonstrated that Mr. Rich conducted a very thorough investigation. Simply because Rich's investigation did not uncover evidence of alleged organic brain damage or manic-depressive disorder, does not entitle Sochor to relief. His good fortune in finding mental health professionals who will now opine that he suffers from organic brain damage and manic-depressive disorder, does not prove that a competent investigation was not conducted at the time of trial. See Rose v. State, 617 So. 2d 291, 295 (Fla. 1993)(rejecting claim that initial findings of mental health experts was deficient simply because defendant obtains new diagnosis of organic brain damage); Provenzano v. Dugger, 561 So. 2d 546 (Fla.1991)(finding no basis for relief by mere fact that defendant has found expert who can offer more favorable testimony); Jones v. State, 732 So. 2d 313, 319 (Fla. 1999)(finding counsel's decision not to pursue further mental health investigation after receiving initial unfavorable report reasonable); Engle v. State, 576 So. 2d 696 (Fla. 1991)(same).

Appellant notes that the trial court did not have the benefit or opportunity to hear directly from trial counsel Mr.

Rich since he was deceased at the time of this evidentiary hearing. However, Sochor's solution to that unfortunate circumstance is to rely on Mr. Rich's testimony from a completely unrelated case, that of James Deaton. **Initial brief at 13-14.** Therein this Court granted capital defendant James Deaton relief based on Mr. Rich's concession at the evidentiary hearing that he did next to nothing in penalty phase preparation or presentation. Deaton, 635 So. 2d at 8-9. Sochor alleges that somehow it would be appropriate to assume that Mr. Rich's performance in this case was a carbon copy of what he did in the way of preparation in the Deaton case. Sochor further argues that the unrebutted testimony of Sochor's family members confirms that, "Mr. Rich employed the same modus operandi in the Sochor case as he had done in Deaton." **Initial brief at 14.** The state asserts that the record in this case clearly rebuts Sochor's claims as Rich did present penalty phase evidence at trial. Ultimately the record demonstrates that the evidence presented twelve years after the penalty phase concluded, is in most aspects identical to the evidence that was actually presented at trial.

In support of this claim Sochor presented the testimony of a forensic psychiatrist Dr. Richard Greer and a neuropsychologist Dr. Karen Fromming. Dr. Greer examined Sochor in April of 1999. Greer identified three main diagnosis; Sochor

is manic depressive; he suffers from chronic drug use; and alcohol abuse. (T 386-387, 394). Greer further explained that a symptom of manic depression, hypersexuality, was also present in the defendant. Consequently, when Dennis saw his brother Gary, kissing Ms. Gifford the defendant went into a "hypermotoric state," which resulted in the strangulation of Ms. Gifford. (T 399-400). The information relied upon by Greer in his diagnosis consisted of a clinical interview with Dennis Sochor; discussions with current defense counsel; review of witnesses statements; the reports of three doctors who testified at trial; a review of jail and medical records of Sochor since 1986. (T 385-389, 392, 409-410).

Greer acknowledged that Sochor has anti-social tendencies however he discounted anti-social personality as a diagnosis. The basis for this opinion was the absence of any evidence that in the commission of this murder, Dennis exhibited any calculated behavior designed for monetary gain (T 402).²

Greer was unable to say when or for how long Sochor was in the manic phase of his bipolar condition at the time of the murder. (T 416). Nor could Greer render an opinion as to whether Sochor was floridly manic at the time of the murder. Greer explained that because Sochor was intoxicated it is not

² All three doctors who examined Dennis Sochor in 1987 concluded that he had an anti-social personality. (T 478, R 679, 799).

possible to pin point which condition, i.e., intoxication or manic depression initially triggered the entire episode. (T 395). Greer concluded that at the time of the murder Sochor had the ability to appreciate the criminality of his conduct, he did not have the ability to necessarily conform his conduct or keep it from being criminal. (T 394). The combination of manic depression and alcohol precluded Sochor from conforming his conduct to the requirements of the law. (T 394).

Dr. Karen Froming, a clinical neuropsychologist, examined Sochor in June of 1996. She stated that Sochor is suffering from substance induced dementia; manic depression; post-traumatic stress syndrome³; brain damage; and substance abuse. (T439-442). Froming concluded that these four diagnosis along with his family history of abuse are sufficient to find that Sochor was suffering from extreme mental or emotional disturbance and that he could not appreciate the criminality of his actions of his conduct or conform his conduct to the requirements of the law. In other words Froming opined that Sochor could not help himself.(T 450-451). The basis of her opinions was a review of Sochor's school records; family medical history; Sochor's medical history; jail and military records. (T 432-434). Although she disagreed with the findings of Ceros-Livingston's MMPI analysis, she was unable to really offer an

³ A diagnosis not made by Dr. Greer. (T 475).

opinion regarding Dr. Ceros-Livingston's assessment that Sochor exhibited a fake bad profile on the MMPI. (T 461-462, 475). Froming never bothered to conduct her own subsequent MMPI test. Nor did Froming bother to conduct a complete IQ testing of Sochor. (T 476).

In rebuttal the state called Dr. Ceros-Livingston. Dr. Ceros-Livingston testified for appellant at the guilt phase. She was called upon to examine Sochor for competency and sanity only and not for statutory mitigators. The evaluation took place in June of 1987. (T 533). Dr. Livingston testified that even after reviewing the additional information presented to her by Sochor's current counsel, she unequivocally stated that her original opinions of Sochor remained the same. The medical, school and military records she has been given to review for this hearing do not indicate that Sochor was manic depressive or suffered from brain damage. (T 538-541, 549). Ceros-Livingston noted at intervals when he was off the anti-depressant, Lithium, there is no indication that his behavior changed in any way. (T 544-548, 565-566). Furthermore if Sochor were in such a state on the night of the murder the symptoms would be obvious to anyone around him. There was no testimony from any of the witnesses who were with Sochor that evening that he was in such a state. (T 541-544).

A review of the record on appeal demonstrates that the testimony of Drs. Greer and Froming is almost identical to the information put before the jury either through the testimony of the three doctors and/or their detailed reports. (ROA 648-741).

In addition to Dr. Ceros-Livingston, Mr. Rich also presented the testimony of Dr. Arnold Zager. Both testified at the guilt phase and their reports were introduced at the penalty phase. (ROA 741). From their testimony it is evident that they were aware of many, if not all, of the specific details of Sochor's childhood problems, including the physical abuse; and his extensive substance abuse problems.⁴ Indeed four family members testified at trial regarding details of Sochor's problems with

⁴ In attacking the evaluations performed by Zager and Ceros-Livingston, Sochor maintains that the doctors were not provided with all the relevant information needed to reach a reliable and competent assessment. However the state would point out that much of the information relied upon by the new doctors in their diagnosis in 1999, was the Department of Corrections Health Services information that was not even generated until after Sochor's trial. Specifically more than half of Vol. III and all of Vol. IV of the materials provided to these doctors contain information about Sochor's behavior from 1987 and beyond. (T 388-389, 407-410, 432-434 SPCR 474-1369). This information was not even in existence at the time Drs. Castillo, Ceros-Livingston and Zager rendered their opinions. It defies logic to allow a challenge to the competency of these doctors' 1987 evaluations when the genesis of that challenge is based on information generated subsequent in time. Cf. Strickland v. Washington, 466 U.S. 668 (1984) (warning that a high level of deference must be paid to counsel's performance and the distortion of hindsight must be limited as the standard is to evaluate performance based on the facts known at the of trial); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (concluding standard is not how current counsel would have proceeded in hindsight).

drugs and alcohol, his violent upbringing, and psychiatric problems. Sochor's self imposed substance abuse, and the ensuing problems related to that use was well chronicled before the jury. Dr. Patsy Ceros-Livingston, a clinical psychologist⁵ and Dr. Arnold Zager a psychiatrist with an expertise in neurology,⁶ related to the jury Sochor's long term history of chronic drug and alcohol abuse.

Sochor told the doctors that he had been drinking prior to the time of crime and that he blacked out during the offense. (ROA 720). Sochor exhibited impulsive and disruptive behavior. (ROA 733-736). Dr. Ceros-Livingston conceded that if Sochor had given detailed accounts of the murder than he most likely did not black out as he has since maintained. (ROA 736).

The doctors testified about Sochor's drinking as a teenager and used cocaine and LSD. (ROA 648-649, 656, 702-703, 706, 709-710, 719, 727, 795). The jury was aware that Sochor became sexually impulsive and violent when he was drinking and that all his troubles with the law involved his use of alcohol. (ROA 650, 657, 676-678, 702, 710, 731, 733, 795). He became sexually

⁵ Ceros-Livingston, an expert in clinical psychology, explored Sochor's psychological history and hospitalization experience. She spent more than three and one-half hours performing her clinical evaluation of appellant. (ROA 694, 696-697).

⁶ Dr. Zager's evaluation/assessment included a measurement of Sochor's physiological brain function. (ROA 647). Additionally Zager explored Sochor's psychiatric history, substance abuse history and family history. (ROA 643, 645-646).

aggressive when drinking and Sochor was intoxicated on the night of the murder. (ROA 649, 651, 565, 663, 692, 719-720). Sochor suffered at least two significant head injuries in his youth (ROA 653), was hospitalized in a psychiatric facility for a few days, he had been diagnosed as manic depressive, (ROA 701, 728) had suicidal tendencies, alcoholic blackouts (ROA 648, 649, 704-707), and was taking anti-depressant drugs, lithium and sinquan as well as psycho tropic medication. (ROA 654, 806).

Ceros-Livingston's diagnosis was that Sochor had an anti-social personality disorder; long history of alcohol and drug abuse; suicidal tendencies, and he was probably trying to fake a more sever illness than he really had. (ROA 699-707). She noted that while Sochor was in the Army it was suggested that he receive psychiatric treatment. (ROA 701,728). Sochor's IQ was in the average range. (ROA 727).

Dr. Zager testified that Sochor had a longstanding problem with drugs and alcohol and manifested since childhood a conduct disorder and antisocial personality disorder. (ROA 656). Alcohol appeared to have a dramatic effect on his behavior. It increased his self esteem and tended to make him more sexually aggressive and violent. (ROA 656-657, 658). Dr. Zager's explained that of course not everyone who commits a crime after having a few drinks is under the influence of alcohol. However in the case of Sochor, although he was competent and sane at the

time, he was under the influence of alcohol and his state of mind at the time of the crime was such that:

"If literally one could stop an individual in the act of it and ask then and so forth, it was my impression that this gentleman, if indeed he committed the crime, and was stopped in the act, and when asked is it wrong or is it against the law to commit such a crime, that individual might say certainly it is, but in a sense, disregard it."

(ROA 688). Zager also explained that when under the influence of alcohol Sochor would disregard or not even consider the consequences. He would simply act on impulse without using any logical thought. (ROA 659).

In rebuttal to Zager and Ceros-Livingston, Dr. Ricardo Castillo, was called by the state. Castillo evaluated Sochor on June 22, 1987. (ROA 793). He pointed that Sochor suffered from long term drug abuse and diagnosed anti-social personality disorder. (ROA 799, 805, 808-809). Castillo noted that prior medical records indicated that Sochor had been diagnosed as manic depressive and that he was currently taking six hundred milligrams a day of lithium. Lithium is normally given to people suffering from a manic depressive disorder. (ROA 807). Dr. Castillo described for the jury the nature of manic depressive disorder but opined that Sochor did not suffer from that disease. (ROA 807). Consistent with Dr. Ceros-Livingston's conclusion that Sochor was a malinger, Dr. Castillo

stated that Sochor had selective amentia, and that he did not blackout on the night of the murder. (T 796-798).

The record without question reveals that the conclusions of the original doctors from 1987 in essence is virtually identical to the testimony of the doctors presented in 1999. Dr. Froming described Sochor's condition at the time of the crime as a complete lack of impulse control to the point that he just could not help himself. (T 451-452). A diagnosis very consistent with that of Dr. Zager. The jury was well aware of Sochor's history of drug and alcohol abuse and his abusive childhood. Sochor presented all of this information in an attempt to satisfy the mitigating factors that he was "under the influence of extreme mental or emotional disturbance"⁷ and that "his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired."⁸ Given the cumulative nature of the "new" findings, relief is not warranted.

The trial court's rejection of appellant's "new" non-statutory mitigation through Sochor's family, friends and teachers was also proper. The court noted that the testimony was cumulative at best. (PCR 1150-1152). In disagreement, Sochor claims that the penalty phase presentation was

⁷ 921.141(6)(b). Fla. Stat.

⁸ 921.141(6)(f). Fla. Stat.

superficial and failed to display the extent of Sochor's physical abuse. The record belies appellant's contentions.

Four of those people, i.e., his parents, Charles and Rose Sochor, his sister Cathy Cooper, his brother Gary Sochor, all testified at the penalty phase in 1987. (ROA 1005-1069). A comparison of their testimony presented at trial and their testimony twelve years later at the evidentiary hearing reveals that they are virtually identical. This family recounted for the jury in 1987 and for the trial court in 1999 that Dennis Sochor was raised in an extremely abusive home. Dennis was severely beaten by both his parent throughout his childhood. His father a successful boxer, in the Army, would punch Dennis and bang his head on the wall or floor. These beatings would leave Dennis with bruising, head injuries, swollen eyes and cut lips. (ROA 1007, 1021-1027, 1038-1039, 1064, 1072). The jury was also presented with testimony regarding Sochor's abusive and violent propensities when drinking. (ROA 1043, 1049, 1057).

In addition to the overall general accounts of the abusive environment, these witnesses offered identical specific instances of the abuse. For instance, at both proceedings Sochor presented testimony that, his father unfairly accused him of stealing a coin collection, (ROA 1042, T 127-129). At both proceedings, Sochor presented testimony that he was involuntarily hospitalized, (ROA 1044-1045, 1050, 1055, 1027-

1029, T 126). At both proceedings Sochor presented evidence that Dennis would turn over his entire paycheck to his father to help support the family when his father had temporarily lost his job. (ROA 1008-1018, T 121-122). At both proceedings, Sochor presented evidence that he was beaten more severely than any of the other siblings. (ROA 1007, 1023, T 116). At both proceedings, Sochor presented evidence that he was a protector of the younger siblings. (ROA 1006, T 229). Francis v. State, 529 So. 2d 670, 673 n. 8 (Fla. 1988)(finding testimony of additional family members insignificant given that it was remote in time to the incident and defendant was already gone from the house and on his own). Given the fact that the evidence presented at both hearings is identical, Sochor's claim that defense counsel Charlie Rich failed to investigate and present non statutory mitigation is false. Routly v. State, 590 So. 2d 397, 401 (Fla. 1991)(finding that defendant did not demonstrate reasonable probability that sentence would have been different had trial counsel presented additional information where much of the evidence was already before judge and jury in different form); Rutherford v. State, 727 So. 2d 216, 224-225 (Fla. 1998)(same); Downs v. State, 740 So. 2d 506 (Fla. 1999)(same); Occhicone v. State, 768 So. 2d 1037, 1049-1050 (Fla. 2000)(same); Bruno, 807 So. 2d at 68 (explaining that counsel cannot be considered deficient simply because new information

presented at evidentiary hearing may have been more detailed given that the information was essentially the same).

To the extent that Sochor presents the testimony of a doctor, twelve years later⁹ who will rely upon the same information and attempt to place it in a more palatable manner i.e., manic depressive, does not render the initial evaluations incompetent. Rose v. State, 617 So. 2d 291, 295 (Fla. 1993)(rejecting claim that initial findings of mental health experts was deficient simply because defendant obtains different diagnosis now); Provenzano v. Dugger, 561 So. 2d 546 (Fla. 1991)(finding no basis for relief by mere fact that defendant has found expert who can offer more favorable testimony); Engle v. State, 576 So. 2d 696 (Fla. 1991). As already noted, Dr. Ceros-Livingston reviewed the new information relied upon by Greer and Froming, i.e., Sochor's medical records generated since 1987, and she unequivocally stated that her opinion would not change. She asserts that Sochor was not manic depressive at the time she evaluated him.¹⁰ Simply because two doctors may arrive at different conclusions based on virtually the same

⁹ Dr. Karen Froming had to concede that she was not available in 1987 to testify on behalf of Sochor regarding this information. (T 481). The state asserted that her testimony should not be considered by the court in determining the adequacy of Sochor's 1987 mental health experts.

¹⁰ Ceros-Livingston's opinions was consistent with the independent evaluations of two well known experts in psychiatry Drs. Zager and Castillo. All three rendered similar opinions.

information, does not entitle Sochor to relief. Remeta v. Dugger, 622 So. 2d 452, 455 (Fla. 1993)(finding that sentencing process not fundamentally unfair since original mental health expert's testimony would not have been significantly different irrespective of new information); Patton, 784 So. 2d 380, 393 (rejecting claim of ineffective assistance of counsel for allegedly failing to provide mental health experts with defendant's mental health background as additional information did not change opinion of original doctors); Cf. Finney v. State, 27 Fla. L. Weekly S785, 786 (Fla. September 26, 2002)(affirming summary denial of claim of ineffective assistance of counsel for failing to provide mental health expert with sufficient background absent affidavit from expert that he would have changed his opinion if provided any new information); Bruno, 807 So. 2d at 65-66 (rejecting claim that trial counsel was ineffective in presentation of mental health witnesses simply because new doctors criticized testing conducted by former experts); Cherry, 781 So. 2d at 1052 (same).

In addition to the cumulative nature of this evidence, the trial court noted that it was not compelling given Sochor's malingering tendencies. Sochor responds by complaining that the trial court "displayed a profound lack of understanding of the mental health mitigation presented." **Initial brief at 51.** The state asserts that the trial court's rejection of this evidence

is also supported by the record. Critical to the diagnosis that statutory mitigation existed is a requirement that Sochor was significantly intoxicated on the night of the murder. However the evidence introduced at trial conclusively rebutted that claim. Not one witness testified at trial that Sochor was actually intoxicated that night. At best Gary testified that Dennis may have moderately or a little drunk but that it was Gary who was much more intoxicated. Dennis was able to drive his truck throughout the evening without any difficulty. (ROA 315-316, 337, 341, 382-383). Patricia Vickers and Delta Hardwick testified that Sochor was not intoxicated that evening. He appeared to be very normal. (ROA 59, 64, 68, 72-75, 89,98). Sochor's roommates, Randy and Barry Eckman, observed Sochor within an hour of the murder. They did not report that he was acting in any bizarre or intoxicated manner. To the contrary, he appeared and acted normal. (ROA 254-269).

Significantly Sochor was able to give details of the crime in three separate confessions. He immediately left Florida once he discovered his picture in the paper and he continually changed his name to avoid prosecution. (ROA 651, 684-685, 736, 797-798). In subsequent attempts to recant his confessions, Sochor told his original doctors that he does not remember what happened that evening with Ms. Gifford but that he does know that he did not kill her. Sochor's actions and statements

prompted two doctors to independently find Sochor to be either a malingerer or suffering from selective amnesia. (ROA 718, 798). In reality the evidence of alleged intoxication is simply lacking in credibility as it is contrary to the facts of the case and it is rebutted by Sochor's own previous doctor. The state would point out that Sochor offers no explanation to counter this damaging evidence. Sochor's new mental health evaluations, made long after the murder, partially based on information not even available to the original doctors, and countered by Sochor's actions and numerous confessions after the murder warrant a rejection of same. Given the cumulative nature of the expert and lay testimony regarding Sochor's drinking and violent tendencies and the fact that nothing presented by Sochor at the evidentiary hearing counters the evidence presented at trial that Sochor was not intoxicated at the time that he killed Patricia Gifford, does not entitle Sochor to relief. Johnston v. Dugger, 583 So. 2d 657, 660 (Fla. 1991)(upholding rejection of new mental health evaluations based on unwavering opinion of original doctor as well as evidence to contradict new evaluations); White v. State, 559 So. 2d 1097 (Fla. 1990) (rejecting claim of ineffective assistance of counsel for failure to pursue intoxication defense based on fact that defense was not supported by the facts).

The only additional information provided by the parents and the siblings involved events not directly related to or even known by appellant. For instance the parents' testified about their respective difficult childhoods, Mr. Sochor's World War II experiences, and the problems associated with the Sochors' engagement and subsequent marriage. (T 96-108,173-108, 206-207,). Sochor's sisters testified regarding the sexual abuse suffered by them by the father/Gary. They conceded that none of this information was ever known by appellant. (T 221-226, 237-251, 310-314). Given that this information does not offer any real insight or information into Dennis's character it would not have been significant if it were presented at Sochor's original trial. Hill v. State, 515 So. 2d 176, 178 (Fla. 1987)(upholding trial court's refusal to admit evidence which focused on life experiences and character of family members rather than that of defendant).

And finally Sochor also presented testimony of two high school friends, two former teachers, and a former girl friend. The friends simply recounted Sochor's experience with illegal drugs and drinking back in the early 1970's. (T 148-170). As noted already this information was well chronicled by witnesses at trial. Furthermore these witnesses had not seen Sochor since the early to mid 1970's, at least ten to twelve years before the trial.

Sochor's two former teachers, Mrs. Thatcher and Mr. Lascala, had not seen Sochor in excess of twelve years at the time this trial took place. (T 262-268, 274-276). Their testimony was very limited. Ms. Thatcher knew Sochor when he attended two years of community college and she stated that Sochor has acting talent. Lascala's testimony was limited to recounting Sochor's basketball talents. Lascala had never meet Sochor's parents.

Sochor's former girlfriend, Rachel Moore, also testified. At the time of trial she had not seen Dennis in eleven years. She was in an intimate relationship with him for two years. They attended community college together. She testified that appellant was an occasional drinker, and that he did not turn violent when he drank. (T 280-289).

The state asserts that none of this information is significant. None of these additional people had seen Sochor in over twelve-fourteen years. Furthermore some of the testimony actually negates Sochor's attempts to present himself as person who had very little chance in life to succeed. For instance, Sochor, in spite of his "alleged brain damage" and manic depressive disorder, overcame those afflictions to attend college, hold down a job when motivated to do so, control his drinking habits, and carry on normal sexual relationship with a woman. Consequently, it is mere speculation to assert that this "new" evidence would have resulted in a life sentence. Relief

must be denied. Mills State, 603 So. 2d 482, 486 (Fla. 1992)(upholding trial court's denial of relief where new psychologist's testimony is premised on poor impulse control would not have resulted in life sentence.); Routly 590 So. 2d at 402; Cherry, 781 So. 2d 1051 (finding that additional specific instance of events that occurred eighteen years prior to murder would not have resulted in a life sentence).

Finally when assessing the potential impact of this mitigation, the trial court took into account the evidence presented in aggravation. (PCR 1152-1153). Sochor's ex-wife testified that he was an extremely violent person during sex. (ROA 952-954). His violent tendencies were usually exhibited without the aid of alcohol. (ROA 955-961). The jury was also aware of his two prior convictions for sexual battery, including the repulsive and violent details of same. (ROA 975-995). Moreover, the second conviction occurred in 1980, two years before the murder of Patricia Gifford. Sochor was placed on five years probation for that sexual assault. Yet, less than two years later Sochor murders a young woman during the course of a sexual battery. (ROA 992-997). It is clear from the record that Sochor's jury and sentencing judge was presented with most of the information that he has presented in these proceedings. This additional information would not have overcome the strength of the aggravating factors and resulted in a life sentence.

Tompkins v. State, 549 So. 2d 1370, 1373 (Fla. 1989)(upholding denial of postconviction relief where additional evidence of abused childhood and drug and alcohol addiction would not have outweighed the aggravating factors which include prior violent sexual batteries and HAC).

And lastly Sochor also claims that trial counsel was ineffective because he failed to prepare these family members for their penalty phase testimony. The record demonstrates that Mr. Rich purposely chose not to review their testimony or discuss it with them. This was done in an effort to demonstrate that "what they had to say to this jury" was from the heart and not rehearsed. (ROA 1032, 1061, 1068). Sochor cannot show that Rich's strategy was unreasonable. The tactics and strategy employed by former counsel, culminated in the presentation of evidence that is identical to the evidence presented twelve years later by current counsel. Relief is not warranted. Mills, 603 So. 2d 482, 485 (Fla. 1992)(rejecting claim that counsel's actions were unreasonable and that he failed to adequately prepare as it is not born out by record).

ISSUE II

THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM THAT THE STATE WITHHELD EVIDENCE IN VIOLATION OF BRADY

Sochor claims that the state committed various Brady¹¹ violations regarding the presentation of Gary Sochor's testimony at trial. Specifically it is alleged that Gary, appellant's brother was forced to falsify his trial testimony. Appellant contended that Gary informed the prosecutor, Kelly Hancock, that he (Gary) and the victim, Patricia Gifford had engaged in kissing and fondling on the night of the murder. Sochor contends Gary was instructed by the prosecutor not to mention this information on the stand. Additionally, the state promised lenient treatment/immunity from prosecution¹² for Gary in exchange for his falsified testimony. In support of his claim, Sochor presented the testimony of Gary Sochor. And in rebuttal, the state presented the testimony of the former prosecutor, Kelly Hancock. Ultimately the trial court as the fact finder, discounted the testimony of Gary Sochor and also determined that none of the requirements of Brady v. Maryland, 373 U.S. 83 (1963) had been substantiated.

¹¹ Brady v. Maryland, 373 U.S. 83 (1963).

¹² Sochor testified that an unnamed police officer and the prosecutor both had offered immunity to Gary in exchange for his testimony.

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

(1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Mendyk v. State, 592 So. 2d 1076, 1079 (Fla. 1992); Hegwood v. State, 575 So. 2d 170, 172 (1991) (quoting United States v. Meros, 866 F.2d 1304, 1308 (11th Cir.), cert. denied, 493 U.S. 932 (1989)); Buenoano v. State, 708 So. 2d 941, 948 (Fla. 1998)(same). The record supports the trial court's conclusions that Sochor has not established any of the requirements of Brady have been met.

When reviewing the propriety of the trial court's ruling, this Court must defer to the trial court's findings on factual issues and must review the trial court's ultimate conclusions *de novo*. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); Bruno v. State, 807 So. 2d 55, 61-62 (Fla. 2001).

At the evidentiary hearing, Gary testified that while talking to the prosecuting attorney prior to trial, Gary admitted that he was kissing the victim Patricia Gifford, on the night she was murdered. In response to that "omission" the

prosecutor allegedly told Gary not to say anything about that on the witness stand. (T 353). Gary also stated that he had been more sexually involved with Ms. Gifford that evening than he had originally testified to at the trial. He and Ms. Gifford engaged in some mutual kissing and fondling in the truck in the presence of Dennis. (T 369).

With regards to the alleged immunity offered Gary, he explained that while walking into the courtroom the morning of trial, a unknown or unidentified detective said, "By the way, you have been granted immunity for your statement." (T 354). He also stated that the prosecutor had given him immunity as well. (T 362). Gary admitted that he had lied at trial when he was specifically asked by defense attorney, Charlie Rich, if had been granted immunity by the state. (T 354). In conclusion Gary admitted that he had told the truth about some things at the trial but lied about other things because he was confused and not really sure what was happening. (T 357-366).

In rebuttal to the Brady allegation, former prosecutor, Kelly Hancock testified that Gary never told him about the alleged sexual activity with Patricia Gifford, nor did Gary ever tell that to the police. Furthermore, Mr. Hancock stated that he never told Gary to lie about anything, he simply told Gary to tell the truth about what happened that night. (T 496-497, 498, 527). Finally Mr. Hancock stated that he never told Gary Sochor

that if he testified against his brother he would not be charged with the crime. (T 498). Hancock explained that he never offered Gary Sochor immunity because the case against Dennis was strong and Gary Sochor indicated that he was in the truck when Dennis murdered Ms. Gifford. (T 497-498).

As noted above, the trial court discounted Gary's credibility pointing out that his testimony at the evidentiary hearing is in complete contradiction to his trial testimony. (PCR 1140). Additionally, the trial court found the prosecutor to be candid, trustworthy, and credible. (PCR 1140). The record supports the trial court's factual conclusions.

Gary Sochor's his trial testimony reveals that he unequivocally stated that he was not promised anything in exchange for his testimony. A review of the four statements he gave to police reveal that he was never forced to cooperate with the police or testify against Dennis in exchange for his immunity. Yet years later he suddenly remembers things differently. (ROA 343-359, SPCR 1427-1509) Sochor asked the trial court and now this Court to believe that an unidentified law enforcement officer, who does not even possess the authority to perform such a function, just happened to "grant" Gary Sochor immunity literally on his way into the courtroom, minutes before he was to testify against his brother. He offers no explanation for these odd events except to say that he committed perjury at

trial because he was "confused." Gary's recantation is not credible. See Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994)(explaining that recanted testimony is inherently unreliable and requires a detailed review of all the circumstances).

Second, appellant offered no rebuttal to the state witness's logical explanation that immunity was never offered because there never was and still is no evidence that Gary Sochor was in anyway involved with the murder of Patricia Gifford. Gary Sochor's evidentiary hearing testimony does not in any way diminish appellant's culpability for the murder of Patti Gifford. More importantly, the testimony does not offer any incriminating evidence against Gary Sochor. Consequently, the necessity of offering immunity to Gary never materialized. The trial court's credibility findings are supported by the record. Relief was properly denied. Phillips v. State, 608 So. 2d 778, 780-781 (Fla. 1992)(upholding denial of Brady allegation based on testimony of prosecutor in contradiction to completely unbelievable testimony of defense witnesses); Cf. Armstrong, 642 So. 2d at 735 (finding recanted testimony including confession of perjury to be untrue and properly rejected by trial court); Sireci v. State, 773 So. 2d 34, 43 (Fla. 2000)(rejecting Brady claim because defendant unable to prove that state offered favorable treatment to witness in exchange for testimony); Van

Poyck v. State, 694 So. 2d 686 (Fla. 1997)(upholding credibility determination by trial court when it rejected ineffective assistance of counsel claim based on testimony of defense counsel irrespective of contrary testimony of co-counsel); Knight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990)(upholding trial court's factual findings that state witnesses were more credible than those of defense was within the court's discretion and will not be disturbed on appeal).

The trial court was also correct in finding that the information was not material under Brady. Materiality under Brady is as follows:

and (4) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. Mills, 684 So.2d at 805; Hegwood v. State, 575 So.2d 170 (Fla.1991). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. at 682, 105 S.Ct. at 3383; see also Gorham v. State, 597 So.2d 782, 785 (Fla.1992). As explained in Kyles v. Whitley, 514 U.S. 419, 435, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995), a Brady violation is established by showing that the favorable evidence suppressed by the State "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." See Jones v. State, 709 So.2d 512 (Fla.1998).

Buenoano, 708 So. 2d at 948. The state asserts that even if there was evidence to establish that the state told Gary Sochor to minimize his sexual involvement that evening in exchange for

immunity from prosecution, such information if known to the jury would not have changed the outcome of this case.

First, Gary Sochor's trial testimony was throughly impeached on cross-examination. Defense attorney brought out on cross-examination that Gary Sochor lied in three separate statements to police in Michigan. (ROA 340, 343, 346, 355). In all three statements, Gary denied that he and his brother knew anything about Patti's disappearance and maintained that she never got into the truck. It was not until the fourth statement to police that Gary admitted that Patti was in the truck. (ROA 359). Gary claimed that his memory had gotten better overtime and stated remembering more details of the night's events. (ROA 350). Gary admitted to feeling like a suspect during this questioning. (ROA 350). A review of the entire cross-examination reveals that the defense attorney, highlighted the fact that Gary was never charged with any crime involving the disappearance of Patti Gifford, despite his admitted presence there that evening. And Gary was never charged with perjury for the obvious lies he told in the first three statements to police. (ROA 368, 372). Simply because the jury was not aware of the fact that Gary and the victim may have engaged in some sexual conduct is not the type of favorable evidence that "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." White v.

State, 729 So. 2d 909, 913 (Fla. 1999). The jury was already very aware of the fact that Gary Sochor was never punished for any wrong doing in this case, consequently any additional information regarding "immunity" or his activities with the victim were not material under Brady. White, 729 So. 2d at 913 (finding additional impeachment evidence against state's main witness not material as jury was well aware of the fact that the witness had much to gain from the state by his testimony).¹³

Second, Gary's admission at the evidentiary hearing that he kissed and fondled the victim cannot remotely be considered material guilt phase evidence. Gary's testimony was as follows

A. I leaned towards her, like I expected a little New Year's peck, which happened, but didn't stop, led into -she, basically, kissed me back. It didn't quit, continued into more of a sexual nature. Q. How long was this sexual encounter going for?

A. From what I can -three, five minutes. I'm not sure. It was-you know, I mean, I'm kissing a beautiful woman I'm not keeping track of time.

Q. While you were doing this, did you hear your brother say or do anything?

A. Yes he asked me what I was doing. Would you please stop.

Q. And did you stop?

¹³ Appellant's additional claim in II B. that counsel was ineffective for not uncovering this information is legally insufficient. Gary admitted at the evidentiary hearing that he lied at trial. Consequently how can trial counsel be held accountable for a witness's untruthfulness. Cf. Carroll v. State, 815 So. 2d 601, 614 (Fla. 2002) (explaining that counsel's decisions are appropriately guided by the statements of the defendant and therefore counsel cannot be held ineffective for not pursuing a particular course of action if counsel is led to believe that it would not be fruitful).

A. No.
Q. What was his tone like?
A. He didn't like what was happening?
Q. Did he keep speaking to you when you were doing what you were doing?
A. Not so much speaking, but what is- his breathing. His breathing was -I could hear his breathing. He was -I could tell he was upset.
Q. . Did there come a time that the car stopped?
A. Yes.
Q. And what happened, and this is going to be the last question in this area, what happened once the car stopped?
A. When the vehicle stopped.
Q. Yes.
A. He pulled her out of the vehicle, out of the driver's side.

(T 347-348). This exchange unequivocally bolsters the state case and provides a clear motive for the murder of Ms. Gifford. Dennis became angry, sexually aroused and strangled Patti Gifford. The state asserts that this testimony is nothing but extremely inculpatory of appellant and therefore its admission would not have affected the outcome of the trial.¹⁴ The trial court's legal conclusion that the evidence is not material is correct. See Atkins v. State, 663 So. 2d 624, 626-627 (Fla. 1995)(finding that withheld photographs of deceased child victim were not material under Brady as they would have inflamed the jury).

C. APPELLANT DID NOT RECEIVE

¹⁴ Indeed at the evidentiary hearing, appellant's expert witness Dr. Greer, testified that Sochor became "hypermotoric" upon seeing his brother kiss the victim. This resulted in the strangulation of the victim. (T 399-400).

CONSTITUTIONALLY INADEQUATE MENTAL HEALTH
ASSISTANCE AT THE GUILT PHASE IN VIOLATION
OF AKE. OKLAHOMA

Appellant claims that trial counsel did not adequately utilize mental health experts at the guilt phase of his trial in violation of Ake v. Oklahoma, 470 U.S. 68 (1985). Sochor argues to this Court as follows, "The nature and extent of his illnesses, however, was not presented to the guilt phase jury, despite the fact that trial counsel appeared to be attempting a voluntary intoxication defense." **Initial brief at 69.** Sochor further argues that the trial court's denial of this claim was not proper because the court merely "sloughed" off the evidence finding it to be cumulative to the evidence elicited at trial.

In his motion for postconviction relief, Sochor argued that counsel failed to properly utilize the assistance of a mental health professional in an effort to establish that he did not have the specific intent to commit first degree murder. (PCR 723). Appellant was granted a hearing on this claim. (PCR 111). However at that hearing, appellant failed to present any evidence regarding this issue. The experts' testimony focused solely on mental health issues as they relate to mitigation. Not one of the witnesses discussed Sochor's ability vel non to perform specific intent.¹⁵ (T 373-482).

¹⁵ This is consistent with the trial testimony of Sochor's mental health professionals who never expressed an opinion that Sochor was unable to form the specific intent to kill that

Drs. Greer and Froming opined that appellant suffered from a myriad of mental health problems including, organic brain damage, bipolar disorder, substance abuse disorder and manic-depressive illness. Dr. Greer concluded that Sochor was intoxicated at the time of the murder, however he never testified that he could not form specific intent. (T -394-395). Likewise Dr. Karen Froming opined that based on Sochor's various mental health problems he was unable to stop himself that evening. However nowhere does either doctor state that he could not form specific intent. (T 439-442, 450-451).

In denying relief on this claim, the trial court also noted in its order the absence of such evidence, "Dr. Greer also could not say whether intoxication or the manic depression triggered the murder." (PCR 1142-1147). Consequently appellant's claim that he is entitled to a new guilt phase based on the failure of the mental health professionals to present an intoxication defense is without merit as there was no evidence presented in support of the factual allegation.¹⁶ Phillips v. State, 608 So.

evening. (ROA 649-650, 656, 659, 719-720, 734-736).

¹⁶ The state would also note that based on the testimony of Greer and Froming, their findings would not have been admissible at the guilt phase. Any testimony regarding Sochor's "hypermotoric state" would have been irrelevant under Florida law. "[V]oluntary intoxication is an affirmative defense and . . . the defendant must come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged. . . . [E]vidence of alcohol consumption prior to the commission of a crime does not, by itself, mandate the

2d 778, 771 (Fla. 1992)(rejecting claim that state used jailhouse informants to elicit information from defendant where defendant failed to establish claim at evidentiary hearing).

D. APPELLANT'S CLAIM THAT HE WAS INCOMPETENT DURING TRIAL IS WITHOUT MERIT AND WAS PROPERLY DENIED

Relying on the testimony of Drs. Greer and Froming who state that appellant is Bipolar, Sochor claims that he was incompetent to stand trial. He further argues that the pre-trial evaluations performed for competency were serious flawed and deprived him of his right to a fair trial. Sochor's argument is factually flawed as there has never been any evidence presented to date that supports the claim that he was in fact incompetent to proceed to trial.

In denying relief, the trial court found, "[w]hile Dr. Greer and Dr. Froming testified about various mental disorders, neither of the Defendant's mental health experts testified as to

giving of jury instructions with regard to voluntary intoxication. . . . [W]here the evidence shows the use of intoxicants but does not show intoxication, the instruction is not required." Linehan v. State, 476 So. 2d 1262, 1264 (Fla. 1985). The complete lack of evidence to support the notion that Sochor was too high to be able to form the specific intent to commit murder renders the mental health experts' testimony inadmissible at the guilt phase. Cf. Reaves v. State, 639 So. 2d 1, 4-5 (Fla. 1994)(upholding rule of law that "general mental impairment" is not admissible at guilt phase); Rivera v. State, 717 So. 2d 477, 485 n.2 (Fla. 1998)(quoting Linehan v. State, 476 So. 2d 1262, 1264 (Fla. 1985))(explaining that to successfully assert the defense of voluntary intoxication there must be evidence that the defendant was unable to form the requisite intent).

the Defendant's competency to stand trial." (T 1141). The record supports the trial court's findings.

As stated by the trial court, Sochor did not present any evidence to establish this claim. Curiously, Sochor failed to even inquire of either of his two mental health experts, Dr. Greer or Dr. Froming about the alleged competency issue. (T 372-483). The trial court's finding was correct. Phillips v. State, 608 So. 2d 778, 781 (Fla 1992)(rejecting claim that state used jailhouse informants to elicit information from defendant where defendant failed to establish claim at evidentiary hearing); Carroll v. State, 815 So. 2d 601, 610-611 (Fla. 2002)(rejecting claim of ineffective assistance of counsel for failing to present evidence of incompetency because no such evidence was presented at the evidentiary in support of allegation). To the contrary, there was affirmative evidence presented to prove that Sochor was competent. For instance, three mental health professionals found him to be sane and competent at the time of trial. (ROA 657-658, 741, 791-799). Sochor argues that those doctors' opinions are "lacking" because they conflict the findings of his new doctors, Froming and Greer.

However, as noted above neither Froming or Greer were ever asked to offer an opinion regarding Sochor's competency at the time of trial. Consequently there is no "conflict" among the

experts on that issue. In any event, even if Froming and Greer offered such an opinion, that alone would not have entitled appellant to relief. Simply because a defendant may find new doctors years later that offer a more "favorable" diagnosis does not entitle a defendant to relief. See Johnson v. State, 769 So. 2d 990 (Fla. 2000)(refusing to find counsel's performance deficient simply because new doctors would take issue with failure of prior doctors to detect the existence of organic brain damage); Rose v. State, 617 So. 2d 291, 295 (Fla. 1993)(rejecting claim that initial findings of mental health experts was deficient simply because defendant obtains different diagnosis now); Provenzano v. Dugger, 561 So. 2d 546 (Fla. 1990)(finding no basis for relief by mere fact that defendant has found expert who can offer more favorable testimony); Engle v. State, 576 So. 2d 696 Fla. (1991); Asay v. State, 769 So. 2d 974 (Fla. 2000)(finding that trial counsel's investigation was not deficient given that new opinions of mental health professionals were very similar to findings of original doctor but for a disagreement over the existence of organic brain damage).

Additionally, the state would also point out that three separate doctors, evaluated Sochor for competency immediately prior to the evidentiary hearing. Although all three doctors opined that Sochor may be currently suffering from a manic

depressive disorder, he was in no way incompetent to proceed with the evidentiary hearing. (T 32-93). Consequently to the extent Sochor attempts to rely on Dr. Greer's and Dr. Froming's diagnosis of manic depression/bipolar disorder at the time of the crime, as evidence of incompetency, such mental deficiencies do not automatically translate into incompetency to proceed to trial. Relief was properly denied. See Provenzano v. Dugger, 561 So. 2d 541, (Fla. 1990)(upholding summary denial of competency claim in postconviction motion based on doctors findings at trial that defendant was competent); Bush v. Wainwright, 505 So. 2d 409, 410-411 (Fla. 1987)(upholding denial of postconviction claim alleging that defendant was incompetent to stand trial absent any proof presented by current doctors).

ISSUE III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S
MOTION TO DISQUALIFY THE COURT

Appellant alleges that the trial court and the state engaged in *ex parte* communications by holding a hearing without providing notice to defense counsel. Relying on Chastine v. Broome, 629 So. 2d 293, 295 (Fla. 4th DCA 1993), Sochor claims that the impermissible contact put him in fear that he would not receive a fair hearing. The trial court denied the motion as legally insufficient. (PCR 102). The trial court's ruling was correct.

When reviewing a motion for disqualification, a trial court must adhere to the following principles:

The function of a trial court when faced with a motion to disqualify himself is solely to determine if the affidavits present legally sufficient reasons for disqualification. Fla. R. Crim. P. 3.230(d). The test for legal sufficiency is whether the party making the motion has a well grounded fear that he will not receive a fair trial at the hands of the judge.

Dragovich v. State, 492 So. 2d 350, 352 (Fla. 1986). A review of the specific reasons set forth for disqualification demonstrate that Sochor's motion was legally insufficient.

Sochor is accusing the trial court of intentionally setting a hearing without any notice to him. The record does not support that accusation. On the afternoon of March 21, 1997, the trial court held a hearing on the defendant's motion for

public records. (T 709 PCR 3112-324). It is clear from the transcript that the trial court was under the impression that both parties had been noticed for the hearing. This is evident from the court's inquiry of his judicial assistant. Twenty-five minutes beyond the starting time for the hearing, the court confirmed that Sochor's attorney had not called to say he could not make it. At that point the court determined that the pending motions were presently denied. (T 710). Consequently, unlike the facts of Chastine, there was no intentional action by the court that could be deemed bias. Clearly, there was simply a miscommunication regarding the scheduling of the hearing.

Indeed, when it was revealed that defense counsel was unaware of the hearing, the defense was allowed to litigate the motions in their entirety. The court granted numerous motions to compel filed by defense and held extensive hearings on all of his outstanding public records requests. (T 715-732, 745-773). At the conclusion of the hearing, counsel advised the court that all issues had been resolved to his satisfaction.¹⁷ Simply because appellant was not in attendance for a scheduled hearing, does not amount to any *ex parte* communications. A mistake in scheduling does not amount to a well founded fear of partiality by the court. The motion was legally insufficient as pled.

¹⁷ There is no challenge in this appeal to any of the trial court's rulings regarding public records.

Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992) (finding disqualification unwarranted because judge previously heard evidence or made adverse rulings); See Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983) (stating that the purpose of the disqualification rule is "to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge-shopping, delay, or some other reason not related to providing for the fairness and impartiality of the proceeding."); see also Fischer v. Knuck, 497 So. 2d 240 (Fla. 1986) (finding the allegations "frivolous and . . . designed to frustrate the process by which petitioner suffered an adverse ruling). Summary denial of appellant's motion to recuse was proper.

ISSUE IV

THE TRIAL COURT'S SUMMARY DENIAL OF APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE AT THE GUILT PHASE WAS PROPER

Appellant alleges that the trial court erred in summarily denying various constitutional challenges to his conviction. First, appellant claims that the state withheld or trial counsel failed to uncover certain impeachment evidence against Gary Sochor. That evidence included several sworn statements Gary had given to the Florida police shortly after the murder. Those statements were inconsistent with Gary's trial testimony. The other evidence was that Gary Sochor had failed two polygraph examinations. The focus of inconsistencies between Gary's various statements center around the extent to which Gary and Dennis were involved in the murder. Sochor alleges that the inconsistent statements and polygraph results were not turned over to defense counsel in violation of Brady v. Maryland, 373 U.S. 83 (1963) or alternatively trial counsel was ineffective in not using the evidence to impeach Gary Sochor during his testimony in violation of Strickland v. Washington, 466 U.S. 668, 685 (1984). The trial court summarily denied this claim finding as follows:

In paragraphs six through twelve of Claim four the Defendant alleges that the state withheld or trial counsel failed to uncover certain impeachment evidence against witness, Gary Sochor. This Court finds that allegation raised in paragraphs six through

twelve fail as they are refuted by the record. Furthermore, the specific allegation contained within this Claim arguing that defense counsel was ineffective, in that, he failed to impeach Gary Sochor regarding his polygraph examination results is legally insufficient.

(SPCR 106-107). The state asserts that the trial court was correct.

A review of the existing record on appeal will conclusively demonstrate that the state neither withheld any information in violation of Brady nor was trial counsel's cross-examination of Gary Sochor constitutionally deficient under Strickland. Mr. Rich was in possession of Gary Sochor's prior statements and in fact Mr. Rich used that information to impeach Gary. (SPCR 1376-1509).

Gary Sochor gave at least five statements to the police. A comparison of the statements reveal that initially he stated that when he and Dennis left the Banana Boat that night they did so alone and that, Patty Gifford was left standing in the parking lot. (ROA 340-354). Ultimately however at trial Gary testified as follows:

He went to the lounge on New Year's Eve with his brother who spent the evening talking with the victim and her friend. When it came time to leave, the victim and his brother were kissing in the lounge parking lot while Gary waited in the truck. Several minutes later, she agreed to go to breakfast with them. They left the parking lot with Sochor driving his employer's truck, Gary in the passenger seat, and the

victim seated between them. Sochor drove to a secluded spot nearby and stopped the truck. Gary remembered the victim screaming for help and seeing Sochor on top of her with her hands pinned down on the ground. He yelled at him and threw a rock over his head. In response Sochor stopped assaulting the victim, turned and

looked at Gary like a man "possessed," angrily told him to get back in the truck, and resumed his assault. A while later Sochor got in the truck with Gary and drove home. The next morning Gary found a woman's shoe and sweater and a set of keys in the truck. He hid the keys. Later he noticed that the truck had been cleaned and the articles removed. When told about the keys, Sochor became upset and demanded their return, which Gary did. A few days later Gary returned to Michigan.

Sochor, 619 So. 2d at 287. Trial counsel did not let these inconsistencies go unnoticed before the jury. From the very beginning of his cross-examination of Gary, Mr. Rich challenged the witness about the prior statements. Mr. Rich extensively and repeatedly questioned Gary regarding the fact that in the first statements given in Michigan on January 8, 1982, Gary denied that he and his brother were in any way involved in the crime. Rich continued to question Gary about the three remaining statements he had given (ROA 355) and how the story eventually changed from one of total innocence of both Gary and Dennis to one that implicated solely Dennis. (ROA 355-361).

Gary was asked to explain why the statements were so different. Rich clearly implied that Gary was guilty of the

murder. (ROA 350-355, 360, 368-369, 372). As already noted by the Florida Supreme Court, "[r]ather, counsel based the defense strategy on the theories of voluntary intoxication or mistaken identity, i.e., that Gary actually committed the crime." Sochor, 619 So. 2d at 289

Rich also focused on the amount of alcohol both brothers consumed that evening. Rich successfully got Gary to admit that he was drunk the night of the murder since he had smoked grass as well as consumed an entire bottle of liquor. (ROA 356-359). Gary also admitted that he was so intoxicated he was unable to help Patty fend off his brother's attack. (ROA 361). Finally Gary testified that he has had an alcohol problem for years, he previously had been committed to a hospital and was taking lithium for two years after this crime. (ROA 364-365, 378-379).

Because the defense was well aware of this information and, in fact, used it as impeachment evidence, Sochor's Brady is without merit. See Routly v. State, 590 So. 2d 397, 399-400 (Fla. 1991)(rejecting claim that state withheld evidence of immunity consideration for state witness when record showed that defense counsel was in possession of that evidence prior to trial and used it to impeach witness at trial).

Nor can Sochor establish a claim under Strickland. A review of the cross-examination of Gary illustrates that he was thoroughly impeached. Any additional information would have been

cumulative. Cf. Aldridge v. State, 503 So. 2d 1257, 1259 (Fla. 1987)(finding that cumulative effect of withheld evidence precludes a finding that such information was material); Thompson v. State, 553 So. 2d 153, 155-156 (Fla. 1989)(same). Summary denial was proper.

With regards to Sochor's claim that counsel should have used the results of Gary's polygraph examination for impeachment purposes, summary denial was appropriate. Sochor fails to explain how such information would be admissible at trial because it is inadmissible absent consent of both parties. Walsh v. State, 418 So. 2d 1000, 1002 (Fla. 1982); Pendelton v. State, 348 So. 2d 1206 (4th DCA 1977). Consequently counsel cannot be deemed ineffective for failing to use the polygraph results.

Next appellant contends that the trial counsel provided ineffective assistance of counsel for failing to adequately litigate the motion to suppress hearing. The trial court found this claim to be procedurally barred and legally insufficient as pled. (SPCR 110-111). The trial court's ruling was correct.

First, appellant challenged the admissibility of his confession on appeal, alleging that his statements were improperly admitted because the state could not independently prove the corpus delicti without it. This Court rejected that claim. Sochor v. State, 619 So. 2d 285, 289 (Fla. 1993).

Appellant's attempt to relitigate the admissibility of his confession under the guise of ineffective assistance of counsel is precluded. Bryan v. State, 641 So. 2d 61, 63 (Fla. 1994)(finding that issues addressed on direct appeal are procedurally barred on collateral review); Quince v. State, 477 So. 2d 535, 536 (Fla. 1985)(same); Rivera v. State, 717 So.2d 477, 480 n.2 (Fla. 1998)(finding claim to be procedurally barred as it is merely using a different argument to raise prior claim); Marajah v. State, 684 So. 2d 726, 728 (Fla. 1996)(finding it inappropriate to use collateral attack to relitigate previous issue). Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995)(same). Second, the motion before the trial court as well as the issue presented on appeal is legally insufficient as pled. Sochor does not present any factual support for his conclusory allegations. Again summary denial was warranted. Sochor contends, "[c]ounsel failed to conduct an adequate investigation regarding the circumstances of these statements and failed to adequately litigate the suppressions issues. The State withheld material, exculpatory evidence regarding the statements, further rendering counsel was ineffective." **Initial brief at 83.** Engle v. State, 576 So. 2d 698, 700 (Fla. 1992) (ruling that motion is legally insufficient absent factual support for allegations); Cf. Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990)(refusing to entertain appellate

issues that only contain reference to other pleadings without further explanation).

In his next argument, Sochor list ten specific instances of alleged deficient performance by trial counsel. **Initial brief at 83-84.** The trial court summarily denied the claim noting that all the claims were raised on direct appeal and found to be procedurally barred by this Court. (SPCR 110-111). The court's summary disposition was proper.

As noted above, these exact issues were raised on direct appeal and were found to be procedurally barred for failure to preserve them at trial. Sochor, 619 So. 2d at 290 n. 7&8. This Court stated that Sochor could not overcome that procedural bar because none of the alleged errors taken individually or collectively amounted to fundamental error. Id. In the postconviction proceedings Sochor attempted to circumvent that procedural bar and relitigate this issue by casting it as one of ineffective assistance of counsel. However, Sochor cannot prevail under this claim.

In order to be entitled to relief, Sochor must establish the requisite prejudice under Strickland. Prejudice is demonstrated if the deficient performance was sufficient to render the result unreliable. Mendyk v. State, 592 So. 2d 1076 (Fla. 1992). Prejudice requires a showing that a reasonable possibility exists that the result of the proceedings would have been

different absent the deficient performance. Routly v. State, 590 So. 2d 397, 401 (Fla. 1991). Given that this Court already determined that this issue was not compelling enough to overcome the procedural bar, Sochor will not be able to demonstrate prejudice in these proceedings. See White v. State, 559 So. 2d 1097, 1099-1100 (Fla. 1990)(rejecting ineffective assistance of counsel claim regarding counsel's failure to preserve issues for appeal in postconviction appeal based on earlier finding by court on direct appeal that unpreserved alleged errors would not constitute fundamental error); Teffeteller v. Dugger, 734 So. 2d 1009, 1019 (Fla. 1998)(finding that defendant had failed to meet prejudice prong of Strickland on issue that counsel failed to adequately argue case below given that it was rejected without discussion); Cherry v. State, 659 So. 2d 1071, 1072 (Fla. 1995)(same). Summary denial was proper.

Furthermore, simply adding a conclusory sentence that counsel was ineffective does not state a proper claim for relief. Sochor's argument is legally insufficient as pled. See Freeman v. State, 761 So. 2d 1055 (Fla. 2000).

In the next claim, Sochor alleges that trial counsel was ineffective for not presenting evidence of his mental infirmities _in support of his motion to suppress. In his motion he conceded that the issue could not be specifically pled absent additional materials under Chapter 119. (PCR 157). The

trial court denied the claim finding that the issue was legally insufficient as pled. (SPCR 111). Now on appeal, Sochor attempts to augment the issue by relying on evidence presented at the evidentiary hearing which was relevant to his claim of ineffective assistance of penalty phase counsel. The state asserts that he cannot do so. Summary denial was proper.¹⁸

Finally Sochor contends that the procedure by which the trial court appoints special public defenders and expert witnesses and the manner in which the accounts are funded creates a conflict of interest for the judges. The trial court summarily denied this claim finding that it was legally insufficient as pled. The trial court's ruling was a correct statement of the law. See Rose v. State, 675 So. 2d 576, 577 n. 2 (Fla. 1996)(finding legally insufficient postconviction defendant's conflict of interest challenge to the way judges appoint experts and public defenders)._

¹⁸ Additionally the state would point out that the mental health expert opinions upon which he now relies, were only relevant to establish Sochor's mental state at the time of the crime, and did not include any reference to Sochor's mental state four and half years later when he confessed.

ISSUE V

THE TRIAL COURT PROPERLY DENIED APPELLANT'S
CLAIM THAT COUNSEL WAS INEFFECTIVE FOR
FAILING TO OBJECT TO JURY INSTRUCTIONS
REGARDING THE AGGRAVATING FACTORS

Sochor alleges that the jury was given unconstitutionally vague instructions regarding the aggravating factors of "heinous, atrocious, and cruel"¹⁹, "prior violent felony"²⁰, the "crime was committed during the course of a felony".²¹ and "the crime was cold, calculated and premeditated".²² Sochor further complains that trial counsel was ineffective for failing to object to these allegedly constitutionally deficient instructions. The trial court summarily denied this claim finding that the issue was procedurally barred, legally insufficient as pled and refuted from the record. (PCR 109-110). The state asserts that the trial court's ruling was proper.

On direct appeal Sochor attempted to attack the constitutionality of the jury instruction applicable to the "HAC" factor. The Court found that claim to be procedurally barred since it was not properly preserved for review. Sochor v. State, 619 So. 2d 285, 291 n. 10 (Fla. 1993). However the

¹⁹ 921.141 (5)(h), Fla. Stat.

²⁰ 921.141 (5)(b), Fla. Stat.

²¹ 921.141 (5)(d), Fla. Stat.

²² 921.141 (5)(i), Fla. Stat.

Court did address Sochor's claim that there was insufficient evidence to sustain the finding of this factor. In rejecting the claim, this Court stated:

The evidence also supports finding that the murder was especially heinous, atrocious, or cruel. Fear and emotional strain can contribute to the heinousness of the murder. Adams, 412 So.2d at 857. Gary testified that the victim screamed for help after she was dragged from the truck and scratches on Sochor's face indicated that a struggle took place. The evidence supports the conclusion of horror and contemplation of serious injury or death by the victim. Moreover, Sochor confessed that he choked the victim to death. It can be inferred that "strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." The trial court properly found this aggravating factor.

Sochor, 619 So. 2d at 292.(citations omitted). Therefore this attempt to again seek review of a procedurally barred claim is precluded. See Rivera v. State, 717 So.2d 477, 480 n.2 (Fla. 1998)(finding claim to be procedurally barred as it is merely using a different argument to raise prior claim); Marajah v. State, 684 So. 2d 726, 728 (Fla. 1996)(finding it inappropriate to use collateral attack to relitigate previous issue). Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995)(same); Koon v. State, 619 So. 2d 246, 248 (Fla. 1993)(finding that failure to challenge the language of the instruction as improper or vague precludes collateral review); Chandler v. Dugger, 634 So. 2d

1066, 1069 (Fla. 1994)(same). Summary denial was proper.

Also on direct appeal, Sochor challenged the sufficiency of the evidence to sustain a finding of the aggravating factor that "the crime was committed during the course of a felony." This Court rejected the claim finding:

Sochor does contest the finding that the murder was committed during a felony. We have already found sufficient evidence of both kidnapping and attempted sexual battery. Thus, the evidence supports this aggravating factor.

Sochor. 619 So. 2d at 292. Sochor's attempt to revisit this issue is precluded. Koon; Chandler; Harvey.

In this appeal Sochor present a challenge to the applicable jury instruction for the aggravating factor of "prior violent felony." However Sochor did not present any challenge on direct appeal to this aggravator. However, this Court did review the evidentiary support for this factor and held, "He does not contest the finding of a previous conviction for a violent felony, and we find this aggravator supported by the record. Sochor, 619 So. 2d at 292. Failure to raise it on appeal precludes review now. Atkins v. State, 541 So. 2d 1165, 1166 (Fla. 1989).

And finally on appeal, Sochor did successfully attack the trial court's finding that the murder was "cold, calculated, and premeditated." Sochor, 619 So. 2d at 292. However, Sochor was denied relief because any error in considering this factor was

harmless beyond a reasonable doubt. Id at n. 11. Consequently, re litigation of this claim is procedurally barred. Freeman v. State, 761 So. 2d 1055 (Fla. 2000).

In an attempt to overcome the procedural bar attached to these four issues, Sochor's claims that counsel was ineffective for failing to preserve them at trial. However, relief is still not warranted. Even if counsel had successfully preserved the issue for review Sochor could not establish prejudice given that this Court determined that there was sufficient evidence to sustain three of the factors, as outlined above. Id. at 292. See Chandler 634 So. 2d at 1069 (finding that overwhelming evidence to establish aggravating factor rendered harmless any deficiency in the instruction).

Sochor next contends that counsel was ineffective for failing to object to the unconstitutionally vague penalty phase jury instructions which improperly "shifted the burden of proof" to the defendant to show that death is not the appropriate sentence. This claim is procedurally barred as it could have been raised on direct appeal. Atkins, 541 So. 2d at 1066; Harvey, 565 So. 2d at 1256. In any event even had counsel objected to the instruction, relief would have been denied. See Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995)(finding that the standard jury instructions regarding the weighing process between the aggravators and the mitigators did not impermissibly

place the burden on the defendant to establish that life was the appropriate penalty); Demps v. Dugger, 714 So. 2d 365, 368 & n.8 (Fla. 1998)(observing that "burden shifting" claim has been repeatedly rejected); Downs v. State, 740 So. 2d 506, 517 (Fla. 1999)(finding that trial counsel cannot be deemed ineffective for failing to object to standard jury instructions which have been previously approved by the Florida Supreme Court); Thompson v. State, 25 Fla. L. Weekly S346, 350 (April 13, 2000)(same); Harvey v. State, 656 So. 2d , 1253, 1258 (Fla. 1995)(same). Consequently counsel was not ineffective. Correll v State, 558 So. 2d 422 (Fla. 1990)(finding that appellate counsel cannot be ineffective for failing to raise issue without merit).

Next Sochor claims that trial counsel was ineffective in failing to object to the court's jury instruction regarding the jury's role in sentencing. Sochor alleges that the instruction given impermissibly denigrates the jury's role in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). The substance of this issue was raised on direct appeal. This Court found it to be procedurally barred since it was not raised at trial. Sochor, 619 So. 2d at 291-292. Relitigation is prohibited. Harvey; Freeman. In any event, the claim had no merit. See Burns v. State, 699 So. 2d 646, 654 (Fla. 1997)(rejecting claim that Espinosa renders incorrect the standard jury instruction regarding the jury's role in the penalty phase); Turner v.

State, 614 So. 2d 1075, 1079 (Fla. 1992)(same) Cf. Sims v. Singletary, 622 So. 2d 980, 981 (Fla. 1993)(rejecting claim that Espinosa warrants a determination on an otherwise procedurally barred claim).

Sochor's final challenge is to the aggravating factor that the "crime was committed during the course of a felony".²³ Sochor claims that the aggravator does not sufficiently narrow the class of individuals who would qualify for a sentence of death. Again this issue is procedurally barred as it could have been raised on direct appeal. Atkins.

To the extent this claim is properly before this Court under the guise of ineffective assistance of counsel, it has not merit. This Court has repeatedly rejected this very issue. Blanco v. State, 702 So. 2d 1250 (Fla. 1997); Freeman. Counsel therefore could not be ineffective for failing to pursue a nonmeritorious issue. Cf. Correll v State, 558 So. 2d 422 (Fla. 1990)(finding that appellate counsel cannot be ineffective for failing to raise issue without merit).

²³ 921.141 (5), Fla. Stat.

ISSUE VI

APPELLANT'S CLAIM THAT HE IS INNOCENT OF THE
DEATH PENALTY AND OF FIRST DEGREE MURDER IS
PROCEDURALLY BARRED AND WITHOUT MERIT

Finally in an attempt to overcome all of the irrevocable procedural bars attached to claims in Issue V, Sochor argues he is "innocent" of his death sentence. He relies on the "actual innocence" exception announced in Sawyer v. Whitley, 112 S.Ct. 2514 (1992) which allows for review of otherwise procedurally barred claims, only if a defendant can establish that all of the aggravating factors used to impose the death sentence are invalid. The trial court found the claim procedurally barred because a challenge to the aggravating factors was raised and rejected on direct appeal. (PCR 109-110). The court's ruling was correct.

As noted elsewhere in this brief, Sochor challenged the propriety of three of the aggravating factors on appeal. Sochor v. State, 619 So. 2d 285, 292 (Fla. 1993). This attempt to reargue those claims is prohibited. See Rivera v. State, 717 So.2d 477, 480 n.2 (Fla. 1998)(finding claim to be procedurally barred as it is merely using a different argument to raise prior claim); Marajah v. State, 684 So. 2d 726, 728 (Fla. 1996)(finding it inappropriate to use collateral attack to relitigate previous issue). Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995)(same).

In any event, Sochor's claim is meritless as this Court found that three of the four aggravator had been established beyond a reasonable doubt. Sochor, 619 So. 2d at 293. Therefore, this claim is void of any merit.

ISSUE VII

APPELLANT'S CHALLENGE TO THE RULE WHICH
PRECLUDES JUROR INTERVIEWS IS PROCEDURALLY
BARRED

Citing to Florida Rule of Professional Conduct 4-3.5(d)(4), Sochor alleges that this rule against interviewing jurors impinges on his right to free association; denied him access to the courts, and is a violation of the equal protection clause. The trial court summarily denied the claim finding it to be procedurally barred and legally insufficient as pled.²⁴ (PCR 115). The trial court's was correct. See Gaskin v. State, 737 So. 2d 209, 520 n.6 (Fla. 1999)(finding procedurally barred a challenge to the rule which prohibits juror interviews to determine whether misconduct has occurred); Thompson v. State, 759 So. 2d 650, n.12 (Fla. 2000); Arbeleaz v. State, 775 So. 2d

²⁴ The law allows juror interviews under certain circumstances. See Roland v. State, 584 So. 2d 68, 70 (Fla. 1st DCA 1991) (finding no criminal rule allowing for postverdict juror interviews, but noting application for such by motion "as a matter of practice"); Sconyers v. State, 513 So. 2d 1113, 1115 (Fla. 2d DCA 1987) (construing criminal rules to allow postverdict juror interviews upon motion which makes a prima facie showing of juror misconduct); cf. Gilliam v. State, 582 So. 2d 610, 611 (Fla. 1991) (affirming denial of defendant's motion to conduct postverdict interview of jurors where defendant failed to make prima facie showing of misconduct); Shere v. State, 579 So. 2d 86, 94 (Fla. 1991) (affirming denial of defendant's motion to conduct postverdict interview of jurors); Fla. R. Civ. P. 1.431(h) ("A party who believes that grounds for legal challenge to a verdict exists may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to challenge."). If Sochor had made a prima facie showing of misconduct, he could have obtained juror interviews.

909 (Fla. July 13, 2000)(same).

ISSUE VIII

APPELLANT'S CONSTITUTIONAL CHALLENGE TO
FLORIDA'S DEATH PENALTY STATUTE WAS PROPERLY
DENIED

Sochor argues that Florida's death penalty statute and two methods of execution amount to cruel and unusual punishment. The trial court found the claim to be procedurally barred and legally insufficient. (PCR 115). The state asserts that summary denial was proper. See Jones v. State, 701 So. 2d 76 (Fla. 1997); Buenoano v. State, 717 So. 2d 529 (Fla. 1998); Remeta v. Singletary, 717 So. 2d 536 (Fla. 1998); Provenzano v. Moore, 744 So. 2d 413, (Fla. 1999). Sims v. Moore, 754 So. 2d 657 (Fla. 2000).

ISSUE IX

APPELLANT'S CLAIM THAT HIS TRIAL WAS TAINTED
WITH NUMEROUS ERRORS WHICH AS A WHOLE
RENDERED THE PROCEEDINGS UNFAIR IS
PROCEDURALLY BARRED, LEGALLY INSUFFICIENT

Scohor claims that, he did not receive a fundamentally fair trial based on "the sheer number and types of errors that occurred in his trial..." **Initial brief at 92.** The trial court found this claim to be legally insufficient as pled, and procedurally barred. (PCR 115S). The state asserts that summary denial was proper. See Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984) ("In spite of Zeigler's novel, though not convincing, argument that all nineteen points should be viewed as a pattern which could not have been seen until after the trial, we hold that all but two of the points raised either were, or could have been, presented at trial or on direct appeal. Therefore, they are not cognizable under rule 3.850."), sentence vacated on other grounds, 524 So. 2d 419 (Fla. 1988); Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994)(same); Rivera v. State, 717 So. 2d 477, 480 n.1 (Fla. 1998)(same); Occchicone v. State, 768 So. 2d 1037, 1040 (Fla. 2000); Freeman v. State, 761 So. 2d 1055, 1073, n. 2 (Fla. 2000); Valle v. State, 705 So. 2d 1331 (Fla. 1997); Jackson v. Dugger, 633 So. 2d 1051 (Fla. 1993); Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323-1324 (Fla. 1994); Melendez v. State, 718 So. 2d 746, 749 (Fla. 1989).

CONCLUSION

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

Respectfully submitted,

CHARLES J. CRIST JR
Attorney General

CELIA A. TERENCE
Assistant Attorney General
Fla. Bar No. 0656879
1515 N. Flagler Dr., Suite 900
West Palm Beach, FL 33401
Office: (561) 837-5000
Facsimile: (561) 837-5108

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Rachel Day, Esq. and Kenneth Malnik, Esq. Capital Collateral Regional Counsel-South, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301 this ____ day of March 2003.

CERTIFICATE OF FONT

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

CELIA A. TERENCE
Assistant Attorney General