IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC02-1471

DWAYNE IRWIN PARKER,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

**********
*** ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (Criminal Division)
**********
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# ANSWER BRIEF OF APPELLEE


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## PRELIMINARY STATEMENT

Appellant/Defendant below, Dwayne Irwin Parker, will be referred to as "Parker". Appellee, the State of Florida, will be referred to as the "State". Record references will as follows: direct appeal - "TR", postconviction - "PCR", supplemental trial or postconviction - "STR" or "SPCR", and Parker's initial - "IB", followed by the appropriate page number(s).

## STATEMENT OF THE CASE AND FACTS

On May 11, 1989, Parker was indicted for the first degree murder of William Nicholson, attempted first degree murder of Robert Killen and Keith Mallow, and nine counts of armed robbery. Parker v. State, 641 So.2d 369, 372 (Fla. 1994). He was convicted on May 10, 1990 of first-degree murder, nine counts of armed robbery charges, and two counts of aggravated battery with a firearm. Id., 641 So.2d at 373. By an eight to four vote, the jury recommended death which the court imposed upon finding four aggravators (prior violent felony, felony murder, great risk, and avoid arrest) and no mitigation. On the non-capital counts, Parker was sentenced to concurrent term of year sentences (TR 2026-29, 2325, 2383-92, 2862, 2887-95).

On direct appeal, Parker presented 12 issues addressed to:

I Jury Selection
II Discovery Violation
III Failure to Inquire About Counsel
IV Jury Instructions and Argument to Jury
V Ex Parte Proceeding
VI First Degree Murder During Flight from a Felony
VII Motion for New Trial
VII Jury Penalty Proceedings
IX Circumstances Found by the Trial Court
X Failure to Consider or Weigh Mitigation
XI Proportionality
XII Constitutionality of Section 921.141

(PCR 621-98). This Court found the following facts:

> Shortly after 11 p.m. on April 22, 1989, Ladson Marvin Preston and Dwayne Parker entered a Pizza Hut in Pompano Beach. Preston was unarmed, but Parker was armed with both a small pistol and a semi-automatic machine pistol. They forced the manager to open the safe at gunpoint, and then Parker returned to the dining room and robbed the customers of money and jewelry. Sixteen customers and employees were in the restaurant, and Parker fired six shots from the machine pistol during the robberies, wounding two customers.
>
> While Parker was in the dining room, an employee escaped from the restaurant and telephoned 911 from a nearby business. Broward County deputies arrived shortly, and first Preston and then Parker left the restaurant. Deputy Killen confronted Parker in the parking lot, and Parker fired five shots at him with the machine pistol. Parker then ran into the street and tried to commandeer a car occupied by Keith Mallow, his wife, and three children. Parker fired the machine pistol once into the car and then fled.
>
> When someone entered a nearby bar and told the patrons that the Pizza Hut was being robbed, several of those patrons, including William Nicholson, the homicide victim, left the bar and went out into the street. Tammy Duncan left her house when she heard shots and saw Parker, carrying a gun, running down the street with Nicholson running after him. She heard another shot and saw Nicholson clutch his midsection

and then fall to the ground.

> Eventually deputies Baker, Killen, and McNesby cornered Parker between two houses. McNesby's police dog subdued Parker, and he was taken to the sheriff's station. The machine pistol and some of the stolen jewelry were found on the ground when Parker was taken into custody. At the station money and more of the stolen jewelry were found on Parker.
>
> The state charged Parker with one count of first-degree murder, two counts of attempted murder, and nine counts of armed robbery. Six shell casings were found inside the restaurant, five in the parking lot, and one in the street near where Nicholson fell. The state's firearms expert testified that all twelve shell casings, as well as the bullet recovered from Nicholson's body, had been fired from Parker's machine pistol. The theory of defense, however, was that the bullet was misidentified and that a deputy shot Nicholson. The jury convicted Parker as charged on the murder and armed robbery charges and of aggravated battery with a firearm on the two counts of attempted murder. The trial court agreed with the jury's recommendation and sentenced Parker to death.

Parker, 641 So.2d at 372-73. Parker's conviction and sentence were affirmed Id., at 378 and on January 23, 1995 certiorari was denied. Parker v. Florida, 513 U.S. 11331 (1995).

Parker, on March 24, 1997, filed a shell postconviction motion (PCR 1-112) and on June 5, 2000, an amended motion raising 25 claims: (1) public records, (2) ineffectiveness of guilt and penalty phase counsel, (3) competence of his mental health expert, (4) discrimination, and (5) constitutional errors (PCR 299-426).

The State responded (PCR 469-1147) and on April 18, 2001 a

Huff v. State, 622 So.2d 982 (Fla. 1983) hearing was held. On February 12, 2002, relief was denied summarily (PCR 1484-1532, 1537-58, 1559-80). This appeal followed (PCR 1581-82).

Simultaneously with the filing of Parker's initial brief in this case, he filed a petition for writ of habeas corpus with this Court under case number SC03-1045.

## SUMMARY OF THE ARGUMENT

Point I - The record reveals much of what Parker argued as proof of ineffectiveness of trial and appellate counsel related to the origin of the fatal bullet or mitigation was pled in conclusory terms or was procedurally barred. The balance of issues were refuted from the record. Hence, summary denial was proper.

Point II - The court did not abuse its discretion in denying Parker's additional public records demand of the Broward Sheriff's Office and thoroughly reviewed the State Attorney's submission of documents for *in camera* inspections, finding none contained Brady material and all were not subject to disclosure.

Point III - Parker's claim of ineffective assistance of counsel for not objecting to juror misconduct during the penalty phase is procedurally barred as is the challenge to the rule prohibiting juror interviews.

Point IV - The summary denial of the ineffectiveness related to Potential Jurors Detriach and Reno is procedurally barred and refuted from the record.

Point V - The claim of systematic discrimination in the jury selection was legally insufficient and procedurally barred.

Point VI - The claim of ineffectiveness respecting the penalty phase jury instructions procedurally barred.

Point VII - Parker's Caldwell challenge to the instruction is procedurally barred and the appellate argument conclusory.

Point VIII - The proportionality challenge is conclusory, thus, waived, but also procedurally barred.

Point IX - The claim of discrimination in capital punishment is improperly pled and barred. Summary denial was proper.

Point X - Parker's challenge to the aggravator instructions is procedurally barred as it was challenged on direct appeal, but also, waived as his appellate argument merely referenced the postconviction claim without further elucidation.

Point XI - The challenge to the capital sentence statute is barred as it was raised and rejected on direct appeal. Further, Parker waived the claim the by pleading it in conclusory terms.

Point XII - The claim that electrocution and lethal injection are unconstitutional is procedurally barred and waived.

Point XIII - The claim of cumulative error is waived as it is pled without supporting argument, but also meritless, none of the individual claims substantiate a finding of error.

Point XIV - Parker admits his claim of "insane to be executed" is premature. It is also pled in conclusory terms, thus, there is no support fo the claim and it must be denied.

## ARGUMENT

### POINT I

### SUMMARY DENIAL OF THE CLAIMS OF INEFFECTIVE ASSISTANCE OF GUILT AND PENALTY PHASE COUNSEL WAS PROPER (restated)

Parker argues the court erred in denying an evidentiary hearing on his claims of ineffective assistance of guilt and penalty phase counsel. Under this Court's standard of review, the order is supported by substantial, competent evidence and the law as the offered evidence was cumulative to that presented at trial, thus, no ineffectiveness was shown, or the claims were legally insufficient or procedurally barred. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998) (noting summary denial of motion to vacate will be affirmed where law and competent substantial evidence supports court's findings). This Court should affirm the summary denial.

Strickland v. Washington, 466 U.S. 668 (1984) in applied when assessing claims of ineffective assistance, and to prevail:

> ... a defendant must demonstrate that (1) counsel's performance was deficient and (2) there is a reasonable probability that the outcome of the proceeding would have been different. ... A reasonable probability is a probability sufficient to undermine confidence in the outcome. ... In reviewing counsel's performance, the court must be highly deferential to counsel, and in assessing the performance, every effort must "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." ...

> As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ... For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. ... "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." ...

Spencer v. State, 842 So.2d 52, 61 (Fla. 2003) (citations omitted); Chandler v. U.S., 218 F.3d 1305, 1312-13 (11th Cir. 2000); State v. Riechmann, 777 So.2d 342, 349 (Fla. 2000); Kennedy v. State, 547 So.2d 912, 913-14 (Fla. 1989). "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead, the test is ... whether what they did was within the 'wide range of reasonable professional assistance.'" Waters v. Thomas, 46 F.3d 1506, 1518 (11th Cir. 1995) (citations omitted); Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998) (noting counsel's conduct is unreasonable only if "no competent counsel would have made such a choice"); Burger v. Kemp, 483 U.S. 776, 789 (1987). At all times the burden of proof remains, on the defendant. Johnston v. Singletary, 162 F.3d 630, 635 (11th Cir. 1998).

**Challenge to guilt phase counsel** - Parker asserts the court overlooked proof of counsel's deficiency for not presenting evidence Parker did not fire the fatal bullet including: (1) photography expert, (2) photos depicting bullet as "silver", (3) noting not all of Parker's bullets were recovered, (4) refuting distance from which victim was shot, (5) victim's criminal history, (6) witnesses to testify deputy shot victim, (7) impeaching Tammy Duncan. These issues were covered by counsel. Merely because Parker claims more or different evidence could have been offered establishes neither deficient performance nor prejudice. The record refutes Parker's claims of ineffectiveness and shows his counsel professionally challenged the State's evidence; any "less than perfect" actions were not prejudicial. Spencer, 842 So.2d at 61. As the court concluded, there was no exculpatory evidence offered or any further investigation counsel should have conducted which would have resulted in evidence "beneficial" to Parker (PCR 1491). The record supports this conclusion as much of what Parker pled was conclusory/legally insufficient,[1] or procedurally barred.[2] The

[1] In many respects the allegations related to the failure to hire a photography expert were conclusory in nature, or did not identify the evidence the expert could have offered to refute, undermine, or impeach the evidence placed before the jury related to the identification and chain of custody of the bullet which killed the victim or how the evidence would not have been cumulative to counsel's cross-examination. Also, legally

insufficient is the claim that: “failing to introduce other existing photographs of the bullet which were available to him. These photographs would have shown the inaccurate and misleading nature of the State’s ‘redeveloped’ photographs.” (PCR 326 ¶19). Parker did not identify which photographs counsel should have introduced or how such would undermine confidence in the outcome especially in light of the fact a ballistics testimony the cut observed in the photo of the bullet depicted in the victim’s sacrum matched the fatal copper bullet identified as State’s exhibit 121 (TR 1800-04). In pure conclusory terms, Parker asserted in his motion below more investigation was needed, an argument should have been made challenging the distance between Parker and the victim established he did not fire the fatal shot, but that Deputy McNesby or some other deputy shot the victim, that the examination of Tammy Duncan was ineffective, and “other possible witnesses”/“several persons at the scene”, including Willie Stan saw the murder (PCR 329-31). The challenge to the presentation of the victim’s criminal history asserted below offered no argument that confidence in the outcome was undermined. Instead he offered only conclusory allegations that counsel did not conduct an adequate investigation. Generally, the allegations did not identify both deficient performance and prejudice, thus the failed to comport with the pleading requirements of Strickland. Hence, the determinations the issues were conclusory/legally insufficient were correct and summary denial was proper. Kennedy, 547 So.2d at 913.

[2] A review of the postconviction motion shows that throughout his challenge to counsel’s investigation and presentation of the projectile evidence, Parker asserted that “to the extent” the trial court and/or the State erred, counsel was rendered ineffective or there was a lack of adversarial testing of the evidence (PCR 324-25, 327). Based upon his pleading of trial errors, the claims were barred and legally insufficient. Asay v. State, 769 So.2d 974, 989 (Fla. 2000); Freeman v. State, 761 So.2d 1055, 1067 (Fla. 2000). Besides taking inconsistent positions with respect to who shot the victim, Parker based his conjecture on the testimony of Dr. Bell and Tammy Duncan which the jury resolved against him. Now that more than a decade has passed since Parker’s trial, he has not identified any evidence or new witnesses to support his contention he did not kill the victim nor did he delineate how the “other possible witnesses” would refute the evidence adduced

balance was refuted by the record. Summary denial was correct.

**Photographic evidence related to fatal bullet** - After Parker's motions to dismiss the case or preclude the medical examiner from testifying were denied (TR 375-78), Dr. Bell explained the victim died from a single gunshot wound fired from a distance of two to twenty-four inches. After removing the bullet, he washed and photographed it, placed it in an evidence envelope, and initialed the envelope. He made an in court identification of the bullet and envelope, explaining the slide evidence taken by him was overexposed, but reflected the bullet extracted from the victim was copper in color with a small cut. He avowed the State's photos depicted the fatal bullet. While he admitted describing the bullet in his autopsy report and initial deposition, as silver with very little deformation, upon review of the slide negative, he concluded the bullet was copper in color with a cut caused when removing it from the victim (TR 1623-24, 1631-32, 1635-43, 1645-46). Detective Cerat ("Cerat") was at the autopsy and testified he photographed the copper bullet removed from the victim (TR 1560-64).

When the State sought to present Dr. Besant-Matthews, as an

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at trial. In essence, Parker challenged the sufficiency of the evidence and as such is barred from raising it here as a claim of ineffectiveness. Medina v. State, 573 So.2d 293, 295 (Fla. 1990). The summary denial was correct in this respect.

expert forensic photographer to testify Cerat's photo was a photo of the fatal bullet, the court excluded the testimony because of his late disclosure and cumulative nature of his testimony. Firearms examiner, Patrick Garland, testified Parker's gun held 33 cartridges, was recovered with 20 copper-jacketed rounds, and the shell casings collected from the scenes were fired from that gun. Over defense objection, he testified Cerat's photo accurately depicted the fatal bullet (TR 1704-54, 1764-70, 1776-86, 1799-07).

The allegation of ineffectiveness for failing to hire a photography expert or present additional photographic evidence to cast doubt on the State's photographic evidence and undermine the proof the fatal bullet came from Parker's gun, is meritless. Parker may not simply allege ineffectiveness for failing to hire an expert and expect to be granted an evidentiary hearing. LeCroy v. State, 737 So.2d 236, 240 (Fla. 1998)(affirming summary denial and reasoning claim legally insufficient based upon court's finding it was conclusory as defendant presented nothing to substantiate allegations expert was necessary or evidence not authentic). Likewise, in part the claim was procedurally barred[3] as counsel did attempt to have an expert

[3] Further, counsel had sought a photo expert and to open the slide negative evidence, but was denied (TR 1629-31, 1651-55, 1743). Parker could have challenged these issues on direct

appointed, but the request was denied. For this same reason counsel may not be deemed deficient for not hiring an expert. Further, the expert's testimony would have been inadmissible and/or cumulative to the evidence before the jury, thus, the hiring of an expert was unnecessary and not prejudicial.

The record reflects the origin and authenticity of the fatal bullet removed were hotly contested by the defense.[4] A counsel does not render ineffective assistance automatically by failing to impeach a witness with a report, if cross-examination is used to bring out the weaknesses in the testimony. Card v. Dugger, 911 F.2d 1494, 1507 (11th Cir. 1990); Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987) (holding counsel not ineffective for failing to obtain expert pathologist where counsel

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appeal and may not use an ineffectiveness claim to relitigate the issue. Rivera v. State, 717 So.2d 477, 480 n.2 (Fla. 1998) (finding it impermissible to recast claim which could have or was raised on appeal as one of ineffective assistance in order to overcome the procedural bar or to relitigate and issue considered on direct appeal). For the same reason, counsel may not be deemed deficient merely because the trial court ruled against him. Bush v. Wainwright, 505 So.2d 409, 411 (Fla. 1987); Songer v. State, 419 So.2d 1044 (Fla. 1982). The dictates of Strickland were not met.

[4] In fact, this Court found: "Detective Cerat attended the autopsy and took the photographs that yielded the original and subsequent prints and testified that, because of the flash, the bullet in the original prints appeared white in the middle and gold at the edges. Parker cross-examined Cerat extensively about photography." Parker v. State, 641 So.2d 369, 374 (Fla. 1994).

cross-examined State expert and argued weaknesses in testimony). Also, failing to present cumulative impeachment evidence does not necessarily rise to the level of ineffectiveness. Valle v. State, 705 So.2d 1331, 1334-35 (Fla. 1997); Provenzano v. Dugger, 561 So.2d 541, 545-46 (Fla. 1990). Here, counsel impeached Dr. Bell with his autopsy report and prior sworn deposition as well as the photograph which counsel claimed depicted a silver bullet. There was nothing more an expert could have put forward which was admissible testimony that could have further impeached or undermined the doctor. This is evident from the court's ruling excluding Dr. Besant-Matthews's expert testimony on the photos in part as cumulative and the fact the jury could resolve the evidence without expert help (TR 1710-29, 1730-31, 1744). Surely, the overexposure of a photograph and the reflective nature of metals is within the common knowledge of the jury and expert testimony is unnecessary. Had the defense obtained an expert in photography, he would not have been permitted to testify as the State's expert was disallowed. This Court should find the record refutes the claim a photography expert was needed.

Furthermore, the record reveals the claim is rebutted conclusively. The testimony of Pat Garland, Dr. Bell, and Cerat (T 1623-24, 1631-32, 1635-38, 1640-47, 1650-64, 1800-04), reveal

a chain of custody from the removal of the projectile from the victim to its trial presentation. The photos with a different exposure were cumulative evidence; the authenticity and color of the bullet in evidence were resolved based upon the actual projectile and Parker failed to allege what other evidence would have altered the trial result. The summary denial was correct.

**Evidence accounting for all bullets fired** - Parker claims the court overlooked the allegation counsel show the police failed to revover all Parker's the bullets. Yet review proves he merely listed the names of persons alleged to live near the crime scenes who heard shots fired. The claim was wholly conclusory, and was denied properly under Kennedy, 547 So.2d at 913.

**Presentation of witnesses to refute the distance from which the victim was shot, show deputy shot victim, and impeachment of Tammy Duncan** - Again portions of these claims were pled in a conclusory, legally insufficient manner, merely attacking the sufficiency of the evidence presented at trial. However, the record refutes the allegations made and the court ruled correctly.

Clearly, relief was not warranted as counsel cross-examined the witnesses competently and brought out the discrepancies in the evidence Parker now claims required further investigation.

Tammy Duncan (“Duncan”) testified she heard a shot and went to the corner of 29th Street and 17th Avenue where she saw the victim running after Parker, and as Parker disappeared from view momentarily, she heard a shot and saw the victim double over and fall. Minutes later, the police arrived. On cross-exam she testified the distance between Parker and the victim was 60 to 70 feet, but this was with the caveat she was not good at estimating distances. At no time did Duncan form the impression the police shot the victim, in fact, she knew differently (TR 1181-91, 1201, 1206-07, 1212-13, 1220-24, 1228, 1230-33, 1236).

Sergeant Baker, just turning onto 17th Avenue, saw Parker running from a person who lay in the street 10 to 15 feet away. (TR 1527-32). Deputy Killen also chased Parker as he fled, but lost sight of him when he turned onto Northeast 29th Street. During this time, the deputy heard gunshots. When he turned onto 29th Street, he saw Parker run in front of a 7-Eleven, but lost sight of him again when he turned south onto Northeast 17th Avenue. The deputy then heard another shot, then saw the victim with a gunshot wound sitting in the road (TR 1492-95, 1498-99).

From his car, Deputy McNesby (“McNesby”) saw the victim doubled over (TR 1246-47). McNesby was questioned sharply by defense counsel who accused him of treating the victim as a suspect and firing the fatal shot, but covering up the fact.

The defense accused the deputy of lying, but he denied any prior wrongdoing or involvement in the shooting of the victim, and testified he never fired his weapon on the night in question (TR 1267-69, 1272-78).

The record reflects only one law enforcement officer discharged his weapon that evening; that was Deputy Killen who returned Parker's fire at the Pizza Hut by firing once (TR 1182-86, 1491, 1488-90). Further, the record revealed the witness, Duncan, to whom Parker points as establishing an officer shot the victim, actually stated under oath, she knew the victim was not shot by the deputies (TR 1233). Clearly, the defense challenged the State's evidence showing the location of Parker and the victim at the time the fatal shot was fired and who shot the victim. Merely because the jury chose not to believe the distance between Parker and the victim estimated by Duncan, does not establish ineffective assistance. What the record shows is counsel attacked the State's case vigorously and Parker has not alleged what evidence counsel should have presented to refute that proof. He has not shown how counsel's performance in questioning the witnesses was deficient, nor has he established prejudice arose from the manner in which counsel investigated or presented the case. Neither prong of Strickland has been satisfied. The summary denial was correct.

With respect to McNesby and the victim's blood on the cruiser, the deputy admitted the victim, while bleeding profusely, had staggered and fallen onto the trunk of the cruiser and McNesby had washed the blood from his car. When questioned, McNesby explained when he stopped his cruiser, the victim, who was staggering in the intersection, collapsed onto the trunk then fell to the ground (TR 1246-50, 1255-57, 1264-65, 1276, 1447-49). Given the facts brought out at trial, Parker failed to allege evidence establishing counsel's deficiency or what other investigation would undermine confidence in the outcome of the proceedings. His claim must fail under Strickland. The summary denial should be affirmed.

Parker's allegation counsel's impeachment of Duncan was ineffective and a deputy other than McNesby shot the victim (PCR 330-31) are refuted from the record. Not only was the jury informed of Duncan's prior statement and deposition, they were advised of the location and actions of the officers involved in Parker's capture. The discrepancies in the State's evidence and Duncan's testimony were brought out in the defense closing. (TR 1868-82, 1886-88, 1921-22, 1926-34). Parker has pointed to no other evidence which counsel could have presented to undermine the conclusion he was the person who murdered the victim. He has not established deficient performance and prejudice under

Strickland.

**Victim's criminal history** - Parker's allegation related to the victim's criminal history was procedurally barred as he was cloaking a direct appeal issue as one of ineffective assistance of counsel. The victim's criminal record was the subject of the State's Motion in Limine, with the court granting the motion (TR 2596-57). Because this issue was addressed at trial, Parker could have challenged the matter on appeal. Having failed to do so, the court correctly found the matter barred. Rivera v. State, 717 So.2d 477, 480 n.2 (Fla. 1998) (finding it impermissible to recast claim which could have been raised on appeal as one of ineffective assistance to overcome bar or relitigate issue); Muhammad v. State, 603 So.2d 488, 489 (Fla. 1992) (holding issues which were or could have been litigated on direct appeal are not cognizable on collateral review); Medina, 573 So.2d at 295 (holding allegations of ineffectiveness cannot be used to circumvent rule postconviction cannot serve as a second appeal).

Using these same record facts, denial on the merits was proper as counsel may not be deemed ineffective because the court ruled against him. Bush v. Wainwright, 505 So.2d 409, 411 (Fla. 1987) (finding counsel's lack of success on motions raised "augurs no ineffectiveness"); Songer v. State, 419 So.2d 1044

(Fla. 1982). Prejudice was not shown as Parker did not establish the victim's criminal history was relevant to the question of who killed him.

As is clear from the foregoing, the court's finding Parker failed to allege evidence which was exculpatory is supported by the record as nothing Parker offered was something the jury had not heard in some form or was admissible and not cumulative. In fact, in his closing argument, counsel presented the "silver bullet" theory, argued Parker was not close enough to the victim to create the burns and stippling observed, asserted Duncan was correct in her first version of events, offered the victim was fleeing from another robbery, claimed there was at least one missing bullet from Parker's gun, and McNesby shot the victim (TR 1868-82, 1886-88, 1921-22, 1926-34). Likewise, the court's conclusion Parker was basically challenging the sufficiency of the evidence stems from the cumulative nature of the evidence offered as overlooked by counsel. Clearly, in part, Parker was challenging directly the sufficiency of the evidence, hence, the denial was proper.

**Challenge to penalty phase counsel** - Parker contends it was error to deny his claim of ineffective assistance of penalty phase counsel. The evidence offered was addressed to (1) mental heath mitigation, (2) further evidence on the origin of the

fatal bullet, and (3) the competency or lack of expert assistance in the areas of mental health, photography, and tool-marking. The State submits when the court's order is read in context, it is clear the appropriate standard was utilized to evaluate the claim and find Parker's offered mitigation and mental health evidence was cumulative and insufficient prove a need for a new sentencing. Likewise, the assistance of the mental health expert was effective and the decision not to call Brent Kessiger or other experts was neither deficient nor prejudicial. The denial should be affirmed.

**Allegation sentencing court found counsel failed to establish the facts necessary to prove mitigation** (IB 19-24) - Parker asserts this Court's determination the judge concluded "no mitigation had been established" Parker, 641 So.2d at 377, equates to a finding counsel failed to establish facts to prove mitigation, and thus, Parker should be granted an evidentiary hearing to convince the court of the mitigation even if cumulative evidence is presented. The State disagrees. First, Parker mis-reads the court's sentencing order - merely because the court rejected the evidence offered as mitigation does not establish ineffective assistance, especially where Parker is offering the same evidence here. Second, he misunderstands the sentencing procedure - under Campbell v. State, 571 So.2d 415,

419 (Fla. 1990) and Trease v. State, 768 So.2d 1050, 1053 n.2 (Fla. 2000) a court must evaluate the evidence offered, but does not have to find it mitigating, as occurred here, or if mitigating, may give it no weight.

In order to be entitled to relief on a claim of ineffective assistance of penalty phase counsel, a capital defendant "must demonstrate that but for counsel's errors he would have probably received a life sentence." Hildwin v. Dugger, 654 So.2d 107, 109 (Fla. 1995). A counsel does not render ineffective assistance by not placing before the jury cumulative evidence. Rutherford v. State, 727 So.2d 216, 225 (Fla. 1998)(finding evidence offered on postconviction was cumulative to that presented during penalty phase, thus, claim was denied properly); Van Poyck v. State, 694 So.2d 686, 692-93 (Fla. 1997)(finding no ineffectiveness where life-history account argued for on postconviction was, in large measure, presented to jury); Woods v. State, 531 So.2d 79, 82 (Fla. 1988) (reasoning where jury heard evidence of psychological problems and new evidence is possible more detailed it is essentially cumulative and "more is not necessarily better"); Card v. State, 497 So.2d 1169, 1176 (Fla. 1986) (holding counsel not ineffective for failure to present cumulative evidence).

Because counsel attempted to show mitigation, but the court

rejected it, does not open the door to a second attempt, though a claim of ineffective assistance, to relitigate the issue. A review of the evidence asserted here establishes it is cumulative to that offered in the penalty phase, reviewed on appeal, and affirmed as not mitigating. Counsel had the assistance of a metal health expert, two investigators, and discussions with family and friends. The proper investigation was undertaken and evidence was offered, thus, no deficiency has been shown. Because the evidence is cumulative, no prejudice can be shown as there is no reasonable probability the result would have been different.

**Alleged additional mitigation** - Parker asserts the court erred in finding his profferd evidence cumulative and overlooked: (1) mental health evidence, (2) Parker's mother's aberrant behavior and effect on her son, and (3) sexual abuse. The record reflects these areas were covered at trial. Parker points to Freeman v. State 761 So.2d 1055, 1065 (Fla. 2000) for the proposition where counsel fails to present "details about specific events" then an evidentiary hearing is required. Yet, in Freeman, counsel did not present any evidence of a head or similar injury, where here, the areas Parker challenges were covered in counsel's presentation. This record refutes the allegations and Freeman is not dispositive.

During the penalty phase, the defense presented Marion Sanders ("Sanders"), Investigators, Howard Finkelstein ("Finkelstein") and Carlton Moore ("Moore"), co-defendant, Ladson Marvin Preston, Jr., and Dr. Caddy, a mental health expert. Finkelstein looked into Parker's case with Moore and between them, they interviewed Parker, his mother, sister, brother, Rev. Parker, teachers, the sister's foster parent, and the mother's ex-boyfriend. Dr. Caddy spoke to Parker and his mother in addition to reviewing the police statements and Preston's deposition (TR 2202-05, 2238-41).

Sanders testified she left Parker's father when Parker was three months old and she was first committed to a mental hospital when Parker was six years old. She had been committed so often she could not recall the number. Family and friends had reported to Finklestein Parker's early life was dysfunctional; his father left at an early age and his mother had serious and numerous mental problems. Sanders had periodic "breakdowns", one almost every six months. Rev. Parker did not take custody of Parker or Charrie Ferrette ("Princess") when their mother was hospitalized. Sanders' behavior was extremely bizarre and threatening; it included running down the street and through the house naked and speaking or yelling for God. On one occasion, Sanders pushed out a second floor screen and acted as

though she would throw Parker from the window. Moore reported that during one of Sanders' mental breakdowns, when Parker was six, she held him by his pants belt while hanging him out a fourth story window and threatened to drop him. Sander's treated Parker harshly when disciplining him and he felt his sister was treated better. Because Sanders was not permitted to take Parker or Princess to the mental hospital, and Rev. Parker would not take them, the children were left with HRS which sent them to separate foster homes. Dr. Caddy echoed much of what the investigators reported regarding Parker's childhood including incidents of sexual, mental, and physical abuse. (TR 2183-90, 2202-05, 2278-81).

Parker's first criminal arrest came in 1979 when he was involved in a shooting. Dr. Caddy discovered that by 12 or 14 years of age, Parker had been arrested for burglary and shoplifting; by 12, Parker had formed a lifestyle of living on the streets. By ninth grade, he was associating with a "bad crowd" and began smoking marijuana and drinking; he had a recurrent pattern of getting drunk. As part of his coping mechanism, Parker, a nervous person, would self-medicate (TR 2202-05, 2244-46, 2178-90).

Due to Sanders mental condition, family members would take in Princess, but Parker would be sent to foster care; this

caused him to feel abandoned. In foster care, Parker was ill treated. He was beaten with an electrical cord and had been known to lie under his bed screaming for hours at a time. On the occasions Princess was sent to foster care, it was to the same stable family; she had a better experience than Parker. Parker felt the separation from his sister was cruel and harsh (TR 2205, 2279, 2281).

When Sanders was released from the mental hospital, she would seek her children, but then have a relapse and return them to foster care. This cyclical behavior lasted for years with Parker going to numerous foster homes and up to 17 schools before graduating. Finkelstein reported this constant change precluded Parker from building social systems or developing friends; there was no one to teach him right from wrong and Parker never had anyone upon whom he could rely or trust.(TR 2206 2280)

Parker reported to the investigators he would run away from his foster homes due to mistreatment. At seven, he was sexually assaulted numerous times. He was forced to offer sex in exchange for shelter, yet, often after having sex, the men would not give Parker the shelter promised. He endured several sexual batteries as a child at the hands of three foster parents, a teenager, and various babysitters. Parker was an unwilling

partner and was afraid of beatings. Dr. Caddy opined Parker's sexuality was blurred and he was mocked in school and suffered a disparaging nickname for years. Parker felt like an outcast; he had no friends. Finkelstein concluded Parker was abused mentally, sexually, and physically. The abuse continued into his high school years (TR 2208-09, 2243-44, 2281).

Although Rev. Parker had not been a part of Parker's life since he was very young, Parker tried to reinitiate contact a few years before the trial, but Rev. Parker made it clear he wanted nothing to do with his son. Dr. Caddy reported Rev. Parker left the family when Parker was about two years old. Once he departed, he never provided for his son. Parker was in and out of HRS' custody due to Sanders' hospitalization and diagnosis of paranoid schizophrenia. He had been picked upon a "fair bit" as a child and was beaten while living in foster homes. By eight or nine, he learned to protect himself by using a broken soda bottle; in fact, once he cut a child who came after him. During his school years, Parker attended approximately 12 to 15 schools (TR 2209, 2238-41).

Parker's home and school life were unstable which caused instability in his relationships. He had relatively poor social skills and developed no real sense of self worth. The only people who had any meaning for Parker were his mother and

children. Having serious troubles in school with below average intelligence, Parker did not do well scholastically. Often, he had tantrums in school, throwing himself on the floor, kicking and screaming as though having a fit. Eventually he was placed in special education, but, those teachers ignored him. (TR 2240-42, 2248-49).

It was Dr. Caddy's opinion Parker had a major alcohol problem and sociopathic tendencies, but was not under the influence of extreme mental or emotional disturbance at the time of the crime. While Dr. Caddy found Parker was under the influence of alcohol and was emotionally impaired, he had to admit the co-defendant reported Parker was not so impaired he did not know what he was doing. Dr. Caddy opined Parker's capacity to appreciate the criminality of his actions and to conform his conduct to the law was mildly impaired, but did not prevent him from judging his actions criminal (TR 2246, 2250, 2262-63 2270-71).

The evidence now offered is either refuted by the record or is cumulative to the penalty phase presentation. The jury was informed of Parker's chaotic childhood from being shuttled between foster homes, experiencing his mother's mental disturbance, and suffering sexual and physical abuse at the hands of friends, care-givers, and strangers (TR 2184-88, 2204-

09, 2239-49, 2279-81). The jury heard Parker had serious scholastic difficulties, was of below average intelligence, threw tantrums in school, was in special education, had sociopathic tendencies, and on the night of the crime, was emotionally impaired and his ability to conform his conduct to the law was "mildly impaired" (TR 2242, 2246-47, 2250, 2262-63 2270-71). Together, this evidence would have allowed the jury to draw the inference Parker had mental difficulties both before and on the night of the crime. Even with this information, Dr. Caddy found Parker was not under the influence of extreme mental or emotional disturbance (TR 2262). Occhicone v. State, 768 So.2d 1037, 1049-50 (Fla. 2000) (affirming denial of relief on ineffective assistance claim for not presenting more evidence of intoxication as information was cumulative). The allegation Rev. Parker permitted his son to live with him for a time then threw him out, and embarrassed him is merely cumulative to evidence that Rev. Parker was not a supportive father, did not nurture his son, and wanted nothing to do with him (RT 2185, 2204-09, 2283).

Upon this, a hearing was not required. Rutherford, 727 So.2d at 225 (finding additional evidence offered at postconviction hearing was cumulative to that presented during penalty phase, thus, claim denied properly); Kennedy, 547 So.2d at 913 (finding

postconviction relief motion may be denied summarily where record refutes claim completely). The evidence now offered is not only cumulative, but cannot outweigh the four aggravators found in this case as the same evidence was rejected previously as not mitigating. Parker, 641 So.2d at 377. (TR 2892-94). Summary denial was appropriate. Tompkins v. Dugger, 549 So.2d 1370, 1373 (Fla. 1989)(finding no prejudice in failure to present more evidence of abused childhood and addictions where evidence, even if admitted, would not have affected sentencing outcome as it would have been outweighed by three aggravators). Parker had four aggravators.

**Trial court's application of Strickland** - Parker asserts the court erred in the Huff hearing when it discussed the Strickland prejudice prong in terms of an outcome which "would have been different" or "substantial probability" the outcome would be different. A reading of the entire transcript establishes the court noted Strickland was the standard, but determined it could not rule until it had re-considered the pleadings and re-read the transcript and record (PRC 1440-42). Hence, the initial comments about the standard should not be cited as the court's final pronouncement. In fact, in the order entered ten months later, when addressing this claim, the court cited to Rutherford v. State, 727 So.2d 216 (Fla. 1998) and Hildwin v. Dugger, 654

So.2d 107, 109 (Fla. 1995) which outline the Strickland standard with the "reasonable probability" language. Clearly, the court applied the correct standard and its short-hand or inadvertent discussion of a standard other than "reasonable probability" must be discounted in light of the subsequent, clear application of Strickland. Woodford v. Visciotti, 123 S.Ct. 357, 358-60 (2002) (noting short-hand discussion of Strickland standard does not invalidate ruling where it is clear court applied standard announced by Supreme Court).

**The court's application of the law to the mitigation** - It is Parker's claim the court's comments at the Huff hearing and in its written order tending to characterize the mitigation as Parker's attempt at blaming others for his actions shows the court failed to understand the purpose of mitigation, both on collateral review and during the original sentencing, thus, erroneously denying a hearing. In Claim I of his habeas corpus petition, Parker raised a similar issue. Both are without merit.

To the extent he challenges his original sentencing via comments made in postconviction, the matter is barred. He may not challenge the original sentencing, as it was raised and

rejected on appeal.[5] Muhammad v. State, 603 So.2d 488, 489 (Fla. 1992).

In postconviction, the analysis under Strickland for penalty phase counsel's performance is different than a direct challenge to the evaluation of mitigation at the original sentencing under Campbell v. State, 571 So.2d 415 (Fla. 1990) and Trease v. State, 768 So.2d 1050 (Fla. 2000). Such difference is evident from the analysis conducted in Occhicone v. State, 768 So.2d 1037 (Fla. 2000). In order to prove ineffectiveness of penalty phase counsel, the defendant must establish "both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different." Occhicone, 768 So.2d at 1040. Merely because other evidence was available does not establish ineffective assistance. Gudinas v. State, 816 So.2d 1095, 1106

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[5] On appeal, Parker challenged the assessment of mitigation. This Court concluded: "Contrary to Parker's contention, the court gave ample consideration to all of the evidence Parker submitted in mitigation. ... The court...found that the facts alleged in mitigation were not supported by the evidence. It is the court's responsibility to resolve conflicts in the evidence, and its determination will not be reversed if supported by the record.... The record supports the trial court's conclusion that no mitigators had been established." Parker, 641 So.2d at 377.

(Fla. 2002); Cherry v. State, 781 So.2d 1040, 1051 (Fla. 2000). These cases do not ask whether the court complied with Campbell and Trease in denying relief.[6]

Parker's reliance upon statements made on postconviction respecting deficient performance, prejudice, and observations of Parker's tactics should not be the determinative factor of whether the dictates of Campbell and Trease were met twelve years earlier. This is especially true where this Court affirmed the court's analysis in rejecting mitigation and imposing a death sentence.[7] (TR 2892-94). Parker, 641 So.2d at 377.

Below, Parker claimed counsel was ineffective for not presenting mitigation involving Parker's childhood, family life, and mental health. The State responded noting the allegations

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[6] Likewise, Parker's reliance upon Lockett v. Ohio, 438 U.S. 586 (1978); California v. Brown, 479 U.S. 538 (1987); Roberts v. Louisiana, 428 U.S. 325 (1976); Santos v. State, 591 So.2d 160 (Fla. 1991); Chesire v. State, 568 So.2d 908 (Fla. 1990); Rogers v. State, 511 So.2d 526 (Fla. 1987) do not further his position as these address the evaluation for the initial sentencing. Here, the judge's challenged comments were in response to postconviction litigation and must be viewed in light of Strickland.

[7] To the extent Parker's claim challenges the original sentencing, at trial, each statutory mitigating factor was discussed and the court considered the evidence offered for non-statutory mitigation along with searching the record for mitigation. (TR 2892-94). As this Court found, the sentencing order comported with the law. Decade-later comments do not undermine that conclusion.

were either refuted from the record or cumulative to the trial where these areas along with alcohol impairment[8] were presented (TR 2184-88, 2190, 2202-09, 2238-47, 2248-50, 2262-63, 2270-71 2278-81, 2283). The State submitted the residual doubt evidence, in the form of Bret Kessinger or others to say Parker did not fire the fatal shot, was not a proper subject for the penalty phase as it was not mitigating. Bates v. State, 750 So.2d 6, 9 n.2 (Fla. 1999); Sims v. State, 681 So.2d 1112, 1117 (Fla. 1986). (PCR 545-60).

In ruling, the court cited the applicable law, Rutherford, 727 So.2d at 225; Hildwin, 654 So.2d at 109; Card v. State, 531 So.2d 79, 82 (Fla. 1988) and summarized Parker's claim as: "[t]he inference to be drawn from the allegations in this claim is that everyone in the defendant's life is to blame and is responsible for the defendant's actions in this murder, and that the jury did not hear this mitigating evidence." (PCR 1493, 1495). After recounting the proffered evidence and that which was presented at trial, the judge reiterated his assessment of the value of the trial mitigation previously rejected and affirmed on appeal. The court noted there was no other

[8] The State submitted Parker's actions showed he was not impaired (TR 996-98, 1012, 1017, 1020-23, 1086, 1091, 1097-98, 1109-16, 1222-34, 1152-56, 1181-87, 1192, 1205-06, 1212, 1241-42, 1246-47, 1249-51, 1332-33, 1336-40).

"testimony that could or should have been presented that would not be cumulative in nature." When these findings are read in context, it is clear the focus of the ruling was that the proffered mitigation was cumulative to that which was presented and rejected at trial (PCR 1494-96). The court, in determining the proffered evidence was cumulative, was considering it in light of ineffective assistance of counsel, not as an initial presentation for sentencing. Rutherford, 727 So.2d at 224-25 (finding no ineffectiveness arising from counsel's failure to present proffered mitigation as such was essentially cumulative to trial testimony); Routly v. State, 590 So.2d 397, 401-02 (Fla. 1991) (denying relief as most of collateral evidence had been presented to jury although in different form); Lusk v. State, 498 So.2d 902, 906 (Fla. 1986). As is evident from the entire postconviction ruling, the court was merely noting the proffered evidence was the same as that presented and rejected previously. The focus was on what impact the evidence would have had on the jury under Strickland. Given that it was cumulative, Parker did not carry his burden. Nothing more can be read into the order, nor used to reopen an issue resolved against Parker on direct appeal.

**Trial court's factual findings** - Parker asserts two of the court's factual findings were not supported by the record.

These are that Rev. Parker testified, and that the investigators spoke to Parker's foster parents. Parker is correct, Rev. Parker did not testify, however, his information was presented through the investigators and Dr. Caddy (TR 2209, 2239). Even though the foster parent was mis-identified, such has little if any bearing on the mitigation presented at trial. These misstatements do not undermine the validity of the order as the question was whether the offered mitigation was cumulative to the trial mitigation. It is to that which this Court must look in evaluating the judge's order.

**Brent Kessinger/origin of fatal bullet** - According to Parker, the court erred in concluding the issue of the origin of the fatal bullet and presentation of Brent Kissinger ("Kessinger") were litigated at trial and were barred. Although, as Parker points out, an ineffectiveness claim was not presented on direct appeal, the court's order is still correct.

Below, Parker claimed counsel was ineffective in the penalty phase for failing to present Kessinger and other evidence tending to show Parker did not fire the fatal bullet in order to create a residual doubt and rebut the "great risk" aggravator (PCR 354-56). However, residual doubt evidence is inadmissable. Bates v. State, 750 So.2d 6, 9 n.2 (Fla. 1999) (following Franklin v. Lynaugh, 487 U.S. 164 (1988) and concluding there is

no constitutional right to present "lingering doubt" evidence); Sims, 681 So.2d at 1117. Counsel professionally excluded inadmissible evidence.

Given the treatment Kessinger's testimony received in the motion for new trial and appeal, to present such "uncredible" testimony would not have altered the outcome of the trial. There is no reasonable probability the jury would have recommended life upon hearing his testimony. This is based upon the fact, not only did the court conclude Kessinger's testimony was so incredible it could be discarded in its entirety, this Court concurred. Parker, 641 So.2d at 376. Neither deficient performance nor prejudice were shown and summary denial was proper. With the strength of the State's case and Kessinger's inconsistencies, it is not probable the offered testimony would have produced a different result. Strickland has not been satisfied; relief should be denied.

Even with Bell's initial erroneous description of the bullet highlighted in the penalty phase, there is no reasonable probability the result would have been different as the jury had rejected the same theory in convicting Parker. Simms, 681 So.2d at 117 (rejecting argument court should have considered and instructed jury on "imperfect self-defense" as "the jury heard and rejected Sims' claim of self-defense during the guilt phase

of the trial and judge characterized argument in penalty phase as "lingering doubt"). The State reincorporates its answer presented with respect to the guilt phase challenge to the fatal bullet's origin for further argument.

**Mental health expert's competency** - Parker asserts the court erroneously overlooked the allegation Dr. Caddy's assistance was "grossly insufficient." The court denied the claim as it was conclusory (PCR 1497). In so ruling the court cited to LeCroy v. Dugger, 727 So.2d 236 (1998) wherein this Court affirmed a summary denial because LeCroy claimed a wealth of evidence, but "failed to detail the nature and/or source of that evidence" and failed to bring forward "proof of any additional evidence that counsel failed to discover." The decision was proper.

In order to prevail Parker should have supported the claim of incompetence with something more than conclusory statements that the examination was "grossly insufficient" and Dr. Caddy "ignore[d] clear indications of either mental retardation or organic brain damage." State v. Sireci, 502 So.2d 1221, 1224 (Fla. 1987). Parker failed in this respect. Other than claiming Dr. Caddy did not conduct a "traditional" diagnostic work-up, Parker did not come forward with any evidence which Dr. Caddy did not take into account. Similarly, Parker did not identify what more evidence related to alcohol should have been

presented or how it would have altered Dr. Caddy's opinion. Below, Parker failed to detail the nature of his alleged "mental illness" and only notes "possible" organic brain damage. The allegations are conclusory, as the court found, requiring summary denial. Kennedy, 547 So.2d at 913.

Even should this Court disagree, relief is not warranted. The State reincorporates its argument presented above in response to the claim of ineffective assistance of penalty phase counsel related to mental health mitigation and submits Parker's chaotic childhood, sexual and physical abuse, history of mental illness within his family, his own "below average intelligence" and apparent "fits" were exhaustively presented to the jury through the investigators, Dr. Caddy, and Parker's mother. Together, they related the information gathered from family, teachers, and others who knew Parker in addition to reviewing police reports and statements (TR 2209, 2188, 2203, 2212, 2238, 2251, 2277-79). Merely because Parker is dissatisfied with the result or feels other experts would have found mitigation based upon the same evidence does not establish ineffective assistance. Asay v. State, 769 So.2d 974 (Fla. 2000) (reasoning first expert's evaluation is no less competent merely upon production of conflicting evaluation by other expert); Teffeteller v. Dugger, 734 So.2d 1009, 1021-22 (Fla. 1999)

(finding summary denial proper where defendant failed to allege what specific information was available, but unknown to mental health expert); Jones v. State, 732 So.2d 313, 320 (Fla. 1999)(reasoning mental health expert's opinion is not rendered incompetent merely because defendant found other expert to provide conflicting testimony); Rose v. State, 617 So.2d 291 (Fla. 1993) (finding counsel not ineffective where he decided to forego other mental health evidence when expert found defendant suffered from antisocial personality disorder and ruled out organic brain disorder); Correll v. State, 558 So.2d 44 (Fla. 1990) (reasoning mental health exam not inadequate simply because defense able to find later experts to testify favorably based on similar evidence).

To the extent Parker asserts the rejection of mitigation at sentencing establishes Dr. Caddy's negligence, the issue is meritless. As noted above and reincorporated here, Parker confuses "rejection of evidence" with "proving ineffectiveness." Such concepts are not the same and do not prove his claim.

Parker also references Dr. Caddy's disciplinary action and the denial of this claim. The court relied upon the district court's reversal of Dr. Caddy's disciplinary case wherein it noted "Dr. Caddy is a highly respected forensic psychologist in South Florida" and reversed with directions "to rescind all

sanctions imposed upon {Dr. Caddy] and to remit the $3000.00 assessed against him as both a fine and investigative costs." Caddy v. State of Florida, Department of Health, Board of Psychology, 764 So.2d 625 (Fla. 1st DCA 2000). Under the highly deferential standard announced in Strickland, counsel's performance may not be deemed deficient for seeking Dr. Caddy's advice in light of the district court's finding, along with the fact the Board's proceedings did not commence until 1993, some **three years after** Parker's trial. Strickland, 466 U.S. at 694 (reasoning high level of deference must be paid to counsel's performance; distortion of hindsight must be limited as performance evaluated based on facts known at time of trial). Disciplinary action taken against an expert **years after** his involvement in a case does not constitute newly discovered evidence, and should be found to have no impact on the determination of whether the expert rendered effective assistance, absent some showing of deficient performance and prejudice. Hough v. State, 773 So.2d 90 (Fla. 5th DCA 2000).

Parker argues the reversal of Dr. Caddy's Department of Health case did not disprove the underlying allegations of impropriety. However, such does not mandate relief on his

collateral claim.[9] If Dr. Caddy's work was sufficient in 1990, then it matters not whether years later he acted inappropriately in other areas of his life. Parker is not entitled to relief. Cf. O'Callaghan v. State, 542 So.2d 1324, 1325-26 (Fla. 1989) (affirming summary denial of ineffectiveness claim which was based on counsel undergoing bar disciplinary proceedings for alcohol problem); Bryan v. State, 753 So.2d 1244, 1250 n.5 (Fla. 2000)(finding counsel not deficient, thus, his alcoholism was irrelevant); Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995)(affirming court's refusal to hear evidence of counsel's drug use as ineffectiveness claim employs an objective standard - basis of alleged shortcoming irrelevant).

**Other experts** - Parker contends the court did not address the allegation he was denied experts in photography and toolmarking (IB 46). The court initially referenced Parker's claim of denial of such experts, then in its ultimate conclusion states "All of the allegations are conclusively refuted by the record, conclusory in nature, legally insufficient and as such

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[9] Before this Court can grant relief, it must find counsel had a duty to investigate the private life of an expert witness. The imposition of this duty would elevate an expert's morality to the level of a constitutional requirement. Such is not contemplated by either the United States or Florida constitutions. What is guaranteed is the right to a fair trial. When the expert renders a professionally effective evaluation, morality is of no moment.

are not entitled to a hearing." (PCR 1497-98). Thus, in its entirety and in conjunction with the pleading below, the conclusion is supported by the record.

Parker claimed the origin of the bullet should have been challenged in the penalty phase. To the extent he argued this in the initial portion of this point directed to the guilt phase, the State reincorporates its argument made above. Because this evidence was litigated in the guilt phase, where the jurors heard from those who saw the bullet, took the contested photos, and identified photos of the bullet in the victim's sacrum and after extraction, the jurors were able to compare the photos and draw their own conclusion and resolved any differences against Parker. As with Kessinger, this evidence went to a claim of residual doubt. Counsel was not deficient as this evidence was inadmissible Bates, 750 So.2d at 9 n.2; Sims, 681 So.2d at 1117. Prejudice cannot be shown as the evidence had been rejected previously; there is no reasonable possibility the jury would alter its conclusion. Relief was denied properly.

## POINT II

## THE TRIAL COURT PROPERLY RESOLVED THE PUBLIC RECORDS ISSUES RAISED BY PARKER (restated)

Parker challenges the resolution of his public records requests respecting the Broward Sheriff's Office ("BSO") and the

State Attorney's Office (IB 48-49). With respect to BSO, he asserts he should have received internal affairs records and as to the State Attorney, Parker contends the court's review was cursory, thus, an abuse of discretion.

**A. Broward Sheriff's Office Records**[10] - Parker claims the judge abused his discretion when it found BSO had substantially complied with the public records requests. He claims the court erroneously found the request overbroad, unduly burdensome, and irrelevant to the postconviction proceedings. This is meritless.

This Court applies an abuse of discretion standard when reviewing a court's determination on public records. Mills v. State, 786 So.2d 547, 552 (Fla. 2001); Glock v. Moore, 776 So.2d 243, 254 (Fla. 2001). Under this standard, a ruling will be upheld unless it is "arbitrary, fanciful, or unreasonable." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). These claims are meritless as the record reflects the court properly exercised its discretion when denying the request for additional public records.

At the November 2, 1999 hearing, subsequent to the filing

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[10] Parker claims the denial of the public records results in a violation of the Sixth, Eighth, and Fourteenth Amendments. There is no federal constitutional right to public records and there is no Sixth Amendment right to effective assistance of postconviction counsel. Lambrix v. State, 698 So.2d 247 (Fla. 1996).

of Parker's March 24, 1997 shell motion, he filed additional public records demands. The court ordered Parker's counsel ("CCR") to file a motion to compel against all agencies who had not responded to the additional public records requests (PCR 136). This was completed on November 12, 1999 (PCR 138-143). Parker's four demands for additional public records pursuant to Florida Rule of Criminal Procedure 3.852 (h)(2), were originally served on BSO on December 29, 1998, and on January 21, 2000, BSO filed a response and objections to Parker's demands for additional records, originally filed in December of 1998 (PCR 146-148; SPRC 11-26). The response alleged BSO had never received the demands and they were unduly burdensome, overbroad, and irrelevant. Id.

On January 27, 2000, the court stated:

> ...I want to make it clear, the request for public records documents without a predicate is nothing more than a stalling tactic and a fishing expedition. If you have a predicate whereby you think you can show me they're deliberately withholding documents that you need to prove a material issue in the case, I may have a different opinion.

(PCR 159). At the March 8, 2000, public records hearing, BSO's counsel relied upon his written response and objections, which alleged: (1) he never received the additional demands, (2) the request was overbroad and unduly burdensome, and (3) there had been no showing of relevance. CCR argued the request, made

under rule 3.852(h)(2), was not subject to the burdens in rule 3.852 (g) and (i) and because there was a trial issue of police misconduct, the officer's notes and internal affairs files were relevant as the listed officers handled the investigation or were present at the scene. The court found no evidence of misconduct, the demand unduly burdensome/overbroad, and BSO had substantially complied with Chapter 119 and rule 3.852 (PCR 216-17).

On March 20, 2001, CCR filed four motions under rule 3.852(i) and renewed the previous 3.852(h)(2) demands. Prior to the April 18, 2001 Huff hearing, the court heard argument on these requests. CCR alleged that in March, 2001, a newspaper reported allegations of misconduct/negligent police work on the part Captain Scheff (investigation for possible perjury) and Deputy Wiley (allegation of misconduct), thus CCR wanted the notes and internal affairs materials for those deputies involved in the case (PCR 1391-92). The court initially denied the requests, finding the prejudicial affect in the interest of justice outweighed the possible probative value of the information, and it would not reasonably lead to admissible evidence. CCR renewed its original December, 1998 motion filed under rule 3.852(h)(2), which had been denied March 8, 2000. BSO's counsel noted he investigated the rule 3.852(h)(2) request

and found the officers listed had nothing to do with the case (PCR 1183-1198, 1183-1198, 1201-1206, 1313-1330 1313-1330 1295-96,1398).

> The Court: I understand why he is raising it. I am sure everyone else does. Based on your representation, you will give them those two investigating officers' files. The rest of the motion is denied.
>
> ...
>
> The Court: The leave to amend is denied. In an abundance of caution, without prejudice, in case there is, let's say, literally, not figuratively, some smoking gun in these records.

(PCR 1399).

As explained in Sims v. State, 753 So.2d 66, 70-71 (Fla. 2000), rule 3.852(i) allows collateral counsel to obtain additional records at any time if counsel can establish a diligent search of the records repository has been made and "the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence." Although rule 3.852(h)(2) did not require the same showing as does 3.852(i), under rule 3.852(k)(1), the court had the authority to compel or deny disclosure of records.

The record shows Parker failed to establish each record requested was relevant to the proceedings or would lead to admissible evidence. Merely claiming the records could be used

for impeachment (IB 56), does not satisfy this burden.[11] Given this, Parker has failed to establish the court abused its discretion.

Parker fails to specify the harm inflicted from the denial of the "still missing" records. Simply wanting more records does not establish relevancy to anything cognizable for collateral review. Public records access is not an end in and of itself. Rather it is intended for indigent defendants to develop claims cognizable for collateral review. As Parker has obtained the additional records noted above, he has failed to plead a meritorious claim. The ruling was reasonable, meriting affirmance.

The claim that later discovery of the files could result in a procedural bar is meritless. Parker erroneously relies upon Glock v. State, 776 So.2d 243, 254 (Fla. 2001) in which the public records requests occurred after a warrant had been signed. However here, the request was made prior to the signing of a death warrant. Relief must be denied.

**B. State Attorney's notes** - The case law suggests the standard of review is plenary with respect documents claimed as

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[11] Notably, the court required BSO to turn over records related to Captain Scheff and Deputy Wiley. The request for leave to amend was denied **without prejudice**. To date Parker has not requested leave to amend based on information provided on those officers.

exemptions. Arbelaez v. State, 775 So.2d 909, 918 (Fla. 2000) (opining "we have reviewed the challenged documents and conclude that the trial court correctly found that they did not constitute public records"); Ragsdale v. State, 720 So.2d 203, 206 (Fla. 1998) (same). Under Ragsdale, a party claiming public records exemptions and in doubt as to disclosure, must submit the documents to the court for *in camera* inspection. In State v. Kokal, 562 So.2d 324, 327 (Fla. 1990), this Court discussed what constitutes a public record and that prosecutor's notes are not subject to public records disclosure. With the caveat Brady v. Maryland, 373 U.S. 83 (1963) material must be disclosed, this Court relied upon Shevin v. Byron, Harmless, Schaffer, Reid & Associates, Inc., 379 So.2d 633, 640 (Fla. 1980) and Orange County v. Florida Land Co., 450 So.2d 341, 344 (Fla. 5th DCA) in defining non-disclosable attorney's notes. Pointing out a public record "is any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type", this Court found "drafts or notes, which constitute mere precursors of governmental 'records' and are not, in themselves, intended as final evidence of the knowledge to be recorded" including "tapes or notes taken by a secretary as dictation" "lists in rough outline form", list of questions to be asked, outlines, and

notes regarding a meeting attended, and deposition notes are not "public records." State v. Kokal, 562 So.2d 324, 327-28 (Fla. 1990); Young v. State, 739 So.2d 553, 558 (Fla. 1999); Johnson v. Butterworth, 713 So.2d 985, 987 (Fla. 1998). "[P]retrial materials which include notes from the attorneys to themselves designed for their own personal use in remembering certain things or preliminary guides intended to aid the attorneys when they later formalize their knowledge are not within the term 'public record.'" Lopez v. State, 696 So.2d 725, 728 (Fla. 1997). "'[I]t is the State that decides which information must be disclosed' and unless defense counsel brings to the court's attention that exculpatory evidence was withheld, 'the prosecutor's decision on disclosure is final.'" Roberts v. State, 668 So.2d 580, 582 (Fla. 1996).

The procedure announced in Ragsdale, 720 So.2d at 206 was followed. The State submitted materials it believed exempt for the court's *in camera* inspection including prosecutor's notes (exempt under §119.07(3)(S), Fla. Stat.; §906.15, Fla. Stat.; Kokal) and other materials not challenged here. (PCR 230-41). The court reviewed the submission for exemptions and Brady material, finding it to be non-disclosable prosecutor's notes (PCR230-38). The court identified the material as "work product impression of the attorneys" (PCR 230) and agreed some were

handwritten notes on the medical records and depositions (PCR 234-35) and notes from a prosecutor. Given the fact the documents were trial or deposition notes, such fell squarely within the definition of non-public documents, thus, negating the contention such had to be compared to formalized documents, if any. Obviously, the court found the documents to be notes, not communications, hence, there would not be draft and formalized copies to compare.

It matters not whether the judge voiced his hesitation at peering through the document or noted his experience with the State Attorney's Office and its compliance with Brady. What matters is that the record shows the court complied with Ragsdale by looking through the material to determine if anything should be disclosed or was Brady material irrespective of the experience he had with the office (PCR231-32). No Brady material found (PCR 238, 241). The record refutes the insinuation the review was not conducted properly, in fact, the court twice stated it would look for Brady material before concluding none existed (PCR 232, 234). The celerity with which the court reviewed the documents does not establish it was not thorough as the court took between 35 and 45 minutes. Parker has not cited a case demanding a certain amount of time be spent reviewing documents or that multiple drafts along with a final

product must be submitted to prove the material is not public records. The ruling must be affirmed.

## POINT III

### DENIAL OF CLAIMS OF INEFFECTIVENESS REGARDING JUROR MISCONDUCT AND THE RULE PROHIBITING JUROR INTERVIEWS WAS PROPER (restated)

Parker asserts the court erred in summarily denying Claim XIV of his postconviction motion related to ineffectiveness of counsel for not raising and preserving for review alleged penalty phase juror misconduct. He Also challenges the denial of Claim XV related to juror interviews and not declaring Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar unconstitutional. Under Diaz, 719 So.2d at 868, the summary denial was proper as the law and record support the conclusion the matter is barred and meritless.

In rejecting these claims, the court found counsel raised the request for interviews regarding allegations of penalty phase juror misconduct, thus, the matter could have been raised on direct appeal. Having failed to present it there, Parker may not use ineffective assistance to overcome the procedural bar. (PCR 1500). With respect to the interview request by postconviction counsel and the constitutional challenge to the ethical rule prohibiting interviews, the court relied upon Mann v. State, 770 So.2d 1158 (Fla. 2000) in finding the matter

barred and not supported by the law or evidence (PCR 1501).

Prior to sentencing, counsel moved to examine the jurors based upon information in a newspaper article noting an initial life recommendation, yet the final vote for death (TR 2973-74). Reference was made to a second individual, later identified as defense investigator Carlton Moore, who would explain "why a second vote was taken." (TR 2344). After the court resolved the issue of whether the news article supported interviews, and admitted the article in support of mitigation, Moore testified he met a juror after the sentencing vote, who confirmed there had been an initial life recommendation. Yet, because the juror was in a hurry the vote was changed (TR 2349-50; PCR 1439).

Based upon the argument made during the hearing on the motion for juror interviews, it was clear all understood the defense was relying upon allegations of juror misconduct and disregard of the instructions (TR 2337-38, 2342, 2973, 2348-

49).[12] The court determined there was an insufficient[13] basis for requiring juror interviews (TR 2338-39). During continued argument which related to the reporter's subpoena, the court found the reporter had no meritorious information. The court concluded a jury could take as many votes as it wanted and their final polling by the court evinced the verdict . (TR 2345-46).

The claim of juror misconduct and interviews could have been raised on direct appeal. Those issues which were or could have been raised on direct appeal are not subject to collateral attack. Muhammad v. State, 603 So.2d 488, 489 (Fla. 1992). The court properly concluded the matter barred. Rivera v. State, 717 So.2d 477, 487 (Fla. 1998) (finding it improper to recast claim as ineffectiveness in order to relitigate previously denied issue).

However, should this Court reach the merits, it will find

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[12] The jury was instructed: "the fact that the determination of when you recommend a sentence...can be reached by a single ballot, should not influence you to act hastely (sic) or without due regard for the gravity of these proceedings." The State referenced Cook v. State, 542 So.2d 964, 971 (Fla. 1989) and argued the instruction was proper and not misleading, the juror's statement may have been taken out of context, and anything said during deliberations would have no legal significance (TR 2337-38).

[13] The transcript reflects the judge stated "… I find that there is sufficient cause shown. Based on that finding, the motion to examine the jurors is denied." (TR 2338-39). The word should have been "insufficient" given the court's ruling.

neither deficient performance nor prejudice. Defense counsel presented the issue to the court, but received an adverse ruling. He may not be deemed deficient merely because the court ruled against him. Bush v. Wainwright, 505 So.2d 409, 411 (Fla. 1987) (finding counsel's lack of success on motions raised "augurs no ineffectiveness"); Songer v. State, 419 So.2d 1044 (Fla. 1982).

To the extent this Court finds the issue of Moore's allegations were not presented as part of the basis for juror interviews, neither deficient performance nor prejudice can be shown. Moore's testimony was that an unidentified juror participated in a seven to five life recommendation, but because he was in a "hurry", another vote was taken which resulted in an eight to four recommendation.[14] This is a classic example of information which inheres in the verdict and would not support interviews.

"In order to be entitled to juror interviews, [a defendant] must present 'sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire

[14] Parker's allegation as represented by Carlton Moore is incredulous. He would have this Court believe that because an unnamed juror was in a hurry, the jury would take a vote to recommend life, spend more time discussing the matter, and vote to recommend death all because a juror was in a hurry.

proceedings.'" Reaves v. State, 826 So.2d 932, 943 (Fla. 2002) (quoting Johnson v. State, 804 So.2d 1218, 1225 (Fla. 2001)). Continuing, this Court in Reaves noted "[j]uror interviews are not permitted relative to any matter that inheres in the verdict itself and relates to the jury's deliberations. To this end, any jury inquiry is limited to allegations which involve an overt prejudicial act or external influence, such as a juror receiving prejudicial nonrecord evidence or an actual, express agreement between two or more jurors to disregard their juror oaths and instructions." Reaves, 826 So.2d at 943 (footnotes omitted).

The record refutes any juror misconduct from the alleged decision to take an initial vote, discuss the matter further, and again vote. No matter the basis (juror impatience or need to reflect further) the jurors decided to deliberate again. A verdict cannot be impeached by juror conduct which inheres in the verdict and relates to the jurors' deliberative process. Johnson v. State, 593 So.2d 206, 210 (Fla. 1992) (finding verdict may not be impeached by behavior which inheres to jurors' deliberations); Kelly v. State, 569 So.2d 754, 762 (Fla. 1990)(finding judge properly refused to inquire into assertions juror may have changed her vote to meet social engagement; such inhered in verdict); Mitchell v. State, 527 So.2d 179, 181-82

(Fla. 1988)(affirming denial of new trial in spite of affidavit claiming juror was pressured into guilty verdict and other jurors had placed burden on defendant to prove innocence as such inhered in verdict); Songer v. State, 463 So.2d 229, 231 (Fla. 1985). The reason for the jury's vote inhered in the verdict. Hence, there was nothing to support a request for juror interviews.

The record refutes the allegation juror misconduct was not before the court even assuming what was presented in the newspaper and by Moore was accurate. Neither was sufficient as a matter of law to obtain juror interviews. As such, no deficient performance has been shown. Also, no prejudice can be established. Without question, the fact the jury took more than one vote and had discussions between votes inheres to the verdict. Obviously, the jury had not finalized its deliberations. The fact it intended further deliberation is borne out by the subsequent polling where each juror affirmed his verdict. As the jury had not finalized its recommendation until the final vote, no prejudice has been established under Strickland. The court correctly determined the record refuted the claim of ineffectiveness as all the facts were available at trial and were presented and rejected by the court.

The decisions denying juror interviews on postconviction and

rejecting the constitutional challenge to Rule 4-3.5(d)(4)[15] are correct. Parker failed to give the postconviction judge and this Court, anything more than what was presented at sentencing. Based upon the foregoing, including the newspaper facts and Moore's testimony, even if true, show the deliberations inhered to the verdict and would not support juror interviews.

Any constitutional challenge could have been made at trial and on direct appeal. Hence, the issue is barred. Muhammad, 603 So.2d at 489; Kelly v. State, 569 So.2d 754, 756 (Fla. 1990)(holding errors apparent from record are not cognizable in postconviction motion). Further, this Court has found the challenge to the procedure for post-verdict juror interviews barred on postconviction. Rose v. State, 774 So.2d 629, 637 n. 12 (Fla. 2000) (noting claims challenging constitutionality of rules governing juror interviews should be brought on direct appeal); Mann, 770 So.2d at 1160-61 n.2 (finding challenge to juror interview issue barred) (citing Young v. State, 739 So.2d 553 (Fla. 1999)).

Because Florida law allows juror interviews under certain circumstances, there is no constitutional violation. Gilliam v.

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[15] The Rules of Professional Conduct are promulgated to regulate members of the Bar. Parker is not a Bar member, thus, he does not have standing to challenge the applicability of a rule.

State, 582 So.2d 610, 611 (Fla. 1991); Shere v. State, 579 So.2d 86, 94 (Fla. 1991); Roland v. State, 584 So.2d 68, 70 (Fla. 1st DCA 1991); Sconyers v. State, 513 So.2d 1113, 1115 (Fla. 2d DCA 1987). Had Parker made a prima facie showing of misconduct, interviews were possible. His inability to meet the requirements, does not render him exempt from the rules, nor does it render his conviction and sentence constitutionally infirm.

## POINT IV

### THE CLAIM OF INEFFECTIVENESS RELATED TO VOIR DIRE OF JURORS WAS DENIED PROPERLY (restated).

Parker claims counsel was ineffective in not questioning Potential Juror Detrich ("Detrich") about an alleged bias and for not refuting the State's assertion Potential Juror Reno ("Reno") agreed he could follow the law. The challenge to counsel's actions related to Reno are not preserved. Nonetheless, the court properly denied relief as the matter is barred and the claim is meritless. This Court should affirm under the standard of review applicable to summary denials. See Diaz, 719 So.2d at 868 (announcing summary denial of postconviction motion will be affirmed where law and competent substantial evidence supports court's findings).

The challenge to Reno is not preserved. Below, Parker noted

as part of his factual basis, Reno had indicated he was for capital punishment because life did not mean life and the State "falsely asserted," Reno affirmed he could follow the law when he was challenged for cause (PCR 308). Parker did not mention Reno again or connect these facts to an ineffectiveness claim (PCR 308-09). Here, he asserts counsel was ineffective in not refuting the State's assertion respecting Reno. Because these are not the same arguments, the matter is unpreserved. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Should the merits be reached, summary denial was proper. As the court concluded, the propriety of voir dire was reviewed on direct appeal (PCR 1488-89). In Parker, 641 So.2d 373, this Court found "Parker used all of his original ten peremptory challenges and requested six more .... The court held that no cause had been shown, but, in its discretion, gave two more peremptory challenges to the defense." This Court concluded there was no error in the denial of the for cause challenges. Id. In his postconviction motion, Parker attacked the propriety of voir dire, this time arguing ineffectiveness regarding the for cause challenges of two new jurors. He attempted to recast the direct appeal claim as one of ineffectiveness. This is impermissible and was denied properly. Rivera v. State, 717 So.2d 477, 480 n.2 (Fla. 1998) (finding it impermissible to

recast claim which could have been raised on appeal as one of ineffectiveness to overcome bar or relitigate issue); Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995).

The record establishes neither Dietrich nor Reno sat on Parker's jury (TR 743, 2723). As such, even had a for cause challenge been appropriate, the jurors were removed and no prejudice can be shown. "[T]here is no reason for a court deciding an ineffective assistance claim to...address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697. See, Chandler v. United States, 218 F.3d 1305, n. 44 (11th Cir. 2000); Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). The fact counsel may have been required to use a peremptory challenge does not establish a constitutional violation necessitating a finding of ineffectiveness as no prejudice can be shown from the manner in which the jurors were removed. U.S. v. Martinez-Salazar, 120 S.Ct. 774 (2000) (opining "...we have long recognized...[peremptory] challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension"); Ross v. Oklahoma, 487 U.S. 81, 86 (1988) (reasoning while defendant was forced to exercise peremptory challenge to cure court error in denying for cause challenge, such was not

constitutional error); Jefferson v. State, 595 So.2d 38, 41 (Fla. 1992) (agreeing peremptory challenges do not rise to the level of a constitutional guarantee)

Under Strickland's deficiency prong, counsel was not ineffective as the record refutes the factual allegations Parker makes respecting Dietrich and Reno. Citing to trial transcript page 726, he asserts Dietrich indicated a bias toward the State and counsel was ineffective in not challenging him for cause. Yet, the record refutes this as Dietrich avowed he could follow the law and the record establishes counsel was not deficient in his handling of the juror. When questioned by the State, Dietrich noted the death penalty was appropriate in certain cases and he would follow the law outlined by the judge (TR 698-99). When defense counsel's colloquy with Dietrich is read in context it is clear Dietrich showed no bias. Instead, he: (1) acknowledged government agencies are not infallible, (2) agreed Parker had nothing to prove, (3) noted people have been convicted wrongly, and (4) avowed he would not convict unless the State proved its case beyond a reasonable doubt. (TR 725-26). The record refutes Parker's factual claim, thus, counsel was not deficient in declining to strike Dietrich for cause.[16]

[16] "The standard for determining whether a prospective juror may be excused for cause because of his or her views of the death penalty is whether the prospective juror's views would

Summary denial was proper.

Similarly, the record refutes the factual allegations Parker raised with respect to Reno. Parker claims Reno indicated he was unable to follow the law when he indicated he was for capital punishment "because life imprisonment doesn't mean that." (TR 499). It is Parker's position the prosecutor misrepresented that Reno said he could follow the law, and that by not challenging the State's assertion, counsel was ineffective (IB 68).

The record establishes that after noting "life doesn't mean [life]", (TR 498-99) Reno affirmed he would follow the law as Judge Moe instructed and he could be "fair and impartial." At this point, the defense moved to challenge Reno for cause and the State countered that Reno agreed to follow the law (TR 500, 505-06). The record proves the prosecutor correct and refutes Parker's claim.

Also, when questioned by the defense on the "life does not

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prevent or substantially impair the performance of his or her duties as a juror in accordance with the juror's instructions or oath." Fernandez v. State, 730 So.2d 277, 281 (Fla. 1999). See Van Poyke v. Singletary, 715 So.2d 930, 932-34 n.4-5 (Fla. 1998) (citing excerpts from voir dire showing responses established each juror could render decision based upon evidence and court instructions); Henyard v. State, 689 So.2d 239 (Fla. 1996) (finding where prospective juror refused to give unequivocal response she could follow the law, court did not err in excusing juror "for cause").

mean life" comment, Reno explained he did not want to see Parker back out on the streets. Later, counsel attempted to strike Reno for cause. In response to the court's inquiry whether or not the death sentence would be recommended automatically, Reno indicated he could follow the law as instructed by the judge (TR 574, 608, 621-23). The record refutes Parker's allegations. As the factual allegation is refuted by the record, Parker cannot show deficiency from counsel's failure to challenge the State's assertion Reno said he would follow the law. The summary denial should be affirmed.

## POINT V

### PARKER'S CLAIM OF SYSTEMATIC DISCRIMINATION WAS CONCLUSORY AND BARRED (restated)

In summary terms, Parker claims the court erred in denying a hearing on his claim of systematic discrimination in the venire selection and counsel's ineffectiveness in not objecting. Under the standard of review announced in Diaz, 719 So.2d at 868, the judge correctly denied relief as the order is supportd by the law and substantial, competent evidence.

Parker's ineffectiveness claim is not pled sufficiently and should be held waived. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does

not suffice to preserve issues, and these claims are deemed to have been waived."); Cooper v. State, 28 Fla.L.Weekly S497, n.7 (Fla. June 26, 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990).

Below, Parker argued he was denied the equal protection of the law as he was tried by a jury where members of his race were purposely excluded and counsel's failure to object and appellate counsel's failure[17] to raise the issue on appeal was ineffective assistance. (PCR 318-19). The State submitted the claim was barred and legally insufficient (PCR 500). The court agreed (PCR1490-91).

The court determination was correct.[18] Other than Parker

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[17] Challenges to appellate counsel's actions is not cognizable in postconviction litigation, but is reserved for habeas corpus review. Downs v. State, 740 So.2d 506, 509 n.5 (Fla. 1999) (holding claims of ineffectiveness of appellate counsel are not cognizable in a rule 3.850 motion for postconviction relief).

[18] In order to show a prima facie violation of the fair cross section requirement, a defendant must show (1) the group alleged to be excluded is a distinctive group within the community; (2) representation of this group in the venire is not fair and reasonable in relation to the number of such persons in the community; and (3) that under representation is due to a systematic exclusion from the jury selection process. Duren v. Missouri, 439 U.S. 357, 364 (1979). Here, however, Parker must also meet the pleading requirements of Strickland. As found below, the matter is barred. The record reflects one African-American juror was excused by Parker, while another was excused for misconduct by the court over a defense objection (TR 613-16; 839-63). The exclusion of at least one African-American was an issue which could have been raised on appeal, hence the matter

asserting his venire of 50 included two African-Americans, and he was prejudiced by the systematic exclusion of members of his race, Parker failed to plead with specificity what evidence he would offer to support the claim of discrimination or that the entire venire summoned by the Clerk of Court, not just the panel called to Parker's trial, was selected in a discriminatory manner. (PCR 318; SPCR2 28-29). Under Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989) a postconviction motion containing conclusory allegations of ineffective assistance is not entitled to an evidentiary hearing. Review of Parker's pleading (PCR 319; SPCR2 28-29) establishes the its insufficienty,[19] thus,

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is barred in this respect. Muhammad, 603 So.2d at 489 (finding issues which could have been litigated on direct appeal are not cognizable through collateral attack). Similarly, Parker should not be heard to complain about a systematic exclusion of African-Americans from his jury when he excused a member. He may not argue ineffectiveness to raise a claim which could have been brought on direct appeal. Because counsel objected to the exclusion of the remaining African-American juror, the issue could have been appealed, but was not. See, Parker, 641 So.2d at 369. Based upon this, the court correctly found the claim barred. Medina, 573 So.2d at 295 (holding allegations of ineffectiveness cannot serve as second appeal).

[19] Foster v. State, 614 So.2d 455, 463-64 (Fla. 1992), cert. denied, 510 U.S. 951 (1993), analyzing McCleskey v. Kemp, 481 U.S. 279 (1987) and citing Harris v. Pulley, 885 F.2d 1354, 1375 (9th Cir. 1988), is instructive where this Court found no entitlement to relief or a hearing on a claim of discrimination in seeking the death penalty absent a showing "the decisionmakers acted with discriminatory purpose." Like Foster, Parker never alleged his jury acted with "discriminatory purpose."

relief was denied properly.

The Supreme Court held a defendant does not have a constitutional right to have a jury partially or completely composed of members of his race. Swain v. Alabama, 380 U.S. 202, 208 (1965) (concluding Constitution does not allow defendant "to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit juries are drawn."),overruled on other grounds, Batson v. Kentucky, 476 U.S. 79 (1986). In fact, the Supreme Court rejected the argument purposeful discrimination could be satisfactorily proved solely by under-representation. Swain, 380 U.S. at 308-09. There is no constitutional requirement a jury be comprised proportionally of a cross-section of the community. Hoyt v. Florida, 368 U.S. 57, 59 (1961). Simply because a jury does not reflect statistically the racial make-up of a community does not establish discrimination. Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (imposing no requirement petit juries mirror the community - defendant not entitled to jury of particular composition, only that venire from which juries are selected must not systematically exclude distinctive groups). Because Parker is not entitled to a particular jury composition, he is unable to show that the lack of an objection was deficient. Moreover, because there was no discrimination, then

no prejudice has been shown, and the denial of relief should be affirmed.

## POINT VI

### THE COURT PROPERLY DENIED PARKER'S CLAIM OF INEFFECTIVE ASSISTANCE RELATED TO THE PENALTY PHASE INSTRUCTIONS (restated)

Merely referencing his collateral Claim X and identifying the allegations made below, Parker maintains the judge erred in denying the claim. Summary denials of collateral relief should be affirmed where the law and competent evidence support the ruling. Diaz, 719 So.2d at 868. The record reflects the propriety of the instructions was raised and rejected on appeal, thus, as the court correctly found, the matter was procedurally barred.

Initially, it must be noted, except for complaining counsel was ineffective, identifying the claim denied below, and citing Mullany v. Wilber, 421 U.S. 684 (1974) and Ring v. Arizona, 122 S.Ct. 2448 (2002), Parker fails to note the instruction and comment he finds improper. He also fails to give argument for the ineffectiveness issue or explain how the cited cases apply. This is an improperly pled appellate argument and the issue should be found waived. See Duest, 555 So.2d at 852.

Assuming this Court reaches the merits, the claim was denied properly. Although not stated here, in his postconviction

motion, Parker asserted the instruction regarding the weighing of the aggravators and mitigators shifted the burden to him to prove life was the appropriate sentence and counsel was ineffective for not objecting (PCR 369-70). Pre-trial and on direct appeal Issue VII, Parker challenged the jury instructions as shifting the burden to him to prove mitigation and that it out weighed the aggravation (TR 2530-31; PCR 675-76). This Court concluded there was no error in denying Parker's instructions and they were either covered by the "standard instructions, misstate[d] the law, or were not supported by the evidence." Parker, 641 So.2d at 376. This Court found "no error in the instructions the court did give to the jury" and the record supported the finding of four aggravators and nothing in mitigation. Id. at 376-77. The question whether the jury was instructed properly was resolved adversely to Parker, thus, the court was correct to find him barred from raising the issue on postconviction, either standing alone or as an ineffectiveness claim. Rivera, 717 So.2d at 482 n.2, 5 (finding it impermissible to recast appellate claim as one of ineffectiveness in order to overcome procedural bar or relitigate direct appeal issue); Muhammad, 603 So.2d at 489 (finding claims which were or could have been raised on appeal barred on postconviction); Medina, 573 So.2d at 295 (holding claims of ineffectiveness cannot be

used to circumvent rule postconviction cannot serve as second appeal).

This Court should determine counsel was not deficient nor were his actions prejudicial as this Court found he had objected to the instructions and those given were proper. Parker, 641 So.2d at 376. Likewise, the prosecutorial comment identified in Parker's postconviction motion (PCR 369) tracked the approved jury instruction, thus, it was professional not to object. Harvey v. Dugger, 656 So.2d 1253, 1257 n. 5 (Fla. 1955) (rejecting claim penalty phase instructions improperly shifted burden to defense). Parker was not prejudiced as no mitigation was found to exist. Hamblen v. Dugger, 546 So.2d 1039, 1041 (Fla. 1989) (rejecting claim burden was shifted to defense to prove death inappropriate in light of conclusion no mitigation was proven). Because four aggravators were proven and no mitigation shown, the aggravation conclusively outweighed the mitigation and the death sentence is proper. There is no possibility the sentence would have been "life" had a different instruction been given. Strickland has not been met and the summary denial was proper. Kennedy, 547 So.2d at 913 (finding summary denial correct as record refutes claim). This is essentially a legal claim which could be resolved on the record.

To the extent Parker relies upon Ring,[20] that decision offers no basis for relief.[21] Ring is not retroactive[22], or

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[20] Further, Parker has not explained how Ring supports his argument, thus, the matter is waived. Duest, 555 So.2d at 852.

[21] On direct appeal, Parker did not challenge his capital sentence on Sixth Amendment grounds (PCR 670-97). He should not be permitted to rely upon Ring for support. The issue should be found barred. While Ring was decided recently, the issue it addressed is neither new nor novel. Instead, it, or a variation, known prior to Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing). Also, because he challenged the constitutionality on direct appeal, Parker, 641 So.2d at 377, he is barred from asserting the instant claim. Medina v. State, 573 So.2d 293, 295 (Fla. 1990).

[22] Ring and Apprendi are not retroactive under either the federal case law or Witt v. State, 387 So.2d 922, 929-30 (Fla. 1980). A new decision is entitled to retroactive application only where it is of fundamental significance, which so drastically alters the underpinnings of the sentence that "obvious injustice" exists. Id., at 929-30; New v. State, 807 So.2d 52 (Fla. 2001). The Supreme Court has held an Apprendi claim is not plain error, U.S. v. Cotton, 535 U.S. 625, 631-33 (2002) (holding indictment's failure to include quantity of drugs was Apprendi error, but did not affect fairness of proceedings; it was not plain error). Consequently, if an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. Ring, 536 U.S. at 620-21 (noting Ring's impact would be lessened by the non-retroactivity principle of Teague v. Lane, 489 U.S. 2888 (1989))(O'Connor, J. dissenting); McCoy v. U.S, 266 F.3d 1245 (11th Cir. 2001)(holding Apprendi not retroactive). U.S. v. Sanders, 247 F.3d 139, 150-151 (4th Cir 2002) (concluding Apprendi not retroactive). Because Ring is an application of Apprendi, Ring is not retroactive. In re Johnson, 2003 U.S. App. Lexis 11514 *4 (5th Cir. 2003); Moore v. Kinney, 320 F.3d 767, n3 (8th Cir. 2003) (en banc); Trueblood v. Davis, 301 F.3d 784, 788 (7th Cir. 2002); Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002), cert. denied, 153 L.Ed.2d 865 (2002). Three state supreme courts have rejected Ring's retroactivity. State v. Lotter, 266 Neb. 245

applicable to Florida's capital sentencing,[23] and the "prior violent felony" and "felony murder" aggravators were found.[24] This Court noted in Cox v. State, 819 So.2d 705, 725 (2002) the

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(Neb. 2003); Arizona v. Towery, 64 P.3d 828 (Ariz. 2003); Colwell v. State, 59 P.3d 463 (Nev. 2002). Although Missouri found Ring retroactive, State v. Whitfield, 2003 WL 21386276 (Mo. June 17, 2003), the federal circuit court covering Missouri found Ring not retroactive. Whitfield v. Bowersox, 324 F.3d 1009, 1012 n.1 (8th Cir. 2003). The right to a jury trial has not been applied retroactively. DeStefano v. Woods, 392 U.S. 631 (1968) (refusing to apply right to jury trial retroactively); Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing).

[23] Neither Ring, nor Ring-based arguments were presented to the trial or appellate courts before. The issue should be found barred in addition to being found not retroactive. This Court has rejected repeatedly challenges to Florida's capital sentencing. Hodges v. State, 28 Fla.L.Weekly S475, n.8, 9 (Fla. June 19, 2003); Pace v. State, 28 Fla. L. Weekly s415 (Fla. May 22, 2003); Duest v. State, 28 Fla.L.Weekly S506 (Fla. June 26, 2003); Pace v. State, 28 Fla.L.Weekly s415 (Fla. May 22, 2003); Jones v. State, 28 Fla.L.Weekly s395 (Fla. May 8, 2003); Chandler v. State, 28 Fla.L.Weekly, s329 (Fla. April 17, 2003); Lugo v. State, 845 So.2d 74, 119 n.79 (Fla. 2003); Butler v. State, 842 So.2d 817, 834 (Fla. 2003); Grim v. State, 841 So.2d 455, 465 (Fla. 2003); Porter v. Crosby, 840 So.2d 981, 986 (Fla. 2003); Anderson v. State, 841 So.2d 390 (Fla. 2003); Cox v. State, 819 So.2d 705 (Fla. 2002); Spencer v. State, 842 So.2d 52, 72 (Fla. 2003); Fotopoulos v. State, 838 So.2d 1122 (Fla. 2002); Doorbal v. State, 837 So.2d 940 (Fla. 2003); Bruno v. Moore, 838 So.2d 485 (Fla. 2002); Bottoson v. Moore, 833 So.2d 693 (Fla. 2002); King v. Moore, 831 So.2d 143 (Fla. 2002); Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001).

[24] Even under Ring, the sentence is proper. This Court has rejected Ring claims where a prior violent felony or felony murder aggravator was found. Lugo, 845 So.2d at 119; Kormondy v. State, 845 So.2d 41 (Fla. 2003); Anderson, 841 So.2d at 408-09; Doorbal, 837 So.2d at 940; Israel v. State, 837 So.2d 381 (Fla. 2002).

burden shifting argument has been rejected repeatedly and is meritless. Freeman v. State, 761 So.2d 1055, 1067 (Fla. 2000); Shellito v. State, 701 So.2d 837, 842-43 (Fla. 1997). It is not ineffective to forego challenging matters raised and rejected numerous times by this Court. Jones v. State, 845 So.2d 55 (Fla. 2003) (rejecting claim of ineffectiveness for not challenging standard jury instruction on basis it shifts burden to defense); Cherry, 781 So.2d at 1054 (rejecting as meritless claim counsel was ineffective for not objecting to penalty phase instructions where jury was given standard instructions); Downs, 740 So.2d at 518 (noting counsel's failure to object to valid standard instruction is not ineffective); Mendyk v. State, 592 So.2d 1076, 1080 (Fla. 1992), (same), receded from other grounds, Hoffman v. State, 613 So.2d 405 (Fla. 1992). Here, counsel did object at trial and direct appeal on the basis of burden shifting (TR 2530-31; PCR 675-76). The record refutes the allegation and the denial must be affirmed.

## POINT VII

### THE CLAIM OF A CALDWELL VIOLATION WAS DENIED PROPERLY (restated)

Referencing collateral Claim XIII, Parker asserts counsel failed to "effectively object" to prosecutorial comments and court instructions which violated Caldwell v. Mississippi, 472

U.S. 320 (1985) and Ring.[25] This claim is not preserved for appeal and the issue is not pled sufficiently. Summary denial was proper under the standard of review announced in Diaz, 719 So.2d at 868. The order should be affirmed as the law and facts support the ruling.

Below, Parker did not reference counsel's actions respecting Caldwell and the jury instructions (PCR 387-90). Hence, the matter is not preserved. Steinhorst, 412 So.2d at 338. Also, he does not plead this issue fully, but makes conclusory statements in referencing his claim below and the new issue of deficient performance. In fact the prejudice prong of Strickland is not even mentioned. Although he asserts there were improper prosecutorial comments, Parker does not identify them. All record cites are to the instructions given by the court. These deficiencies demand the matter be considered waived, Duest, 555 So.2d at 852, or barred Kennedy, 547 So.2d at 913.

In denying this claim, the court noted the standard instructions had been given and affirmed by this Court. (PCR 1499). On direct appeal, Parker raised as Points VIII and XII

[25] Because Parker did not challenge his capital sentence on Sixth Amendment grounds on direct appeal (PCR 670-97), he may not rely upon Ring for support and the matter is procedurally barred. The State reincorporates it Ring argument presented in Point VI.

(PCR 678, 687-88) challenges to instructions on the jury's sentencing role and the constitutionality under Caldwell. In response, this Court stated "the constitutional challenges have been rejected previously, and we refuse to reconsider them." Parker, 641 So.2d at 377. Because a postconviction motion may not be used as a second appeal, the court correctly denied relief. Muhammad, 603 So.2d at 489; Harvey, 656 So.2d at 1255-56 (reasoning challenges to jury instruction procedurally barred as it was raised on direct appeal); Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1988) (same).

Caldwell challenges have been rejected repeatedly. "[T]he standard jury instruction fully advises the jury of the importance of its role, correctly states the law...and does not denigrate the role of the jury." Brown v. State, 721 So.2d 274, 283 (Fla. 1998)(citation omitted); Burns v. State, 699 So.2d 646 (Fla. 1997); Turner v. Dugger, 614 So.2d 1075 (Fla. 1992). It is unnecessary to inform jurors under what conditions the advisory opinion would be overridden. Burns, 699 So.2d at 654. Should the merits be reached, counsel was not ineffective as the standard instruction was given. Floyd v. State, 808 So.2d 175, 191 n.10 (Fla. 2002) (finding no ineffectiveness where counsel did not raise Caldwell violation); Thomas v. State, 838 So.2d 535, 541-42 (Fla. 2003) (same); Mendyk, 592 So.2d at 1080

(concluding when jury instructions are proper counsel is not ineffective for not challenging them).

## POINT VIII

### PARKER'S CHALLENGE TO THE PROPORTIONALITY OF HIS SENTENCE IS BARRED (restated)

Parker would have this Court conduct another proportionality review using the evidence he suggests counsel failed to present. In conclusory terms Parker references the collateral claims where he noted more evidence should have been presented. Not only is the claim insufficiently pled, Duest, 555 So.2d at 852, but Parker does not apply the proper standard for analysis.

In support, Parker cites Almeida v. State, 748 So.2d 922 (Fla. 1999), Besara v. State, 656 So.2d 441 (Fla. 1998), and Proffitt v. State, 510 So.2d 896 (Fla. 1987). All are direct appeal cases where proportionality review is mandated. Yet, this is a collateral attack and the analysis to be conducted is different. These cases are not controlling.

When claims of ineffective assistance of counsel are raised, the applicable standard is Strickland, and the court must assess whether counsel's performance was deficient and prejudicial. To establish prejudice, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The appellate court does not

conduct another proportionality review. It merely assesses whether the missing evidence was the result of counsel's deficiency and whether there is a reasonable probability the proceedings would have been different had the evidence been offered. Because this analysis has been conducted in Point I, the State reincorporates its answer here, reasserting counsel was not ineffective.

## POINT IX

### THE CLAIM THE SENTENCE WAS IMPOSED PURSUANT TO A PATTERN OF DISCRIMINATION IS IMPROPERLY PLED AND SUMMARY DENIAL WAS CORRECT (restated)

Merely noting the postconviction claim raised below, Parker alleges summarily was improper. This issue does not satisfy the pleading requirements of Duest, 555 So.2d at 852 and should be found waived. Under Diaz, 719 So.2d at 868, the standard of review is that a summary denial will be affirmed if supported by the law and competent substantial evidence. The denial meets this standard and should be affirmed.

In the postconviction motion, Parker referenced law review articles and reports presenting a statistical analysis of death sentences (PCR 100-04). Citing Dobbs v. Zant, 720 F.Supp. 1566, 1572 (N.D. Ga. 1989) and McClesky v. Kemp, 481 U.S. 279, 282 (1987), he admitted to succeed he would have to show "the decision-makers in his case acted with discriminatory purpose,

or that the decision-makers possessed racial biases that created 'an unacceptable risk that affected the sentencing decision.'" Yet, he offered the court nothing more than he was a black defendant accused of killing a white victim and the death sentence "was the direct result of the inherent discrimination in Florida's death penalty statute." (PCR 398, 402). The court recognized the pleading deficiency in its denial of the claim. (PCR 1501-02).

In Foster, 614 So.2d at 463-64 , this Court rejected the defendant's claim of discrimination in capital sentencing as Foster, like the defendant in McClesky v. Kemp, "offered no evidence specific to his own case to support an inference that racial considerations played a part in his sentence." This Court relied upon Harris, 885 F.2d at 1375 to affirm the summary denial as the defendant offered no proof his decision-makers "acted with discriminatory purpose." Parker offered far less, as such, the summary denial should be affirmed.

**POINT X**

**THE CHALLENGE TO THE AGGRAVATOR INSTRUCTIONS IS INSUFFICIENTLY PLED AND BARRED (restated)**

In wholly conclusory terms,[26] Parker asserts either counsel

[26] Conclusory appellate arguments which merely cite to a prior pleading are insufficient and will be deemed waived. Duest, 555 So.2d at 852; Roberts, 568 So.2d at 1260. Parker's argument meets this definition ans should be considered waived.

was ineffective or the court erred in giving "inadequate and vague" instructions. The standard of review to be applied, announced in Diaz, 719 So.2d at 868, is that the summary denial will be affirmed where the law and competent substantial evidence supports it.

Below Parker claimed the jury instructions related to the four aggravators were improper and counsel was ineffective (PCR 360). At trial, counsel requested 30 special jury instructions, all of which were rejected (TR 2783-50, 2274) and on appeal he challenged that decision along with the sufficiency of the evidence supporting the aggravation, with the exception of the prior violent felony aggravator (PCR 677-78, 680-83). Although in a footnote it was noted challenges to the avoid arrest and great risk aggravators had not been preserved, this Court specifically found the objection to the felony murder aggravator had been rejected previously and that there was "no error in the instructions the court did give to the jury." Parker, 641 So.2d at 376-77 n.12. This unequivocal statement establishes all the instructions met constitutional muster. Any postconviction challenge is barred.

Constitutional challenges to all Parker's aggravators, have been rejected. Hudson v. State, 708 So.2d 256, 261 (Fla. 1998) (prior violent felony aggravator); Blanco v. State, 706 So.2d 7,

11 (Fla. 1997) (felony murder); Banks v. State, 700 So.2d 363, 367 (Fla. 1997) (same); Parker v. Dugger, 537 So.2d 969 (Fla. 1988) (same); Davis v. State, 698 So.2d 1182, 192-93 (Fla. 1997) (avoid arrest); Wike v. State, 698 So.2d 817 (Fla. 1997)(same); Whitton v. State, 649 So.2d 861, 867 n. 10 (Fla. 1994)(same); Van Poyck v. State, 564 So.2d 1066, 1070 (Fla. 1990) ( great risk). Based upon this, counsel performance was not ineffective as the instructions given, challenged or unchallenged, were proper. Moreover, this Court had found the record supported the finding of the aggravators. Hence, neither deficient performance nor prejudice under Strickland can be established as there is no reasonable probability, that had the instructions been challenged the result of the proceeding would have been different. Sweet v. Moore, 822 So.2d 1269, 1275 (Fla. 2002) (rejecting suggestion counsel could be ineffective as this Court concluded on direct appeal trial evidence clearly established avoid arrest aggravator); Arbelaez v. State, 775 So.2d 909, 915 (Fla. 2000) (concluding even if counsel were deficient for not objecting to instruction there could be no prejudice as evidence established aggravator); Mendyk, 592 So.2d at 1080 (holding when jury instructions are proper counsel is not ineffective in failing to object). The summary denial was proper.

**POINT XI**

**FLORIDA'S CAPITAL SENTENCING IS CONSTITUTIONAL**

In two sentences, Parker references postconviction Claim XVII and asserts error. The issue is waived as it does not satisfy the pleading requirements of Duest, 555 So.2d at 852. Nonetheless, under Diaz, 719 So.2d at 868, the standard of review is a summary denial will be affirmed if supported by the law and competent substantial evidence. The court's order meets this standard.

Below, Parker claimed Florida's capital sentencing denied him due process and constituted "cruel and unusual punishment on its face and as applied" based upon the: (1) form of execution; (2) standard of proof for weighing aggravators and mitigators; (3) lack of independent reweighing of the factors; (4) vagueness, inconsistency in application of aggravators; and (5) use of the felony murder aggravator. While he claimed "[t]o the extent defense counsel failed to properly preserve this issue," counsel rendered prejudicially deficient assistance[27] (PCR 403-

[27] The allegation of ineffectiveness is conclusory and barred. Asay, 769 So.2d at 989 (finding "one sentence" conclusory allegation improper pleading and attempt to relitigate barred claims); Freeman, 761 So.2d at 1067(finding bare allegation of ineffectiveness does not overcome bar of underlying claim); Medina, 573 So.2d at 295 (holding ineffectiveness claim may not be used to circumvent rule against postconviction serving as second appeal; Rivera, 717 So.2d at 482 n.5 (finding claim barred as it merely used different argument to raise prior claim); Marajah v. State, 684 So.2d 726,

04), Parker has abandoned the issue here.

At trial and on appeal, counsel raised constitutional challenges to the death penalty (PCR 670-78, 680-84, 687-97, 1076-1144). All were denied, and such rulings were affirmed on appeal. Parker, 641 So.2d at 376-77. The court correctly denied relief as the claim was barred. Parker is not permitted to relitigate issues which were raised and rejected on appeal. Teffeteller v. State, 734 So.2d 1009 (Fla. 1999); Muhammad, 603 So.2d at 489.

Should this Court reach the merits, it will recognize Florida's capital sentencing has been found constitutional in light of a myriad of challenges. Bottoson, 833 So.2d at 695; King, 831 So.2d at 143; Mills, 786 So.2d at 537; Sims v. Moore, 754 So.2d 657 (Fla. 2000); Provenzano v. Moore, 744 So.2d 413, (Fla. 1999); Remeta v. Singletary, 717 So.2d 536 (Fla. 1998); Pooler v. State,

704 So.2d 1375 (Fla. 1997); Hunter v. State, 660 So.2d 244, 252-53 (Fla. 1995); Parker 641 So.2d at 376-77; Thompson v. State, 619 So.2d 261, 267 (Fla. 1993); Henry v. State, 613 So.2d 429, 433 n.11, 13 (Fla. 1992); Dougan v. State, 595 So.2d 1, 4 (Fla. 1992); Sochor v. State, 619 So.2d 285 at 292; Young v. State, 579 So.2d 721 (Fla. 1991); Robinson v. State, 574 So.2d 108

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728 (Fla. 1996).

(Fla. 1991). This claim fails procedurally and on its merits.

## POINT XII

### EXECUTION BY ELECTROCUTION OR LETHAL INJECTION IS CONSTITUTIONAL (restated)

In conclusory fashion, Parker identifies his postconviction claim and asserts execution by electrocution or lethal injection is unconstitutional and violative of international law. This issue is waived under Duest, 555 So.2d at 852, and given its repeated rejection by this Court, the summary denial meets the standard of review noted in Diaz, 719 So.2d at 868.

In Point XI, reincorporated here, capital sentencing is constitutional. Specifically, execution by lethal injection and electrocution have been upheld Arbelaez v. State, 775 So.2d 909 (Fla. 2000); Kearse v. State, 770 So.2d 1119 (Fla.2000); Sims, 754 So.2d at 657; Bryan, 753 So.2d at 1253; Provenzano, 744 So.2d at 413; San Martin v. State, 705 So.2d 1337, 1350 (Fla. 1997). This Court has rejected claims based on international law. Knight v. State, 746 So.2d 423, 437 (Fla. 1998); Arango v. State, 437 So.2d 1099, 1104 (Fla. 1983). Parker has offered no basis for altering this Court's well settled position. The ruling must be affirmed.

## POINT XIII

### PARKER'S CLAIM OF CUMULATIVE ERRORS IS PROCEDURALLY BARRED AND MERITLESS (restated)

Without identifying the errors, Parker asserts his trial was unfair due to their cumulative effect. Parker cites several cases which recognize cumulative errors may deprive a defendant of a fair trial. However, as answered in Points I - XII, reincorporated here, no errors occurred below, thus, there can be no cumulative effect necessitating a new trial. Moreover, the effect of cumulative error is a direct appeal issue and having failed to raise it there, Parker is procedurally barred. Occhicone v. State, 768 So.2d 1037, 1040 n.3 (Fla. 2000) (holding cumulative errors argument is direct appeal issue and procedurally barred in collateral review); Torres-Arboleda v. Dugger, 636 So.2d 1321, 1323-24 (Fla. 1994). Because the individual claims are either procedurally barred or meritless, *a fortiori,* Parker has suffered no cumulative effect which invalidates his sentence. Downs, 740 So.2d at 509 (finding where allegations of individual errors are meritless, cumulative error argument must fall); Melendez v. State, 718 So.2d 746, 749 (Fla. 1998); Zeigler v. State, 452 So.2d 537, 539 (Fla. 1984), sentence vacated other grounds, 524 So.2d 419 (Fla. 1988). This claim should be denied summarily.

## POINT XIV

### PARKER'S CLAIM HE IS INSANE TO BE EXECUTED IS PREMATURE AND PLED INSUFFICIENTLY (restated).

Not only does Parker admit his claim is premature, as he did below, but he merely references that claim, without argument. In denying relief, the court accepted Parker's representation of prematurity and note no facts were offered in support of the claim (PCR 405, 1502-03). Without factual support for the claim, summary denial was proper. LeCroy, 727 So.2d at 239 (upholding summary denial where no factual support provided); Engle v. State, 576 So.2d 698, 700 (Fla. 1992). The conclusory nature of the appellate argument demands it be deemed waived. Duest, 555 So.2d at 852. However, the court's order is supported by the law, thus it should be affirmed. Diaz, 719 So.2d at 868.

## CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of postconviction relief.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Dan D. Hallenberg, Esq., Capital Collateral Regional Counsel - South, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301 on August 12, 2003.

_____
LESLIE T. CAMPBELL

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on August 12, 2003.

_____
LESLIE T. CAMPBELL