**IN THE SUPREME COURT OF FLORIDA**

**GEORGE WALLACE BROWN,**

**Appellant,**

**v.** **CASE NO. SC02-1787**

**STATE OF FLORIDA,**

**Appellee.**
_____/

**ON APPEAL FROM THE CIRCUIT COURT**
**OF THE TENTH JUDICIAL CIRCUIT,**
**IN AND FOR POLK COUNTY, STATE OF FLORIDA**

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# ANSWER BRIEF OF APPELLEE

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## OTHER AUTHORITIES

## PRELIMINARY STATEMENT

References to the direct appeal record will be designated as (DAR ___). References to the instant post-conviction record will be designated as (R. Vol. #, p #).

## STATEMENT OF THE CASE AND FACTS

Mr. Brown was charged by indictment and convicted of first degree murder and armed robbery (DAR 1257-1258). Following a penalty phase proceeding the jury recommended a sentence of death by an eight to four vote (DAR 2093). The trial court imposed a sentence of death finding three aggravating factors (prior violent felony conviction, murder committed during the course of a robbery, and that it was especially heinous, atrocious or cruel) and no mitigating circumstances. The facts are cogently summarized in this Court's opinion affirming the judgment and sentence. Brown v. State, 644 So. 2d 52 (Fla. 1994).

> When defendant George Brown was arrested on an unrelated warrant in Englewood, Colorado, on May 1, 1990, he had in his possession two wallets, his own and one containing credit cards in the name of Horace Brown. He told Detective Hess, "Horace D. Brown is dead. He was murdered eight days ago." He added quickly, "No, no, I didn't do it, but I was the only one that was a witness to it." Brown said he wanted to talk to an investigator, and later that evening after being told of his rights and signing a waiver gave Detective Lackey an account of the crime, paraphrased below:
>
> > George met Horace at a bar called Sam's in an unspecified location on April 22, 1990, and after drinking with him asked Horace if he would drive him to his girlfriend's in Polk City, Florida. On the way, Horace drove onto a dirt road and met a friend named

> Danny in another car. While Horace was in Danny's car, George left in Horace's car, drove to his girlfriend's, and returned an hour later. He found Horace's wallet, watch, and papers on the ground where Danny's car had been, and then after driving down the road found Horace's body. The body was approximately twenty-five feet off the road, lying feet first on its stomach in weeds. The body was bloody and when George could find no pulse, he got scared and left. He did not go to the police because he had outstanding warrants and was afraid he would be charged with the killing. He drove to Orlando, cashed a check from Horace's checkbook for $650, bought a car, and drove to Nashville where he planned on becoming a country music star under the stage name "K.C. Cannon." Two days later, he left Nashville and drove to Colorado, where he was arrested.

Based on Brown's statement, Colorado police contacted Polk County Sheriff's deputies who located Horace's decomposing body in a ditch where Brown said it would be and in the posture he had described. Horace had been stabbed three times. Detective Ore of the Polk County Sheriff's Office flew to Colorado and interviewed Brown on May 2 after reminding him of his rights and showing him his signed waiver form. Brown gave roughly the same account of events at this session. His girlfriend, Judy, subsequently told police that he had left her house on foot in the early evening on the night of the killing, and had returned later that night driving a car she had not seen before. On returning, he had blood on his clothes and told her he had been in a fight. She noticed that a pocket knife she normally kept on her nightstand was missing. He packed his belongings and left that night.

(Id. at 52-53)

At the penalty phase, trial defense counsel Doyel called clinical neuropsychologist Dr. Henry Dee (DAR 1306-1332). Dr. Dee met with and evaluated appellant George W. Brown, interviewed him and tested him for nine to twelve hours (DAR 1309). According to Dr. Dee, appellant was conceived outside his mother's marriage and when she returned to her husband the husband indicated to her that in order for her to come back she would have "to get rid of the bastards." Brown was turned over to a maternal aunt who ran a couple of houses of ill repute when he was about two years old (DAR 1309). The state became aware of his living situation, removed him and placed him in a series of foster homes until his natural father took custody of him. The relationship was a poor one; the father was abusive, beat him frequently (and at age sixteen with a tire iron) and in 1967 apparently shot him in the head with a .22 caliber revolver. He was hospitalized, had a wound in the left occipital area and began to have uncontrollable rage reactions. Brown associated the rage reactions to the gunshot wound during his 1974 hospitalization in Montana. The records indicate a long history of emotional and social maladjustment characterized by explosive temper outbursts; he had been married on five different occasions. His work history was spotty because he

could not accept authority. The Montana records indicated Brown was manipulative, doesn't accept the consequences of his actions and no gross evidence of psychosis was noted. His coping mechanisms were quite defective (DAR 1310-11). The Montana commitment was voluntary. Appellant informed Dr. Dee that his father was alcoholic and extremely abusive, exacerbated by the fact that the appellant was very protective of his sister Anita who was terminally ill with cancer. Brown had seventeen half brothers and sisters, but Anita was the only sibling with whom he had a relationship. The father was a con man with a very bad reputation and people expected appellant to be the same way. Brown didn't care what happened to him since he had no real family or friends. He had completed two years of college but left and tried work when he couldn't afford to continue. He bought a couple of trucks and went bankrupt (DAR 1312-1313). He attributed the failure of his marriages to alcoholism, which was consistent with Dr. Dee's findings. Brown scored relatively high on the WAIS test, an IQ of 117 (DAR 1314). He had a Full Scale Memory Quotient of 103 indicating an impairment of memory (DAR 1315). This was indicative of cerebral injury consistent with his history (hospital records in Montana and Brown's claims of numerous blows to his head in various fights and a 1968 automobile accident)(DAR 1316). There was a report by Dr.

Garcia of Winter Haven in 1990, diagnosing Brown as an epileptic with a four month history of weakness on the left side of the body (hemiparesis) which could indicate something's wrong in the brain. Dr. Dee opined he had an organic brain syndrome and alcoholism. His syndrome was manifested by impulsiveness, overreacting and undercontrolled behavior with a great deal of suspiciousness and distrust of other people, and very rapid mood changes (DAR 1317). He is a very assertive, aggressive person, bold and uninhibited and tolerates stress a good deal. Dr. Dee continued that Brown is very easily hurt and wounded by what other people say and the way they act towards him. He has never had any kind of nurturing or close relationships in his life and hasn't been successful in any of them (DAR 1319). He was more tense than 96% of the population. His personality tests indicate clearly an Organic Personality Disorder (DAR 1320-1321). The tests measured that he was significantly depressed. Dr. Dee thought both statutory mental mitigators were present (DAR 1322-1323).

The defense at penalty phase also called appellant's mother Juanita Lamey (DAR 1333-1356). She testified that Ed Eaton, the father of her first three children, was an alcoholic and abusive to both her and the children. She left and met appellant's father, Willie Brown, by whom she had George, Anita and Diane.

She did not marry Willie Brown (DAR 1333-34). She later remarried Eaton. Anita was thirty-nine years old when she died the previous August (DAR 1335). Lamey broke up with Willie Brown when appellant was almost three, when he was jailed for a crime (DAR 1337). He jumped bond and left her. She entrusted the children to Willie Brown's aunt and didn't see them again (DAR 1338). She next saw appellant when he was about fifteen years old (DAR 1339). She thought everyone was afraid of Willie Brown; she knew he was capable of doing serious bodily damage (DAR 1340). She learned from Anita that they worked in the migrant fields picking fruit (DAR 1341). The witness became friends with Willie's subsequent wife, Mary Lou Stabler, who informed her that Willie had been abusive to the children, didn't let them go to school and made them work in the fields. Appellant had eight or ten half brothers and sisters (DAR 1342). When appellant got away from his father, he would briefly visit his mother while driving a truck (DAR 1345). He told her he had been to prison after shooting into the walls when he found his wife and her lover in bed (DAR 1346). Appellant protected his sister Anita from Willie, and kept her out of harm's way (DAR 1348). She was told by Anita that the father shot appellant in the head with a .22 rifle (DAR 1349). She was aware that Brown sang, played guitar and wrote music (DAR 1350).

By stipulation, the defense introduced as Exhibit 1 a poem written by appellant and read it to the jury (DAR 1359).

In the penalty phase closing argument, trial defense counsel argued that Dr. Dee had testified about the two statutory mental mitigators, that Brown's problems included brain damage and his background that made him subject to a complete lack of control (DAR 1377). Counsel argued that the jury should consider the circumstances of the prior violent conviction aggravator as explained by Dr. Dee and Mrs. Lamey, an incident that had occurred thirteen years earlier (DAR 1379). Defense counsel argued that less weight should be given to the fact of this homicide since it was probably a felony murder (DAR 1382). Counsel argued that this killing was not heinous (DAR 1383). Counsel repeated that appellant was in court now as a result of the brain damage, psychological abuse, the entire emotional mind set because of Willie Brown (DAR 1387); that appellant had gone through life believing his mother had abandoned him as told by his abusive father (DAR 1388). Counsel argued that Brown was intelligent and sensitive and an epileptic (DAR 1389). Despite his problems, counsel argued, Brown was still creative -- he can sing, write music, play a guitar and write poetry (DAR 1390). With his sister Anita now dead, he could live alone and die alone in prison with a life sentence (DAR 1392).

Appellant filed an Amended Motion to Vacate Judgments of Conviction and Sentence in December 1999 (R. Vol. III, 505-592). The state filed its Response in January of 2000 (R. Vol. IV, 595-598). The lower court conducted a Huff hearing on May 25, 2000 (R. Supp. Vol. II, 290-305). The court granted an evidentiary hearing on claims one through five and denied relief summarily on the remaining claims (R. Supp. Vol. II, 306-307).

At the evidentiary hearing beginning on October 19, 2000, trial defense counsel (now judge) Robert Doyel was the first witness to testify. His education included obtaining a Masters of Laws degree in Constitutional Criminal Law from the University of Wisconsin in 1985 and a Doctorate, Doctor of Juridical Science (SJD) also in Constitutional Criminal Law, University of Wisconsin in 1987 (R. Vol. IV, 613). He also was a law professor at the University of Mississippi and at Mercer University (R. Vol. IV, 613-14). His practice in Bartow was devoted exclusively to criminal defense and appellate work. Although he had not tried any capital cases, he had handled a couple of capital appeals and several first degree murder cases that had started off as death cases. He has subsequently handled capital cases and has probably been involved in about forty first-degree murder cases. In this case he was appointed as conflict counsel for Brown when the Public Defender withdrew

(R. Vol. IV, 614-616). {His exhibit 1 fee claim he submitted to the court did not overstate the work done-R. Vol. IV, 617-18}. Doyel had a legal assistant/part-time receptionist Linda Goodwin who had worked for other law firms. She was extremely bright and he mentored her. Goodwin acted as liason to Brown, taking his phone calls and taking information to him at the jail (R. Vol. IV, 623-626). Doyel thought he had enough time to spend on Brown's case (R. Vol. IV, 629). Aware at the time that it was not the general practice in Polk County to obtain co-counsel, he succeeded in asking that Goodwin be appointed to appear and take notes during the trial since many civil lawyers brought paralegals to court to keep track of exhibits. Goodwin sat through the trial. Doyel understood mitigation issues, having attended a lot of life over death conferences at the public defender's office (R. Vol. IV, 630-631). Brown maintained his innocence and Doyel investigated the manner in which he had been arrested and held in Colorado and whether statements obtained from him were legally obtained. Doyel also reviewed the public defender's files (that office had been involved for several months prior to Doyel) (R. Vol. IV, 633-34). Doyel generally recalled that the state was seeking handwriting exemplars, either the "Bobby-Wanda" note or for comparisons with the transactions made on victim Horace Brown's bank account or

credit cards. There was a meeting on November 7 where Brown gave handwriting samples to Detective Ore or state attorney investigator Tom Spate (who is now deceased). He doubted that Goodwin was present for that (R. Vol. IV, 634-640). There would have been no reason for her to be there since Doyel was present to insure that no interrogation took place (641). Doyel obtained medical records from the Montana prison and recalled that there had been a diagnosis of epilepsy and used a psychologist Dr. Henry Dee who performed an evaluation of Brown (646-47). Doyel corresponded with a pathologist (either Dr. Willey or Dr. Feegel) because Doyel wanted help with the autopsy (R. Vol. IV, 648). The one constant in the case was that Brown maintained his innocence; he asserted that there had been a third party named Danny at the site where Brown had left the victim, whom the client suspected may have had a homosexual relationship with victim Horace Brown. Doyel asked his investigator Ken Taylor to go to the one gay bar Doyel knew about in Polk County to see if there was anyone named Danny (R. Vol. IV, 649-50). The witness recalled that the state wanted additional handwriting exemplars and a hearing was held on December 5, 1990 (R. Vol. IV, 654-55). Brown had a problem with his hand, some of the index finger was missing and Doyel could not imagine delegating someone in his office to do the samples.

Doyel had a conference with Dr. Garcia, the doctor Brown had been sent to when he had seizure and other problems at the county jail and he was put on medications. Doyel never saw Brown have a seizure (R. Vol. IV, 659-662).[1]

A brief recess was taken to allow testimony by Dr. Leroy Riddick, a forensic pathologist in Mobile, Alabama who reviewed the records in Brown's case (R. Vol. IV, 668). He opined that it was in the ballpark timeframe offered by Dr. Melamud that the time of death was about eight to ten days earlier from the time of discovery. There was no bug larvae. It was difficult for him to determine a cause of death. Two of the stab wounds did not hit a vital organ and there may have been something else undiscovered because of decomposition (R. Vol. IV, 669-670). The hyoid bone was missing, the alcohol level was .18 grams percent and the sixty-two year old victim was found with his pants down and no underwear (R. Vol. IV, 672-675). On cross-examination, the witness conceded that a third wound hit

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[1] Contrary to appellant's suggestion, trial counsel Doyel did not testify at the hearing about any concern regarding Brown's competency. Appellant's allusion to R. Vol. IV, 663 concerns the brief comment by Doyel in his testimony that he spoke to Dr. Garcia who had seen Brown at the county jail following a seizure. Brown was put on medication (R. Vol. IV, 661). He recalled that he may have spoken to Dr. Garcia on "a health issue" of being able to aid in his defense and sit through a trial (R. Vol. IV, 663). Doyel gave no testimony that he questioned appellant's competence.

the liver which is a vital organ and you could bleed to death from such wound. He agreed with Dr. Melamud that the victim had been stabbed at least three times and the body was missing the hyoid bone, upper esophagus and entire brain. Given the animals in the area there was no guarantee you could find the hyoid bone and Dr. Riddick was not really aware of the scene (R. Vol. IV, 680-82).

Doyel returned to testify and recalled that there had been a speedy trial issue and the Florida Supreme Court had denied a writ of prohibition (R. Vol. IV, 689-690). As to the Bates and Rolling documents, Doyel and Brown wondered if a series of interstate murders might have something to do with the instant homicide (those crimes were later attributed to Aileen Wuornos) (R. Vol. IV, 693). Rolling was a suspect in the Gainesville killings and since there were manifestations of mutilation on the Horace Brown body (hole in the back, hyoid bone, tongue, and brain missing) Doyel started to gather information to see whether he could attribute this killing to Rolling or to create reasonable doubt (R. Vol. IV, 694-695). His discovery requests to get access to evidence of the task force investigating the Gainesville murders were quashed by the court (R. Vol. IV, 698). No one from his office interviewed Rolling and he laughed when he had read the Goodwin deposition that she claimed to have seen

Rolling -- that did not happen (R. Vol. IV, 701). Investigator Taylor talked to Wanda Kent, appellant's wife; Brown didn't want them to involve his family. Linda Goodwin talked to appellant's mother, Juanita Lamey (R. Vol. IV, 704). He had discussions with Judy Etherington who lived with Brown before he left Florida that was mitigation-related (R. Vol. IV, 708). Doyel took depositions in Colorado and filed a motion to suppress statements (R. Vol. IV, 710-711). Appellant had driven a long distance there and the primary issue was Miranda, an issue he was thoroughly familiar with (he had written a dissertation on it) and had there been an issue that came to his attention he would have raised it (R. Vol. IV, 712). Brown did have a long history of alcohol abuse, but the defense of voluntary intoxication would have been inconsistent with the client's continued protests of innocence. When they started the trial it was expected Brown would testify and the voluntary intoxication defense was not acceptable to Brown (R. Vol. IV, 713-714). They ended up not putting the client on; Brown was angry at prosecutor Aguero who pointed at him during jury selection. Both Doyel and Brown agreed that he wouldn't be able to remain calm and that he would be more harmful than helpful when testifying. Doyel was afraid of appellant's angry reaction during the expected cross-examination. Counsel thought it

arguable to offer explanation to the jury consistent with Brown's story based on the evidence presented. There was no formal plea offer but there had been discussions. Brown throughout would not plead. Within the last month Doyel asked Aguero if he would consider an offer and was told that if Brown pled guilty he would not seek the death penalty. Doyel informed his client and also advised that he should have taken a plea. Brown was adamant not to involve his family, restricting Doyel to the time of trial when he put on Dr. Dee (R. Vol. IV, 730-734). Doyel testified that after trial Goodwin found notes on her windshield that "George knows", which Goodwin explained was a message to Detective Ore that appellant was aware of the Ore-Goodwin relationship (R. Vol. IV, 737). Doyel became aware of the relationship when Ore came to the office and picked up Goodwin for lunch; when he asked her about it, she said they were just friends (R. Vol. IV, 738). Doyel subsequently requested that Goodwin resign or terminate the relationship with Ore because he thought it would affect his reputation and livelihood as a criminal defense lawyer and clients might not hire him once he disclosed the relationship (R. Vol. IV, 741-42). She left. Doyel repeated that voluntary intoxication was not a viable option; it was inconsistent with the detailed recollection Brown had of the events (R. Vol. IV, 756). Doyel

talked to Brown several times about his feelings for his sister Anita, the closest emotional attachment he had in his life; it was devastating when she died. Brown had been a singer and Doyel contemplated having him sing at penalty phase, but decided it was not a good idea (R. Vol. IV, 758-760). After Brown waived the confidentiality privilege, Doyel explained that on the day of sentencing Brown handed him a stack of poems intended to be lyrics to songs. Doyel discussed the possibility with him of book or music deal, but there was no discussion or contracts before sentencing (R. Vol. IV, 762-764).

In a break in testimony, the defense next called Dr. Albert Pinero, a neurologist who reviewed Brown's records, the findings and testimony of Dr. Dee (R. Vol. IV, 765-773). The records indicate a history of epilepsy and treatment for it (R. Vol. IV, 767). Epilepsy is a major contributor to the brain dysfunction he thinks he suffers; the records mention several episodes of head trauma (car accidents, gunshot wound) which affects impulsivity. His judgment and behavior are not consistent with his above average intelligence (R. Vol. IV, 769-771). On cross-examination he admitted this type of brain damage causes tremendous propensity for violence and is consistent with his getting mad at the prosecutor and having outbursts because of what was said. Such people might indeed unsurprisingly have a

significant criminal history. Pinero agreed with Dr. Dee although Pinero did not meet or examine or test Brown himself (R. Vol. IV, 773).

Doyel resumed testifying and admitted that he did not talk to appellant's stepmother Mary Lou (Stapler) Brown or stepsister Carmen Kay (R. Vol. IV, 775). Doyel did not retain lighting expert because of what the expert had told him (R. Vol. IV, 777). Doyel identified exhibit 8, the Warm Springs State Hospital records and was aware that Brown had been diagnosed with schizophrenia as far back as 1974 (R. Vol. IV, 779). Doyel thought he got the relevant information in through Dr. Dee (R. Vol. IV, 780) and also thought he got the gunshot head wound in through Dr. Dee. Doyel testified that he made tactical decision not to introduce the records as there were several references to lack of impulse control and propensity to violence, which he judged would not be helpful to the jury (R. Vol. V, 783). He admitted that Ellison was not located and investigator Taylor made an effort regarding the events of the tag transfer and Brown's stay in Nashville. Doyel answered counsel's question below that the fact of Brown's seeking gainful employment and that therefore robbery would not be a motive was inconsistent with the fact that he did use the credit cards and stole the victim's car (R. Vol. V, 785-86). Doyel did not obtain a crime

scene analysis; he didn't perceive it to be useful given the fact of the lapse of time and it was a public road with all the traffic (R. Vol. V, 789). As to the handwriting examples, Doyel indicated that the documents were not inconsistent with Brown's own version of events and he may have thought it was unnecessary to cross-examine Outland since it was corroborative of appellant (R. Vol. V, 800). Regarding the mental health reports, Doyel reiterated that there was a lot of material that he would not have wanted the prosecutor to have -- explosive temper outbursts, much physical aggressiveness, everything was sort of really bad for Brown (R. Vol. V, 823). He attempted and did use Dr. Dee to elicit helpful stuff without having to put on negative damaging material in the reports. This was a conscious decision on his part to avoid presenting harmful material at penalty phase. Doyel contacted Dr. Willey about the possibility that this was a sex crime (Willey indicated that the hole could be explained by some type of homosexual activity with a cavity in the body after the killing); Doyel pursued this line with Brown and the client was not agreeable to allowing an inference of some kind of homosexual behavior in the murder of Horace Brown (R. Vol. V, 824-25). As to the handwriting expert on the credit cards and checks, Doyel repeated that since Brown admitted taking the stuff from the beginning there was no reason

to challenge the exemplars – it corroborated the client's story and made it sound like he was telling the truth. Therefore, the jury should also believe the remainder of his story that he did not kill the victim (R. Vol. V, 827). Doyel did succeed in having suppressed a statement Brown had given to investigator Spate (R. Vol. V, 827-28){see also DAR 1746-1748}. Brown did not want him to contact family members. Doyel did contact defendant's mother and Wanda Kent anyway - without the client's knowledge - but appellant wanted others left out (R. Vol. V, 830). Brown agreed with the decision not to sing to the jury (R. Vol. V, 830). Doyel acknowledged that Dr. Pinero's testimony and Brown's explosive anger would be more of the same damaging material as in the reports (R. Vol. V, 831). Initially, Brown did not want any penalty phase witnesses but he did agree that they could use Dr. Dee and Brown also authorized the use of his mother to testify (R. Vol. V, 833). Doyel emphasized that anything that happened with the music business happened after the sentencing and there was not any conflict at all in the representation of Brown through the trial and sentencing. He did not compromise the defense in any way to make the intellectual property more valuable. He understood the Lockett decision and was aware of the non-restrictive nature of mitigation evidence (R. Vol. V, 833-35).

On the second day of the hearing, October 20, 2000, Linda Goodwin testified (R. Vol. V, 843-930). She was employed by Doyel in 1990-91 as a legal secretary and stated that she had been discharged from the second law firm she worked for because someone had made an accusation of tearing up something that looked like an X-ray (R. Vol. V, 850-53). She acknowledged that she might have talked to appellant's mother to prepare for penalty phase. She was appointed by the court as a paid assistant for Doyel at trial (R. Vol. V, 859). Her tasks included going to Brown to ask him questions that Doyel was unclear about (R. Vol. V, 863). Doyel wanted to humanize the defendant so she needed to get "touchy-feely" stuff about him (R. Vol. V, 866). Brown expressed anger at Ore because he felt Ore harassed and was responsible for the death of his sister Anita who had been sick (R. Vol. V, 867). She visited with the client a lot in jail; her task was to deal with the client (R. Vol. V, 868-69). Doyel was pleased personally and happy from a strategic basis at the newspaper coverage he was receiving (this was at the time of the Gainesville murders)(R. Vol. V, 870). She stated that Brown was concerned that Doyel was not following up on the "Danny" issue very well and wanted to know why the attorney was not visiting him as well (R. Vol. V, 871). Brown was very comfortable with her but she was not with him; he would

turn the tables on her and start asking her personal questions (R. Vol. V, 872-73). Doyel thought Brown might be convicted of a lesser charge at guilt phase (R. Vol. V, 873-74). The witness claimed that when the Danny Rolling issue came up she had to go to Ocala to find out where he was and talk to him about the George Brown case. She went but didn't see Rolling, he was not there and she didn't talk to any of the attorneys. She also felt it was inappropriate for her to go to the crime scene because she was down in a ditch with Brown without Doyel or the corrections officers with her (R. Vol. V, 875-78). She felt Doyel delegated too much responsibility to her; her main task was to know the paperwork inside and out, not go out in the field (R. Vol. V, 879). She drafted a lot of the pleadings and Doyel would edit and review (R. Vol. V, 880). She didn't remember the Linda Goodwin affidavit until shown it that day, but did recall the attachments to it. Doyel tasked her with having Brown write what it says. She thought he got something from the state asking for handwriting exemplars (R. Vol. V, 880-883). Goodwin reiterated that she never saw Rolling, and her deposition was in error if she said that (R. Vol. V, 885). The witness testified that the relationship with Ore was a friendship that became romantic (R. Vol. V, 888). She didn't know who put the "George knows" note on her windshield (R. Vol.

V, 889-892). She left Doyel's office on good terms (R. Vol. V, 894). Goodwin claimed that Doyel always wanted the poems Brown wrote so that his wife could turn them into songs; she thought Doyel manipulated how Brown felt for her (R. Vol. V, 897). Her relationship with Ore was most certainly after the trial. The word affair was too strong; it was a friendship that did have a physical aspect to it that did not last too long and then went back to a friendship —- all after the trial (R. Vol. V, 910-912). Goodwin also recalled making a report of an attack in her bedroom by two unknown white males on July 1, 1991. She was scraped on the back with a knife and she did not recognize the attackers. She may have suggested in an interview to police the attackers were two investigators Fred Reynolds and Al Smith, just as kind of a joke that got out of hand (R. Vol. V, 912-916). Bob Ore was not her boyfriend. Goodwin admitted problems with her memory, and indicated she has MS (R. Vol. V, 919-920). Tom Spate was a nice man, a friend and she had no romantic relationship with him (R. Vol. V, 921, 925).

Carmen K. Jones, sister of appellant, testified that Brown was good to her and defended her and took beatings for her from the father. Appellant played music and deceased sister Anita raised her. Their father was sexually, physically and mentally abusive. She had heard that George was shot in the head, but

can’t really put a finger on it. She has never seen George take a drink; he is a good person (R. Vol. V, 931-937). Betty Hill Highlander knew the defendant as Carl Kent between 1985 and 1987. She met him at a jam session in Lakeland where she was a singer and he played guitar and wrote songs. She performed the wedding ceremony for appellant and Wanda Kent. Brown seemed to be a good stepfather to Wanda’s one or two children. She admitted she never heard of George Brown until the lawyers contacted her (R. Vol. V, 938-941). Carol Smith met the “Kents” through her friend Highlander. She saw appellant play music at the Rainbow Club in Winter Haven. He seemed to be really involved with the kids. She recalled giving a statement or deposition in 1991 at which Detective Ore was present at the state attorney’s office (R. Vol. V, 942-945).

Robert Ore was a detective and employed with the sheriff’s office for twenty-two years (R. Vol. V, 946). He testified that the affair with Goodwin occurred after the trial; he had talked to her during the trial in a professional capacity (R. Vol. V, 947). Brown made several threats against him and was angry because of the death of his sister Anita. Ore supplied no information to Goodwin concerning the case during the trial. He did not ask her to obtain handwriting samples and he had no idea about the exhibit 35 Goodwin affidavit (R. Vol. V, 948).

Any samples of handwriting she obtained were not put into evidence. The only exhibits used were ones he submitted to FDLE. He thought Doyel was present when he got Brown's handwriting samples. He recalled that there was an incident when Doyel stopped the obtaining of samples and that there was a subsequent hearing before a judge to make a determination and Ore got additional samples. Ore would not have requested Goodwin to go and do work for him (R. Vol. V, 949-951). When told of the reported attack on Goodwin he advised her to report the matter to the local law enforcement agency. The affair with Goodwin definitely started after the sentencing of Brown and the physical relationship with her lasted at the outside a month. He had nothing to do with the "George knows" note (R. Vol. V, 953-955).

Appellant announced at the conclusion of the testimony that he waived his presence at another hearing and a colloquy ensued (R. Vol. V, 957-964).

The case was continued to December 15, 2000 and at that time the defense admitted into evidence the depositions of Dave Anderson, Fred Reynolds and Al Smith and the Lakeland Police Department report which was an exhibit to the Anderson

deposition.[2] Counsel for Brown also stated that Brown was not present. He had signed a waiver. He did not want to come and counsel had advised him of the pros and cons. The defense announced that there was no further evidence and the state similarly announced that it had no evidence (R. Vol. VI, 967). The court then entertained oral argument by both sides (R. Vol. VI, 968-997). The defense did not request an opportunity to present further argument at that time.

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[2] Dave Anderson testified in his deposition that he conducted a follow-up investigation to the initial investigation report by Officer Bohannon of the complaint by Linda Goodwin in July 1991 (R. Supp. Vol. VII, 1011-39). He and Officer Moore contacted Goodwin a week after the incident; she had made allegations naming two private investigators Fred Reynolds and Al Smith (R. Supp. Vol. VII, 1014-16). Anderson was suspicious of her story, she seemed to want attention, and concluded this was a "fatal attraction" thing. Detective Moore's conclusion was the same. Anderson concluded that the event did not happen and that she made it up. Photos were taken of superficial scratches on her neck, back and legs (R. Supp. Vol. VII, 1026-28). Anderson talked to Ore who said it was mistake to have been involved with her (R. Supp. Vol. VII, 1029). The last page of his report has conclusion that claim was unfounded, Sgt. Harrison concurred and it was not forwarded to the State Attorney for prosecution. The case was closed July 8 (R. Supp. Vol. VII, 1030-32). In his deposition, self-employed private detective Fred Reynolds testified he was irate when police interviewed him about the allegation of attacking Linda Goodwin and he denied being a buddy of Detective Ore (R. Supp. Vol. I, 55-61, 67). In his deposition licensed private investigator Al Smith denied that he had done any work for Mrs. Ore, he denied that he had anything to do with any alleged attack and first learned of the allegation when his wife told him what Goodwin told her. His wife is a reporter for the Ledger. Smith opined that Goodwin was a liar and later learned that she wanted to drop the matter (R. Supp. Vol. I, 76-93).

The lower court denied relief in a thorough, comprehensive and well-reasoned order (R. Supp. Vol. I, 100-185). The court rejected claims of conflict of interest because of an improper interest in the outcome of trial, the assistant's improper relationship with the lead detective, and counsel's alleged improper delegation (R. Supp. Vol. I, 104-121). The court rejected appellant's claim under Brady v. Maryland, 373 U.S. 83 (1963) (R. Supp. Vol. I, 122-123). The court denied the claim that trial counsel rendered ineffective assistance at the guilt phase (R. Supp. Vol. I, 123-166). The court rejected the claim of ineffective counsel at penalty phase (R. Supp. Vol. I, 166-182). The court also rejected a claim of ineffective counsel and violation of Ake v. Oklahoma, 470 U.S. 68 (1985) (R. Supp. Vol. I, 182-184).

Thereafter the court entered its Amended Order denying Brown's Motion for Rehearing (R. Supp. Vol. VI, 1002-1005).

## SUMMARY OF THE ARGUMENT

Issue I: The lower court correctly rejected as procedurally barred several claims which either were raised on direct appeal (and therefore not appropriately the subject of relitigation) or were not raised and could have been asserted on direct appeal if properly preserved for appellate review (and therefore not cognizable collaterally since the post-conviction vehicle does not serve as a second or successive appeal).

Issue II: The lower court correctly denied relief to the claim that trial counsel rendered ineffective assistance at the guilt and penalty phases in a lengthy, thorough and comprehensive order. Appellant makes virtually no effort to challenge the lower court's findings or analysis on the claim of ineffectiveness at guilt phase. With respect to penalty phase, relief was correctly denied as testimony to the jury about appellant's personal history and mitigation was presented through Brown's mother and neuropsychologist Dr. Dee, despite the client's expressed desire not to use family members. Counsel ably utilized Dr. Dee to elicit favorable medical and mental health testimony while simultaneously minimizing damaging information available in records and keeping access to such records away from the prosecutor. Mitigating evidence submitted at the evidentiary hearing was either cumulative or

inconsequential.

Issue III: The lower court did not err in allowing appellant to be absent after the second day of the evidentiary hearing. This claim must be deemed procedurally barred as the issue was never presented to the lower court for consideration and preservation for appellate review. The claim is also meritless. Brown simply chose not to attend any further proceedings and his signed written waiver has been made part of the record. Brown reiterated during the colloquy with the prosecutor that he was waiving the opportunity to testify (R. Vol. V, 962). Brown did not complain thereafter that he was denied the opportunity to appear and/or testify.

Issue IV: Appellant's claim that the lower court abused its discretion or violated due process of law by failing to permit argument by Brown's counsel is totally meritless. The record reflects that at the conclusion of the evidentiary hearing on December 15, 2000, the lower court heard and entertained defense counsel's argument about trial counsel's alleged ineffectiveness, the alleged conflict of interest and the prosecutor's alleged misconduct. At the conclusion, Brown's counsel did not request a further opportunity to present additional argument. That successor counsel may have made a

request months after submission to the court for more argument did not entitle appellant to it, any more than counsel could permissibly expect subsequent or successive oral argument in this Court.

Issue V: Appellant's complaint that the lower court did not properly consider or resolve matters about the check exemplars or "Bobby-Wanda" exemplars is meritless since the evidence at the hearing established that counsel tactically chose not to object to evidence which corroborated and was consistent with the client's version of events. As to assistant Linda Goodwin, the record is clear that Detective Ore did not utilize her in obtaining the court-ordered handwriting exemplars.

Issue VI: The lower court correctly decided that there was no conflict of interest adversely affecting counsel's performance regarding the "book and song" deal and trial counsel did not violate the standards enunciated by Strickland v. Washington, 466 U.S. 668 (1984) and its progeny; nor did appellant satisfy the criteria established by Cuyler v. Sullivan, 446 U.S. 335 (1980). The lower court was in a more advantageous position than an appellate tribunal and appropriately decided and resolved any conflict in the testimony between attorney (now Judge) Doyel and legal assistant Goodwin.

## ARGUMENT

## ISSUE I

**WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING CLAIMS 6 THROUGH 21.**

Appellant initially notes that on October 1, 2001, amendments went into effect pertaining to post-conviction challenges to conviction. That fact is an irrelevancy since, as Brown concedes, the instant motion was filed prior to the effective date of such amendments. Indeed, the hearing held pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), occurred on May 25, 2000, some seventeen months prior to the amendments (R. Supp. Vol. II, 290-305).[3]

Mr. Brown next complains that the lower court "failed to look beyond the labels attached by the state" to his issues (Brief, p. 37). This amounts to a not-so-subtle invitation that the Court overrule its considerable jurisprudence over the years regarding procedural default and adopt Brown's view that post-conviction challenges should be treated as second (or third or fourth) appeals and that any claim can be raised at any time, and repeatedly, in the hope that perhaps new judges - like new expert witnesses - will be available to accept his view. The

[3] Appellee does not accept the view that under the amendments to the rule, the mere defense assertion of the need for an evidentiary hearing mandates one where the issue does not require it; or that prior procedural defaults are vitiated.

Court should not merely decline the invitation, but reject it decisively. Issues 6 through 21 presented below can be summarized as follows (R. Vol. III, 535-588):

- Claim 6 - prosecutorial misconduct, presenting misleading evidence and improper argument to jury;

- Claim 7 - violations during voir dire due to counsel's deficiencies or being rendered ineffective by state action;

- Claim 8 - aggravating factor of murder committed during a felony was duplicative of felony-murder;

- Claim 9 - jury misled and instructions diluted their sense of responsibility (Caldwell claim);

- Claim 10 - use of invalid prior conviction in the sentencing calculus (Johnson v. Mississippi, 486 U.S. 578 (1988));

- Claim 11 - penalty phase jury received information incorrect under Florida law and shifted the burden;

- Claim 12 - defendant did not make knowing and intelligent waiver and rights were violated when his statements were admitted into evidence;

- Claim 13 - denial of right to speedy trial;

- Claim 14 - use of nonstatutory aggravating factors and state's argument;

- Claim 15 - electrocution is cruel and unusual punishment;

- Claim 16 - complaint about rules prohibiting juror interviews;

- Claim 17 - improper argument and jury instruction regarding mercy and sympathy;

- Claim 18 - finding of HAC improper, since not proven, citing Jackson v. Virginia, 443 U.S. 307 (1979) and Lewis v. Jeffers, 497 U.S. 764 (1990);

- Claim 19 - trial court failed to find mitigating circumstances in record;

- Claim 20 - jury's general verdict must be set aside pursuant to Mills v. Maryland, 486 U.S. 367 (1988) and Stromberg v. California, 283 U.S. 359 (1931); and

- Claim 21 - proceedings fraught with error.

**(1) WHETHER THE LOWER COURT CORRECTLY DENIED RELIEF ON ISSUES 12, 13, 18 AND 19 AS PROCEDURALLY BARRED BECAUSE THEY HAD BEEN RAISED ON DIRECT APPEAL.**

The lower court determined after the Huff hearing that claims 12, 13, 18, and 19 had been raised on direct appeal, noting that appellant had prevailed on claim 18 (R. Supp. Vol. II, 306-307; see also R. Vol. VI, 999-1000). See Allen v. State/Crosby, ___ So. 2d ___, 28 Fla. L. Weekly S 604, 606 n 4 (Fla. 2003)(finding procedural bar, "claims 8, 9 and 10 were raised on direct appeal."). Appellant now argues, as an appellate afterthought, that while claim 12 pertaining to the

suppression of his statements to law enforcement officers had been raised on appeal (see Issue VII of direct appeal brief), he now sought to garb the claim in the cloak of ineffective assistance of counsel. Two responses are immediately apparent.

First, at the Huff hearing, the parties agreed that an evidentiary hearing was appropriate in claims 1 through 5, which dealt with ineffective assistance of counsel and Brady claims.[4] When the court inquired of Brown's collateral counsel about the remaining sixteen claims, counsel alluded to a prosecutorial misconduct/Brady claim (R. Vol. II, 292-293) and claim 7 (R. Vol. II, 294). Although given the opportunity, counsel did not urge that an evidentiary hearing was required on the now-asserted claim 12. Appellant thus abandoned the claim at the Huff hearing. See R. Anderson v. State, 822 So. 2d 1261, 1266-1267 (Fla. 2002) ("Although the trial court inquired whether there were any other issues to be discussed, collateral counsel never asserted that an evidentiary hearing was required for the additional Brady subclaims. . . . Accordingly, . . . we conclude that Anderson intentionally abandoned the presentation of any Brady subclaims.")

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[4] The state noted that if claim 5 were an ineffective counsel claim, a hearing was appropriate but that if it were strictly a due process violation of Ake v. Oklahoma, 470 U.S. 53 (1985), the claim should be deemed procedurally barred (R. Supp. Vol. II, 294-296).

Secondly, this Court has consistently and repeatedly declared that post-conviction motions do not constitute a second appeal and that it is improper simply to urge an issue that is properly cognizable on appeal under the cloak of an ineffective assistance of counsel claim. See, generally, Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990); Brown v. State, 755 So. 2d 616, 620 (Fla. 2000).

In claim 12 below appellant asserted that his statements were obtained illegally and made without a knowing and intelligent waiver of his rights and that counsel was ineffective. Brown raised in Issue VII of his direct appeal a claim that the trial court had erred by failing to grant a motion to suppress statements. Defense counsel at trial had filed a pre-trial motion to suppress statements due to Miranda violations (DAR 1678) which was denied by the trial court (DAR 1853-54) following an evidentiary hearing at which the trial court heard the testimony of Deputy Sheriff Richard Hess, Investigator Roland Lackey and Homicide Investigator Robert Ore (DAR 1790-1851). The trial court ruled that jailor Hess did not conduct an interrogation (DAR 1850) and this Court affirmed without discussion. Investigator Lackey testified that he provided Miranda warnings and appellant signed a waiver of

rights form acknowledging he understood his rights and agreed to answer questions (DAR 1821-1824). Brown agreed to talk to Detective Ore when told his Miranda rights still applied (DAR 1827). The lower court correctly determined that Brown had previously litigated his claim that his statements were obtained illegally; the claim was insufficiently pled and appellant was merely attempting improperly to relitigate a rejected claim under the guise of an ineffectiveness of counsel assertion.[5]

As to claim 13 below, appellant concedes that the speedy trial issue was raised on direct appeal (see Issue VIII in direct appeal brief) and his attempt merely to present the variant that counsel was ineffective in the speedy trial is impermissible under the established case law cited.

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[5] At the Huff hearing, Brown's collateral counsel made no effort to urge the need for an evidentiary hearing on claim 12. Rather, he confirmed the state's acquiescence to a hearing on claims 1 through 5, except to contend that the prosecutorial misconduct claim (claim 6) included intentional conduct by the prosecutor and that in claim 7 it was desirable for trial counsel to address whether there was a race neutral reason in jury selection (R. Supp. Vol. II, 291-294).

At the conclusion of the Huff hearing, the court was informed that the parties had taken the depositions of Linda Goodwin and Detective Robert Ore and the parties seemed to agree they could depose the detective who did the in-house investigation and return to the court in the event further judicial action was needed (R. Supp. Vol. II, 297-304).

Subsequently, depositions were taken of Dave Anderson (R. Supp. Vol. VII, 1009-1042), Fred Reynolds (R. Supp. Vol. I, 51-75) and Al Smith (R. Supp. Vol. I, 76-98), and were submitted into evidence. (R. Supp. Vol. VI, 967).

As to claim 18 below, appellant acknowledges that a challenge to the HAC aggravating factor was made on appeal (Issue X in direct appeal brief) and that this Court found the evidence insufficient to support the HAC. This Court added:

> We find this error and any error in instruction on this circumstance harmless on this record. There is no reasonable possibility that the error contributed to the recommended sentence. State v. DiGuilio, 491 So.2d 1129 (Fla.1986).
>
> Brown v. State, 644 So. 2d 52, 54 (Fla. 1994)

Brown argues here that he seeks review of the impact of the HAC removal on his sentence. But if his complaint is with this Court's resolution of the issue, trial counsel's alleged ineffectiveness has nothing to do with that and obviously the trial court is in no position to reverse this Court. As to claim 19, the correctness of the lower court ruling that the challenge to the trial court's alleged failure to consider and find mitigating circumstances presented in the record was procedurally barred as a question for direct appeal is confirmed by J.D. Wright v. State/Crosby, ___ So. 2d ___, 28 Fla. L. Weekly S 517, 522 (Fla. 2003)("on direct appeal, we affirmed the trial court's order finding there were no mitigating circumstances . . . [citation omitted] . . . Wright did not raise this claim [that this Court failed to reweigh as required by Sochor v. Florida, 504 U.S. 527] in a motion for rehearing

following our opinion in his initial appeal. We therefore conclude that he abandoned this claim. See Lightbourne v. State, 841 So. 2d 431, 442 (Fla. 2003)(finding that a claim which could have been raised in a motion for rehearing but was not was abandoned and procedurally barred from consideration in a postconviction proceeding . . . [citation omitted] . . . Therefore, to the extent Wright argues this Court erred in failing to find the existence of mitigation, this claim is procedurally barred.").

Contrary to appellant's cursory suggestion, neither Apprendi v. New Jersey, 530 U.S. 466 (2000) nor Ring v. Arizona, 536 U.S. 584 (2002) has any impact either on the procedural bars to appellant's claims or the merits of those claims.

As to claim 19 below, Brown raised such a claim on direct appeal (see Issues XII and XIV in direct appeal brief) and this Court disposed of the claim, stating: "The trial court considered mitigating evidence in three full pages of its sentencing order, but gave it little weight. We find no error." Brown v. State, 644 So. 2d 52, 54 (Fla. 1994). Appellant did not explain either in the lower court or in this Court why he is entitled to an evidentiary hearing on the claim of whether the trial court considered mitigating evidence in the record.

**(2) WHETHER THE LOWER COURT ERRED IN SUMMARILY DENYING CLAIMS 6, 7, 8, 9, 11, 14, 17, AND 20 BELOW AS PROCEDURALLY BARRED BECAUSE THEY SHOULD HAVE BEEN RAISED ON DIRECT APPEAL.**

The lower court found these claims procedurally barred (R. Supp. Vol. II, 306-307; R. Vol. VI, 999-1000).[6] See Gore v. State/Crosby, 846 So. 2d 461, 466 n 4 (Fla. 2003) (procedurally barred claims as issues that should have been raised on direct appeal are not properly presented in post-conviction and cannot be resurrected by making conclusory ineffective assistance of counsel allegations); R. S. Jones v. State/Crosby, 845 So. 2d 55, 72 n 38 (Fla. 2003) (trial court correctly found issues procedurally barred because they should have been or were raised on direct appeal); D. R. Spencer v. State/Crosby, 842 So. 2d 52 (Fla. 2003) (substantive claims of prosecutorial misconduct and juror bias procedurally barred since not raised on appeal); M. A. Griffin v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 723 (Fla., September 25, 2003) (repeatedly stating that issues are procedurally barred because they could have and should have been raised on direct appeal, citing Valle v. State, 705 So. 2d 1331, 1335 (Fla. 1997) and Harvey v. Dugger, 656 So. 2d 1253, 1256

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[6] While Brown mentions issue 20 in the caption to his argument, he does not mention it in his argument section. Thus, that claim is abandoned. See Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990); Shere v. State, 742 So. 2d 215, 217 n 6 (Fla. 1999); Sweet v. State, 810 So. 2d 854, 870 (Fla. 2002); State v. Mitchell, 719 So. 2d 1245, 1247 (Fla. 1st DCA 1998); Fotopoulos v. State, 838 So. 2d 1122, 1127 n 4 (Fla. 2002).

(Fla. 1995)).

In claim 6 below, almost the entirety of the claim, subissues A and C, pertained to alleged improper argument and actions by the prosecutor which were a matter of record and could easily have been argued as error on direct appeal if appellant chose to do so. No cause or prejudice excusing the default has been advanced. As to subsection B, the detective's relationship with Linda Goodwin was the subject of the two-day evidentiary hearing and the trial court heard the testimony of attorney (now judge) Doyel, Detective Ore and Ms. Goodwin. Judge Padgett's comprehensive, thorough and well-reasoned resolution of the issue remains largely unchallenged by appellant. Subsection D was insufficiently pled to demonstrate that the jury was exposed to evidence that was not admitted. At the evidentiary hearing when asked about the prosecutor's closing argument about Officer Shipman having taken a number of crime scene photos, Mr. Doyel answered that the context of Mr. Aguero's comment seemed to be that Aguero was holding the photographs in his hand when mentioning that the state introduced all of them -- not that the state introduced every photo that was taken (R. Vol. V, 212). The lower court determined in the Order denying post-conviction relief that Brown presented no testimony at the hearing showing that

inadmissible photographs were mistakenly given to the jury (R. Supp. Vol. I, 158). In short, this claim was heard, considered and denied as an aspect of the ineffective assistance of counsel claim.

In claim 7 below appellant complained of errors during voir dire. There is no merit to the claim of an improper Neil/Bottoson challenge to juror Hicks. The court granted the state's challenge because of religious beliefs and hesitancy in the event of a death recommendation (DAR 210-212). There was a race-neutral reason expressed. Hicks acknowledged that it would be difficult to cast a vote knowing the person would be put to death (DAR 150-152). Appellant's claim that the jury was not impartial is meritless. Juror Margewich was excused peremptorily (DAR 372). The defense struck juror Willis (DAR 374). [Another juror Nancy Willis, unrelated to Cynthia Willis, was not objected to by the defense and sat on the jury - DAR 199, 207, 238]. Juror Dalhover stated that her experiences would not prevent her from being fair and impartial (DAR 88) and the court properly denied the motion to excuse for cause (DAR 130, 206). The complaint about the prosecutor's alleged improper hypothetical question is barred substantively as a question for direct appeal and cannot serve as a basis for an ineffective assistance of counsel claim since trial defense

counsel did object (DAR 98-99).

As to claims 8, 9, 11, 14, and 17 below, appellant here only alludes to what the issues were but makes no attempt to argue that there was any merit to the claims or why the lower court's ruling was erroneous and should be overturned. This tactic is impermissible. See Duest, *supra*; Shere, *supra*; Sweet, *supra*; Fotopoulos, *supra*. Appellant does not address claim 20, so it too is abandoned. Lightbourne v. State, 841 So. 2d 431 (Fla. 2003); Marshall v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 461 (Fla. 2003); Garcia v. State, 816 So. 2d 554, 569 (Fla. 2002); Atkins v. Singletary, 965 F.2d 952, 955 n 1 (11th Cir. 1992); Doyle v. Dugger, 922 F.2d 646, 649 n 1 (11th Cir. 1991).

Finally, appellant erroneously asserts at page 48 of his brief that "the court below never addressed, either at the *Huff* hearing or in his subsequent written Order, Mr. Brown's Issue 21, which asserted cumulative error." In actuality, the lower court entered its Amended Order on April 17, 2002 wherein the court noted that Brown was correct in the assertion that the court inadvertently failed to address claim 21 previously, but that no additional hearing was necessary since relief had been denied on the individual claims. See Bryan v. State, 748 So. 2d 1003, 1008 (Fla. 1999)(where allegations of individual error are found without merit, a cumulative-error argument based thereon

must also fail") and that any other matter in the defense motion which the defendant felt the court either overlooked or misapprehended, the court found that no relief was warranted (R. Supp. Vol. VI, 1003).[7] See also Downs v. State, 740 So. 2d 506, 518 (Fla. 1999).

[7] Since he does not assert here any error in the rulings on claims 10, 15 and 16, they have been abandoned.

## ISSUE II

**WHETHER THE LOWER COURT ERRED IN DETERMINING THAT TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE AT THE GUILT AND PENALTY PHASES.**

The standard of review regarding the trial court conclusion that counsel did not render ineffective assistance is two-pronged: the appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001).

**GUILT PHASE**:

Although appellant alludes in the caption of his issue to guilt phase ineffectiveness, his only specific reference to guilt phase is the comment at Brief, p. 61, that Doyel did not present the opinion of Dr. Willey that this might have been a sex offense nor did he present an intoxication defense. Perhaps appellant deemed it too burdensome to address Judge Padgett's findings, analyses and conclusions which spanned over forty pages in the comprehensive order at claim III (R. Supp. Vol. I, 123-166).

As to the failure to present a voluntary intoxication defense, the lower court concluded that, as Doyel testified, such a defense would have been inconsistent with Brown's continued

protests of innocence and counsel could hardly argue a position that would be short-circuited by appellant's expected testimony of innocence, rather than guilt by reason of intoxication. This Court has repeatedly rejected claims of ineffectiveness for the failure to pursue an intoxication defense where it would have been inconsistent with the defendant's theory of the case that he did not commit the crime. See State v. Williams, 797 So. 2d 1235 (Fla. 2001); Rivera v. State, 717 So. 2d 477 (Fla. 1998); Cherry v. State, 659 So. 2d 1069 (Fla. 1995). This tactical determination was a reasonable one and there is no reasonable probability of a different result had another option been selected (R. Supp. Vol. I, 123-126).[8]

As to Dr. Willey and the possibility that this was a sex crime, the lower court noted that Doyel had discussed the matter with Dr. Willey but that appellant was adamant about not allowing the inference of any sort of homosexual behavior in the murder of Horace Brown and thus there was no deficiency (R. Supp. Vol. I, 131-132).[9]

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[8] Doyel testified that voluntary intoxication was not a viable defense since inconsistent with defendant's claim of innocence and thus not acceptable to Brown (R. Vol. IV, 714) and was inconsistent with the detailed recollection Brown had of the events (R. Vol. IV, 756).

[9] According to Doyel, not only did Brown not want any inference of homosexual behavior but he did not want the victim's wife exposed to such testimony (R. Vol. V, 825).

Since appellant does not challenge the remainder of the guilt phase ineffectiveness claim dispositions, they are deemed abandoned.[10]

Appellant's suggestion that counsel must have been deficient because his fee claim submitted to the court is not as great as collateral counsel would like ignores the fact that Doyel was appointed as conflict counsel when the Public Defender withdrew and had the benefit of that accumulated discovery (DAR 1467; R. Vol. IV, 634). He utilized assistant Goodwin to obtain information from the client which he did not put on his bill (R. Vol. IV, 626). Doyel obtained the services of an investigator,

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[10] Counsel was not ineffective in failing to challenge the state's case by presenting witnesses to challenge the testimony regarding the manner in which the crime occurred (R. Supp. Vol. I, 126-138). Trial counsel was not ineffective - there was neither deficiency nor prejudice - in failing to move to suppress appellant's statements on the basis of inability to waive Miranda as it was meritless and there was no testimony presented that there was a reasonable probability of a different result (R. Supp. Vol. I, 138-139). Trial counsel was not ineffective in failing to object to prosecutorial misconduct because there was neither deficiency nor a reasonable probability of a different result (R. Supp. Vol. I, 139-158). Counsel was not ineffective in failing to communicate a plea offer because he did relay the offer and advised him to accept it (R. Supp. Vol. I, 158-159). No evidence was presented to support the claim that counsel failed to effectively cross-examine Detective Ore and the court found that counsel was not ineffective (R. Supp. Vol. I, 160-165). Since there were no errors or omissions by counsel, there was no merit to the claim of cumulative effect of counsel's deficient performance. Counsel was not deficient in failing to pursue phone records since there was no evidence that there were records for the phone in question (R. Supp. Vol. I, 165-166).

Ken Taylor (DAR 1468-1469; 1476-1477; R. Vol. IV, 649-650, 701-704, 715). Mr. Doyel took depositions in Colorado and filed motions to suppress statements (R. Vol. IV, 710-711) and succeeded in suppressing the statement appellant had given to a state attorney investigator (R. Vol. V, 827-828; DAR 1746-1748).

**PENALTY PHASE:**

Appellant attempts to characterize counsel's performance as insufficient time to prepare and inadequate presentation of available mitigation evidence. As explained below, there was neither deficient performance nor has appellant satisfied the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984) and thus the lower court's order denying relief must be affirmed. **(1) The Deficiency Prong** - Appellant's attempt to paint the scene as counsel merely abdicating investigation and preparation of the penalty phase because his client was uncooperative is not entirely accurate. While attorney Doyel repeatedly acknowledged that Mr. Brown did not want his family members and others involved in mitigation, Doyel testified that despite his client's expressed wishes he did contact appellant's mother and Wanda Kent without the client's knowledge and in fact persuaded Brown they should use his mother Juanita Lamey and Dr. Dee to provide mitigation testimony (R. Vol. V, 833). Moreover, Doyel sought

and obtained the appointment of Dr. Dee on January 3, 1991, almost four months prior to trial (DAR 1613-15). Thus, it was not a last-minute, last straw effort initiated after the guilty verdict.

The direct appeal record included the penalty phase testimony of Mrs. Lamey who described appellant's background and the abusive relationship with Ed Eaton and Willie Brown, and entrusting appellant to Willie Brown's aunt, and that appellant had to work in the migrant fields and that he was protective of his sister Anita (DAR 1333-1356).

Trial counsel also utilized neuropsychologist Dr. Dee who provided appellant's personal history including his custody by the maternal aunt who ran houses of ill repute, the state's subsequent removal of him and placement in a series of foster homes, the subsequent poor relationship with his father who beat him and shot him in the head with a .22 revolver, Brown's consequent uncontrollable rage reactions which led to a 1974 hospitalization in Montana - and that the records indicated a long history of emotional and social maladjustment characterized by explosive temper outbursts, five unsuccessful marriages, and a spotty work record because Brown could not accept authority. His coping mechanisms were quite defective (DAR 1306-11). Dr. Dee was also able to testify that appellant was very protective

of his terminally ill sister Anita (who died), the only sibling with whom he had a relationship; that appellant had no real family or friends, went bankrupt after purchasing a couple of trucks; that his marriages failed because of alcoholism; that his relatively high scores on intelligence tests were balanced by the indicators of cerebral injury (blows to the head in various fights and an automobile accident); that a 1990 report by Dr. Garcia of Winter Haven diagnosed appellant with epilepsy. Dr. Dee opined he had an organic brain syndrome and suffered from alcoholism (DAR 1312-17), an Organic Personality Disorder and thought both statutory mental mitigators were present (DAR 1320-1323).

The courts have recognized that counsel is not to be fully faulted when the client refuses to cooperate. See Cummings-El v. State/Crosby, ___ So. 2d ___, 28 Fla. L. Weekly S 757 (Fla. 2003) (rejecting claim that trial counsel was ineffective at the penalty phase where defendant was adamant about not wanting his family to "beg for his life" and counsel presented defendant in a positive light and did not present evidence of drug use, poor upbringing or that family had members with criminal convictions; and finding that testimony at the evidentiary hearing was essentially the same as that presented at penalty phase); M. A. Griffin v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 723 (Fla.,

September 25, 2003)(Griffin did not provide information about family background and childhood to trial counsel despite proper inquiry by counsel. Trial counsel is not deficient where he makes a reasonable strategic decision to not present mental mitigation testimony during penalty phase because it could open the door to other damaging testimony. Failure to call half-brother to add some details about Griffin's upbringing not deficient since information was largely cumulative to information provided at trial through other witnesses and relatives had limited contact with defendant during his childhood.); Rose v. State, 617 So. 2d 291, 294 (Fla. 1993)("Given the limitations placed on him by Rose, Rousen made reasonable tactical decisions with respect to the presentation of mitigating evidence."); Mitchell v. Kemp, 762 F.2d 886, 889-890 (11th Cir. 1985)(Reasonableness of a decision on the scope of investigation will often depend on what information defendant communicates to the attorney. When a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made.); Johnston v. Singletary, 162 F.3d 630, 642 (11th Cir. 1998)(The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions; in practical terms, counsel's ability to present certain types of evidence may be informed, if not

sharply curtailed by, a client's refusal to cooperate); Sims v. Singletary, 155 F.3d 1297, 1316 (11th Cir. 1998) (counsel's failure to present evidence of defendant's troubled childhood during penalty phase was not ineffective assistance where defendant specifically told counsel not to bother defendant's family members and defendant would not provide counsel any information); Sims v. State, 602 So. 2d 1253, 1257 (Fla. 1992)(We find no error in trial counsel's failure to ascertain the existence of other mitigating evidence so it could be introduced in the penalty phase. Sims had directed defense counsel not to collect this evidence . . . we do not believe counsel can be considered ineffective for honoring the client's wishes); Fotopoulos v. State, 838 So. 2d 1122, 1131 (Fla. 2002); Porter v. State, 788 So. 2d 917, 925 (Fla. 2001)(trial court found that the defendant failed to cooperate with counsel at the penalty phase of trial); Waterhouse v. State, 792 So. 2d 1176, 1183 (Fla. 2001)(counsel's failure to present penalty mitigating evidence and retain mental health expert was not ineffective assistance since it was due to defendant's own conduct of electing not to present mitigating evidence and to meet with mental health expert); Ventura v. State, 794 So. 2d 553 (Fla. 2001)(even though counsel's investigation into defendant's background was deficient, prejudice prong was not satisfied since testimony of

six siblings and minister at evidentiary hearing mirrored testimony of witnesses who testified during the penalty phase); Gore v. State, 784 So. 2d 418 (Fla. 2001) (defendant himself thwarted counsel's efforts to secure mitigating evidence by refusing to cooperate with mental health experts); Hardwick v. Dugger, 648 So. 2d 100 (Fla. 1994)(counsel not ineffective where, despite uncooperative defendant who ordered counsel to present no penalty phase mitigation, counsel obtained psychiatric evaluation by mental health expert and conducted investigation of defendant's background); Atwater v. State, 788 So. 2d 223 (Fla. 2001)(counsel not ineffective in penalty phase of capital murder trial where defendant's personal and family history was presented through testimony of forensic psychologist); Patton v. State, 784 So. 2d 380 (Fla. 2000)(counsel not ineffective for failing to present cumulative mitigation during sentencing); Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000)(reasonableness of counsel's actions may be determined or substantially influenced by defendant's own statements or actions).

Trial counsel Doyel's testimony at the evidentiary hearing below supported the reasonableness of his conduct. His investigator Ken Taylor talked to Brown's wife Wanda Kent, Linda Goodwin talked to appellant's mother Mrs. Lamey and Doyel had mitigation-related discussions with Judy Etherington who was

living with Brown before he left Florida (R. Vol. IV, 704-708). Brown was adamant not to involve family members (R. Vol. IV, 734). Doyel was aware of Brown's hospital records and Brown's diagnosis of schizophrenia and thought he had elicited the relevant information to the jury through Dr. Dee (R. Vol. IV, 780). Doyel made a tactical decision not to introduce medical records since there were several references to lack of impulse control and propensity to violence which he did not think would be helpful to the jury (R. Vol. V, 783). He reiterated that there was a lot of bad and dangerous material that he did not want the prosecutor to have -- explosive temper outbursts and much physical aggressiveness. Thus, he made the conscious decision to use Dr. Dee to elicit the helpful portions without putting on the negative, damaging, harmful material in the report at penalty phase (R. Vol. V, 823).

The lower court credited Doyel's testimony and found trial counsel's performance was not deficient (R. Supp. Vol. I, 166-175). Yet appellant makes little or no effort to explain that the finding was erroneous or the basis for this Court to discard it.

Appellant argues that the record including attorney Doyel's records demonstrate that little or no time was spent on the case. Specifically, Brown asserts that he spent "a maximum of 7.5 hours

preparing for the penalty phase," that he "spent 11.5 hours on the first day of trial representation and mitigation investigation," "13 hours for the second day of trial and penalty phase work and 13 hours for the day of the penalty phase" (Brief, p. 50). A close examination of appellant's analysis shows it to be deeply flawed. Appellant looks only to a portion of page 10 of Defense Exhibit 1 Motion for Attorney's Fees and Reimbursement for Costs and notes that 11.5 hours were spent on April 29, 13 hours on April 30 and 13 hours on May 1, 1991. Appellant overlooks the fact that Doyel spent over 370 hours on the case from October 1990.[11] Counsel's activities included traveling to Colorado for depositions, correspondence in November 1990 to Dr. Dee and other doctors, receipt of information from investigator in Colorado, correspondence to psychologist in December of 1990, a December 1990 conference regarding Dr. Garcia, a number of calls from experts, an office conference on January 18, 1991 regarding Dr. Dee, a review of the psychologist's report on February 2, 1991, receipt of a telephone call on February 4, 1991 from appellant's aunt and mother, another telephone call from appellant's mother on April 4, 1991, and payment of expenses on the photocopying of Montana State Prison records on December 18,

[11]Appellee is attaching as Exhibit 1 to this brief for this Court's convenient review the complete Motion for Attorney's Fees and Reimbursement of Costs.

1990. While it is understandable that appellant seeks to position himself similarly to defendants who obtained relief such as in State v. Lewis, 838 So. 2d 1102 (Fla. 2002), no matter the degree of stretching, Mr. Brown will not fit on that Procrustean bed.

**(2) The Prejudice Prong** - Even if this Court were to conclude that some deficiency is present, appellant has totally failed to satisfy the prejudice prong of Strickland. While appellant criticizes attorney Doyel for his penalty phase representation, it is interesting to note the paucity of additional mitigating evidence presented at the hearing below by collateral counsel after months and years to review. At the evidentiary hearing, collateral counsel called neurologist Dr. Albert Pinero who in eight pages of testimony announced that he agreed with the assessment of Dr. Dee who had testified at penalty phase (R. Vol. IV, 765-773). It should be noted that in his cross-examination he admitted that he did not meet or examine or test Brown himself (R. Vol. IV, 773). Apparently he simply utilized the same records available to Doyel and Dee. Pinero also agreed that Brown's condition causes tremendous propensity for violence and it should not be surprising that such people indeed might have a significant criminal history (R. Vol. IV, 771-772). Counsel is not ineffective for failing to put on cumulative evidence in

mitigation. Patton v. State, 784 So. 2d 380 (Fla. 2000). See also Cooper v. State/Crosby, ___ So. 2d ___, 28 Fla. L. Weekly S 497, 501, n 5 (Fla. 2003)(even more favorable expert testimony in postconviction does not automatically establish the original evaluations were insufficient, citing Carroll v. State, 815 So. 2d 601, 618 (Fla. 2002), and Gaskin v. State, 822 So. 2d 1243, 1250 (Fla. 2002)); Hodges v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 475, 477 (Fla. 2003)(presentation of changed opinions and additional mitigation evidence in the post conviction proceeding does not, however, establish ineffective assistance of counsel); Asay v. State, 769 So. 2d 974, 987 (Fla. 2000); Rutherford v. State, 727 So. 2d 216, 224 (Fla. 1998); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). Trial counsel is not ineffective in failing to put on mitigation evidence that was cumulative to evidence already presented. Freeman v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 611, 613 (Fla. 2003); Gudinas v. State, 816 So. 2d 1095, 1106 (Fla. 2002); Cherry v. State, 781 So. 2d 1040, 1051 (Fla. 2000); Fennie v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 619, 621 (Fla. 2003); Woods v. State, 531 So. 2d 79, 82 (Fla. 1988)(“More is not necessarily better”); Maxwell v. State, 490 So. 2d 927, 932 (Fla. 1986) (“The fact that a more thorough and detailed presentation could have been made does not establish counsel’s performance as deficient”); Foster v. Dugger,

823 F.2d 402, 406 (11th Cir. 1987) (the mere fact that other witnesses might have been available or other testimony might have been elicited is not a sufficient ground to prove ineffectiveness); Stewart v. Dugger, 877 F.2d 851 (11th Cir. 1989)(proffer of additional character witnesses would not have had significant impact on the trial as it was merely cumulative); Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991) (failure to present cumulative witnesses did not amount to ineffectiveness); Waters v. Thomas, 46 F.3d 1506, 1511 (11th Cir. 1995)(en banc)("we have never held that counsel must present all available mitigating circumstance evidence in general. . ."); Glock v. Moore, 195 F.3d 625 (11th Cir. 2000) (failure to present repetitive and cumulative witnesses at penalty phase not ineffective); P.A. Brown v. State, 755 So. 2d 616, 637 (Fla. 2000)(failure to present additional lay witnesses to describe childhood abuse and low intelligence was not prejudicial and would have been cumulative to evidence presented); Valle v. State, 705 So. 2d 1331, 1334 (Fla. 1997).

At the hearing below, collateral counsel also called as potential mitigation witness Carmen K. Jones, appellant's sister, who testified that appellant defended her from their father who was abusive, that appellant played Roy Orbison songs, thought appellant may have been shot in the head (but couldn't put her

finger on it) and had never seen him take a drink (R. Vol. V, 931-937). Additionally, the lower court heard the testimony of Betty Hill Highlander who knew the defendant as Carl Kent between 1985 and 1987 but had never heard of George Brown until contacted by collateral counsel. She met appellant at a Lakeland jam session where he played guitar and she sang songs. She performed the wedding ceremony for appellant and Wanda Kent (R. Vol. V, 938-941). Carol Smith met the "Kents" through her friend Highlander and saw appellant play music at the Rainbow Club in Winter Haven and he seemed to be involved with the kids. She recalled giving a statement or deposition in 1991 (R. Vol. V, 942-945). That was the extent of mitigation submitted below. Since trial defense counsel had presented personal history and mental health evidence and argued appellant's music creativity, it is unlikely the inconsequential testimony submitted by Jones, Highlander and Smith would reasonably have had an impact at penalty phase. Indeed, since Highlander and Smith did not even know appellant's real name, the jury would undoubtedly have been unimpressed.[12]

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[12] Perhaps sensing that the mitigation submitted below was not overwhelmingly persuasive, collateral appellate counsel now indicates the desirability of a forensic social worker, but collateral counsel could have but did not present any such testimony at the hearing and there is no basis for this Court to speculate on evidence never presented.

Appellant's reliance on State v. Lewis, 838 So. 2d 1102 (Fla. 2002) is misplaced and that case is clearly distinguishable. There, trial counsel did not spend any time on penalty phase preparation until after the jury returned its guilty verdict; did not attempt to obtain mitigation evidence contained in Lewis's background records, including hospitalization, school and foster care records. Counsel belatedly obtained appointment of mental health expert Dr. Klass who did not receive necessary information prior to trial. Dr. Klass was the only witness willing and able to testify for the defense but did not when Lewis refused. Klass apparently was only going to testify that Lewis had an allergy to alcohol. The information available, had the investigation been done, included (1) having an alcoholic and promiscuous mother, (2) exposure to violence and severe neglect, (3) a skull fracture and two weeks hospitalization at age two or three, (4) observation of his father's violence and domestic abuse on a daily basis, (5) the parents' attempts to kidnap children from each other after divorce, (6) foster care system could not take care of his needs because of prior neglect and abuse, (7) diminished mental capacity, (8) brain damage, (9) history of serious alcohol and drug abuse, and (10) Klass could have testified to additional mitigators if he had been provided information. In contrast,

Doyel in the instant case contacted appellant's mother and Dr. Dee despite his client's objections and persuaded him to allow their testimony to the jury. What has been submitted at the evidentiary hearing is either cumulative or inconsequential as noted above.

While appellant alludes to Wiggins v. Smith, ___ U.S. ___, 156 L.Ed.2d 471, 123 S.Ct. 2527 (2003), it is clear that decision can offer no support to his claim that post-conviction relief must be granted. In Wiggins, defense counsel confined their investigation to two reports and even after telling the jury they would hear about the defendant's difficult life they did not follow up on the suggestion with details of his history. In contrast here, counsel did investigate and provided information about the defendant's life to the jury through appellant's mother and Dr. Dee (despite Brown's initial command not to contact family members). The only sibling Brown was close to, Anita, had died and the cursory testimony of mitigation witnesses at the evidentiary hearing was inconsequential and cumulative to that presented (two of the witnesses did not even know appellant's real name), whereas the uninvestigated and unpresented mitigation evidence in Wiggins was powerful. Additionally, defense counsel Doyel did have and use appellant's hospital records and tactically used beneficial aspects through Dr. Dee but avoiding

the most negative material which may have come in if the records had been introduced.

Appellant’s claim is meritless. This Court should affirm the trial court’s order denying relief.

## ISSUE III

**WHETHER THE LOWER COURT ERRED IN ALLOWING APPELLANT NOT TO BE PRESENT AT CONCLUSION OF EVIDENTIARY HEARING.**

The standard of review on whether the court erred in allowing the defendant to waive his subsequent appearance is abuse of discretion. Whitfield v. State, 706 So. 2d 1 (Fla. 1997).

At the conclusion of the second day of the evidentiary hearing, the parties and court discussed a date for the next hearing. Brown announced at that point he would like to waive his presence at the next hearing. Appellant understood that he had the right to testify and that he could decide not to testify; that was not somebody else's decision (R. Vol. V, 957-958). Collateral counsel indicated a preference for Brown to be the last witness and appellant answered he preferred to return to the prison (R. Vol. V, 959). When the court made further inquiry, Brown concluded by saying, "So, I'm not going to testify, period" (R. Vol. V, 960). The court carefully explained that appellant initially had to be there because the law required his presence, if for no other reason than to inform the court of the desire not to be there (R. Vol. V, 960-961). Appellant mentioned the convenience of his medicine at the prison. When the prosecutor indicated that if appellant was choosing to testify they could do

so that afternoon, Brown responded:

> THE DEFENDANT: I just said I was waiving. Can't you understand this, Ms. [sic] Aguero?
>
> THE COURT: You are not testifying?
>
> THE DEFENDANT: I am not coming back to testify. They say I can't testify because they got these other witnesses to put on, and they don't want me to testify until these other witnesses are put on, and I am saying I am not making this trip again.
>
> (R. Vol. V, 962)

The appellant then stated:

> THE DEFENDANT: Your Honor, between -- let's put this in abeyance. I need to really discuss -- they have these other witnesses they want to put on the record. At some point between now and whenever they have this other witness, let's decide -- let me decide then, okay?
>
> THE COURT: Okay.
>
> THE DEFENDANT: Okay. Thank you, Your Honor.
>
> THE COURT: Court's adjourned.
>
> THE BAILIFF: Court stands adjourned.
>
> MR. BRODY: Your Honor, could we get a motion to -- you want to go back as soon as possible?
>
> THE DEFENDANT: Yes, I do.
>
> (R. Vol. V, 963-964)

Thereafter, on November 16, 2000, Brown executed a written

Waiver of Appearance at Evidentiary Hearing acknowledging that he had been fully advised of the right to appear and to testify and understanding that by not appearing he may fail to present evidence on claims for which he had been granted a hearing and knowingly waived his appearance and possible presentation of his testimony (R. Supp. Vol. I, 99). At the hearing on December 15, 2000, counsel advised that Brown signed a waiver; after being advised on the matter he did not want to attend (R. Vol. VI, 967).

**(1) <u>The claim is procedurally barred</u>:**

Appellant first may not prevail since appellant did not complain below in any fashion of any denial of the right to attend the remainder of the evidentiary hearing. Brown was adamant in telling prosecutor Aguero that he was waiving his right to be present and testify (R. Vol. V, 962) and informed the court that he would decide whether to attend the next hearing (R. Vol. V, 963-964). Thereafter, he signed a written waiver acknowledging the consequences of his choosing not to appear and testify (R. Supp. Vol. I, 99). Counsel informed the court of Brown's desire not to attend (R. Vol. VI, 967). Appellant did not subsequently complain in the trial court that he had been denied any right to participate or that he had changed his mind about his waivers.

None of the cases cited by appellant mandate relief for appellant. Brown alludes in a footnote to Henry v. State, 613 So. 2d 429 (Fla. 1992), which dealt with appellant's in-court waiver of presentation of mitigation evidence at the penalty phase of trial and this Court held that the trial court had complied with the requirements of Hamblen v. State, 527 So. 2d 800 (Fla. 1988). Id. at 433. The instant case of course does not deal with waiver of mitigation at the penalty phase of trial. Similarly, in Thibault v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 486 (Fla. 2003), this Court found that an exchange during a change of plea hearing did not meet the threshold established in Lamadline v. State, 303 So. 2d 17 (Fla. 1974), for the existence of a waiver of the right to a penalty phase jury under F.S. 921.141(1). Appellant did not waive penalty phase jury and, as noted above, trial counsel presented the testimony of Mrs. Lamey and Dr. Dee. In Hill v. State, 688 So. 2d 901, 905 (Fla. 1996), this Court held that the trial court had conducted an adequate hearing in compliance with Faretta v. California, 422 U.S. 806 (1975), and Rule of Criminal Procedure 3.111(d) on the defendant's waiver of counsel for his trial. In Peede v. State, 474 So. 2d 808 (Fla. 1985), this Court held that a defendant may waive his presence at a capital trial.

Perhaps the closest cases to approximate the instant

situation decided by this Court are Griffin v. State, 820 So. 2d 906 (Fla. 2002), and Spann v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 293 (Fla. 2003), wherein this Court held that a defendant who had waived a sentencing phase jury could not attack the voluntariness of his waiver on direct appeal because of the failure to challenge the waiver in the trial court. While the instant case does not deal with waiver of penalty phase jury, it does involve an attempt to challenge the defendant's presence at a portion of a hearing where there has been no such presentation of the claim in the trial court (and may well simply be an appellate afterthought). The Court should deem appellant's claim to be procedurally barred, since appellant waived his right to be present following the second day of the evidentiary hearing, executed a written waiver, and did not subsequently assert in the trial court that he should be allowed to set aside his waivers.

**(2) The instant claim is meritless:**

To the extent that appellant is contending that the Court should require more of an on-the-record waiver of the right to testify, appellee submits that Brown's explicit rejection of the prosecutor's suggestion that he could testify that afternoon (R. Vol. V, 962) suffices. Moreover, in the context of the trial situation, it is not required that a trial court obtain an on-the-record waiver of the right to testify. In Lawrence v. State,

831 So. 2d 121, 132 (Fla. 2002) the Court stated:

> Lawrence contends that this Court should adopt a rule requiring a record waiver of the right to testify. As he acknowledges, this Court has considered and rejected this claim. See Occhicone v. State, 570 So.2d 902 (Fla.1990); State v. Singletary, 549 So.2d 996 (Fla.1989); Torres-Arboledo v. State, 524 So.2d 403, 410-11 (Fla.1988).

Accord, Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990)("We also find no merit to Occhicone's claim that the trial court erred in not telling Occhicone specifically that he had the right to testify in his own behalf."); Torres-Arboledo v. State, 524 So. 2d 403, 410-411 (Fla. 1988)(trial court does not have affirmative duty to make record inquiry concerning defendant's waiver of right to testify). In State v. Singletary, 549 So. 2d 996, 997 (Fla. 1989) the Court elucidated:

> During the course of a criminal trial, defense counsel necessarily makes many tactical decisions and procedural decisions which impact upon his client. It is impractical and unnecessary to require an on-the-record waiver by the defendant to anything but those rights which go to the very heart of the adjudicatory process, such as the right to a lawyer, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), or the right to a jury trial. Fla.R.Crim.P. 3.260. The defendant may even waive the right to testify without personally having to express his intent on the record. Torres-Arboledo v. State, 524 So.2d 403 (Fla.), cert. denied, ___ U.S. ___, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988).

As noted above in subsection (1), *supra*, the cases upon which

appellant relies do not mandate the granting of relief. The case of Henry v. State, 613 So. 2d 429, 433 (Fla. 1992) involved the defendant's penalty phase waiver of presentation of mitigation evidence; in the instant case there was no waiver of mitigation at the penalty phase, only the appellant's choice not to appear further at the conclusion of the second day of the post-conviction hearing. In Thibault, *supra*, the Court found non-compliance with the requirement of F.S. 921.141(1) that the record show a voluntary and intelligent waiver of the jury's rendering an opinion on the appropriateness of the death penalty. Unlike Thibault, the instant case does not involve a waiver of the penalty phase jury.

The closer analogy in the direct appeal context is Griffin v. State, 820 So. 2d 906 (Fla. 2002) where the Court held that when a defendant waives the penalty phase jury, appellate review on the voluntariness of the plea is precluded upon the failure of the capital defendant to first attack the voluntariness of a waiver of a sentencing jury in the trial court. Id. at 913. Accord, Spann v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 293, 295 (Fla. 2003).

Appellant cites no rule of procedure that mandates that a defendant may not waive his right to appear at a post-conviction hearing. Similarly, the reliance on Hill v. State, 688 So. 2d

901 (Fla. 1996) is inapposite; the instant case is not a waiver of counsel case and the election to proceed at trial with self-representation. Here, Brown chose to allow counsel to handle his hearing without his further presence.

In the trial context, a capital defendant may waive the right to be present in a capital proceeding. Peede v. State, 474 So. 2d 808 (Fla. 1985); see also Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Whitfield v. State, 706 So. 2d 1, 4 (Fla. 1997)("...we do not find that the trial judge abused his discretion in allowing Whitfield to leave.").[13]

In the instant case, the record is clear that appellant knowingly and voluntarily chose not to attend the continued hearing. He requested to waive his presence in the future (R. Vol. V, 957), understood that he had the right to appear and testify, and that it was his decision, not somebody else's (R. Vol. V, 958). Brown wanted to return to prison and be left alone (R. Vol. V, 959) and "So I'm not going to testify period" (R. Vol. V, 960). When the prosecutor suggested that after the lunch

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[13]A habeas petitioner does not have an automatic right to be present at a hearing in which he is collaterally attacking his criminal conviction. See Machibroda v. United States, 368 U.S. 487, 495 (1962); Sanders v. United States, 373 U.S. 1, 20 (1963); Wade v. Calderon, 29 F.3d 1312, 1325-1326 (9th Cir. 1994)(district court did not abuse its discretion in declining to order Wade be brought to the evidentiary hearing on the issues of whether counsel had rendered ineffective assistance and whether jurors had received improper communications).

break that day -- or even before the break -- appellant could "get on the witness stand and say something," appellant responded, "I just said I was waiving. Can't you understand this, Ms. [sic] Aguero." He insisted he was not coming back to testify (R. Vol. V, 962). Appellant then commented they could put this in abeyance and he would decide later (R. Vol. V, 963). Thereafter, he executed a written waiver of appearance (R. Supp. Vol. I, 99)[14] and counsel informed the court at the December 15 hearing he did not want to attend after being advised on the matter (R. Vol. VI, 967).

[14]That waiver recites: "**WAIVER OF APPEARANCE AT EVIDENTIARY HEARING** I, GEORGE WALLACE BROWN, having been fully advised of my right to appear at and testify in my evidentiary hearing, hereby waive appearance at the December 15, 2000 hearing. I understand that by not appearing and providing testimony, I may fail to present evidence on claims for which I have been granted a hearing but knowingly waive appearance and the possible presentation of my own testimony."

## ISSUE IV

**WHETHER THE LOWER COURT DENIED DUE PROCESS AND ABUSED ITS DISCRETION BY ALLEGEDLY FAILING TO PERMIT ARGUMENT BY BROWN'S COUNSEL.**

Appellant asserts at page 81 of the brief that "the court neither entertained nor ordered written or oral final argument to sum up the evidence presented at the hearing and to argue logical inferences therefrom." This is inaccurate. The record reflects that at the hearing on December 15, 2000 after the defense entered the depositions of Dave Anderson, Fred Reynolds and Al Smith, the lower court entertained argument wherein defense counsel discussed the alleged conflict of interest in the outcome of the trial, the alleged conflict because of the relationship between Linda Goodwin and Detective Ore, the alleged ineffective assistance of trial counsel at the penalty phase, and ineffective assistance of counsel at the guilt phase. (R. Vol. VI, 969-975, 975-978, 978-981).[15] Defense counsel also pointed out that the record was clear about allegations pertaining to prosecutorial misconduct in the prosecutor's closing arguments and asked the court to review those. (R. Vol. VI, 992). Defense counsel at the time of the conclusion of that oral argument did not request a further opportunity to present

[15] Defense counsel acknowledged having elected not to call a witness on alleged Brady violation. (R. Vol. VI, 991).

additional argument.

Apparently, Appellant's current complaint is that several months later, after the court had taken the case under advisement, successor collateral counsel who had not previously participated in the evidentiary hearing requested the court to hold its ruling in abeyance and to accept supplemental argument and permit supplemental oral argument. (R. Supp. Vol. VI, 934-936; R. Supp. Vol. VI, 939). The state filed a Response to Motion to Hold in Abeyance (R. Supp. Vol. VI, 937-938), and a Response to Motion to Accept Supplemental Argument and to Permit Supplemental Oral Argument (R. Supp. Vol. VI, 999-1001). The court denied the requests in its order of March 26, 2002, finding that Brown was not entitled to any further supplemental argument (R. Supp. Vol. II, 184-185).[16]

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[16] The order recites:

> "In his Motion to Hold Ruling in Abeyance, Mr. Brown, through undersigned counsel, Mark S. Gruber, requests that this Court hold its final ruling on Mr. Brown's Motion for Post Conviction Relief in abeyance for a period of at least sixty days. [footnote omitted] Due to a change in administration, the attorneys who represented the defendant before and during the evidentiary hearing are no longer employed with this agency and as such after being given an opportunity to review the case and file such motions as may be appropriate (See Motion to Hold Ruling in Abeyance, attached). Thereafter, in his

Appellant's claim is meritless and it is understandable that he cites no decisional law to support the view that there has been a violation of due process of law or an abuse of discretion by the trial court.[17] There simply is no constitutional requirement that mandates continuing requests for oral argument,

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> Motion to Accept Supplemental Argument and Permit Supplemental Oral Argument, filed, October 12, 2001, Mr. Brown again through undersigned counsel, Mark S. Gruber, having reviewed the transcript of the evidentiary hearing now moves the Court to consider and permit oral argument regarding the introduction of handwriting exemplars combined with defense counsel's failure to challenge the authenticity and relevance of numerous credit card transactions. [footnote omitted] (See Motion to Accept Supplemental Argument and Permit Supplemental Oral Argument, filed October 12, 2001, attached). The Court after considering the Motion to Hold Ruling in Abeyance, State's Response to Defendant's Motion to Hold Ruling in Abeyance, Motion to Accept Supplemental Argument and Permit Supplemental Oral Argument, and State's Response to Defendant's Motion to Accept Supplemental Argument and Permit Supplemental Oral Argument, court file, and record, as well as, the Court's above ruling on Mr. Brown's Motion to Vacate Judgments of Conviction and Sentence, finds that Mr. Brown is not entitled to any further supplemental argument. As such, no relief is warranted with respect to theses [sic] Motions."

[17] Obviously, an appellant would not be entitled to unending and successive requests for oral argument to this Court after having been given one argument up until the date this Court issues its opinion.

simply upon the change in assistant counsel.

## ISSUE V

**WHETHER THE LOWER COURT'S ORDER DENYING POST-CONVICTION RELIEF MUST BE REVERSED BECAUSE APPELLANT NOW ASSERTS THIS WAS A CIRCUMSTANTIAL EVIDENCE CASE WITH AN "INVADER" IN THE DEFENSE CAMP (RESTATED).**

In a somewhat intriguing - yet ultimately meritless argument - appellant appears to contend that this was a circumstantial evidence case that had gaps in the tangible evidence, with an "invader" in the defense camp.

To the extent that appellant's jeremiad is intended as an attack on the sufficiency of the evidence to convict, such a challenge is both improper and untimely. This Court previously affirmed the judgment and sentence of death on direct appeal finding the evidence sufficient to support the verdict. Brown v. State, 644 So. 2d 52, 53 (Fla. 1994)("...there was ample evidence supporting first-degree murder under a felony-murder theory: Brown was convicted of robbery; he stole Horace's car and credit cards, and cashed one of his checks for $650. We find no error."). The time for rehearing has long since expired and the case law is legion that post-conviction challenges and appeals from adverse rulings on collateral attacks may not serve as a substitute for, or successive appeal. See generally, Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995); Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988); Chandler v. Dugger, 634

So. 2d 1066 (Fla. 1994); King v. State, 597 So. 2d 780 (Fla. 1992); Swafford v. Dugger, 569 So. 2d 1264 (Fla. 1990).

The instant appeal is from the correctness of the lower court's ruling denying post-conviction relief following an evidentiary hearing and appellant does not point to any erroneous ruling or analysis in the lower court's lengthy disposition of the motion to vacate, except to say that the lower court did not address the check exemplars and "Wanda" note which successor collateral counsel Gruber sought to pursue months after the evidentiary hearing.[18] See Thomas v. State, 838 So. 2d 535, 539 (Fla. 2003)("a claim of ineffective assistance of trial counsel must be raised in circuit court, not this Court, for -- above all -- it is this Court's job to *review* a circuit court's ruling on a rule 3.850 claim, not *decide* the merits of that claim"); Bruno v. State, 807 So. 2d 55, 61-62 (Fla. 2001).

Before proceeding to the Brave New World suggested by appellant wherein this Court would eschew the traditional role of appellate court and instead become a new jury, ignoring the role and actions of the lower court in consideration of its

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[18] Current collateral counsel was appointed to represent Mr. Brown in the instant appeal when Mr. Gruber filed an untimely, belated notice of appeal from the denial of post-conviction relief and this Court authorized the lower court to appoint current counsel. (R. Vol. VI, 1064-1069, 1079-1081).

disposition of post-conviction claims, assume the role of deciding credibility of witnesses it has not seen or heard, and erasing or ignoring the entire jurisprudence regarding procedural bars, appellee would suggest a momentary pause.

To the extent that Brown's current handwriting exemplar issue is separate from his conflict of interest issue or the ineffective assistance of counsel claim, it does not appear that it was raised in the Amended Motion to Vacate; if it was not, obviously it is improper to initiate a claim on appeal not urged in the post-conviction motion. See Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988); Griffin v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 723, n 7 (Fla., September 25, 2003).

With regard to the handwriting exemplars issue, the lower court discussed this in section IB of its order below (R. Supp. Vol. I, 113-116) in which it discussed the testimony of Ms. Goodwin, Detective Ore, and trial counsel Doyel. Ms. Goodwin testified that she obtained the handwriting samples from appellant at Mr. Doyel's request and that it was the state who wanted the handwriting exemplars. Detective Ore testified that he never asked Goodwin to obtain any handwriting samples and that samples Ms. Goodwin had obtained were not used as evidence in the case. As part of his duties as lead detective, subsequent to a judicial hearing, Detective Ore obtained further

handwriting samples on his own without the aid of Ms. Goodwin. Mr. Doyel testified that the state was trying to compare appellant's handwriting on the various transactions that were made in Horace Brown's name and with his credit cards. On November 7, 1990, Doyel met with Mr. Spate and appellant for the purpose of Brown giving handwriting exemplars that had been requested. He had no specific recollection if Ms. Goodwin was present when the handwriting samples were taken. Since Brown's version from the beginning had been that he had taken the credit cards, checkbook, wallet and car of the victim and cashed the check, Doyel felt no reason to challenge the exemplars or the handwriting expert as it corroborated Brown's story and made it sound like Brown was telling the truth (R. Supp. Vol. I, 113-116).

**(1) The Check Exemplars**

At trial FDLE handwriting analyst James Outland testified that State's Exhibit 44 are check sample forms, reportedly the known handwritings of George Brown writing the name Horace Brown (DAR 696). State Exhibit 44 was introduced into evidence without objection (DAR 701). Detective Ore did not testify at trial about State Exhibit 44.

At the evidentiary hearing Detective Ore testified but CCR counsel Mr. Brody did not ask him any questions about the check

sample forms or his reports but instead confined his examination to matters relating to the Linda Goodwin affair (R. Vol. V, 945-955). There was no limit on the scope of the inquiry and counsel could have chosen, if he desired to do so, to ask whatever he wanted about check exemplars and/or supplemental reports. Brown's counsel chose not to do so. That successor counsel might desire to ask an additional question months after conclusion of the hearing neither mandates the granting of such relief nor brings into question Detective Ore's testimony. That successor counsel speculates that the blood samples and exemplars could not have been obtained in 1½ hours is mere speculation -- certainly not supported by testimony at the hearing. Moreover, the assertion that Doyel would have complained about having Brown sign his name thirty times ignores the fact in the record that Doyel did so complain at the December 5, 1990 hearing before Judge Strickland:

> MR. DOYEL: Plural. And they asked him to sign his name 20 or 30 times, maybe more than that, but to sign another name. He did all those things.
>
> (emphasis supplied) (R. Vol. VI, 1037; DAR 1536)

Doyel informed the court at that hearing that the state had received three samples of the Bobby-Wanda note and the court authorized an additional seven samples (R. Vol. VI, 1040; DAR

1539). While current successor appellate counsel blithely asserts that "there were *no* check exemplars taken from him on November 7th" (Brief, p. 85), that is refuted by Doyel's representation on the record at the December 5, 1990 hearing that "they asked him to sign his name 20 or 30 times, maybe more than that, but to sign another name." And Doyel was present when the November 7 exemplars were taken; Gruber and Bonner were not![19]

Quite apart from appellant's refusal to abandon his conspiracy by law enforcement personnel theory, Brown makes no effort to address either attorney Doyel's testimony or the findings of Judge Padgett. That alone is fatal to his claim. Doyel indicated that testimony about the documents - credit card receipt and check -- were not inconsistent with Brown's own statement; indeed it corroborated appellant's statement (R. Vol. V, 826).[20] There was no need to challenge the handwriting expert

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[19] No serious response need be made to the charge (Brief, pp. 85-86) that Ore spoke of the blood samples in the active voice but "deliberately changed to the passive voice" when speaking of the handwriting. Obviously, there was no obscuring the fact Ore was not present since Doyel told Judge Strickland that Ore was not present (R. Vol. VI, 1038; DAR 1537). Collateral counsel at the evidentiary hearing probably correctly decided not to question Ore on his active versus passive voice practices.

[20] According to Doyel, Brown's story from the beginning was "I took the credit cards. I took the checkbook. I took the wallet. I took the car. I went to Orlando. I cashed the check." (R. Vol. V, 826).

regarding the credit cards and check since Brown had admitted taking the items from the beginning; the Outland testimony corroborated the client's story and made it sound like he was telling the truth. In short, the jury should also believe the rest of Brown's story that he did not kill the victim (R. Vol. V, 826-827). The lower court concurred:

> Therefore, there was no reason for Mr. Doyel to challenge the exemplars of the handwriting expert as it corroborated his story and made it sound like Mr. Brown was telling the truth. (R. Supp. Vol. I, 115)

Additionally, Judge Padgett concluded:

> More importantly, as previously discussed, Mr. Brown never denied signing any of the things that he allegedly signed . . . there is no prejudice because Mr. Brown never denied that it was his signature. Therefore, Mr. Brown fails to meet both prongs of the Strickland test. (R. Supp. Vol. I, 116)

The lower court correctly denied the request by attorney Gruber to permit oral argument regarding the introduction of handwriting exemplars combined with defense counsel's failure to challenge the authenticity and relevance of numerous credit card transactions since no relief was warranted with respect to his motions (R. Supp. Vol. I, 184-185).

**(2) The "Bobby-Wanda" Exemplars**

At trial, the state introduced Exhibit 45 which FDLE expert

Outland described as a questioned document which he compared to known writings of George Brown and opined that appellant executed the hand printing on that note (DAR 698-699). Outland also testified (DAR 694-702). Exhibits 53 and 54, the exemplars of that note, were also introduced (DAR 699). Detective Ore testified at trial that he obtained Exhibit 45 in the mail with a return address of Robert Ellison of Nashville, Tennessee, which was examined by FDLE expert Outland (DAR 1000-1001).

Mr. Doyel testified at the evidentiary hearing that he recalled the state was seeking handwriting exemplars (and there was a note about “Bobby, I’m going to see Wanda in Arab”)(R. Vol. IV, 634-637); that the state wanted more handwriting exemplars and identified Defense Exhibit 2 as the December 5, 1990 transcript of hearing on the issue (R. Vol. IV, 654-655). As noted above, Doyel viewed the exhibits as corroborative of Brown’s version of events (R. Vol. V, 800; R. Vol. V, 826-827). The transcript of the December 5, 1990 hearing reflects that three exemplars of the note had been taken (which corresponds to State Trial Exhibit 53 [R. Vol. VI, 1030-1032]) and the court then authorized that an additional seven exemplars could be taken (which corresponds to State Exhibit 54).

Doyel recalled there was a meeting on November 7 where Brown gave handwriting samples to state authorities and doubted that

Linda Goodwin was present (R. Vol. IV, 640). Detective Ore testified at the evidentiary hearing that he supplied no information to Ms. Goodwin during the trial and did not ask her to obtain handwriting samples. He had no idea about the Exhibit 35 Goodwin affidavit regarding samples but could testify that any samples she obtained were not put into evidence. The only exhibits used were the ones he submitted to FDLE.[21] Ore recalled the incident where the judge had intervened to authorize additional samples. Ore would not have requested Goodwin to go and do work for him (R. Vol. V, 948-951). As previously argued, *supra*, the lower court credited the testimony of Doyel -- there was no reason to challenge the exemplars or the handwriting expert as it corroborated appellant's story and made it sound like Brown was telling the truth (R. Supp. Vol. I, 115). The lower court properly concluded based on the total evidence and testimony presented:

> After reviewing the testimony presented at the evidentiary hearing, the Court finds that any relationship that existed between Ms. Goodwin and Detective Ore did not commence until after the trial, and therefore, there was no conflict of interest in Mr. Doyel's representation of Mr. Brown. Moreover, there is no indication that counsel acted improperly or assisted the

[21] This is confirmed by the fact that Exhibit 54 introduced at trial has FDLE expert Outland's initial in the upper right hand corner of each page, as Outland testified.

State in their case in any way with the handwriting samples that were reportedly taken by Ms. Goodwin at Mr. Doyle's [sic] request. There was no testimony presented at the evidentiary hearing that Ms. Goodwin ever gave the handwriting samples to Detective Ore.[4] The State never had possession of these samples. The samples in the State's possession were exemplars which the State had asked Mr. Brown to sign and write certain things in Mr. Doyel's presence. It was at this time that Mr. Doyel refused to allow Mr. Brown to continue giving samples, and the State had to go back before the Court for the purpose of getting an order to continue. (See Post Conviction Evidentiary Hearing Transcript, dated October 19, 2000, vol. II, pp. 206-208, attached). Moreover, there is no record that the samples taken by Ms. Goodwin ever went to the FDLE nor were they ever admitted into evidence during the trial. (See Post Conviction Evidentiary Hearing Transcript, dated October 15, 2000, p. 17, L: 25, p. 18, L: 1-19, attached). More importantly, as previously discussed, Mr. Brown never denied signing any of the things that he allegedly signed. Even if the "affidavit" was further proof of the ongoing affair between Ms. Goodwin and Detective Ore, and that she was trying to help the prosecution in gathering these handwriting samples, there is no prejudice because Mr. Brown never denied that it was his signature. Therefore, Mr. Brown fails to meet both prongs of the Strickland test. As such, no relief is warranted on ground 1-B.

[4]At the post conviction evidentiary hearing, Ms. Goodwin testified only that the handwriting samples were taken from Mr. Brown at the jail. She never testified that she gave the handwriting samples to Detective Ore. (See Post Conviction Evidentiary Hearing Transcript, dated October 20, 2000, vol. III, p. 277, L: 11-

25, p. 278, L: 1-9, attached)
(R. Supp. Vol. I, 115-116)
(emphasis supplied)

Brown selectively chooses among the testimony he believes helpful to his present cause and conveniently denies or ignores and omits contrary testimony inconvenient to his position.[22] Take for example the Linda Goodwin and Bob Ore testimony. At the hearing below she did not remember the Linda Goodwin affidavit until shown it that day, but did recall the attachments to it. Her recollection was that Doyel had tasked her with having Brown write the samples (R. Vol. V, 880-883). She further testified she left Doyel's employ at the end of June 1991. Her relationship with Ore was most certainly after the trial -- the word affair is too strong -- it was a friendship that had a physical aspect to it that did not last too long --

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[22] Although the parties stipulated to the admission of the depositions of Anderson, Reynolds and Smith at the hearing on December 15, 2000 (R. Vol. VI, 956), it is abundantly clear that their testimony has no relevance to the issue being litigated, i.e., whether trial counsel rendered ineffective assistance. None of the three witnesses had anything to do with the prosecution or the defense in this capital trial. The depositions of Reynolds and Smith relate to their denial of participating in an assault or burglary at the Goodwin residence (R. Supp. Vol. I, 51-70, 76-93) and the deposition of Anderson relates to his investigation of the Goodwin burglary complaint and determination that it was meritless (R. Supp. Vol. VII, 1011-1039).

To the extent appellant is attempting simply to impeach his own witness Goodwin, it is extraneous to the issue and irrelevant.

then went back to a friendship, all after the trial (R. Vol. V, 904, 910-912). She testified that Ore was not her boyfriend (R. Vol. V, 917). Goodwin testified that investigator Tom Spate was a nice, good man, a friend and she had no romantic relationship with Spate (R. Vol. V, 921, 925).

Ore testified that he talked to Goodwin in a professional capacity during the trial and had a short-lasting affair, about a month, after the trial and sentencing of Brown. He supplied no information to Goodwin concerning the case during trial. He did not ask her to obtain handwriting samples; the only exhibits that were used at trial were the ones he submitted to FDLE and he would not have requested Goodwin to go and do his work for him (R. Vol. V, 946-953).

Despite this testimony by the parties involved, collateral counsel -- who did not attend the hearing and did not see or hear the witnesses -- reinterprets the case and concludes that Linda Goodwin was “an invader in the defense camp” acting to ingratiate herself to the state. Brown apparently would ask the Court to reject the testimony of both Ore and Goodwin on this and go on an imaginary tour as to some benefit she might receive. Not only does appellant fail to explain the benefit she might have accrued, he cannot show any benefit obtained by the state. Since the reality is Ore and Goodwin had a brief

fling after the trial, that Ore obtained the handwriting exemplars without Goodwin pursuant to court order and Doyel recognized that the samples and Outland's testimony was corroborative of appellant's version that he stole but did not kill and therefore should not be challenged, the trial court's findings supported by the sworn testimony at the hearing below must be affirmed.[23] Appellee would ask, even rhetorically, if a trial judge is not to decide facts based on sworn testimony of witnesses, how should he decide cases?

The appellant's final suggestion that the Court apply United States v. Cronic, 466 U.S. 648 (1984) rather than Strickland v. Washington, 466 U.S. 668 (1984) is meritless. See P. A. Brown v. State/Crosby, 846 So. 2d 1114, 1121 n 6 (Fla. 2003); Bell v. Cone, 535 U.S. 685, 696-697, 152 L.Ed.2d 914, 928 (2002):

> When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. We said 'if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.' *Cronic*, *supra*, at 659, 80 L.Ed.2d

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[23] The most reasonable explanation for the Goodwin affidavit and exemplars is that Doyel mentioned Judge Strickland's ruling authorizing the seven additional exemplars and she misinterpreted it as a directive to get the samples on one of her visits to the client at the jail. Her misinterpretation was of no moment since Ore got the State Exhibit 54 samples on his own and Goodwin's exemplars were not given to FDLE or introduced at trial.

> 657, 104 S.Ct. 2039 (emphasis added). Here, respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind.

Obviously, Doyel's asserted failures were not complete. The record establishes able advocacy at penalty phase. His presentation of appellant's mother Juanita Lamey and Dr. Dee and jury argument was constitutionally adequate and perhaps better than the cursory presentation at the hearing below -- of Dr. Pinero (who did not evaluate Brown), Carmen Jones (who hadn't seen appellant ever take a drink) and Betty Lou Highlander and Carol Smith who knew appellant as Carl Kent. Appellant has failed to satisfy the appropriate Strickland test.

## ISSUE VI

**WHETHER THE LOWER COURT ERRED IN ITS ORDER DENYING RELIEF ON THE "BOOK AND SONG" DEAL.**

In his final argument, appellant complains that the lower court accepted the testimony of trial defense counsel Doyel, rather than that of Linda Goodwin. The lower court's analysis appears at R. Supp. Vol. I, pp. 106-109:

> At the post conviction evidentiary hearing, Mr. Doyel, Mr. Brown's trial counsel, testified that with regards to any agreement entered into between himself and Mr. Brown, anything that happened with regards to such an agreement, happened after the sentencing of Mr. Brown for the murder of Horace Brown. (See Post Conviction Evidentiary Hearing Transcript, dated October 19, 2000, vol. II, p. 227, L: 21-25, p. 228, L: 1-6, attached). Mr. Doyel testified that on the morning Mr. Brown was sentenced, Mr. Brown handed him a stack of poems that he had written. (See Post Conviction Evidentiary Hearing Transcript, dated October 19, 2000, vol. II, p. 156, L: 18-25, attached). Mr. Brown then proceeded to discuss with Mr. Doyel the possibility of a joint venture where together the two of them would try to get the poems put to music, and perhaps try to do a book or some other thing about Mr. Brown's life and his experiences on death row. (See Post Conviction Evidentiary Hearing Transcript, dated October 19, 2000, vol. II, p. 157, L: 11-20, attached). Mr. Doyel, in testifying with regards to the instant matter, reiterated that he did not compromise Mr. Brown's defense in any way to increase in value any potential intellectual property. (See Post Conviction Evidentiary Hearing Transcript, dated October 19, 2000, vol. II, p. 229, L: 5-12, attached). Mr. Brown

presented no evidence or testimony to the contrary demonstrating that Mr. Doyel was actively representing conflicting interests. (See Post Conviction Evidentiary Hearing Transcripts, dated October 19, 2000, October 20, 2000, and December 15, 2000, attached). Therefore, the Court finds that Mr. Brown has failed to demonstrate that any actual conflict of interest existed between Mr. Doyel and Mr. Brown as a result of Mr. Doyel's attempt to enter into intellectual property agreements to obtain the rights to Mr. Brown's life story. As such, no relief is warranted with respect to this portion of ground I-A.

As to Mr. Brown's second contention of conflict of interest whereby counsel allegedly sought to obtain rights to Mr. Brown's poetry and recordings in order to enhance his wife's performing career, conflicting testimony was presented at the post conviction evidentiary hearing regarding whether Mr. Doyel had any proprietary interest during his representation of Mr. Brown to the detriment of his client. Mr. Doyel testified, as discussed above, that any supposed agreement between himself and Mr. Brown was made after sentencing.

Contrary to Mr. Doyel's testimony, Mr. Brown, through the testimony of Ms. Goodwin, Mr. Doyel's former legal assistant, attempted to establish that Mr. Doyel had labored under an actual conflict of interest which infected his representation of Mr. Brown. At the post conviction evidentiary hearing, Ms. Goodwin testified that Mr. Doyel always wanted Mr. Brown's poems because he wanted to have his wife turn them into songs. (See Post Conviction Evidentiary Hearing Transcript, dated October 20, 2000, vol. III, p. 289, L: 6-12, attached). Ms. Goodwin testified that this occurred during the representation of Mr. Brown while Mr.

Brown was in jail. (See Post Conviction Evidentiary Hearing Transcript, dated October 20, 2000, vol. III, p. 290, L: 24-25, attached). Post-conviction evidentiary hearings on capital post conviction motions claiming ineffective assistance of counsel are required in order to provide a defendant an opportunity to present factual and expert evidence which was not presented at trial and to have the trial court evaluate and weigh that additional evidence. See Porter v. State, 788 So. 2d 917, 923 (Fla. 2001). "Following such an evidentiary hearing, the performance and prejudice prongs are mixed questions of law and fact subject to a de novo standard but the trial court's factual findings are to be given deference." Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999). So long as a decision by the trial court is supported by competent, substantial evidence, an appellate court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court. Id. In considering the testimony of Mr. Doyel and Ms. Goodwin, the Court realizes that there is conflicting testimony as to whether counsel's attempt to gain any proprietary interest on his own behalf or that of his wife occurred after the representation of Mr. Brown, and therefore in assessing the credibility of both witnesses, finds the testimony of Mr. Doyel to be more credible. See Moore v. State, 458 So. 2d 61 (Fla. 3d DCA 1984)(holding that trial courts are privileged to reject a defendant's testimony in favor of conflicting testimony of counsel). Therefore, Mr. Brown fails to show that Mr. Doyel labored under any conflict of interest to the detriment of Mr. Brown. As such, no relief is warranted with respect to this portion of ground I-A.

(emphasis supplied).

It is for the trial court not this Court to evaluate the credibility of witnesses since only that court observes and hears their testimony. See Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998) ("It is the province of the trier of fact to determine the credibility of witnesses and resolve conflicts [citations omitted]. Sitting as the trier of fact in this case, the trial judge had the superior vantage point to see and hear the witnesses and judge their credibility....Secondly this Court will not reweigh the evidence when the record contains sufficient evidence to prove the defendant's guilt beyond a reasonable doubt."); Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984); State v. Spaziano, 692 So. 2d 174, 178 (Fla. 1997)("We give trial courts this responsibility because the trial judge is there and has a superior vantage point to see and hear the witnesses presenting the conflicting testimony. The cold record on appeal does not give appellate judges that type of perspective."); Wainwright v. Witt, 469 U.S. 412, 434, 83 L.Ed.2d 841, 858 (1985)(quoting from an earlier case that "face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded"). Suffice it to say the fact finder heard and decided which witnesses were credible. See also Creamer v. Bivert, 214 Mo. 473, 113 S.W. 1118, 1120-121 (Mo. 1908):

> We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness, may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify.

**The Appropriate Standard**: The appropriate standards are found in Cuyler v. Sullivan, 446 U.S. 335 (1980) and Strickland v. Washington, 466 U.S. 668 (1984).

(A) Under the traditional standard announced in Cuyler v. Sullivan, 446 U.S. 335 (1980) a defendant must show that there is an actual conflict of interest adversely affecting counsel's performance. Mere hypothetical or speculative conflicts are insufficient. See Thompson v. State, 759 So. 2d 650, 661 (Fla.

2000); Quince v. State, 732 So. 2d 1059, 1064 (Fla. 1999); Herring v. State, 730 So. 2d 1264, 1267 (Fla. 1998). The question of whether defense counsel labored under an actual conflict of interest that adversely affected counsel's performance is a mixed question of law and fact.

Appellant cannot prevail since he has failed to establish that there was an actual conflict of interest adversely affecting counsel's performance. Mickens v. Taylor, 535 U.S. 162, 152 L.Ed.2d 291 (2002); Buenoano v. Dugger, 559 So. 2d 1116, 1119-20 (Fla. 1990)(rejecting claim of counsel ineffectiveness due to conflict of interest for assigning counsel an interest in any film or book proceeds as a result of the trial proceedings); Buenoano v. Singletary, 74 F.3d 1078, 1086-87 (11th Cir. 1996)("The [district] court found that the contract was initially discussed and executed after all the evidence had been presented in the penalty phase of the trial. Thus, the contract was not discussed until after the Johnstons had devised their penalty phase strategy. The contract played absolutely no role in counsel's guilt or penalty phase strategy. Moreover, Buenoano offers no evidence of an adverse effect on counsel's appellate performance. Therefore, we find that the Johnstons' performance was not adversely affected by any conflict even if an actual conflict existed. Accordingly, we

find that counsels' performance was not ineffective due to a conflict of interest."). See also Brownlee v. Haley, 306 F.3d 1043, 1064, n 17 (11th Cir. 2002):

> Even if Brownlee could show that Dunn operated under a conflict of interest, he would still not prevail on his Sixth Amendment claim. In order to void a conviction on the basis of a conflict of interest, "it [is] at least necessary . . . for [a] petitioner to establish that the conflict of interest adversely affected his counsel's performance." Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 1245, 152 L. Ed. 2d 291 (2002). In order to prove adverse effect, a petitioner must show (1) a plausible alternative defense strategy that counsel might have pursued; (2) that the alternative strategy was reasonable; and (3) some link between the actual conflict and the decision to forego that strategy. See Freund, 165 F.3d at 860. Brownlee does not even attempt to link counsel's alleged conflict with any deficiencies in the pre-trial or guilt/innocence stages of his case. Therefore, any presumed conflict would not present a basis on which to overturn Brownlee's conviction.

(B) More recently the United States Supreme Court has revisited the jurisprudence on Sixth Amendment ineffective assistance of counsel due to conflict of interest in Mickens v. Taylor, *supra*. The Court reconfirmed the requirement in Cuyler v. Sullivan, 446 U.S. 335 (1980) that to void a conviction a petitioner must establish that the conflict of interest adversely affected his counsel's performance. Mickens, like the

predecessor case Cuyler, dealt with conflict of interest in the multiple representation context. The instant case is not of that sort; rather, Brown's claim is that attorney Doyel's personal interest conflicted with that of the representation of Brown. In its analysis, however, the Mickens Court indicated that lower federal courts had applied Cuyler v. Sullivan "unblinkingly" to "all kinds of alleged attorney ethical conflicts, Beets v. Scott, 65 F.3d 1258, 1266 (CA5 1995) (en banc)." 152 L.Ed.2d at 306.

The Court continued with this disclaimer:

> They have invoked the Sullivan standard not only when (as here) there is a conflict rooted in counsel's obligations to *former clients*, see, *e.g.*, Perillo v. Johnson, 205 F.3d 775, 797-799 (CA5 2001); Freund v. Butterworth, 165 F.3d 839, 858-860 (CA11 1999); Mannhalt v. Reed, 847 F.2d 576, 580 (CA9 1988); United States v. Young, 644 F.2d 1008, 1013 (CA4 1981), but even when representation of the defendant somehow implicates counsel's personal or financial interests, including a book deal, United States v. Hearst, 638 F.2d 1190, 1193 (CA9 1980), a job with the prosecutor's office, Garcia v. Bunnell, 33 F.3d 1193, 1194-1195, 1198, n 4 (CA9 1994), the teaching of classes to Internal Revenue Service agents, United States v. Michaud, 925 F.2d 37, 40-42 (CA1 1991), a romantic "entanglement" with the prosecutor, Summerlin v. Stewart, 267 F.3d 926, 935-941 (CA9 2001), or fear of antagonizing the trial judge, United States v. Sayan, 296 U.S. App. D.C. 319, 968 F.2d 55, 64-65 (CADC 1992).

> It must be said, however, that the language of Sullivan itself does not clearly establish, or indeed even support, such expansive application.
>
> (emphasis supplied) (152 L.Ed.2d at 306)

The Court explained that the purpose is to vindicate the Sixth Amendment right to counsel, not to enforce the Canons of Legal Ethics. See Nix v. Whiteside, 475 U.S. 157, 165 (1986)("breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel"). Appellant's reliance on Rule 4-1.(8)(d) of the Rules Regulating the Florida Bar is simply irrelevant to the issue whether there has been a violation of the Sixth Amendment right to the effective assistance of counsel.

Appellee respectfully submits that the Court's approving citation to Beets v. Scott and notation that lower courts had expanded Cuyler unnecessarily to cases which merely involved situations implicating counsel personal or financial interests, job offers or romantic entanglements constituted an endorsement of the Beets en banc determination that the appropriate standard to be employed when the attorney's personal interest conflicted with that of a client (in contrast to the multiple representation context) is not Cuyler, but Strickland v. Washington. In Beets v. Scott, 65 F.3d 1258, 1272 (5th Cir.

1995)(en banc), cert. den., 517 U.S. 1157 (1996), the Court stated:

> These considerations, which prompted the Court's reluctance to micromanage standards of professional and ethical behavior, apply with full force to the duty of loyalty with respect to attorney self-interest. The interests of both the defendant and society are served by a standard that, as far as possible, does not straitjacket counsel in a stifling, redundant federal code of professional conduct. Moreover, the purpose of the Sixth Amendment is not primarily to police attorneys' ethical standards and create a constitutional code of professional conduct; its purpose is to assure a fair trial based on competent representation. Finally, while Strickland does state that counsel owes the client a duty to avoid conflicts of interest (citing Cuyler), this is just one duty listed among others -- the duties to advocate the defendant's cause, to consult with and keep the defendant informed, and to employ skill and knowledge on the defendant's behalf. The Court emphasizes these as an unexhaustive list of the basic duties of counsel. Id. at 688, 104 S. Ct. at 2065. To list these duties is thus the starting point, not the conclusion, of constitutional analysis. We are firmly persuaded that it is most consistent with Strickland to assess the duty of loyalty pitted against a lawyer's self-interest under the Strickland test. n18
>
> n18 There is another reason why multiple representation cases are more amenable to Cuyler's fairly rigid rule of presumed prejudice. They are amenable to prophylactic rules requiring court oversight of potential conflicts. Self-interested duty of loyalty problems ordinarily defy prophylactic treatment, suggesting appropriateness of a real prejudice standard

for after-the-fact review.

4. Cuyler v. Strickland

> If Cuyler's more rigid rule applies to attorney breaches of loyalty outside the multiple representation context, Strickland's desirable and necessary uniform standard of constitutional ineffectiveness will be challenged. Recharacterization of ineffectiveness claims to duty of loyalty claims will be tempting because of Cuyler's lesser standard of prejudice. See United States v. Stoia, 22 F.3d 766, 769-70 (7th Cir. 1994); United States v. McLain, 823 F.2d 1457, 1463-64 (11th Cir. 1987). A blurring of the Strickland standard is highly undesirable. As a result of the uncertain boundary between Cuyler and Strickland, the focus of Sixth Amendment claims would tend to shift mischievously from the overall fairness of the criminal proceedings -- the goal of "prejudice" analysis -- to slurs on counsel's integrity -- the "conflict" analysis. Confining Cuyler to multiple representation claims poses no similar threats to Strickland. The dissent, of course, purports to avoid unwarranted expansion of Cuyler by confining its scope, apart from multiple representation cases, to instances involving "extraordinary" attorney-client conflicts "stemming from a highly particularized and powerful source." This open-ended, though hyperbolic, language is bereft of any animating principle and, as such, is unfortunately guaranteed to spawn far more litigation that [sic] it resolves.
>
> For all these reasons, we conclude that Strickland governs the issue whether Andrews's media rights contract and status as a witness resulted in the denial of constitutionally adequate counsel to Beets.

Appellee submits that in the instant case, where the alleged

conflict is predicated on counsel's alleged personal or financial gain rather than multiple representation of clients, this Court should join Beets in adopting the Strickland test. The lower court properly determined that "Mr. Brown has failed to demonstrate that any actual conflict of interest existed between Mr. Doyel and Mr. Brown as a result of Mr. Doyel's attempt to enter into intellectual property agreements to obtain the rights to Mr. Brown's life story. As such, no relief is warranted with respect to this portion of Ground I-A." (R. Supp. Vol. I, 107). Further, as to the claim of counsel seeking to obtain rights to Mr. Brown's poetry and recordings in order to enhance his wife's performing career, Judge Padgett appropriately determined "the testimony of Mr. Doyel to be more credible" than that of Ms. Goodwin and that "Mr. Brown fails to show that Mr. Doyel labored under any conflict of interest to the detriment of Mr. Brown." (R. Supp. Vol. I, 108).

Contrary to appellant's complaint, there is no incompleteness in the record. The lower court considered the testimony of the witnesses presented and made the appropriate credibility choices.[24] Appellant chose not to be present following the second day of the hearing. The lower court's

[24] Counsel for appellant below acknowledged in closing argument that the lower court had to make credibility choices (R. Vol. VI, 994).

findings and conclusions are supported by the record, and the case law, and should be affirmed.[25]

In summary, appellant's claim must be rejected. (1) The trial court's factual findings that appellant presented no evidence or testimony to the contrary on Doyel's denial that he actively represented conflicting interests and that Doyel was more credible than Goodwin regarding the joint venture on poems and music after sentencing are supported by the testimony and there is no basis for this court to substitute its judgment therefor. (2) Applying the Strickland standard to the ineffective counsel claim, appellant may not prevail since he has failed to establish either a deficiency by trial counsel or that even if there had been deficiency, that the prejudice prong has been satisfied, i.e., that there is a reasonable probability of a different result. Brown has failed to show that counsel's conduct undermined the reliability of the proceedings. (3) Even applying the Cuyler standard, Brown cannot prevail for the failure to demonstrate the existence of an actual conflict of

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[25] Appellee does not understand why it is interesting that Mr. Doyel did not handle the direct appeal. As this Court well knows, it is quite common that the Public Defender for the Tenth Judicial Circuit handle indigent capital defendants on direct appeal (DAR 2371-2373). On June 3, 1992 this Court entered its order allowing appellate counsel to withdraw and on August 18, 1992 acknowledged that substitute counsel, Ronald E. Smith, Esq., had been appointed.

interest that adversely affected Doyel’s performance.

For all these reasons, appellant’s claim must be rejected.

## CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Mary Catherine Bonner, Esq., 207 S.W. 12th Court, Ft. Lauderdale, FL 33315, this 15th day of October, 2003.

## CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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**COUNSEL FOR APPELLEE**

**IN THE SUPREME COURT OF FLORIDA**

**GEORGE WALLACE BROWN,**

**Appellant,**

**v.** **CASE NO. SC02-1787**

**STATE OF FLORIDA,**

**Appellee.**
_____/

**APPENDIX**

1 . . Motion for Attorney’s Fees and Reimbursement for Costs