IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-371

LLOYD CHASE ALLEN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Defendant was charged with (1) the first degree premeditated murder of Dortha Cribbs, (2) armed robbery of money belonging to Ms. Cribbs, (3) grand theft of a ring belonging to Ms. Cribbs, (4) grand theft of Ms. Cribbs' car and (5) kidnapping Ms. Cribbs with the intent to commit or facilitate the robbery or murder. (R. 4-8)[1] The historical facts of the case are:

> Cribbs left her home in Ohio to drive to Florida in November 1991. She apparently met Allen at a truck stop in Atlanta. Allen accompanied Cribbs during her visit with friends in Jacksonville Beach and during a stop in Bunnell to sell her trailer.
>
> Allen, whom Cribbs introduced as "Lee Brock," told Cribbs' friends in Jacksonville Beach and Bunnell that he owned a ranch in Texas and a trucking rig. Cribbs told the friends that she was going into the trucking business with Allen after she sold her trailer in Bunnell and vacation home in Summerland Key. Cribbs was paid $4100 in hundred dollar bills for the trailer. Allen witnessed this transaction on November 12. The friends in both locations stated that Cribbs was wearing a diamond-studded horseshoe-shaped ring, which was valued at $8,000.
>
> A man working at the house across the street from Cribbs' Summerland Key house saw her exit and re-enter the house early on the morning of November 13. He also observed Allen exit and re-enter the house around 11 a.m. The worker left for lunch at 11:45 a.m. When he returned a little after 1 p.m., the worker noticed that Cribbs' 1988 Ford Taurus was gone.

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[1] In this response, the symbol "R." will refer to the record on direct appeal. The symbol "T." will refer to the transcript of the trial. The symbol "S.R." will refer to the supplemental record on appeal.

The real estate agent who managed Cribbs' property arrived between 12:30 and 1 p.m. to investigate Cribbs' unexpected arrival at the house. When no one responded to his knocks, the agent used his own key to enter the house. The television set, which was on high volume, was emitting loud static and a snowy picture. The coffee pot was turned on and half-full. The agent discovered Cribbs' body on the floor of the master bedroom. She was lying face down on a pillow and her body was surrounded by a puddle of blood.

The medical examiner placed the time of death between 4 a.m. and 2 p.m. on November 13. There were two stab wounds to the right side of Cribbs' face, ligature marks on her wrists and ankles, and a stab wound to her left neck that severed the carotid artery. The angle of the neck wound indicated that it was inflicted as Cribbs lay face down. The left stab wound caused Cribbs to bleed to death. The medical examiner estimated that Cribbs lived for fifteen to thirty minutes after this wound was inflicted and was conscious for fifteen minutes. Based upon the lack of defensive wounds and blood splatter, the medical examiner opined that Cribbs was bound at the time that she was stabbed.

The following items were recovered from the scene: a suitcase containing a blue shirt and a camera loaded with undeveloped film depicting Allen; a pair of grey lizard skin boots; a pair of blue jeans containing a blood stain on the right knee, found at the foot of the bed; a sperm-stained hand towel, found by the side of the bed; a piece of window sash cord found under Cribbs' left arm consistent with the ligature marks and also consistent with a cord that had been cut in the spare bedroom; and a sheathed knife and a rag found in the spare bedroom. The contents of Cribbs' purse were scattered across the bed; the $4100 and diamond ring were missing. There were no signs of forcible entry and no fingerprints of value were found. The interior of the house and its contents appeared to have been wiped clean with a damp rag.

Expert witnesses testified that the body fluids found on the hand towel were consistent with Cribbs'

and Allen's blood types and DNA genotypes; the blood on the jeans was consistent with Cribbs' blood. The suitcase, boots, and shirt recovered from the scene were identified by witnesses as items that Allen had or wore in Jacksonville Beach and Bunnell. Pursuant to the State's motion granted by the court, Allen tried on these items of clothing, which, with the exception of the jeans, fit him. Allen's inability to fit into the jeans was explained by a considerable weight gain following his arrest.

A taxi driver testified that he picked up Allen at the Buccaneer Lodge Tiki Lounge between 12:30 and 12:45 p.m. on November 13, that he took Allen to Key Largo, and that Allen paid the eighty-dollar fare with a hundred-dollar bill. Cribbs' automobile was located in the parking lot of the Buccaneer Lodge on December 23. The car was covered with debris, indicating that it had been parked there for some time. Allen's prints were lifted from the car. A trucker's log book containing a credit card number and a sequence of telephone numbers led the police to Allen's location in California, where he was arrested on February 18, 1992.

At the close of all evidence, the trial court entered a judgment of acquittal for robbery of the cash and for theft of the ring. The court found insufficient evidence that force was employed in connection with any taking and insufficient evidence that Allen had taken the ring. Allen also informed the court that he wished to proceed pro se during the penalty phase, if one was necessary. The jury found Allen guilty of first-degree murder and grand theft of an automobile, but not guilty of kidnapping.

After the verdict was announced, defense counsel moved to withdraw from representation during the penalty phase. Counsel informed the court that Allen wanted to waive presentation of mitigating evidence and to affirmatively argue for imposition of the death penalty. Defense counsel explained that he was uncomfortable advocating this position and that Allen was competent to represent himself. The court conducted a *Faretta* inquiry and concluded that Allen knowingly and voluntarily waived his right to counsel

and was competent to represent himself. The court ordered Allen's defense attorney to remain present in a stand-by counsel status. The court also ordered an examination for psychological competency pursuant to Florida Rule of Criminal Procedure 3.210. At the subsequent competency hearing, two mental health experts testified that Allen satisfied all six items of competency under Florida Rule of Criminal Procedure 3.211 and was competent to proceed to the penalty phase. The court found Allen competent to represent himself in the penalty phase.

In his closing argument to the jury, Allen expressly denied the existence of mitigating evidence and specifically denied that he was abused in childhood or that he suffered from alcoholism or drug abuse. While Allen asserted his factual innocence of murder, he also urged the jury to vote for death because he felt responsible and remorseful for Cribbs' death. Allen theorized that Cribbs had been murdered by an unnamed associate that he had summoned to assist with house repairs and whom he had told that Cribbs carried a large sum of cash in her purse. Allen also stated that he preferred death to life in prison. The jury recommended death by a vote of eleven to one.

The court followed the jury's recommendation and imposed a sentence of death, and also sentenced Allen to five years for grand theft of an automobile. The court found three aggravating factors: the murder was committed while under a sentence of imprisonment based upon Allen's escape from a work release program in Kansas; the murder was committed for pecuniary gain based upon Allen's statements, the contents of the purse scattered across the bed, and the theft of the automobile; and the murder was especially heinous, atrocious, or cruel based upon the medical examiner's testimony that it took fifteen to thirty minutes for death to occur and that Cribbs would have been conscious for fifteen minutes after being stabbed. Secs. 921.141(5)(a), (f), (h), Fla. Stat. (1991). The court also found two nonstatutory mitigators that were not argued but were contained within the record: Allen's family background and his military service in Vietnam. The court also stated that it did not consider Allen's request for the death sentence in

imposing the sentence.

Allen v. State, 662 So. 2d 323, 325-27 (Fla. 1995), *cert. denied*, 517 U.S. 1107 (1996).

Defendant appealed his conviction and sentence to the Supreme Court of Florida, raising six issues:

> I.
> THE TRIAL COURT'S ERROR IN ADMITTING, IN GUILT/INNOCENCE PHASE OF TRIAL, UNDULY PREJUDICIAL PHOTOGRAPH OF VICTIM CUDDLING GRANDCHILD IN HER LAP, AS WELL AS OTHER VICTIM IMPACT EVIDENCE AND PROSECUTORIAL ARGUMENT THEREON, VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL, UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§2, 9, 16, 17 AND 22 OF THE STATE CONSTITUTION.
>
> II.
> THE TRIAL COURT ERRED IN ACCEPTING THE DEFENDANT'S WAIVER OF MITIGATION EVIDENCE, WHERE DEFENSE COUNSEL HAD NEVER PERFORMED ANY INVESTIGATION INTO THE PRESENCE OF MITIGATING EVIDENCE, AND CONSEQUENTLY THERE EXISTS NO RECORD EVIDENCE, IN VIOLATION OF ***KOON V. DUGGER***, 619 SO. 2D 246 (FLA. 1993), AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§2, 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION.
>
> III.
> THE TRIAL COURT ERRED IN PERMITTING THE DEFENDANT TO MAKE UNSWORN AND UNSUPPORTED DENIALS OF APPLICABLE MITIGATING FACTORS, BEFORE THE SENTENCING JURY, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§2, 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION.
>
> IV.
> THE TRIAL COURT ERRED IN FINDING, AS AN AGGRAVATING FACTOR, THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN, WHERE THE TRIAL HAD ENTERED A JUDGMENT OF

ACQUITTAL FOR ROBBERY OF THE VICTIM'S CASH AND WHERE THE THEFT OF THE VICTIM'S CAR WAS FOR THE PURPOSE OF ESCAPE, IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS, THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, ARTICLE I §§2, 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, AND §921.141(5)(F), F.S.A. (1993).

V.

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING FACTOR THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL, WHERE THE ENTIRE BASIS FOR THAT FINDING WAS THE TESTIMONY OF MEDICAL EXAMINER NELMS TO HIS "GUESS" THAT THE VICTIM WAS CONSCIOUS FOR FIFTEEN MINUTES AFTER THE FATAL STABBING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, §§2, 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION AND §921.141(5)(H), F.S.A. (1993).

VI.

THE PROSECUTOR'S COMMENTS TO THE JURY DURING THE PENALTY PHASE THAT ONLY A SENTENCE OF DEATH WOULD PREVENT THIS DEFENDANT, WHO HAD ESCAPED PREVIOUSLY FROM A WORK RELEASE FACILITY, FROM KILLING SOMEONE ELSE CONSTITUTED IMPROPER ARGUMENT OF A NONSTATUTORY AGGRAVATING FACTOR, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, §§2, 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION AND §921.141, F.S.A. (1993).

The State cross appealed, raising one issue:

THE TRIAL COURT ERRED IN FINDING MITIGATING CIRCUMSTANCES, WHERE THE FINDINGS WERE NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND/OR WERE POSITIVELY REFUTED BY THE EVIDENCE.

The Court affirmed Defendant's conviction and sentence and rejected the State's cross-appeal. *Allen*, 662 So. 2d at 330, 332.

Defendant then sought certiorari review in the United States Supreme Court, claiming:

> WHETHER THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO ADDRESS THE ISSUE LEFT OPEN IN SCHIRO V. FARLEY, 114 S. Ct. 783 (1994): NAMELY, WHETHER THE COLLATERAL ESTOPPEL DOCTRINE APPLIES DURING THE CAPITAL SENTENCING PHASE TO AN "ISSUE OF ULTIMATE FACT" WHICH WAS PREVIOUSLY RESOLVED IN A CAPITAL DEFENDANT'S FAVOR DURING THE GUILT PHASE AS A RESULT OF AN ACQUITTAL OF A CHARGED OFFENSE PREDICATED ON THE SAME FACTUAL ISSUE.

On March 25, 1996, the Court denied certiorari. *Allen v. Florida*, 517 U.S. 1107 (1996).

On March 20, 1997, Defendant filed his initial shell motion for post conviction relief. (PCR. 8-42)[2] Thereafter, Defendant sought public records disclosure for several years. During the protracted public records litigation, Defendant wrote to the State, stating that he wished to discharge his counsel and asking that his death warrant be expedited. (PCR. 729) Based on this letter, the State requested that the trial court conduct a waiver hearing pursuant to *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993). (PCR. 725-27)

At the *Durocher* hearing, Defendant indicated that he did wish to waive further post conviction proceedings and understood

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[2] The symbol "PCR." will refer to the record of appeal in this proceeding.

the nature an consequences of doing so. (PCR. 1452-57) When the trial court inquired why Defendant wished to waive his post conviction remedies, Defendant stated:

> Well, I've been trying to get to court for five years and this is the only time I've got there, this way here, so, you know. I don't see whether it makes any difference whether I kill myself or, you know. Just all I ever tried to do was get an evidentiary hearing, and that didn't look like it was going to happen, so that's why I got rid of --

(PCR. 1457) After discussing the issue of the delay with counsel, Defendant informed the trial court:

> Judge, I don't know if this -- I just found out something here on some evidence that I wasn't aware of and I'd like to have 30 days. And if they don't -- they've told me they're going to file something to you within 30 days, and if I don't get a copy of it within that, then, you know, I'm going to -- I want to proceed with this. But if they get it filed, then I'm more than happy.

(PCR. 1458) The trial court then determined that Defendant had withdrawn his request to waive further post conviction proceedings and ordered that the final amended motion be filed within 30 days. (PCR. 1459, 1464)

On January 1, 2001, Defendant filed his final amended motion for post conviction relief, asserting claims:

> I.
>
> [DEFENDANT] WAS DENIED HIS RIGHT TO AN ADEQUATE ADVERSARIAL TESTING AT THE GUILT PHASE OF HIS CAPITAL TRIAL DUE TO THE CUMULATIVE EFFECT OF INEFFECTIVE ASSISTANCE OF COUNSEL AND THE WITHHOLDING OF MATERIAL, EXCULPATORY EVIDENCE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED

STATES CONSTITUTION.

II.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL BECAUSE TRIAL COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EXAMINATION. [DEFENDANT'S] RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WERE VIOLATED.

III.

[DEFENDANT] WAS DEPRIVED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL. [DEFENDANT] WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

IV.

[DEFENDANT] IS DENIED HIS RIGHTS UNDER THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING HIS LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

V.

[DEFENDANT] IS INNOCENT OF THE DEATH PENALTY.

VI.

[DEFENDANT'S] RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN HE WAS ALLOWED TO WAIVE HIS RIGHT TO PRESENT PENALTY PHASE EVIDENCE WITHOUT AN ADEQUATE RECORD INQUIRY TO DETERMINE WHETHER THE WAIVER WAS KNOWING, VOLUNTARY AND INTELLIGENT.

VII.

[DEFENDANT] IS INSANE TO BE EXECUTED.

VIII.

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND IT VIOLATES HE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT.

IX.

[DEFENDANT] IS BEING DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION BY THE LACK OF FUNDING AVAILABLE TO FULLY INVESTIGATE AND PREPARE HIS POSTCONVICTION PLEADINGS, UNDERSTAFFING, AND THE UNPRECEDENTED WORKLOAD ON PRESENT COUNSEL AND STAFF, IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND IN VIOLATION OF SPALDING V. DUGGER.

X.

[DEFENDANT] IS INNOCENT OF FIRST-DEGREE MURDER. EVIDENCE THAT WAS NOT PRESENTED TO THE JURY DUE TO STATE MISCONDUCT AND TRIAL COUNSEL'S INEFFECTIVENESS, AS WELL AS NEWLY DISCOVERED EVIDENCE PROVE THAT [DEFENDANT] IS INNOCENT. THE JURY WAS DEPRIVED OF EVIDENCE NECESSARY TO ITS DETERMINATION IN GUILT PHASE OF [DEFENDANT'S] TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

XI.

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

(PCR. 748-870) After the State filed its response, the trial court conducted a *Huff* hearing.

At the *Huff* hearing, Defendant argued that the record did not show that two reports from FDLE had been disclosed. (PCR. 1476-77) He asserted that the report concerning the hair analysis was exculpatory because it showed that the hair found in the victim's hand did not belong to Defendant. (PCR. 1477-84) He argued that the report concerning the fingerprint in the car was material because it could have been used to argue that other testimony regarding the lack of fingerprints in the house was unreliable. (PCR. 1485-86) He asserted that he was not required to show that testimony was false and not merely inconsistent to raise a *Giglio* claim. (PCR. 1487-92)

He asserted that trial counsel was ineffective for arguing that Ms. Cribbs committed suicide. (PCR. 1492-1500) He alleged that trial counsel should have used the discrepancies in the description of Larry Woods and that the fact that Defendant acknowledged that Mr. Woods had seen him did not matter. (PCR. 1500-01) He asserted that trial counsel should have called Tania McLean to claim that a third person committed the murder even though Defendant had never told his attorney that any third person was present. (PCR. 1501-03) He also argued that trial counsel was ineffective for failing to object to the admission

of the knife because there was no conclusive testimony that it was the murder weapon. (PCR. 1503-08) He also asserted that counsel should have investigated whether Defendant checked into the Buccaneer Lodge to support the claim that a third person was involved. (PCR. 1510-11) He claimed that even if the individual claims did not merit relief, the cumulative effect of the claims did. (PCR. 1511-12)

The State argued that Defendant had not exercised due diligence in finding the FDLE reports because he was well aware that the State had found a hair and was having it tested when the State sought his hair sample to conduct the test. (PCR. 1512-13) It also asserted that since Defendant had been seen in the car and the house, the evidence only had meaning if the evidence showed that the hair and fingerprint belong to someone who was not permitted to be in the house and car, which had not been alleged. (PCR. 1513)

The State argued that the knife was properly admitted because it was consistent with the wounds and found at the crime scene. (PCR. 1513-14) The State responded that the fact that the witnesses' description of Defendant was inconsistent with his present appearance did not show that the descriptions were inconsistent with the way Defendant looked at the time of the crime, as the trial record reflected that Defendant's appearance

had changed. (PCR. 1514) Moreover, given the strength of the identification, Defendant's admission that he was the person seen by the witnesses and the theory of defense asserted, there was no reasonable probability that the failure to have attempted this impeachment would have affected the outcome. (PCR. 1515) The State responded that trial counsel had not actually argued that Ms. Cribbs committed suicide. (PCR. 1506-09) Instead, he asserted that the State had not proven how or when Ms. Cribbs was stabbed and that the State could not even eliminate the possibility that it might have been suicide. (PCR. 1506-09) It asserted that counsel had no reason to investigate the presence of a third person, as Defendant had admitted that he never told counsel there was a third person. (PCR. 1516) Moreover, the fact that Defendant was seen with a third person at a different location after the murder did not show that a third person committed the murder. (PCR. 1516)

During an extended discussion of why the hair results did not matter because there was no usable standard from Ms. Cribbs to eliminate her as a donor of the hair and why counsel had not been diligent in seeking the results of the hair analysis, Defendant asserted that a report did exist. (PCR. 1519-27) The State then provided a copy of the report to the lower court. (PCR. 1527) The lower court read the report and understood that

because of a labeling problem, no standard of Ms. Cribbs' hair was available to test. (PCR. 1527-31) As such, the conclusion of the hair analysis was that Ms. Cribbs could not be excluded as the source of the hair. (PCR. 1527-31)

Regarding the penalty phase, Defendant argued that he had not validly waived mitigation because counsel had not investigated mitigation. (PCR. 1531-33) He asserted that he was not claiming that the colloquy was inadequate. (PCR. 1531-32) He asserted that despite Defendant's statements that he understood what mitigation was, Defendant could not have understood unless counsel had investigated. (PCR. 1532-35) He thus claimed that counsel was ineffective for failing to investigate. (PCR. 1532-35)

The State responded that this Court's analysis of the waiver claim on direct appeal was not limited to the applicability of *Koon*. (PCR. 1535-36) Instead, the record reflected that counsel had discussed the types of evidence that could be considered mitigating, that counsel had been instructed by Defendant not to investigate and that Defendant refused to provide any information about his background, including the names of his family members, to counsel so that an investigation could be done. (PCR. 1536) Additionally, Defendant had represented himself at the penalty phase, waiving any claim of

ineffective assistance. (PCR. 1536) Moreover, Defendant had specifically disavowed before the jury that he had a bad upbringing or substance abuse problem, which was now being claimed as mitigation. (PCR. 1536-37)

The lower court responded that because Defendant had chosen to represent himself, the trial court only needed to conduct a *Faretta* inquiry. (PCR. 1538) After Defendant was permitted to represent himself, he decided what to present. (PCR. 1538-40)

The State pointed out that this Court had already ruled on the claim of whether the waiver of mitigation was valid if counsel had not investigated mitigation. (PCR. 1539-41) The State also noted that this was not a case where the decision to waive mitigation was made at the last minute. (PCR. 1545) Instead, the record reflected that Defendant had signed a written waiver of mitigation pretrial and had precluded an investigate prior to trial. (PCR. 1545-46)

After the *Huff* hearing, the trial court denied the motion for post conviction relief summarily. It found that the claims were facially insufficient and procedurally barred. (PCR. 1026-

This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly rejected Defendant's *Brady* claims because there was no reasonable probability that the result of the proceeding would have been different if the material had been disclosed. The lower court also properly rejected the claims of ineffective assistance of counsel at the guilt phase.

The lower court properly found the claim regarding the waiver of mitigation procedurally barred, as the claim was raised and rejected on direct appeal. Moreover, Defendant waived any claim of ineffective assistance of counsel at the penalty phase by representing himself and denying the existence of the mitigation now claimed.

The lower court properly rejected the claim of ineffective assistance of failing to have Defendant's mental health evaluated. Counsel had no reason to investigate Defendant's mental health. Further, the claim was insufficiently plead.

The lower court properly denied the claim of innocence of the death penalty as insufficiently plead. Moreover, Defendant's attacks on HAC would not have affected the finding of that aggravator, much less the imposition of a death sentence. The claim of ineffective assistance of counsel at the penalty phase was properly denied.

The lower court properly rejected the claims regarding juror

interviews and the constitutionality of the death penalty. The lower court also properly rejected the claim of ineffective assistance of post conviction counsel. Finally, the lower court properly denied the claim of cumulative error.

ARGUMENT

I. THE LOWER COURT PROPERLY DENIED DEFENDANT'S *BRADY*[3] CLAIM.

Defendant next asserts that the State violated *Brady* by failing to disclose that a hair in Ms. Cribbs' hand did not match Defendant, that FDLE had not matched a fingerprint in Ms. Cribbs' car and that evidence was contaminated. However, the lower court properly denied this claim.

In order to plead a *Brady* claim properly, a defendant must allege:

> [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

Way v. State, 760 So. 2d 903, 910 (Fla. 2000)(quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Inherent in the requirement that the State suppressed the evidence is a requirement that the State actually possess the evidence and that the defendant could not have obtained it. *See United States v. Grintjes*, 237 F.3d 876, 880 (7th Cir. 2001) (holding *Brady* does not apply where evidence could have been discovered by defense with use of diligence); *United States v. Corrado*, 227

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[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

F.3d 528, 538 (6th Cir. 2000)(same); *High v. Head*, 209 F.3d 1257, 1265 (11th Cir. 2000) (finding *Strickler* has not abandoned due diligence requirement of *Brady*); *United States v. Maloof*, 205 F.3d 819, 827 (5th Cir. 2000)(same); *Johns v. Bowersox*, 203 F.3d 538, 545 (8th Cir. 2000)(defining "state suppression" component of *Brady* as "[t]here is no suppression of evidence if the defendant could have learned of the information through 'reasonable diligence'"); *United States v. Hotte*, 189 F.3d 462 (2d Cir. 1999)(same). In fact, this Court has acknowledged that a defendant cannot show that a *Brady* violation occurred if the defendant knew of the existence of the evidence or in fact had the evidence. *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000)(“Although the "due diligence" requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.”)(quoting *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000)). In reviewing a trial court’s decision concerning a *Brady* violation, this Court makes an independent review of the trial court’s legal conclusions but gives deference to the trial court’s

findings of fact. *Rogers v. State*, 782 So. 2d 373, 376-77 (Fla. 2001).

Here, Defendant was aware that the State had found a hair in Ms. Cribbs' hand. (R. 46-47) He knew that the State had submitted this hair for testing and that problems had arisen. (S.R. 848-50) As Defendant knew of the existence of this evidence, it cannot be said that the State suppressed the evidence. *Maharaj*. As such, the lower court properly denied this claim.

Relying extensively on *Hoffman v. State*, 800 So. 2d 174 (2001), Defendant asserts that the lower court should have held a evidentiary hearing on the claim that the State withheld the report concerning the hair in Ms. Cribbs' hand. However, in *Hoffman*, the victims were excluded as donors of the hair. The defendant was only weakly tied to the crime scene by a fingerprint on a cigarette pack. Here, the hair in Ms. Cribbs' hand could have been her own. As such, the fact that the hair did not match Defendant's would not have supported the claim that it belonged to some unknown person who killed Ms. Cribbs. Moreover, Defendant was strongly tied to the crime scene. He was admitted to being there, his clothing was found there, and he was seen there by witnesses. As such, the lower court properly denied this claim.

With regard to the allegedly withheld report of the fingerprint, the lower court properly denied the claim. The fact that two experts disagreed does not show that either expert is lying. *See Maharaj v. State*, 778 So. 2d 944, 957 (Fla. 2000) *Craig v. State*, 685 So. 2d 1224, 1226 (Fla. 1996); *Routly v. State*, 590 So. 2d 397 (Fla. 1991); *see also United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989); *United States v. Bailey*, 123 F.3d 1381, 1395-96 (11th Cir. 1997)(proof of perjury requires more than showing of mere memory lapse, unintentional error or oversight); *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994)(conflicts in testimony are insufficient to show perjury). Further, the fact that FDLE did not find a match does not show that the Sheriff's investigation was deficient.

Moreover, Defendant was seen by a number of witnesses in the car where the print was found. In fact, Defendant admitted to having been in the car. Counsel argued that the finding of Defendant's print in the car signified nothing more than the fact that he had been in the car at some point. As no one could say when the print was left, counsel argued that the print did not show that Defendant committed the murder. Further, Defendant does not assert that these reports show that the fingerprint or hair did not belong to someone who was known to have been in the house or car. In fact, Defendant does not

assert that the hair or fingerprint were not Ms. Cribbs' own. As such, the failure to present this type of inconclusive evidence would not have affected the outcome, and the claim was properly denied. *See State v. Riechmann*, 777 So. 2d 342 (Fla. 2000).

With regard to the contamination, Defendant was aware that the State had submitted the evidence for RFLP DNA testing that had failed. He also presented evidence that the medical examiner had failed to note that Ms. Cribbs' feet had been tied and had erred regarding the cause of death in an unrelated case. He pointed out that the State had not tested the knife or the blood in the sink. The alleged contamination regarding the hair consisted solely of the fact that the hairs from Ms. Cribbs had not been properly labeled. As such, any evidence of contamination regarding the hairs would only have been cumulative. As such, it cannot be said to have affected the outcome, and the claim was properly denied. *See State v. Riechmann*, 777 So. 2d 342 (Fla. 2000); *Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla. 1997); *Provenzano v. Dugger*, 561 So. 2d 541, 545-46 (Fla. 1990); *Glock v. Dugger*, 537 So. 2d 99, 102 (Fla. 1989); *Card v. State*, 497 So. 2d 1169, 1176-77 (Fla. 1986), *cert. denied*, 481 U.S. 1059 (1987).

II. THE LOWER COURT PROPERLY DENIED THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE.

Defendant next asserts that the lower court improperly denied his claim of ineffective assistance of counsel during the guilt phase. Defendant asserts that he should have been granted an evidentiary hearing on his claims that trial counsel was ineffective for failing to request a *Frye* hearing on the DNA evidence, for arguing that Ms. Cribbs had killed herself, for failing to impeach Mr. Woods with an allegedly inconsistent prior description and for failing to call Tania McLean. However, the lower court properly summarily denied these claims.

With regard to the alleged ineffectiveness for failing to request a *Frye* hearing, the lower court properly denied this claim, finding that Defendant could not show prejudice from the failure to seek the exclusion of the DNA evidence. Blood group testing showed that the blood found on Defendant's clothing matched the victim and 10 percent of the population. (T. 488-89) Blood group testing also showed that the semen stain was consistent with a mixture of fluid from Defendant and the victim. (T. 480-81) The DNA testing revealed the same population frequencies with regard to the blood on Defendant's clothing. (T. 514) As such, the State would have been able to make the same argument concerning the bloody jeans regardless of

the admissibility of the DNA evidence.

Moreover, there was no evidence of when the blood got onto Defendant's clothing or when his semen got onto the towel. Instead, all the DNA evidence was able to show was that Defendant was present in the house. There was never any dispute that Defendant was in the house. In fact, counsel argued that all the State had proven was that he was present in the house (which was not in dispute), and Defendant's theory of how the crime could have been committed admitted Defendant's presence in the house. Under these circumstances, there is no reasonable probability that the failure to seek a *Frye* hearing to exclude the DNA results would have affected the outcome. *Strickland*. The lower court properly denied the claim.

The claim that counsel was ineffective for relying on suicide as a defense was also properly denied. The record reflected that counsel did not claim that the victim had kill herself as a defense.

The theme of Defendant's case and closing argument was that the police were sloppy and that they accused Defendant because he was a convenient suspect and they wanted to close the case. (T. 549-76) As part of this defense, Defendant pointed out that the State had presented a great deal of evidence to show that Defendant was in Ms. Cribbs' house and car, which was not in

dispute. However, the State did not submit the knife for testing either for trace evidence or to show that it was the murder weapon and did not test the blood in the sink. Defendant also pointed out that the medical examiner had done a sloppy job and had made major mistakes about the cause of death in a prior case. As the medical examiner could not explain the lack of bruising and evidence of a struggle and could not say when Ms. Cribbs' was tied and untied other than before her death, Defendant pointed out that Ms. Cribbs could have been tied and untied before the fatal attack. Given the alleged mistakes in the investigation, Defendant asserted that it was possible that another person had killed Ms. Cribbs. He also contended that suicide was a possibility in a scenario where Ms. Cribbs was tied and untied, had a fight with Defendant that caused him to leave and then stabbed herself to death. Given that Defendant is still alleging that the police mishandled the case and accused Defendant out of convenience, counsel should not be deemed deficient for following this same theory at trial. *See Strickland*. The lower court properly denied the claim.

Defendant's reliance on *Rose v. State*, 675 So. 2d 567 (Fla. 1996), is misplaced. There, counsel, who had been appointed to represent the defendant for resentencing, had conducted no investigation into mitigation. As a result, counsel did not

present available unrebutted mitigating evidence. Instead, counsel attempted to present lingering doubt evidence, which was not admissible. Here, counsel presented an argument that the police failed to conduct an adequate investigation of this case and instead went after Defendant because he was a convenient suspect during the guilt phase, which is a valid argument. In fact, Defendant is basically advancing the same theory now. As such, *Rose* is distinguishable, and the claim was properly denied.

With regard to the alleged ineffectiveness for the manner in which counsel cross examined Larry Woods, the lower court properly denied this claim. Defendant contended that counsel was ineffective for failing to ask Mr. Woods if he had seen another person at Ms. Cribbs' house the morning of the murder and for failing to impeach Mr. Woods with an allegedly inconsistent description of Defendant. However, counsel did ask that question, and impeachment with the description that was largely consistent with Defendant's appearance at the time of the crime would not have affected the outcome.

While Defendant claims that counsel never asked Mr. Woods if he had seen someone else at the house, counsel did ask that question. (T. 392) He also elicited that Mr. Woods was away from the house for an hour that morning and that he did not know

what occurred during that time to support a claim that another person could have been in the house. (T. 393) As such, counsel cannot be deemed ineffective for failing to do what he in fact did. The lower court properly denied the claim.

Defendant also asserts that Mr. Woods should have been impeached with his allegedly inconsistent description. However, in order to use a prior statement as impeachment, it must in fact be inconsistent. *See Maharaj v. State*, 778 So. 2d 944, 958 (Fla. 2000). Here, Mr. Woods stated that at the time of the crime Defendant was thin. Even by the time of trial, the evidence showed that Defendant had gained weight. (T. 269, 364, 389) At trial, Mr. Woods stated that Defendant was much heavier than he had been at the time of the crime. (T. 389) As such, the fact that Defendant's present weight is inconsistent with Mr. Woods' description does not show that Mr. Woods description was inconsistent with the way Defendant looked at the time of the crime. Moreover, the fact that Defendant's hair is light brown is not inconsistent with a description of sandy blonde hair, a shade of brown.

Further, Mr. Woods was able to assist in the construction of a composite drawing that matched Defendant, he was able to identify Defendant from the photographs from the camera found at the scene before Defendant was arrested and he was able to

identify Defendant from a photograph taken at the time of his arrest and in court. Defendant admitted that he was the person Mr. Woods saw. (T. 750-51) Given all of these facts, there is no reasonable probability that the failure to have impeached Mr. Woods with the fact that he was not initially sure of the gender of Defendant and the discrepancy regarding the height would have affected the outcome of the trial. *Strickland*. As such, the lower court properly denied the claim.

The lower court also properly denied the claim regarding the failure to call Ms. McLean. In his motion, Defendant stated that Ms. Lean had given an original statement to the police in which she had stated that she had seen two cars at the scene of the murder both the night before the murder and the morning of the murder. (PCR. 794) He also asserted that Ms. McLean had described seeing a heavy-set woman with a thin, young-looking man with dirty blond hair. (PCR. 794) Defendant asserts that this description was inconsistent with Defendant's present appearance. (PCR. 794-95)

However, in her pretrial deposition, Ms. McLean testified that at some point between 11:00 a.m. and noon, she went outside her house to check her fishing poles during a commercial break in a television program she was watching. (PCR. 1207) She looked across the canal in the direction of Ms. Cribbs' house

and saw a tall, skinny man and a short, fat woman on the balcony of the house. (PCR. 1207) She stated that she only glanced at the people and was not paying much attention to them. (PCR. 1207) At the time she made this observation, she was not wearing her glasses and that without her glasses she "see[s] people but [she] don't see." (PCR. 1209) She stated that at the time she made this observation, she only saw one car. (PCR. 1209) She stated that she thought that a second car may have been there but that she could not be sure that she had not seen a neighbor's car. (PCR. 1210-11)

As Ms. McLean's deposition testimony was that there was only one car on the day of the murder and that she could not be sure that a second car was even at the house the night before, it is not clear that counsel could have used Ms. McLean to establish the presence of a second car at the house. *See Morton v. State*, 689 So. 2d 259 (Fla. 1997)(trial court may exclude impeachment with a prior inconsistent statement because impeachment is not substantive evidence and introduction may confuse jury). Moreover, Ms. McLean's description of Defendant as a tall, skinny man is not inconsistent with the way Defendant appeared at the time of the crime. The record is replete with reference to the fact that Defendant had gained weight prior to trial. (T. 269, 364, 389) As such, the fact that Defendant is not

skinny today does not show that Ms. McLean's description was of someone other than Defendant. Additionally, Ms. McLean admitted that she was not wearing her glasses and did not get a good look at Defendant. As such, the lower court properly determined that there was no reasonable probability of a different result had Ms. McLean been called as a witness. *Strickland*. The claim was properly denied.

III. THE LOWER COURT PROPERLY REJECTED THE CLAIM REGARDING THE WAIVER OF MITIGATION.

Defendant next asserts that the lower court improperly summarily denied his claims that his waiver of mitigation was involuntary. He asserts that the waiver was invalid because trial counsel conducted an inadequate investigation into possible mitigation and the trial court conducted an inadequate colloquy with Defendant.

On direct appeal, Defendant asserted that his waiver of mitigation was involuntary because his counsel did not conduct an adequate investigation regarding mitigation and the trial court did not conduct an adequate inquiry into the waiver. This Court rejected the claim:

> Allen first asserts that the court erred in accepting his waiver of mitigating evidence where defense counsel did not investigate possible mitigating evidence and there was no record showing of mitigation evidence as required by *Koon*. In *Koon* this Court established the procedure that must be followed when a defendant, against counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase. 619 So. 2d at 250. Counsel must inform the court on the record of the defendant's decision. Based upon an investigation, counsel must indicate whether there is mitigating evidence that could be presented and what that evidence would be. Defendant must then confirm on the record that counsel has discussed these matters with him, and despite counsel's recommendation, the defendant wishes to waive presentation of penalty phase evidence. *Id.* We established this rule because of "the problems inherent in a trial record that does not adequately

reflect a defendant's waiver of his right to present any mitigating evidence." *Id.*

In *Koon*, we determined that defense counsel committed no error in following Koon's instruction not to present evidence during the penalty phase because counsel had investigated potential mitigating evidence before trial and argued the existence of mitigating factors based upon testimony presented in the guilt phase. *Id.*

We find the procedure established in *Koon* inapplicable to this case for two reasons: 1) during the penalty proceedings before the jury, Allen asserted his right of self-representation and the court found him competent to represent himself in the penalty phase; and 2) the opinion in *Koon* did not become final until several months after Allen's sentencing was conducted.

As noted above, the court conducted a *Faretta* inquiry and determined that Allen's waiver of the right to counsel was voluntarily and intelligently made. The two mental health experts who examined Allen at the court's request also concluded that Allen was competent to proceed to the penalty phase. Thus, unlike *Koon*, in this case the penalty proceeding before the jury was conducted by a defendant who chose to represent himself and decided not to present mitigating evidence. *See Hamblen v. State*, 527 So. 2d 800, 802-04 (Fla. 1988).

However, we note that Allen was represented by counsel again during the sentencing proceeding. During deliberations as to Allen's sentence, the jury requested that it be given written copies of the jury instructions and that the penalty phase evidence be submitted to it. When the judge asked Allen if he had any objections, he requested permission "to step aside and let [defense counsel] take over all the legal things to follow." Defense counsel then re-undertook Allen's representation and offered no objection to the jury's request. Defense counsel's representation during the penalty proceeding was limited to this single issue, and the jury returned its recommendation of death several hours later.

Counsel, however, also represented Allen during the sentencing proceeding where the State presented three witnesses to rebut the residual doubt argument

> that Allen had made to the jury during closing argument in the penalty proceeding. The State also presented into evidence a radio interview with Allen that was taped after the jury returned its recommendation of death. During argument to the court at sentencing, defense counsel stated that he had no mitigating factors to present because Allen refused to provide any and "repeatedly requested that I not plead for life in his case." Counsel further stated that he was "biting his lip" because he was "not allowed to open up and say everything that I would like to say and argue everything that I want to argue," but was instead respecting Allen's wishes on this matter and would "do exactly what [Allen] asked me to do." Although the judge asked defense counsel whether he had informed Allen about the statutory mitigating factors available, there was no indication that counsel had investigated Allen's background or history to determine whether particular mitigating evidence was available. Counsel also made no proffer of mitigating evidence that could be presented to the court.
>
> While this procedure arguably fell short of that established in *Koon*, our ruling in *Koon* by its own terms is prospective only. 619 So. 2d at 250; *see also Elam v. State*, 636 So. 2d 1312, 1314 (Fla. 1994). The opinion in *Koon* did not become final until rehearing was denied in June 1993, over three months after sentencing occurred in the instant case. Because the *Koon* procedure was not applicable either during the penalty proceeding before the jury or during the sentencing proceeding before the judge, we find no error on this point.

Allen, 662 So. 2d at 328-29. As this issue was addressed on direct appeal, the lower court properly found this claim to be procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). While Defendant asserts that the Court only determined that *Koon* was inapplicable, a review of this Court’s holding shows that this is untrue. As such, the lower court properly

refused to lift the procedural bar.

The cases relied upon by Defendant do not show that the lower court erred in finding the claim barred. In *Deaton v. Dugger*, 635 So. 2d 4 (Fla. 1993), the defendant claimed ineffective assistance of counsel for failing to present mitigation. The issue of a waiver of mitigation had not been raised on direct appeal. *See Deaton v. State*, 480 So. 2d 1279 (Fla. 1985). The State had asserted in the post conviction proceedings that the actions of defendant and his family had prevented the presentation of mitigation. This Court rejected the claim, finding that the failure to explain what mitigation was negated the alleged lack of cooperation from Defendant. In *Battenfield v. Gibson*, 236 F.3d 1215 (10th Cir. 2001), the defendant again claimed ineffective assistance of counsel. Again, the issue of a waiver was not raised on direct appeal. *Battenfield v. State*, 819 P.2d 555 (Okla Crim. App. 1991). Again, the State attempted to defend the claim of ineffective assistance on the grounds that Defendant had prevented the presentation of mitigation. Again, the court found the last minute decision not to testify or call the defendant's parents was based on a lack of investigation or explanation of what could be presented. *See also Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991)(same); *Thompson v. Wainwright*, 787 F.2d

1447 (11th Cir. 1986).

Here, the issue was presented and rejected on direct appeal. Moreover, counsel did not represent Defendant at the penalty phase; Defendant represented himself. As such, Defendant waived any claim of ineffective assistance of counsel. *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). Further, the record reflects that this was not a last minute decision made because counsel had nothing to present.

Defendant filed a sworn written waiver of mitigation months prior to the commencement of the guilt phase. (R. 188-89) In the waiver, Defendant acknowledged that he did not want any mitigation presented, that he was refusing to provide any information so that counsel could investigate mitigation, that he had ordered that no investigation be presented and that he desired to have a death sentence imposed if he was convicted. (R. 188-89)

After the guilt phase charge conference, Defendant indicated that he desired to proceed *pro se* in the penalty phase because his counsel did not believe that he could ethically proceed in the manner that Defendant wanted. (T. 541) After the jury found Defendant guilt, counsel moved to withdraw, indicating that Defendant had stated that he did not want any mitigation presented and wanted to ask for the death penalty. (T. 661)

Counsel had consulted extensively with Defendant on this issue and had another attorney discuss the matter with Defendant. (T. 661) After a *Faretta* inquiry, Defendant represented himself at the penalty phase. During his presentation, he specifically stated that he was raised in a good family and had no problems with alcohol or drug dependence. (T. 739-40)

As this Court had addressed the issue on direct appeal, the lower court properly found the claim to be procedurally barred. Moreover, Defendant waived any right to claim ineffective assistance of counsel at the penalty phase by discharging counsel. Finally, Defendant's decision was not a last minute decision based on a lack of preparation but a reasoned decision made well before trial. Under these circumstances, the lower court properly rejected the claim.

Defendant next appears to contend that counsel was ineffective for failing to present mitigation. However, Defendant represented himself at the penalty phase and waived any claim of ineffective assistance regarding that proceeding. *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975).

Moreover, Defendant specifically denied having a poor family background or abusing alcohol or any other substance. (T. 739-40) As such, counsel cannot be deemed ineffective for failing to present evidence that was diametrically opposed to

Defendant's own testimony. *Correll v. Dugger*, 558 So. 2d 422, 426 n.3 (Fla. 1990).

Moreover, had counsel presented military service as mitigation, the State would have been allowed to show that Defendant had gone AWOL on numerous occasions, was convicted of desertion and was given an undesirable discharge. (S.R. 915, 916, 920) Given that the presentation of this evidence would have opened the door to the presentation of damaging testimony, counsel cannot be deemed ineffective for failing to present it. *Breedlove v. State*, 692 So. 2d 874, 877-78 (Fla. 1997); *Valle v. State*, 581 So. 2d 40, 49 (Fla. 1991); *Medina v. State*, 573 So. 2d 293, 298 (Fla. 1990) (finding no ineffectiveness in not presenting witnesses where they would have opened the door for the State to explore defendant's violent tendencies).

Further, the trial court found Defendant's military service as mitigation and his family life mitigating even though they were not presented. Defendant himself stated that he was merely a thief, not a violent criminal. (T. 737-39) Defendant reiterated this claim in the radio interview that was introduced at the *Spencer* hearing. (S.R. 896-97) The trial court also considered a presentence investigation report, which outlined Defendant's criminal history. (S.R. 911-13) Despite these findings and the presentation of this evidence, the trial court

still imposed a death sentence. As such, counsel cannot be deemed ineffective, and the claim was properly summarily denied. *Strickland*.

Finally, Defendant appears to assert that waivers of mitigation are illegal. However, this Court has noted that such is not true. *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001). As such, the lower court properly denied this claim.

IV. THE LOWER COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO HAVE DEFENDANT EVALUATED BY MENTAL HEALTH PROFESSIONALS.

Defendant next asserts that the lower court improperly summarily denied his claim that his counsel was ineffective for failing to have Defendant's mental health evaluated. However, the lower court properly summarily denied this claim.

In his motion for post conviction relief, Defendant asserted because the trial court inquired if Defendant had been treated for any mental illness during the *Faretta* inquiry, counsel should have been on notice that he had mental problems. He contended that counsel had a duty to investigate his mental state even if he had no reason to believe that Defendant had any mental problems. However, Defendant did not assert that he had any mental problems. Instead, he asserted:

> The assistance of a mental health expert is necessary to determine whether a client is competent or sane, as well as to determine the applicability of diminished capacity defenses. In regard to the penalty phase, the client's background and family history must be investigated for the presence of statutory and nonstatutory mitigation. As a result of counsel's failure to secure the assistance of a mental health expert and to conduct an adequate background investigation, the jury that convicted and sentenced [Defendant] to die was deprived of relevant information necessary to a fair trial and a reliable sentencing.

(PCR. 811-12) The lower court denied this claim, finding that

Defendant had not asserted any facts that indicated that Defendant had any mental health problems, that Defendant was found competent and that a defense based on an alleged inability to form specific intent would have been inconsistent with Defendant's assertion of innocence. (PCR. 1071-75)

While Defendant asserted that his mental health was always at issue because Florida law permits the presentation of mental health evidence, this is simply untrue. As the United States Supreme Court noted in *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985), "A defendant's mental condition is not necessarily at issue in every criminal proceeding." Both this Court and the Eleventh Circuit have held that where there was nothing to put counsel on notice of a defendant's alleged mental problems, counsel does not have a duty to hire mental health experts to evaluate the defendant's mental state. *See Mills v. Moore*, 786 So. 2d 532, 535 (Fla. 2001); *Mills v. State*, 603 So. 2d 482, 485 (Fla. 1992); s*ee also Williams v. Head*, 185 F.3d 1223, 1239 (11th Cir. 1999); *Baldwin v. Johnson*, 152 F.3d 1304, 1314-15 (11th Cir. 1998). As such, the lower court properly rejected Defendant's assertion that his counsel had a duty to investigate his mental state where counsel had no indication that Defendant had any mental problems.

Moreover, the record affirmatively reflects that counsel had

never seen any indication that Defendant had any mental problems. Counsel affirmatively stated that he found Defendant to be "in all respects coherent and rational." (T. 661) Moreover, Defendant personally informed the trial court that he had never been treated for a mental illness, and stated:

> I have been tested with numerous NPR and IQ tests. I have an IQ that fluctuates because of the different tests at 135 to 138.

(T. 671) As counsel had no indication that Defendant was mentally ill, he had no duty to investigate Defendant's mental state, and the lower court properly summarily denied this claim.

The only allegation that counsel should have been on notice that Defendant had a mental disability claim in the motion was the trial court inquiry during the *Faretta* colloquy about whether Defendant had ever been treated for a mental illness. Defendant asserted that this question showed that the trial court realized that Defendant had mental problems after only speaking to him for a brief period of time and that therefore counsel should have realized that Defendant had mental problems. However, the trial court affirmatively indicated that it had no reason to doubt that Defendant was mentally sound. (T. 672, 675-76) Instead, the question was asked in the context of a *Faretta* inquiry. Such a question is necessary in this context. *See In Amendment to Florida Rule of Criminal Procedure*

3.111(d)(2)-(3), 719 So. 2d 873, 878 (Fla. 1998)(providing a model *Faretta* inquiry including the question, "Have you ever been diagnosed and treated for a mental illness?") Thus, the colloquy with the trial court did not demonstrate any basis for counsel to have questioned Defendant's mental health. As counsel had no reason to believe that Defendant was, or ever had been, mentally ill, he had no duty to investigate Defendant's mental state. The lower court properly denied the claim.

Defendant's reliance on *Mauldin v. Wainwright*, 723 F.2d 799 (11th Cir. 1984), is misplaced. There, counsel raised an insanity defense. However, counsel never investigated Mauldin's mental health and did not have him examined by an expert. Instead, counsel presented the insanity defense based solely on lay witness testimony. The Eleventh Circuit determined that counsel was ineffective for failing to conduct an adequate investigation into the sole defense in the case. Here, Defendant claimed that he had not committed the crime. Defendant has shown no reason why his counsel should have questioned his mental health. As such, *Mauldin* is inapplicable.

Moreover, even if counsel could be deemed deficient for failing to investigate Defendant's mental state, the lower court would still have properly denied the claim because Defendant did not sufficiently allege prejudice. Defendant did not assert

below, and had not asserted here, that he was incompetent at the time of trial, that he was insane at the time of the offense, or that he suffered from any mental illness. Instead, he merely asserted that because Defendant's mental health was not investigated, "information" was not presented to the jury. (PCR. 809, 812) Defendant never asserted what that information was. As this Court has stated, for a claim to be facially sufficient, the motion must allege specific facts, which are not conclusively refuted by the record. *See Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). Since this claim did not met this standard, the lower court properly denied the claim.

Defendant also alleges that counsel was ineffective for failing to question the qualification of Dr. Wolfe, one of the mental health experts who examined him prior to the penalty phase. The gravamen of Defendant's complaint is that Dr. Wolfe is not a licensed psychologist in the State of Florida. However, in *State ex. rel Huie v. Lewis*, 80 So. 2d 685, 690 (Fla. 1955), this Court held that it was not necessary for experts appointed to evaluate a defendant to be licensed. *See also Provenzano v. State*, 750 So. 2d 597, 601-02 (Fla. 1999)(finding that person who had a doctorate of education in psychology who practiced psychology was qualified as an expert). As such, the trial court would have been able to find that Dr.

Wolfe was qualified to serve as a competency expert even though he was not licensed. Thus, the lower court properly denied this claim.

Moreover, Defendant does not explain how the failure to question Dr. Wolfe's qualifications would have affected the outcome of the proceedings. As previously noted, the trial court had no question about Defendant's competency and ordered the evaluation out of an abundance of caution. (T. 672, 674) Defendant was evaluated by more than one doctor, and Defendant has not shown that Dr. Holbrook's finding of competency is tainted. Nor has Defendant demonstrated that an evaluation of Defendant by a different doctor would have resulted in a finding that Defendant was incompetent. As such, Defendant has not shown that the failure to challenge the qualifications affected the outcome in any manner. *See Sanchez-Velasco v. State*, 702 So. 2d 224 (Fla. 1997)(where trial court did not have a doubt about defendant's competency, trial court did not err in appointing only one doctor to evaluate him). The lower court properly denied the claim.

V. THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIM THAT HE IS INNOCENT OF THE DEATH PENALTY.

Defendant next asserts that the lower court improperly denied his claim that he is innocent of the death penalty. He based this claim on his allegation that Dr. Nelms' testimony regarding the length of time that it took Ms. Cribbs to bleed to death and the length of time that she was conscious while doing so was false. He also asserts that counsel was ineffective for failing to call a medical examiner to dispute these time periods. He also alleged that counsel was ineffective for failing to object to Dr. Nelms' testimony because it was a guess. He also asserts that the trial court should have reconsidered whether this Court could conduct a proper proportionality review after the waiver of mitigation. However, the lower court properly denied this claim.

To prove a claim of actual innocence of the death penalty, a defendant must show "based on the evidence proffered plus all record evidence, a fair probability that a rational fact finder would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." *Sawyer v. Whitley*, 505 U.S. 333, 346 (1992)(quoting *Sawyer v. Whitley*, 945 F.2d 812 (5th Cir. 1991)). The Court further noted that "the 'actual

innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error." *Id.* at 347. In applying this test to Florida's sentencing law, the Eleventh Circuit stated:

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

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

Here, the trial court found three aggravating factors in support of Defendant's death sentence: under a sentence of imprisonment, for pecuniary gain and HAC. (R. 239) Defendant is presently only complaining about the finding of HAC. He does not allege that the other two aggravating circumstances were improperly found. As such, the claim was insufficient and was properly denied on this basis.

Moreover, the lower court properly rejected the basis of

Defendant's claim. Defendant raised the claim that the trial court improperly found HAC because Dr. Nelms' testimony regarding the time lengths was only a guess. Initial Brief of Appellant, Florida Supreme Court Case No. 81,639, at 53-59. The State responded to this claim on the merits, without asserting a procedural bar. Brief of Appellee at 82-84. The Florida Supreme Court rejected the claim on the merits without mentioning any procedural bar. *Allen*, 662 So. 2d at 330-31. As the issue was raised on direct appeal, it is procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). Further, recasting the claim in terms of ineffective assistance of counsel does not negate the bar. *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990). As such, the lower court properly denied this claim.

With regard to the assertion that the State knowingly presented false testimony, Defendant asserted that Dr. Nelms' testimony was false because he has a new expert, who allegedly would testify that the time it took Ms. Cribbs to lose consciousness and die was less than Dr. Nelms stated. However, in order to sufficiently allege a *Giglio*[4] claim, a defendant must

[4] *Giglio v. United States*, 405 U.S. 150 (1972).

allege:

> (1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material.

Craig v. State, 685 So. 2d 1224, 1226 (Fla. 1996); *see also Routly v. State*, 590 So. 2d 397 (Fla. 1991). "[M]ere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony." *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989); *see also United States v. Bailey*, 123 F.3d 1381, 1395-96 (11th Cir. 1997)(proof of perjury requires more than showing of mere memory lapse, unintentional error or oversight); *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994)(conflicts in testimony are insufficient to show perjury). The mere fact that two experts disagree does not show that either expert's testimony is false, or that the State knew it was false. As such, the lower court properly denied this claim. *See Maharaj v. State*, 778 So. 2d 944, 957 (Fla. 2000).

With regard to the claim that counsel should have consulted an independent pathologist, it must be remembered that counsel did not represent Defendant during the penalty phase. Defendant represented himself. As such, Defendant waived any right to raise a claim of ineffective assistance of counsel during the penalty phase. *Faretta v. California*, 422 U.S. 806, 834 n.46

(1975). Defendant did not assert that his new expert would have disputed the medical examiner's testimony regarding the cause of death. Instead, he asserts that such an expert would dispute the amount of time that the victim was alive after the fatal would was inflicted and the amount of time it could have taken for the victim to lose consciousness. However, the amount of time that it took the victim to die or lose consciousness is not material to any guilt phase issue; it was only material in the penalty phase. As Defendant waived the right to claim ineffective assistance at the penalty phase, the lower court properly denied this claim.

Even if counsel had been representing Defendant at the time of sentencing, he would still not have been ineffective for failing to present the testimony of another medical examiner. Defendant only claims that his new expert would contest the length of time Ms. Cribbs was conscious and the length of time it took her to bleed to death. Defendant does not allege that his pathologist would dispute that Ms. Cribbs had two stab wounds to the right side of her face and a fatal stab wound to the left side of her neck, all of which were inflicted while she was alive and bound. This Court has affirmed the finding of HAC when the victim was stabbed multiple times and bled to death even when the evidence showed that the victim was alive and

conscious for far less time. *E.g.*, *Bates v. State*, 750 So. 2d 6, 17-18 (Fla. 1999)(HAC properly found where victim was conscious for 1 to 2 minutes after being fatally stabbed); *Brown v. State*, 721 So. 2d 274, 277-78 (Fla. 1998)(HAC properly found where victim was alive and conscious for "a period of minutes" during repeated stabbings); *Rolling v. State*, 695 So. 2d 278, 296 (Fla. 1997)(HAC properly found where defendant stabbed victim who was initially asleep and victim lived for only 30 to 60 seconds after attack began). In fact, this Court has stated, it has "consistently upheld this aggravator in cases where the victim was repeatedly stabbed." *Williamson v. State*, 681 So. 2d 688, 698 (Fla. 1996); *see also Brown v. State*, 721 So. 2d 274, 277-78 (Fla. 1998); *Cole v. State*, 701 So. 2d 845, 851-52 (Fla. 1997). As Ms. Cribbs had three separate stab wounds, this trial court would still have properly found HAC even if Defendant had presented a medical examiner to dispute the time it took her to lose consciousness and die. Thus, Defendant did not shown a reasonable probability that the result of the penalty phase proceeding would have been different had another pathologist been presented. *See Strickland*. As such, the claim was properly denied.

The lower court also properly denied the proportionality argument. On direct appeal, Defendant argued that this Court

could not conduct a proper proportionality review because of the waiver of mitigation. Initial Brief of Appellant, Florida Supreme Court Case No. 81,639, at 63 n.63. This Court rejected this argument:

> In a footnote to this final issue, Allen also argues that his waiver of mitigation evidence precludes this Court from conducting a proportionality review of the death sentence. As discussed above, we find no error regarding Allen's decision to waive presentation of mitigation evidence and to affirmatively assert the non-existence of mitigation. Such a valid waiver of mitigation does not preclude this Court from conducting the required proportionality review. *See Hamblen*. Moreover, we find that the facts of this case warrant the death sentence imposed and that the sentence is proportionate to other sentences of death affirmed by this Court. *See, e.g., Carter v. State*, 576 So. 2d 1291 (Fla. 1989)(affirming death sentence where the trial court found three aggravating circumstances of committed while under a sentence of imprisonment, committed during a robbery, and prior violent felony conviction, and one nonstatutory mitigating circumstance of a deprived childhood), *cert. denied*, 502 U.S. 879, 112 S. Ct. 225, 116 L. Ed. 2d 182 (1991).

Allen v. State, 662 So. 2d 323, 331-32 (Fla. 1995). As this claim was raised and rejected on direct appeal, the lower court properly found this claim to be procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

Defendant asserts that the procedural bar to this claim should be lifted because of this Court's decision in *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001). However, this Court

expressly stated that its decision in *Muhammad* only applied prospectively. *Id.* at 365 ("An adoption of a prospective procedure in this case would not call into question those cases that are already final on appeal.") As such, *Muhammad* does not lift the procedural bar.

Even if *Muhammad* did apply, it did not hold that this Court would no longer allow waivers of mitigation because it precluded proportionality review. Instead, it held that a trial court, presented with a defendant who was waiving mitigation, had to order a PSI and consider all of the evidence in the record and from the PSI to determine if any mitigation existed. Here, the trial court did order a PSI, did consider the PSI and all record evidence regarding whether any mitigation existed and, in fact, did find mitigation based on its review of the record and PSI. (R. 239-41) As such, the requirement of *Muhammad* would be met even if it did apply. *See Overton v. State*, 801 So. 2d 877 (Fla. 2001). The lower court's denial of this claim should be affirmed.

VI. THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE WAS PROPERLY DENIED.

Defendant next asserts that the lower court improperly summarily denied his claim that counsel was ineffective at the *Spencer* hearing. He asserts that counsel should have investigated and presented evidence that Defendant had registered at the Buccaneer Lodge, that counsel should have objected to the introduction of a radio interview he had given, that counsel was ineffective for failing to object to alleged violations of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and that counsel was ineffective for failing to object to a comment during the State's penalty phase closing argument. However, the lower court properly rejected these claims.

While Defendant asserts that had counsel investigated the records of the Buccaneer Hotel, he could show that Defendant had registered at the hotel, which would have allegedly showed that Det. Glover's testimony was false. However, Detective Glover did not testify that there was no evidence that Defendant was at the lodge. Instead, the testimony was:

> [The State:] Did you check the records to find out if Dortha's Cribbs' car was registered to the Buccaneer Lodge from December 21, 1991?
> [Det. Glover:] Yes.
> [The State:] Had it been?
> [Det. Glover:] There was nothing found?

(T. 791) Detective Glover also stated that he did not check to see if Richard Lee Brock was registered at the hotel. (T. 792) As Detective Glover never testified that Defendant had not registered at the hotel, he could not possibly have testified falsely regarding Defendant's registration at the hotel. Moreover, Defendant does not explain how the fact that he had another person with him when he registered at the hotel would have shown that Defendant was accompanied by another person at Ms. Cribbs' house earlier. As such, there is no reasonable probability that Defendant would not have been sentenced to death had this information been presented. *See Strickland*. The lower court properly denied this claim.

While Defendant asserts that his counsel was ineffective for failing to object to the introduction of the radio interview as irrelevant, the tape of the radio interview given by Defendant was relevant. During his closing argument before the jury, Defendant asserted an alternative theory of the crime. In the radio interview, he provided a few more details of this theory. The State introduced the interview to show that an investigation had been done into some of the allegation, and they had been found to be unsupported. As the interview was presented to provide a complete version of Defendant's new story, it was not irrelevant. Further, Defendant has not shown how the

introduction of a more complete version of his exculpatory theory would have cause a reasonable probability that he would have received a life sentence. *See Strickland*. As such, the lower court properly denied the claim.

The lower court also properly rejected the *Caldwell* claim. At the time comment was made and jury instruction was given, Defendant was representing himself. By representing himself, Defendant waived his right to claim ineffective assistance of counsel. *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). As such, Defendant's claim that his counsel was ineffective at a time when he was not representing Defendant was properly summarily denied.

Even if counsel had been representing Defendant at the time this issue arose, this claim would still have properly been summarily denied. *Caldwell* claims and claims regarding ineffective assistance for failing to raise *Caldwell* issues are procedurally barred. *Oats v. Dugger*, 638 So. 2d 20, 21 & n.1 (Fla. 1994).

Moreover, as this Court noted in *Combs v. State*, 525 So. 2d 853, 855-58 (Fla. 1988), informing the jury that their recommendation regarding sentencing is advisory is a correct statement of Florida law. As the United States Supreme Court has held, "to establish a *Caldwell* violation, a defendant

necessarily must show that the remarks to the jury improperly described the role assigned to the jury under local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989). As the comment and instructions properly informed the jury of its role under Florida law, any claim of a *Caldwell* violation is without merit. *See Davis v. Singletary*, 119 F.3d 1471, 1481-85 (1997). Therefore, counsel cannot be deemed ineffective for failing to raise this claim. *See Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *see also Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990). The claim was properly summarily denied.

The lower court also properly denied the claim that counsel was ineffective for failing to object to comments by the prosecutor both before the jury and during the *Spencer* hearing that allegedly regarded future dangerousness aggravation. This issue was raised on direct appeal and rejected on its merits:

> As his final issue, Allen argues that the prosecutor improperly argued the nonstatutory aggravating factor of future dangerousness during the penalty phase before the jury and during the sentencing proceeding before the judge. While arguing to the jury that the aggravating circumstance of "committed by a person under a sentence of imprisonment" applied in this case, the prosecutor reminded the jury that Allen had escaped from a work release facility in Kansas in 1990. The prosecutor also argued that "no form of control, whether it was probation or parole or prison or work release was adequate to take care of this defendant. Had he served out his term of years in Kansas at the time, this crime might not have been committed 13 months

> later." Allen contends that the prosecutor was in essence arguing that he should be executed because he would escape from prison and kill again, which constitutes a nonstatutory aggravating factor that the sentencer may not consider. *See Teffeteller v. State*, 439 So. 2d 840, 845 (Fla. 1983) ("There is no place in our system of jurisprudence for [future dangerousness] argument."), *cert. denied*, 465 U.S. 1074, 104 S. Ct. 1430, 79 L. Ed. 2d 754 (1984).
>
> Initially, we note that this issue has not been preserved for appeal as the defense neither objected to the prosecutor's argument during either proceeding nor made a motion for mistrial. *Parker*, 456 So. 2d at 443. However, even if the issue of the prosecutor's argument to the jury had been preserved, it would have no merit. The prosecutor did not predict that Allen would murder again if he were sentenced to life imprisonment and paroled after twenty-five years, which is the type of argument that this Court condemned in *Teffeteller*, 439 So. 2d at 844-45. Instead, the prosecutor's comment in this case was very similar to the one that we found proper in *Parker*, 456 So. 2d at 443.
>
> Even if defense counsel had preserved the issue of the prosecutor's argument during the sentencing proceeding, any error would be harmless in this case. The sentencing order specifically provides that the court's decision to impose the death sentence was based solely on the three statutory aggravating factors of committed by a person under a sentence of imprisonment, committed for pecuniary gain, and HAC. The order further provides that "[t]he Court did not allow any other aggravating factors to be argued to the jury and the Court finds that those aggravating factors do not exist or there was insufficient evidence in the record to support them."

Allen, 662 So. 2d at 331. As such, the claim is procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). The lower court properly denied it.

VII. THE LOWER COURT PROPERLY DENIED THE CLAIM REGARDING THE JUROR INTERVIEWS.

Defendant next asserts that the lower court erred in denying his claim that the Florida Bar Rules that prevent counsel from interviewing jurors are unconstitutional. However, the lower court properly found that this claim was procedurally barred and legally insufficient.

In his post conviction motion, Defendant asserted that the Florida Bar Rules that prohibited juror interviews were unconstitutional. (PCR. 840-41) However, Defendant did not allege any act of juror misconduct. *Id.* The lower court denied this claim as procedurally barred and facially insufficient, quoting from this Court's decision in *Arbelaez v. State*, 775 So. 2d 909, 920 (Fla. 2000). (PCR. 1077-78)

In *Arbelaez*, this Court rejected a remarkably similar claim, stating:

> The trial court did not address Arbelaez's claim that he was prohibited from interviewing the jurors. While we would normally send an unaddressed claim back for the trial court to rule upon, we conclude that remand on this issue is unnecessary because the claim is both procedurally barred and legally insufficient. Any claims relating to Arbelaez's inability to interview jurors should and could have been raised on direct appeal. *See Smith*. Furthermore, Arbelaez did not make a prima facie showing of any juror misconduct in his postconviction motion below. Instead, he appears to be complaining about a defendant's inability to conduct "fishing expedition" interviews

> with the jurors after a guilty verdict is returned. Thus, even if the claim were not procedurally barred, Arbelaez would not be entitled to relief on the grounds he asserted and no evidentiary hearing was required on this claim.

Id. at 920 (footnotes omitted); *accord Vining v. State*, 27 Fla. L. Weekly S654 (Fla. Jul. 3, 2002). As such, the lower court properly denied this claim as procedurally barred and legally insufficient.

VIII. THE ISSUE REGARDING THE CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY STATUTE WAS WAIVED AND WAS PROPERLY REJECTED BY THE LOWER COURT.

Defendant next asserts that lower court improperly denied his claim that Florida's death penalty statute is constitutional. However, this issue has been waived because it is not adequately raised here. Moreover, the lower court properly found this claim to be procedurally barred and without merit.

In his brief, Defendant asserts in one sentence that the death penalty statute is unconstitutional:

> As argued in Claim VIII of [Defendant's] motion for post conviction relief (PCR 857-60), Florida's capital sentencing statute fails to prevent the arbitrary and capricious imposition of the death penalty and deprives [Defendant] pf his right to due process of law and constitutes cruel and unusual punishment on its face and as applied.

Initial Brief at 65. Defendant does not even attempt to explain how or why the statute is allegedly unconstitutional and instead relies upon a reference to his motion in the lower court. However, as this Court held in *Anderson v. State*, 27 Fla. L. Weekly S580 (Fla. Jun. 13, 2002), it is insufficient to reference a pleading filed below to raise an issue on appeal. As Defendant has not attempted to explain why the statute is allegedly unconstitutional in his brief, this issue has been

waived. *See Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) ("Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Even if Defendant has sufficiently raised this issue, the lower court properly found the claim to be procedurally barred and without merit. This Court has held that issues regarding the constitutionality of the death penalty statute are issues that could have and should have been raised on direct appeal. *Byrd v. State*, 597 So. 2d 252 (Fla. 1992). Moreover, the claim is entirely devoid of merit, as it has been repeatedly rejected by this Court. *Johnson v. State*, 660 So. 2d 637, 647-48 (Fla. 1995); *Wuornos v. State*, 644 So. 2d 1012, 1020 & n.5 (Fla. 1994); *Fotopolus v. State*, 608 So. 2d 784, 794 & n.7 (Fla. 1992); *Arango v. State*, 411 So. 2d 172, 174 (Fla. 1982). The claim was properly denied.

IX. THE LOWER COURT PROPERLY DENIED THE CLAIM THAT POST CONVICTION COUNSEL WAS RENDERING INEFFECTIVE ASSISTANCE DUE TO A LACK OF FUNDING.

Defendant finally asserts that the lower court improperly denied his claim that his post conviction counsel was not rendering effective assistance because of underfunding. However, the lower court properly rejected this claim.

The State would first note that there is no constitutional right to effective representation by counsel in postconviction proceedings under either Florida or Federal law. *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Vining v. State*, 27 Fla. L. Weekly S654 (Fla. Jul. 3, 2002); *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996). Even if such a right did exist, this Court denied a claim that CCRC-South was inadequately funded, as the legislature has remedied the alleged shortcomings. *Arbelaez v. Butterworth*, 738 So. 2d 326 (Fla. 1999). As such, the lower court properly denied this claim.

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

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

CONCLUSION

For the foregoing reasons, the denial of the motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Dan Hallenberg, Assistant CCRC, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this 24th day of July, 2002.

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CERTIFICATE OF COMPLIANCE

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

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