IN THE SUPREME COURT OF FLORIDA

MICHAEL GEORGE BRUNO, SR.,

Petitioner,

vs. Case No. SC 02-467

MICHAEL W. MOORE,
Secretary, Florida Department
of Corrections,

Respondent.
_____/

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PROCEDURAL HISTORY

Petitioner, Michael George Bruno, SR., was the defendant in the trial court below and will be referred to herein as "Petitioner" of "Bruno." Respondent, Michael W. Moore, Secretary, Florida Department of Corrections, will be referred to herein as "the State." The following symbols will be used: "ROA" denotes record on direct appeal; "SROA" denotes supplemental record on direct appeal in Bruno v. State, 574 So. 2d 76 (Fla. 1991); and PCR denotes record on appeal from the denial of the motion for postconviction relief in Bruno v. State, 807 So. 2d 55 (Fla. 2001).

On September 11, 1986, Michael Bruno was indicted for the first-degree murder and armed robbery of Lionel Merlano, allegedly committed in the late evening of August 8 or early morning of August 9, 1986. (ROA VI 960). A petit jury, on August 11, 1987, convicted Bruno on both counts as charged. (ROA VI 1076-77). At the penalty phase, which commenced the following day, the State and defense stipulated before the jury that Bruno had been convicted of possession of cocaine and marijuana. (ROA IV 785). The State presented no other evidence. In his defense, Bruno presented the testimony of his parents, and Dr. Arthur Stillman. (ROA IV 786-93, 794-98; V 799-830). Bruno also testified on his own behalf. (ROA V 835-80). Based upon the evidence, the jury recommended death by a vote of eight to four. (ROA V 913).

The trial court followed the jury's recommendation and sentenced Bruno to death, finding the following aggravation: (1) prior violent felony conviction (contemporaneous armed robbery),

(2) felony murder (for the robbery), (3) avoid arrest, (4) murder committed for pecuniary gain, (5) heinous, atrocious, or cruel manner ("HAC"), and (6) cold, calculated, and premeditated ("CCP"). However, the trial court merged the first three aggravators. Nothing was found in mitigation. (ROA VI 1104-08).

On direct appeal, this Court found the following facts:

> Direct evidence of how the crime occurred was furnished by Bruno's fifteen-year-old son, Michael, Jr., and by Bruno himself in the form of a taped confession. According to Michael, Jr., he and his father went to Merlano's apartment on the night of August 8, 1986. After drinking some beer and listening to the stereo, Bruno went to the bathroom. Later, when Merlano was playing with the stereo, Bruno pulled a crowbar from the front of his trousers and began hitting Merlano. The man fell to the floor but appeared to still be alive. Bruno told Michael, Jr., to bring him a gun from under the sink in the bathroom. Michael, Jr., obtained the gun and handed it to his father. Bruno put a pillow over the gun and shot Merlano twice in the head. Bruno made several trips back to Merlano's apartment for the purpose of stealing the stereo and its associated equipment. Merlano's body was not found until August 11, 1986.
>
> In his taped confession, Bruno said that he and his son drank some beers with Merlano in his apartment. Bruno was carrying a crowbar. Merlano began playing his stereo and "started getting loud with my son." Ultimately, a fight erupted between Bruno and Merlano. Bruno hit Merlano with the crowbar several times. Merlano retrieved a pistol from his room, but Bruno hit him again and thought he knocked Merlano unconscious. When Bruno began to walk away, Merlano reached for the gun, but Bruno grabbed it and shot him in the head once or twice.
>
> In addition, Christopher Tague testified that Bruno borrowed his .22-caliber revolver in late July or early August of 1986. On

> August 8, 1986, Tague testified that Bruno borrowed another man's car so that he and his son could go to the apartments where Merlano lived. Bruno returned alone about one-and-a-half to two hours later. Tague also testified that on August 11, 1986, at Bruno's request, Tague, Bruno, and Jody Spalding stopped at Merlano's apartment because Bruno wanted to remove some "prints." Bruno could not get into the apartment, so they left. Diana Liu testified that on the night of the murder she was in the pool area at Merlano's apartment complex. Bruno asked her if she wanted to go to another party, stating "[i]t's a murder party. It's going to be a great killing." Arthur Maheu testified that on a Saturday morning in early August 1986, he observed a .22-caliber pistol under the pillow on which Bruno was laying. Bruno told Maheu that the stereo equipment "came from this house where he killed this guy, and he ransacked it."
>
> Jody Spalding testified that early in the morning on August 9, 1986, Bruno told him "that he had just gotten into a big fight with this guy and he was dead." He further told him "that he was going to get some equipment and stuff from the guy's house." Later that morning, Jody saw Bruno with a VCR and other electronic equipment, and he told him that "he got it from the guy's house who he killed." They then left together to go to Bruno's parents' house, but on the way they stopped at a canal into which Bruno threw what looked to be a "steel bar" wrapped up in a cloth. They went to another canal into which Bruno threw a gun also wrapped in cloth. At another canal Bruno threw in the cylinder from the gun. Later in the week, Bruno called Jody and asked him to throw away a pair of shoes for him because he had gotten blood on them when he was "murdering this guy." An expert firearms examiner testified that one of the projectiles recovered from the victim was fired from the gun retrieved from the canal.

Bruno, 574 So. 2d at 78-79.

In reviewing the sentence imposed, this Court struck the

"prior violent felony" and "avoid arrest" aggravators, merged the "felony murder" and "pecuniary gain" aggravators, and upheld the HAC and CCP aggravators. Bruno, 574 So. 2d at 81-82. The trial court's rejection of mitigation was also upheld. Id. at 82-83. Given the presence of the three remaining aggravating factors and no mitigation, this Court affirmed Bruno's death sentence. Id. at 83. On October 7, 1991, the United States Supreme Court denied Bruno's petition for writ of certiorari. Bruno v. Florida, 502 U.S. 834 (1991).

On July 26, 1993, Bruno filed his postconviction relief motion pursuant to Florida Rule of Criminal Procedure 3.850. (SPCR IV 610-807). Following public records litigation, Bruno declined to amend his motion , thus, on November 15, 1994, the State filed its response. (SPCR I 67-165). Following an evidentiary hearing, and the submission of post-hearing memoranda, the trial court denied Bruno's 3.850 motion. (PCR I 75-203).

Bruno appealed the denial of postconviction relief raising ineffective assistance of counsel claims from both the guilt and penalty phases of trial, ineffective assistance related to the investigation of Bruno's competency to stand trial and possible mitigation, challenges to penalty phase instructions, and various claims of constitutional error. This court affirmed. Bruno v. State, 807 So. 2d 55 (Fla. 2001). Now, Bruno seeks relief through a petition for writ of habeas corpus.

REASONS FOR DENYING THE WRIT

ISSUE I

BRUNO'S CHALLENGE TO THIS COURT'S DIRECT APPEAL ANALYSIS OF THE AGGRAVATING FACTORS AND AFFIRMANCE OF THE DEATH SENTENCE IS PROCEDURALLY BARRED (Restated).

Bruno asserts that he is entitled to habeas corpus relief because this Court did not conduct an adequate harmless error analysis when it rejected the trial court's finding of the prior violent felony aggravator and merged other aggravators before concluding that "[i]n light of three statutory aggravating circumstances and no statutory mitigating circumstances, we find no error in the judge's sentence of death." (Petition at 3-4 quoting Bruno v. State, 574 So. 2d 76, 83 (Fla. 1991). This alleged error was presented in Bruno's rehearing on direct appeal, and rejected by this Court. (Appendix A, Motion for Rehearing; Appendix B, Order Denying Motion for Rehearing in case 90,231). As such, the matter is procedurally barred in a habeas corpus proceeding and should be denied.

A petitioner for "habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in rule 3.850 proceedings." White v. Dugger, 511 So. 2d 554, 555 (Fla. 1987). See, Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987); Copeland v. Wainwright, 505 So. 2d 425 (Fla. 1987). This Court "has made clear that habeas is not proper to argue a variant to an already

decided issue." Jones v. Moore, 794 So. 2d 579, 583 n.6 (Fla. 2001). "This Court has consistently held that habeas claims wherein the defendant challenges this Court's previous standard of review in the case are procedurally barred." Bottoson v. State, 27 Fla. L. Weekly S119 (Fla. Jan. 31, 2002); Thompson v. State, 759 So. 2d 650, 657 n. 6 (Fla. 2000) (stating that assertion that appellate court conducted an improper harmless error analysis during direct appeal was an improper "invitation to utilize the writ of habeas as a vehicle for the reargument of issues which have been raised and ruled on by this Court"); Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989) (reasoning that claim that Florida Supreme Court failed to provide appellant with a meaningful review of his death sentence on direct appeal was procedurally barred). Likewise, where a petitioner merely expresses dissatisfaction with appellate counsel's argument on appeal, the petition may be denied because re-argument of an appellate point is not permitted. Thompson, 759 So. 2d at 668; Routly v. Wainwright, 502 So. 2d 901, 903 (Fla. 1987) (declining "petitioner's invitation to utilize the writ of habeas as a vehicle for the re-argument of issues which have been raised and ruled on by this Court.)) (quoting Steinhorst v. Wainwright, 477 So. 2d 537, 540 (Fla. 1985)). Petitions for writ of habeas corpus properly address claims of ineffective assistance of appellate counsel. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000) (opining, "[h]abeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel."); Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995)

(same); Knight v. State, 394 So. 2d 997, 999 (Fla. 1981) (same). "However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion." Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000).

This Court has rejected claims of error where such were not raised as claims of ineffective assistance of counsel. Freeman, 761 So. 2d at 1072. The Court opined, "Freeman does not argue appellate counsel was ineffective for failing to raise this issue. The propriety of jury instructions is a direct appeal issue, and will not be considered on its merits in a habeas petition." Id. Moreover, where an issue was presented on appeal and decided adversely to petitioner, habeas relief is not appropriate, because "[a]ppellate counsel cannot be ineffective for failing to convince the Court. Id.; See, Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990) (noting that "[a]fter appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance.").

In the case at bar, the propriety of the trial court's finding of aggravation and the appropriateness of the death penalty were addressed on appeal. This Court analyzed each aggravator found by the trial court and opined:

> We agree with the trial court that only three aggravating circumstances were proper for consideration, although we arrive at this conclusion in a somewhat different manner. The aggravating circumstance of a prior violent felony was inapplicable because the felony in question was the contemporaneous

conviction of the robbery of Merlano. *Wasko v. State*, 505 So. 2d 1314 (Fla. 1987). However, the trial court did properly find that the murder was committed during a robbery and was committed for pecuniary gain. These two circumstances are based on the same aspect of the criminal episode and should properly be considered as a single aggravating factor. The evidence was insufficient to support the finding that the murder was committed for the purpose of avoiding or preventing a lawful arrest. Standing alone, the fact that the victim could identify the murderer does not prove beyond a reasonable doubt that the elimination of a witness was a dominant motive for the killing. *Floyd v. State*, 497 So. 2d 1211 (Fla. 1986).

Further, contrary to Bruno's argument, we do believe that there is sufficient evidence to support the finding that the murder was especially heinous, atrocious, or cruel. As noted by the judge in his sentencing order:

...

We also conclude that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Despite Bruno's contention during the sentencing proceeding that the killing simply took place as a result of a fight, there is substantial evidence that Bruno planned to kill Merlano before he went to his apartment. As noted by the judge in his sentencing order:

...

Therefore, we conclude that the murder was aggravated by the three following valid factors: (i) that the murder was committed during a robbery and for pecuniary gain; (ii) that the murder was heinous, atrocious, or cruel; and (iii) that the murder was cold, calculated, and premeditated.

The main focus of the evidence presented in mitigation was Bruno's longtime use of drugs. Dr. Stillman, a psychiatrist, testified that Bruno's drug abuse had left him

> with some brain damage. However, the trial judge found no mitigating circumstances. With respect to the statutory mitigating circumstance that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, the judge's sentencing order stated:
>
> ...
>
> In light of three statutory aggravating circumstances and no statutory mitigating circumstances, we find no error in the judge's sentence of death. We also reject Bruno's argument that his sentence is disproportionate to other cases involving the death sentence.

Bruno, 574 So. 2d at 81-83. This issue was the subject of Bruno's Motion for Rehearing (Appendix A, Motion for Rehearing, 3-4) in which he argued a thorough harmless error review was not conducted and that the Court found fewer aggravators than the trial court.

Similarly, Bruno argues in the instant petition that this Court failed to conduct a proper harmless error analysis and miscounted the number of aggravating factors found (Petition at 4-5). Both of these issues were addressed in the Motion for Rehearing on direct appeal (Appendix A). As such, the matter is procedurally barred here. Bottoson v. State, 27 Fla. L. Weekly S119 (finding habeas corpus "claims wherein the defendant challenges this Court's previous standard of review in the case are procedurally barred."); Thompson, 759 So. 2d at 657 n. 6 (stating that assertion that appellate court conducted an improper harmless error analysis during direct appeal was an improper "invitation to utilize the writ of habeas as a vehicle for the reargument of issues which have been raised and ruled on by this Court"); Parker,

550 So. 2d 460 (finding that habeas is not proper place to relitigate issues that could have been or were raised on direct appeal). Relief should be denied.

To the extent Bruno relies upon Sochor v Florida, 504 U.S. 527 (1992), he is not entitled to relief. The opinion in Sochor was issued more than a year after the direct appeal decision in Bruno, 574 So. 2d at 76 and such was not made retroactive to existing cases. As such, it does not support Bruno's claim for relief. Moreover, in Sochor, the United States Supreme Court did not require a formalistic harmless error analysis be conducted. Sochor, 504 U.S. at 540 (noting that there is no federal requirement that state courts adopt "a particular formulaic indication" before its review for harmless error will pass constitutional scrutiny). On remanded in Sochor v. State, 619 So. 2d 258, 293, n.11 (Fla. 1993), this Court noted that a harmless error analysis was conducted. Here, it is clear from the reading of the opinion in Bruno, 574 So. 2d at 81-83, this Court conducted a constitutionally valid harmless error analysis when it reviewed the remaining aggravation, the trial court's rejection of mitigation, and determined that there was "no error in the judge's sentence of death."

Additionally, this Court is well versed in conducting a harmless error analysis and often conducts a harmless error review when striking an aggravting factor. See, Martin v. Singletary, 599 So. 2d 119, 120 (1992) (noting if Court were to strike aggravator, it may conduct a harmless error review); Preston v. State, 564 So. 2d 120, 122-23 (Fla. 1990) (recognizing that it is constitutionally

permissible for a reviewing court to reweigh the remaining aggravators and mitigators when one of the aggravating circumstances is stricken). As discussed in Grossman v. State, 525 So. 2d 833 (Fla. 1988), receded from on other grounds, Franqui v. State, 699 So. 2d 1312, 1319-20 (Fla. 1997):

> This Court routinely applies harmless error analysis to, and affirms, death sentences where the judge has improperly found invalid aggravating factors provided one or more valid aggravating factors exist which are not overridden by one or more mitigating factors. *White v. State*, 446 So. 2d 1031 (Fla.1984); *Sims v. State*, 444 So. 2d 922 (Fla. 1983) *cert. denied*, 467 U.S. 1246, 104 S.Ct. 3525, 82 L.Ed.2d 832 (1984); *Alford v. State*, 307 So. 2d 433 (Fla. 1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). Even more significantly, in *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), the Court specifically approved the application of harmless error analysis to death sentences and held that consideration by the trial judge of an invalid aggravating circumstance does not, per se, render the imposition of a death sentence unconstitutional.

Grossman, 525 So. 2d at 844. Hence, this Court is well versed in conducting harmless error review upon the striking of an improper aggravator. From the foregoing, it is clear this Court understands its duty to reweigh the aggravating and mitigating circumstances in order to determine whether death remains the appropriate sentence when an aggravaating factor is struck. The Court fulfilled its duty in the instant case. Merely because this Court did not entitle its analysis as a harmless error review does not entitle Bruno to a second review of this matter or relief on this claim.

Bruno also alleges that this Court failed to consider non-

statutory mitigation in its analysis in violation of Hitchock v. Dugger, 481 U.S. 393 (1987). However, a review of the sentencing order reveals that no mitigation was found by the trial court in this case even though consideration was given to "[a]ny other aspect of the Defendant's character or record, and any other circumstance of the offense." (ROA 1107). Moreover, this Court rejected Bruno's direct appeal argument that the alleged mitigation in his case "calls for a sentence less than death." Bruno, 574 So. 2d at 83. Thus, this Court's mere reference to "statutory mitigating circumstances" without referencing possible "non-statutory mitigation" does not establish a basis for relief in this case as there was no mitigation found by the trial court in the first instance. This Court should deny habeas relief.

ISSUE II

APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE (Restated).

In his habeas petition, Bruno claims that his appellate counsel was ineffective for failing to challenge on direct appeal: (1) the trial court's failure to order a competency evaluation under Florida Rule of Criminal Procedure 3.210 and for failing to order competency hearings prior to the guilt phase and sentencing; (2) the admission of autopsy photographs and a photograph of the location where stolen property was discovered; (3) the trial court's refusal to order the State to disclose information regarding prospective jurors; and (4) the completeness of the appellate record. Taking each sub-claim in turn, the Court will find that the matter is either procedurally barred or without merit. Relief should be denied.

"Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel." Rutherford, 774 So. 2d at 643. See, Downs v. Moore, 801 So. 2d 906, 909 (Fla. 2001) In Freeman, 761 So. 2d at 1069, this Court reiterated the burden a petitioner must meet in order to prove ineffective assistance of appellate counsel:

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion. In evaluating an ineffectiveness claim, the court must determine

> whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
>
> *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986). *See also Haliburton*, 691 So. 2d at 470; *Hardwick*, 648 So. 2d at 104. The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. *See Knight v. State*, 394 So. 2d 997 (Fla. 1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." *Id.* at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. *See Medina v. Dugger*, 586 So. 2d 317 (Fla. 1991); *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

Freeman, 761 So. 2d at 1069. See, Bryan v. Dugger, 641 So. 2d 61, 65 (Fla. 1994); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993); Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986).

As his first sub-claim, Bruno asserts that his appellate counsel rendered ineffective assistance by failing to raise "the issue of Mr. Bruno's competency or the failure of the trial court to hold a competency hearing during the trial or before sentencing

or the trial court's failure to appoint court experts to determine Mr. Bruno's competency." (Petition at 19). This claim is procedurally barred and without merit.

Initially it must be noted that the record does not bear out Bruno's underlying premise that trial counsel confused Florida Rules of Criminal Procedure 3.210 and 3.216. As the following discourse establishes, trial counsel was seeking a confidential expert[1] (albeit three initially) to examine Bruno and report back the findings to counsel. This request was granted.

> THE COURT: This is your motion for appointment of a psychiatrist. Do you have reason to believe that Mr. Bruno has psychological and/or psychiatric problems?
>
> MR. STELLA[2]: Yes, sir. That is indicated in the motion.
>
> THE COURT: That's fine.
>
> MR. STELLA: **I have filed under 3.216, appointment for a psychologist or psychiatrist**.
>
> THE COURT: **That is the confidential part**.
>
> MR. STELLA: **That's correct**.
>
> MR. COYLE[3]: The motion I have requests three experts be appointed.

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[1] Additionally, when attempting to supplement the record on appeal, Mr. Stella reminded the trial judge that "[a]ll of the psychological evaluations of the defendant were, in fact, confidential, and obviously pursuant to the rule were not entered into evidence...." (2nd SROA 29). Clearly, trial counsel wanted a confidential expert, and one was appointed.

[2] Trial defense counsel.

[3] Assistant State Attorney.

THE COURT: That's not the confidential part.

MR. STELLA: The rule, I believe it's one or two. I would request one or two.

THE COURT: **You have a right to have one confidentially**.

MR. STELLA: **That's what I want**.

THE COURT: You have to file a motion. You're asking me to appoint three psychiatrists?

MR. STELLA: **I'm asking the Court to appoint one psychiatrist or psychologist**.

MR. COYLE: I have a copy, Judge.

THE COURT: What does 3.216 say?

MR. COYLE: It's the confidential section requiring the Court to appoint one if the defendant is indigent.

THE COURT: Are you a special on this?

MR. STELLA: Not on Bruno. I'm privately retained[4]. Mr. Kelly is also present before the Court-

THE COURT: Stillman, Haber, whoever-- she and Rappaport. Pick one.

MR. STELLA: Stillman.

THE COURT: Stillman, confidential, granted.

(3rd Supp ROA 4-6) (emphasis supplied).

Dr. Stillman was not called during the guilt phase, but did testify at the penalty phase raising for the first time Bruno's

[4] Later in the hearing, Bruno was declared indigent (3rd SROA 6-7).

sanity at the time of the murder (ROA V 803-23). The fact that defense counsel had not been informed of this conclusion, and in fact had been told by Dr. Stillman that Bruno was competent was brought to the trial court's attention (ROA V 863-86; VI 1093-95).

On direct appeal, appellate counsel asserted that the trial court erred in not holding a hearing regarding the competency issue and in denying a mistrial or continuance (Second Amended Initial Brief in case no. 71,419 at 69-71). This Court summarily rejected that claim, stating "We reject the balance of Bruno's penalty-phase claims which include the following: ... (5) The trial court erred in failing to conduct an evidentiary hearing, declare a mistrial or continuance of the penalty phase when the dispute between trial counsel and his mental health expert was brought to the court's attention." Bruno, 574 So. 2d at 83.

It is well settled that an issue which was raised in prior litigation is barred from consideration in a habeas petition. This Court has held numerous times that "[h]abeas corpus is not to be used to relitigate issues that have been determined in a prior appeal." Porter v. Dugger, 559 So. 2d 201, 203 (Fla. 1990). "This Court previously has made clear that habeas is not proper to argue a variant to an already decided issue." Jones, 794 So. 2d at 583 n.6; Thompson, 759 So. 2d at 657 n. 6. Clearly, Bruno's appellate counsel raised the issue of the trial court's treatment of competency, and as such, should be barred from raising it here as a variant of that claim. Furthermore, "[a]ppellate counsel cannot be ineffective for failing to convince the Court." Freeman, 761 So.

2d at 1072; Swafford, 569 So. 2d at 1266.

However, should this Court find that the issue is not barred, relief is not warranted. As noted above, in order to prevail on a claim of ineffective assistance of appellate counsel, petitioner must show "first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Pope, 496 So. 2d at 800. See, Groover, 656 So. 2d at 425.

As outlined above, trial counsel was clear in his request for appointment of a confidential mental health expert under rule 3.216 (ROA 975-77; 3rd SROA 4-6). Trial counsel requested a confidential expert, received that expert, and did not inform the trial court that a competency hearing was necessary. As the Court will recall, it was not until the cross-examination of the defense expert during the penalty phase that the expert first disclosed that he had changed his opinion and believed Bruno was not sane at the time of the murder (ROA 863-66). Because counsel did not seek an earlier determination of Bruno's competency, the failure to hold a competency hearing before the penalty phase was not preserved for appellate review.[5] Where an issue is not preserved for review,

[5] In fact, trial counsel informed the trial court that prior to the mental health expert's penalty phase testimony, he "had no reason to believe that the Defendant was not competent to stand trial or was insane at the time the offense was committed." See,

appellate counsel may not be deemed ineffective for not having raised the issue. Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991) (finding that appellate counsel cannot be faulted for not raising an issue that either was not preserved for appeal or does not constitute fundamental error).

Additionally, as noted above, appellate counsel did appeal the trial court's denial of an evidentiary hearing once the mental health expert changed his opinion on Bruno's sanity. See Bruno, 574 So. 2d at 83. As such, counsel may not be deemed deficient where the reviewing court rejects counsel's argument. Freeman, 761 So. 2d at 1072 (opining, "[a]ppellate counsel cannot be ineffective for failing to convince the Court."); Swafford, 569 So. 2d at 1266.

The issue of Bruno's competency was raised in his postconviction litigation. Such involved a claim of conflict of interest stemming from trial counsel's disclosure of what the confidential mental health expert had reported prior to testifying in the penalty phase that Bruno's drug use caused him to be insane at the time of the murder. Bruno also appealed the denial of his claim that trial counsel was ineffective in not providing the mental health expert with sufficient background information to enable the expert to sufficiently assess Bruno's competency and potential mitigation. Bruno, 807 So. 2d at 62-64, 68-70.

Bruno v. State, 807 So. 2d 55, 64 (Fla. 2001). As such, the record would support a finding that trial counsel did not seek a competency hearing before this time and that any challenge to appellate counsel's performance would have to be limited to issues which arose after the mental health expert's penalty phase testimony.

The Court made the following findings:

> Another example of the alleged conflict of interest relates to comments made by defense counsel during the penalty phase. The comments were made in response to Dr. Stillman's testimony that Bruno was insane at the time of the offense. Shortly after Dr. Stillman's testimony, defense counsel requested a side-bar conference and told the trial court that he was surprised by the testimony, as Dr. Stillman had previously informed defense counsel that Bruno was sane at the time of the offense. At the evidentiary hearing below, defense counsel explained that he conveyed his surprise to the court in order to justify his subsequent motion for an additional psychological examination.
>
> ...
>
> Despite ruling that claim three was procedurally barred, the trial court proceeded to address the claim on the merits:
>
> > This motion was filed by [defense counsel], after Dr. Stillman testified at the penalty phase, that because of drug and alcohol usage, that the Defendant was not sane at the time the offense was committed. [Defense counsel] indicated to the trial judge that this testimony took him by surprise, because Dr. Stillman was examining the Defendant to render an expert opinion as to possible mental mitigating circumstances, not whether he was sane at the time the crime was committed. **[Defense counsel] told the trial judge that prior to Dr. Stillman's testimony, that he had no reason to believe that the Defendant was not competent to stand trial or was insane at the time the offense was committed**. [Defense counsel] testified that he explained his surprise to Judge Coker, in order to justify his

> subsequent motion for an additional psychological examination.
>
> ....
>
> This Court does not find ... that the Defendant was prejudiced by [defense counsel]'s statements to the Trial Judge. [Defense counsel]'s statements to the Trial Judge were made as a justification for his seeking leave of court to file a belated notice of intent to rely on an insanity defense, pursuant to rule 3.216(f)....
>
> The Defendant has failed to show that he was prejudiced by [defense counsel]' s statements to the trial judge.

Ultimately, the trial court concluded that Bruno failed both prongs of the *Strickland* test. We agree.

...

III. BRUNO'S COMPETENCY

Bruno claims that counsel was ineffective in failing to provide Dr. Stillman with sufficient background information. Bruno argues that counsel's neglect prevented *69 Dr. Stillman from sufficiently assessing Bruno's competence to stand trial and potential mitigating circumstances.

Prior to trial, Dr. Stillman was appointed to evaluate whether Bruno was insane at the time of the offense or incompetent to stand trial. **The record reveals that Dr. Stillman informed defense counsel on two separate occasions that he did not believe that Bruno was either insane at the time of the offense or incompetent to stand trial**. Subsequently, Dr. Stillman was called as a defense witness during the penalty phase. In preparing for this testimony, Dr. Stillman interviewed, for the first time, members of Bruno's family and a jail nurse who had

contact with Bruno. These meetings occurred within two days of Dr. Stillman's testimony. During the State's cross-examination, Dr. Stillman opined that he believed that Bruno was insane at the time of the offense. Dr. Stillman testified that despite his previous determinations that Bruno was not insane[18], he still had a suspicion, and that this suspicion was confirmed upon meeting with members of Bruno's family and the nurse. Thereupon, during a break in the penalty phase, **defense counsel explained to the trial court that Dr. Stillman's testimony was a complete surprise and contrary to the opinion that Dr. Stillman had previously given defense counsel**. Prior to sentencing, defense counsel filed a motion for a psychiatric reevaluation, which was denied by the trial court.

The trial court below rejected this claim as follows:

> Since Dr. Stillman is dead, there is no way for the court to ascertain what factors he considered, or did not consider, in the way of background material on the Defendant. The record of the trial reflects that Dr. Stillman interviewed the defendant twice for a total of two and a half hours. He read letters written to Jean Gruninger and he spoke with the defendant's sister and parents. The record reflects that Dr. Stillman was aware of the Defendant's extensive drug usage, and his stay at Pilgrim State hospital. **The experts presented by the Defendant at the evidentiary hearing did not testify that they believed that the Defendant was incompetent to stand trial**.... At the penalty phase, the jury and trial judge were presented with testimony relating to his drug usage, family background, and mental health. The fact that the defendant and his family withheld information from [counsel], or that a more detailed presentation of this

> evidence could have been made in hindsight, does not render [counsel's] performance deficient.
>
> We agree. As far as Dr. Stillman's penalty phase testimony, it is clear from the record that Dr. Stillman had been provided with all necessary information at the time of his testimony. **In regards to whether Bruno was competent to stand trial or insane at the time of the offense, we find no negligence on the part of defense counsel. Defense counsel asked Dr. Stillman to evaluate Bruno prior to trial. Dr. Stillman rendered an opinion, on two separate occasions, that Bruno was neither incompetent to stand trial nor insane at the time of the offense**. Bruno has not established that Dr. Stillman told defense counsel that he needed more information in order to form this opinion. Counsel cannot be faulted simply because Dr. Stillman apparently changed his opinion after meeting with Bruno's family members, especially since it appears that Dr. Stillman failed to inform defense counsel of his new conclusion. **Moreover, as pointed out by the trial court below, Bruno failed to present any evidence in the evidentiary hearing below that he was either incompetent to stand trial or insane at the time of the offense**. Hence, we find no merit to this claim.
>
> _____
>
> [18] The record indicates that prior to the guilt phase of the trial, defense counsel received two letters from Dr. Stillman, wherein Dr. Stillman opined that Bruno was not insane at the time of the offense or incompetent to stand trial.

Bruno, 807 So. 2d at 62-64, 68-70 (emphasis supplied).

Should this Court find that appellate counsel did not, but should have raised the issues of the trial court's failure to hold a competency hearing and denial of appointment of additional mental health experts, relief is not warranted. As this Court found in

the postconviction appeal, Bruno has "failed to present any evidence in the evidentiary hearing below that he was either incompetent to stand trial or insane at the time of the offense." Bruno, 807 So. 2d at 70. Thus, if there were any deficiency in performance, such did not compromise "the appellate process to such a degree as to undermine confidence in the correctness of the result." Pope, 496 So. 2d at 800. To date, even after an evidentiary hearing in his postconviction litigation, Bruno has not established that he was incompetent to stand trial or insane at the time of the crime. The fact that this Court may not have addressed, on direct appeal, the denial of a competency hearing at trial does not undermine confidence in the appellate process. Bruno was competent to stand trial and was not insane at the time of the murder. Merely because this Court did not make such a finding on direct appeal does not undermine confidence in the correctness of the appeal. Relief must be denied.

In Bruno's second sub-claim, he maintains that certain autopsy photographs and a photograph of where the victim had kept some of the missing electronic equipment were admitted over defense counsel's objection, yet appellate counsel did not raise this as an issue on appeal (Motion 20-21). It is Bruno's position that the admission of these photographs could not have been deemed harmless error under Chapman v. California, 87 S.Ct. 824 (1967) and State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) (Motion at 20). The State submits that this claim is without merit.

Appellate counsel attempted to raise the issue of the autopsy

photographs on direct appeal. Initially, counsel had filed a 230 brief which did not challenge the autopsy photograph issue, then sought leave to file a supplemental brief raising the issue of "inflammatory photographs." (Appendix C). In that motion, appellate counsel noted that the record had been supplemented with the photographs of the deceased and with a pre-trial motion claiming that the autopsy photographs were "irrelevant, unnecessary, inflammatory, and excessively gruesome." (Appendix C; 2nd ROA 101-02). On May 12, 1989, this Court denied "Appellant's Motion for Leave to File Supplemental Brief" and struck the 230 page brief ordering that it be reduced to no more than 100 pages (Appendix D). Given the fact that appellate counsel identified the issue and attempted to appeal the admission of the autopsy photographs, but this Court refused to permit a supplemental brief and required counsel to reduce his brief by more than half, appellate counsel may not be deemed deficient for not having included in the final version of the initial brief what he apparently came to realize was a non-meritorious argument related to the autopsy photograph. See Downs, 801 So. 2d at 909 (rejecting claim of ineffective assistance as appellate counsel cannot be deemed ineffective for failing to raise non-meritorious claims on appeal); Rutherford, 774 So. 2d at 643(same); Kokal v. Dugger, 718 So. 2d 138, 142 (Fla. 1998) (reasoning that "[appellate counsel cannot be faulted for failing to raise a nonmeritorious claim.").

However, should this Court find that counsel's failure to challenge the admission of the autopsy and crime scene photographs

in the second amended brief filed with the Court presents a proper claim for review, it will find that such omission does not constitute "a substantial deficiency that falls measurably outside the range of professionally acceptable performance and that such deficient performance compromised the appellate process so as to undermine confidence in the correctness of the result." Ferguson, 632 So. 2d at 58. A review of the record reveals that it was not deficient performance not to have raised this issue given the weakness of the claim, and even had the issue been raised, relief would not have been granted.

At trial, Dr. Ongley, an Associate Medical Examiner, testified he conducted the autopsy of the victim, Lionel Merlano, and that State Exhibits M, N, P, Q, R, S, T, and U (later State's Exhibits 17-24), were from the autopsy and would assist him in explaining this testimony to the jury (ROA III 527, 531-33). After reviewing the photographs, defense counsel objected on the grounds that they were repetitive (ROA III 532).

> MR. STELLA: My objection would be that State's Exhibit R, A, and Q, and M are basically the same wounds and thus are repetitive and redundant in nature. If one of them would come in, I would have no objection to that, but the fact that they all come in, they all seem to be of the same injuries sustained.
>
> THE COURT: This one looked pretty much the same.
>
> MR. COYLE: They rotated, his head is rotated and you can see it all.
>
> THE COURT: Go ahead with your objections.

> MR. STELLA: That is my objection as to that. This (indicating) I have no objection to. That would be U.
>
> This (indicating), I feel T is redundant of U because they virtually indicate the same thing.
>
> MR. COYLE: It is a different hand.
>
> THE COURT: I understand what his objections are.
>
> Doctor Ongley has looked at them and indicated to the Court that each of them would be of value and assist his testimony. I do not feel they are necessarily redundant and I do not feel they are necessarily gory.
>
> They will be admitted and received over objection starting with 17, 17 through 24.

(ROA III 532-33; 2nd SROA 112). Dr. Ongley then testified about the victim's wounds using the photographs. The photographs depicted wounds to the victim's palm, hand, fingers, shoulder, and head rotating from the right to left views (ROA III 537-40).

The admission of photographic evidence is within the trial court's sound discretion, and will not be overturned absent a showing of a clear abuse[6]. Pangburn v. State, 661 So. 2d 1182, 1187 (Fla. 1995); Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9 (Fla. 2000); Cole v. State, 701 So. 2d 845, 854

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[6] Under the abuse of discretion standard, substantial deference is paid to the trial court's ruling and such will be upheld "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980); Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000). This standard is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997).

(Fla. 1997); Jent v. State, 408 So. 2d 1024 (Fla. 1981); Wilson v. State, 436 So. 2d 908 (Fla. 1983). Photographs which assist the medical examiner in explaining wounds found on a murder victim are admissible. See, King v. State, 623 So. 2d 486 (Fla. 1993). Even gruesome photographs will not be found inadmissible "[a]bsent a clear showing of abuse of discretion by the trial court." Rose v. State, 787 So. 2d 786, 794 (Fla. 2001). See, Gudinas v. State, 693 So. 2d 953 (Fla. 1997). The mere fact a photograph is gruesome does not preclude its use. Thompson v. State, 565 So. 2d 1311, 1314-15 (Fla. 1990) (reasoning fact "photographs are gruesome does not render their admission an abuse of discretion"). Where the court has viewed the evidence and determined it relevant and necessary for a complete understanding of the testimony, the ruling should not be overturned. Lott v. State, 695 So.2d 1239, 1243 (Fla.)(finding no error where judge viewed prints and found them necessary and relevant to demonstrate manner of death, nature of injuries, and how they were inflicted), cert. denied, 522 U.S. 986 (1997); Larkins v. State, 655 So. 2d 95, 98 (Fla. 1995)(same). As reasoned in Henderson v. State, 463 So. 2d 196, 200 (Fla.), cert. denied, 473 U.S. 916 (1985), "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments."

Here, the trial court reviewed the autopsy photographs sought to be admitted and found them to not be redundant. Further, the trial court ruled that the photographs would be of assistance to the medical examiner in his testimony before the jury. Although

not part of defense counsel's objection, the trial judge determined that the photographs were not "necessarily gory." Given this record, it is clear that had appellate counsel raised the admission of the autopsy photographs as an appellate issue, the trial court's ruling would have been found proper. As such, appellate counsel's failure to raise this issue does not undermine confidence in the outcome of the appellate process. See, Jones v. Moore, 794 So. 2d 579, 587-88 (Fla. 2001) (rejecting claim of ineffective assistance of appellate counsel for failing to object to admission of autopsy photographs where the trial record reflected that the trial court reviewed the challenged evidence and found it to be probative and not prejudicial; abuse of discretion was not found).

Likewise, counsel's failure not to assert on appeal that the trial court erred in admitting a photograph of the area where the victim kept his electronic equipment does not undermine confidence in the appellate decision. During the examination of the victim's sister, Mary Jane Merlano, the following exchange took place:

> Q [By Mr. Coyle]: I show you State's exhibit D. Is that an accurate photograph of where [the victim] kept his electronic equipment?
>
> A: The bulk of it, yes.
>
> Q: Is that how you found it after you were allowed back [into the apartment].[7]
>
> A: Yes.

(ROA III 335). In response to defense counsel's voir dire

[7] Ms. Merlano testified that she had found her brother's body in his apartment (ROA III 332-34).

examination, Ms. Merlano admitted that she did not see the area depicted in the photograph until a week after his body was found and she was permitted to reenter the apartment (ROA III 336-37). Counsel's objection to the admission of the photograph because Ms. Merlano had not observed that area on the day her brother was found was overruled (ROA III 337).

Had this issue been briefed fully on appeal, no error would have been found, as the admission of evidence is within the sound discretion of the trial court. The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray, 755 So. 2d at 610; Zack, 753 So. 2d at 25; Cole, 701 So. 2d at 845; General Elec. Co. v. Joiner, 522 U.S. 136 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion"). The photograph depicted the area where the victim's equipment used to be stored and how that area looked after the murder as captured by the police photographer. Thus, it was relevant to establish that electronic equipment was missing.

However, should the Court find the photograph should not have been entered, such would have been harmless given the overwhelming evidence of guilt in this case. Not only did Bruno's son testify as to how his father killed the victim, but Bruno confessed to the crime. Further, other witnesses placed Bruno at the crime scene, carrying a gun and later disposing of it, in possession of electronic equipment, and admitting to the murder. Bruno, 574 So. 2d at 78-79. Given this evidence, it cannot be said appellate

counsel was deficient in not raising this issue on appeal or that the appellate process was undermined by such omission. Jones, 794 So. 2d at 587-88; Ferguson, 632 So. 2d at 58 Relief should be denied.

As his third sub-claim of ineffective assistance of appellate counsel, Bruno asserts that he had asked for disclosure of criminal and voting information on the prospective jurors, but the record does not indicate that such information was supplied (Petition at 21). This he claims amounts to trial court error and constitutes ineffective assistance of appellate counsel for not raising this issue on direct appeal (Petition at 21-22). This claim is meritless.

Bruno does not aver that he did not receive the requested materials, only that the record does not indicate that he received them. Moreover, he has not pointed to a record site establishing that the trial court denied the motion[8]. As such, it cannot be said that this matter was preserved for appeal. Where an issue is not preserved for appeal, appellate counsel may not be deemed ineffective for not addressing the point with the reviewing court. Roberts v. State, 568 So. 2d 1255 (Fla. 1990) (holding that appellate counsel's failure to raise a claim which was not preserved for review and which does not present a question of fundamental error does not constitute ineffective performance

[8] In noting that the record does not indicate that criminal histories were disclosed, he cites to record page 1014. However, that page is part of his motion to suppress his confession and has nothing to do with jury information.

warranting relief).

Furthermore, Bruno has not alleged that any juror responded inaccurately during voir dire, did not disclose fully when asked about criminal history, or was not competent to sit on his jury. As recognized in Lebron v. State, 799 So. 2d 997, 1014 (Fla. 2001)

> A juror's nondisclosure of information during voir dire warrants a new trial if it is established that the information is relevant and material to jury service in the case, the juror concealed the information during questioning, and failure to disclose the information was not attributable to counsel's lack of diligence. *Cf. Jennings v. State*, 512 So. 2d 169, 173 (Fla.1989) (observing that a juror's concealment on voir dire of information which may have been material to whether the juror would have been excused on peremptory challenge or for cause, and which is not revealed or discovered until after trial, can justify the granting of a new trial); *Lebron v. State*, 724 So. 2d 1208 (Fla. 5th DCA 1998) (holding that a juror's failure to timely disclose to the trial court his suspicion that the accused had murdered the juror's friend was juror misconduct, warranting a new trial); *Marshall v. State*, 664 So.2d 302 (Fla. 3d DCA 1995) (holding that a juror's failure to disclose that she volunteered at the jail where the defendant was held constituted juror misconduct and entitled the defendant to new trial); *Blaylock v. State*, 537 So. 2d 1103, 1106-07 (Fla. 3d DCA 1988) (reflecting that nondisclosure is considered material if it is substantial and important so that if the facts had been known, the complaining party might have been influenced to peremptorily exclude the juror from the jury), review denied, 547 So. 2d 1209 (Fla. 1989); but *cf. James v. State*, 751 So. 2d 682 (Fla. 5th DCA 2000) (holding that a prospective juror's failure to disclose, during voir dire, that she had two close relatives who had been convicted of crimes was not material, and thus no new trial was required).

Lebron, 799 So. 2d at 1014. Without some evidence that an improper juror sat on the jury, Bruno is unable to meet his burden of proving that appellate counsel's performance fell "measurably outside the range of professionally acceptable performance" and that such "compromised the appellate process so as to undermine confidence in the correctness of the result." Ferguson, 632 So. 2d at 58. Clearly, if there were no juror misconduct[9], it would matter not that the jurors' criminal and voting histories were not disclosed. Likewise, without some showing of misconduct, confidence in the appellate decision is not undermined. Relief should be denied.

In his fourth sub-claim, Bruno alleges that appellate counsel was ineffective for not having ensured that a complete record on appeal was prepared (Motion at 22). The items Bruno claims should have been made part of the record on appeal, but were not, are the two letters delivered to trial counsel by Dr. Stillman, the confidential mental health expert (Petition at 26). What Bruno is asserting is that his appellate counsel is ineffective for not having ensured that Dr. Stillman's letters were made part of the record on appeal even though those letters were not entered into

[9] It is interesting to note that it has been ten years since Bruno's conviction and sentence have become final and there has been public records litigation appendant to a postconviction evidentiary hearing and appeal. Yet, there has been no allegation of juror misconduct. Cf. Buenoano v. State, 708 So. 2d 941, 952 (Fla. 1998) (rejecting claim of ineffective assistance on ground that defendant could not show that evidence of juror's criminal history could not have been discovered sooner with the use of due diligence).

evidence or made a court exhibit by the trial counsel. This claim is without merit.

Pursuant to Florida Rule of Appellate Procedure 9.200(a)(1):

> Except as otherwise designated by the parties, **the record shall consist of the original documents, exhibits, and transcript(s) of proceedings, if any, filed in the lower tribunal**, except summonses, praecipes, subpoenas, returns, notices of hearing or of taking deposition, depositions, other discovery, and physical evidence. The record shall also include a progress docket.

(emphasis supplied). The instant record reflects that the trial counsel never filed with the Court the letters received from Dr. Stillman. When the issue of Dr. Stillman's new opinion was discussed during the penalty phase, the following occurred:

> MR. STELLA: Thank you, Your Honor, for seeing me at side bar....
>
> Doctor Stillman, to my surprise and dismay testified today that he told me, at least verbally that, number one, my client was probably or at least possibly insane at the time of the offense because of drug, alcohol and substance abuse as well as a number of other factors.
>
> ... I have since during the luncheon break had a chance to go back....
>
> I did not receive a report from Doctor Stillman. However, I did receive an initial letter dated December 8th of 1986 and another letter after I had had a conversation with Doctor Stillman regarding the fact that, despite his findings in the December 8th letter finding my client completely competent, finding no indication of insanity or competency at the time of the offense nor incompetency to stand trial nor at the time of the offense, I (Mr. Stella) still had my doubts.

> I called him verbally. He reevaluated the defendant or at least visited him; wrote me a letter on June 19, 1987, verifying and resubstantiating that position.
>
> ...
>
> THE COURT: **If you would like for the purpose of the appellate record, like to put in a copy of that letter in there -- I don't know if it is confidential**.
>
> MR. STELLA: **It is confidential, and at this particular point in time I will probably do some research before I do that**.

(ROA V 863-65) (emphasis supplied). When appellate counsel attempted to supplement the record on appeal with these letters, Mr. Stella reminded the trial court that such were not made part of the record (2nd SROA 28-30).

> THE COURT: **Psychological reports filed in a trial court. There were none**.
>
> MR. STELLA: **There were none**.
>
> THE COURT: Defense exhibits 1 and 2 introduced into evidence.[10]
>
> MR. STELLA: And I indicated to the Court that I will do my best through the attorney to get those....
>
> All of the psychological evaluations of the defendant were, in fact, confidential, and obviously pursuant to the rule were not entered into evidence....
>
> THE COURT: No.

[10] These were exhibits introduced during the suppression hearing and consisted of a letter written by Michael Castoro to the Bruno family returning the retainer check to them and Mr. Castro's notes regarding his conversation with the Margate police before Bruno's confession (ROA I 9-13).

> MR. STELLA: ... I showed the Court copies of the reports I had received.
>
> **You asked me if I wanted them put into evidence and I indicated that I did not because then they would go to the jury**.
>
> ...
>
> MR. STELLA: NO. I'll try to get the defense exhibits for the motion to suppress, and I think that's all my office can contribute.

(2nd SROA 28-30)(emphasis supplied). As a follow-up, Mr. Stella corresponded with the Broward County Clerk's Office, sending a copy to Bruno's appellate counsel, Craig S. Barnard, that stated:

> In regards to **the psychiatric reports, they are confidential and cannot be submitted unless Mr. Barnard can get a written waiver from Mr. Bruno** allowing our office to release them for the appeal. Additionally, **they were not admitted into evidence**.

(2nd SROA 35) (emphasis supplied).[11]

From the foregoing, it is clear that Dr. Stillman's letters were not entered into evidence. As such, appellate counsel may not be deemed deficient for not supplementing the record with items which were not part of the trial record. Thomas v. Wainwright, 495 So. 2d 172, 173 (Fla. 1986) (finding that "[a]ppellate counsel cannot be faulted for not ensuring the inclusion in the record of documents not placed in the record by the presiding judge"). Also, this Court has rejected a claim of ineffective assistance where portions of the trial were not transcribed and if transcribed could

[11] There has been no allegation that Bruno gave his consent to Mr. Stella to release Dr. Stillman's letters to appellate counsel.

have been made part of the appellate record under rule 9.200:

> We have previously rejected a similar claim that appellate counsel was ineffective for failing to have transcribed portions of the record, including parts of voir dire, the charge conference, and a discussion of whether the defendant would testify. *See Ferguson v. Singletary*, 632 So. 2d 53, 58 (Fla. 1993). We reasoned that "[h]ad appellate counsel asserted error which went uncorrected because of the missing record, or had [the defendant] pointed to errors in this petition, this claim may have had merit." *Id.* However, because the defendant "point[ed] to no specific error which occurred" during the portions of the record that remained untranscribed, we concluded that appellate counsel was not ineffective. *Id.*... As with the defendant in *Ferguson*, Thompson has not pointed to any errors that occurred during the untranscribed portions of the proceedings. Therefore, these habeas claims are without merit.

Thompson, 759 So. 2d at 660.

Bruno cannot establish that an error has gone uncorrected based upon Dr. Stillman's letters. All Bruno can say is that his direct appeal position outlined in claims B.2 and B.3[12] would have been bolstered (Petition at 26). As is evident from the record, appellate briefs, and postconviction litigation, the issue of Bruno's competency, as well as the performances of trial counsel and the mental health expert, were litigated fully. Dr. Stillman's findings and conversations with Mr. Stella were disclosed during

[12] B.2 "The trial court erred in failing to conduct an evidentiary hearing, declare a mistrial or continuance at penalty phase when the dispute between trial counsel and his mental health expert was brought to the Court's attention" and B.3 "There is substantial record evidence in mitigation calling for a sentence less than death." (Second Amended Initial Brief at 69-71, 78-84 in case number 71,419)

cross-examination[13] (ROA V 821). Mr. Stella's account was discussed at trial and at the postconviction evidentiary hearing which revealed that Dr. Stillman had reported one diagnosis, then changed his opinion just before the penalty phase commenced, and that Bruno's actions/obstructionist behavior impeded counsel (ROA V 863-66, 920-28; VI1093-95; PCR XI 191-92; XII 425-34, 437; XIII 549, 561, 570, 602, 641; XIV 717-19, 726-28). Consistently, this Court has found that the rejection of mental mitigation and trial counsel's actions with regard to Bruno's competency were proper. Bruno, 807 So. 2d at 62-64, 68-70; Bruno, 574 So. 2d at 83.

Moreover, with the overwhelming evidence in this case of Bruno's guilt, the strong aggravation, and no mitigation established, it cannot be said that the mere exclusion of letters which were never part of the trial record to begin with undermines confidence in the appellate review. Thompson, 759 So. 2d at 660; Groover, 656 So. 2d at 425; Pope, 496 So. 2d at 800. Bruno has not carried his burden of proving either deficient performance or undermining confidence in the correctness of the appellate process. Relief must be denied.

[13] On cross-examination, Dr. Stillman testified he believed Bruno was not sane at the time of the murder. He also averred that he had completed one examination, reported his findings verbally to Mr. Stella, conducted a second exam and did not want to write a report until he had spoken to Bruno's family members. Dr. Stillman noted he told Mr. Stella that he had suspicions Bruno was insane, but needed corroboration. (ROA V 821).

ISSUE III

THE CLAIM OF CONSTITUTIONAL ERROR PURSUANT TO APPRENDI V. NEW JERSEY, 530 U.S. 466 (2000) IS NOT COGNIZABLE, IS PROCEDURALLY BARRED, AND IS MERITLESS (Restated).

Bruno asks this Court to revisit the trial court's findings and his death sentence in light of Apprendi v. New Jersey, 530 U.S. 466 (2000) (Petition at 30). This claim is not cognizable and is procedurally barred. Nonetheless, the matter is without merit as this Court has determined that Apprendi does not apply to capital sentencing, and has rejected the argument that aggravating circumstances must be included in the indictment, presented during the guilt phase of the trial, and found by a unanimous jury. Spencer v. Moore, Case no. 00-2588 (Fla. April 11, 2002); Bottoson v. State, 27 Fla. L. Weekly S 119 (Fla. Jan. 31, 2002).

Here, Petitioner merely alleges that certain issues related to the constitutionality of his conviction and death sentence were addressed on direct appeal and should be reconsidered because of Apprendi. This is not a proper issue for habeas corpus litigation and should be denied as not cognizable. Freeman, 761 So. 2d at 1072 (rejecting claims of error in habeas petition that were not challenging appellate counsel's effectiveness). A collateral challenge to a judgment and sentence must be raised in a post-conviction motion under rule 3.850 and not in a petition for writ of habeas corpus. Rule 3.850 supplants the remedy of habeas corpus for raising collateral challenges to a judgment and sentence. Patterson v. State, 664 So. 2d 31 (Fla. 4th DCA 1995). See Routly,

502 So. 2d at 903 (declining "petitioner's invitation to utilize the writ of habeas as a vehicle for the re-argument of issues which have been raised and ruled on by this Court.")) (quoting Steinhorst v. Wainwright, 477 So. 2d 537, 540 (Fla. 1985)).

Moreover, the matter is procedurally barred. While Bruno challenged the propriety of permitting the State to argue the alternate theories of premeditation and felony murder during the guilt phase, he did not challenge on direct appeal the trial court's rejection of his motion to declare the death penalty unconstitutional where the State did not list in the indictment the aggravation upon which it would rely. As such, Bruno is barred from seeking a review here. Parker, 550 So. 2d at 460 (opining that "habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial."). However, should this Court find the matter cognizable and reaches the merits, relief should be denied as this issue has been decided adversely to Bruno. Spinkellink v. Wainwright, 578 F. 2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979)

The Florida Supreme Court found that Apprendi does not apply to capital sentencing and has rejected the argument that aggravating circumstances must be included in the indictment, presented during the guilt phase of the trial, and found by a unanimous jury. Bottoson v. State, 27 Fla. L. Weekly S 119 (Fla. Jan. 31, 2002); Brown v. Moore, 800 So. 2d 223 (Fla.

2001)(rejecting claims that aggravator must be charged in indictment, presented to the jury during guilt phase, and found in a unanimous jury verdict); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001) (finding Apprendi does not apply to capital sentencing); Mills v. Moore, 786 So. 2d 532, 536-38 (Fla.), cert. denied, 532 U.S. 1015 (2001) (same); Dufour v. State, 495 So. 2d 154, 163 (Fla. 1986) (rejecting claim that aggravating factors must be charged in the indictment); Hitchcock v. State, 413 So. 2d 741, 746 (Fla.), cert. denied, 459 U.S. 960 (1982) (same); Sireci v. State, 399 So. 2d 964, 970 (Fla.1981), cert. denied, 456 U.S. 984 (1982) (same); Menendez v. State, 368 So. 2d 1278 (Fla. 1979); Spinkellink, 578 F. 2d at 582. This conclusion is based upon the Florida Supreme Court's interpretation of Florida's capital sentencing statute to be that death is the maximum penalty permitted under section 921.141, Florida Statutes. Mann, 794 So. 2d at 599; Mills v. State, 786 So. 2d 547, 549 (Fla. 2001). Furthermore, recently in Bottoson, the Florida Supreme Court rejected a similar claim as that presented by Bruno stating:

> In Bottoson's third and final habeas claim, he alleges that the U.S. Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), applies to Florida's capital sentencing statute. We have consistently rejected similar claims and have decided this issue adversely to Bottoson's position. *See King v. State*, 27 Fla. L. Weekly S65 (Fla. Jan. 16, 2002), stay granted, No. 01-7804 (U.S. Jan. 23, 2002); *Mills v. Moore*, 786 So.2d 532, 536-537 (Fla. 2001), *cert. denied*, 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); *see also Brown v. Moore*, 800 So. 2d 223, 26 Fla. L. Weekly S742 (Fla. Nov. 1,

> 2001) (rejecting claims that aggravating circumstances are required to be charged in indictment, submitted to jury during guilt phase, and found by unanimous jury verdict); *Mann v. Moore*, 794 So.2d 595, 599 (Fla. 2001). Thus, we conclude that Bottoson is not entitled to relief on this claim.
>
> Although we recognize that the United States Supreme Court recently granted certiorari review in *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (Ariz.2001), *cert. granted*, --- U.S. ----, 122 S.Ct. 865, --- L.Ed.2d ---- (2002), we decline to grant a stay of execution or other relief, in accordance with our precedent on this issue in *King*.

Bottoson, 27 Fla. L. Weekly at S119.

Nonetheless, should the Court reach the merits if will find Lewis is not entitled to relief. In Apprendi, the United State's Supreme Court concluded that its decision did not effect prior precedent with respect to capital sentencing schemes such as Florida's. Apprendi, 530 U.S. at 496-97, citing, Walton v. Arizona, 497 U.S. 639 (1990). In Walton, the Supreme Court noted that constitutional challenges to Florida's capital sentencing have been rejected repeatedly. See, Hildwin v. Florida, 490 U.S. 638 (1989)(stating case "presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida and concluding that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury"); Spaziano v. Florida, 468 U.S. 447 (1984); Proffitt v. Florida, 428 U.S. 242 (1976). Clearly, Bruno has not established a basis for the instant

claim. As such, relief should be denied.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for writ of habeas corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Todd G. Scherer, Esq., Office of the Capital Collateral Representative, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301, this ____ day of April, 2002.

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Assistant Attorney General

CERTIFICATE OF FONT SIZE

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

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LESLIE T. CAMPBELL