IN THE SUPREME COURT OF FLORIDA

ROBERT BEELER POWER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC02-874

APPELLEE'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the trial court, will be referenced in this brief as Appellee, the prosecution, or the State. Appellant, Robert Beeler Power, the defendant in the trial court, will be referenced in this brief as Appellant or by his proper name.

The record on appeal consists of thirty consecutively paginated volumes, which will be referenced by the letter “R,” followed by any appropriate page number. "IB" will designate Appellant's Initial Brief, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The state accepts Power’s statement of the case as being generally accurate; however, as Power’s “statement of the facts” does not contain any facts, the State provides the following account of the first-degree murder, sexual battery, kidnapping of a child under the age of thirteen, armed burglary of a dwelling, and armed robbery, omitted from the initial brief.

This Court set out those facts as follows:

> The conviction arises from events occurring on October 6, 1987, when Frank Miller, a friend of the Bare family, arrived at the Bare home with his daughter to pick up twelve-year-old Angeli Bare for

school. When he arrived, Miller honked the horn twice. He then glanced at the house where he saw a man standing inside the doorway with his back to the street. Miller assumed the man was Angeli's father because he was approximately the same build. The man made a gesture which Miller interpreted as meaning for him to wait. Miller remained in his car. When he next looked, he noticed the front door was closed with no one in sight. At approximately 8:55 a.m., Angeli came out of her house and walked down to the sidewalk to Miller's car. She approached within three feet of the passenger side of the car (the side closest to the house), and stopped. At that point, Miller noticed that Angeli appeared very nervous.

Angeli told Miller that there was a man in the house who she believed wanted to rob her. Angeli refused Miller's repeated requests to get into the car because, she said, the man in the house would kill all three of them. Miller told Angeli that he would get help and immediately drove the four blocks back to his own house and called the Bares at work and 911. Miller then drove back and parked four or five houses away from the Bares' home.

At approximately 9:10 a.m., Deputy Richard Welty received a radio dispatch and drove to the Bare home. En route, he was flagged down by Miller who related what he saw. Miller described the man he had seen as a white male with reddish hair. Mr. and Mrs. Bare, who had just arrived, stated that Angeli's biological father, who lived in California, had reddish hair.

Deputy Welty went to the Bare home and searched it but found nothing. After another officer arrived, Welty went to check the field behind the Bare home. Welty walked west into an area filled with heavy brush and trees. He followed a path with his revolver drawn in one hand and his two-way radio in the other. When the footing became treacherous, Welty holstered his gun as a safety precaution, and proceeded down the path. Welty then noticed a white male with sandy blond hair walking casually through the field. The man, who was wearing worn blue jeans and a dungaree-style shirt, appeared to have a sandwich in his right hand and was "high-stepping" through the field toward a nearby construction site.

Because Welty was originally looking for a man with reddish hair, he called a fellow officer on the

radio to ask for a better description from Frank Miller. While talking on the radio, Welty became unsure of his footing, looked down, and when he looked up again, found himself facing the man he had seen earlier now pointing a gun at him. Welty subsequently identified the man as Robert Power.

Power told Welty to hand over his sidearm. Welty thrust his hands into the air and then slowly reached for his pistol. Power then ordered Welty to put his hands into the air once again and retrieved Welty's pistol himself. Power asked Welty, "How many others are there?" Deputy Welty told Power that there were "six deputies on the scene." After a lengthy pause, Power asked for and received Welty's radio. Power then ordered the deputy to run in the direction of the construction site and warned him, "If you turn around, I will kill you." Welty jogged about thirty feet, stopped, looked back, and saw Power running west towards U.S. 441. Angeli Bare's body was found in the same general direction later that morning.

Welty ran back to the Bare home and reported that the culprit had his radio and service revolver. The police set up a perimeter but were unable to apprehend the fleeing suspect.

It was late morning or early afternoon before authorities found the body of Angeli Bare in the tall grass of the field behind her home. The body was lying on its right side, gagged and "hog-tied" by the wrists and ankles. The body was nude from the waist down. Lying nearby were her school books, jacket, purse, and an empty paper lunch bag. Officer Welty's service revolver was later found in a wooded area near the canal.

The autopsy revealed that the victim's left eye was blackened and that she had superficial contusions on her neck. In the medical examiner's opinion, the death of Angeli Bare resulted from shock following exsanguination due to the severance of the right carotid artery. The artery was cut by a stab wound on the right side of her neck. The autopsy also revealed injuries to the vaginal and anal area. The doctor estimated that these injuries were the result of the insertion of an oversized foreign object, perhaps a human penis. The doctor approximated the time of death as within thirty minutes of 9:15 a.m. The crime lab serologist found no semen on the victim's underwear. Vaginal,

rectal, and oral swabs revealed no spermatozoa. Blood stains found on the victim's underwear were the same blood type as that of the victim.

Police conducted a thorough search of the Bare home. They found no signs of a struggle or forced entry. Angeli's bank had been pried open and a screwdriver was found in the kitchen sink. None of the latent prints found by the crime scene technicians matched Robert Power. Latent fingerprints found on Officer Welty's service revolver also did not match Robert Power. Police found no latent fingerprints of any kind on the victim's body. According to the State's experts, however, three pubic hairs from Angeli's bedspread were indistinguishable from Power's known pubic hairs, and one pubic hair from Angeli's fitted bed sheet was indistinguishable from Power's. Additionally, a single hair recovered during the autopsy from Angeli's pubic area was indistinguishable from Power's pubic hair.

The State's experts agreed that a number of head hairs of unknown origin found in the sheets of Angeli's bedding did not match Power's. Numerous hairs recovered from the bedding and clothing remained unidentified at the time of trial.

Approximately ten days after the murder, Officer Welty identified a photograph of Robert Power as the man who robbed him in the field. A SWAT team executed a search warrant at the residence of Robert Power, who lived at the house with his mother, her youngest daughter, her eldest son, that son's wife, and their three children. Robert Power was found hiding in the attic and was arrested. Police seized a maroon duffle bag from the attic that was close to Power. The duffle bag contained a pistol, some ammunition, a pair of tan driving gloves, a red bandanna, at least three documents with Robert Power's name on them, and a folding knife.

Police also found a box in the front bedroom containing various electronic parts, one of which contained a serial number corresponding to the serial number of the radio that was taken from Deputy Welty. An exhaustive examination of the box revealed numerous latent fingerprints, none of which matched Robert Power's. The crime lab was unable to find any useful latent prints on the radio parts inside the box. Police seized some green, hooded sweatshirts and several denim work shirts from the

> front bedroom. According to the State's experts, two of three head hairs recovered from the sweatshirts were consistent with Angeli Bare's.
>
> The jury found Power guilty of first-degree murder, sexual battery, kidnapping of a child under the age of thirteen, armed burglary of a dwelling, and armed robbery. The jury [unanimously] recommended death for the homicide.

Power v. State, 605 So.2d 856, 858-60 (Fla. 1992).

SUMMARY OF ARGUMENT

1. Power cannot show entitlement to reversal on the instant ineffective assistance of counsel claim as there is competent, substantial evidence to support the trial court's finding that counsel sufficiently prepared for the presentation of mitigation prior to Power's waiver, and that Power reasonably understood what he was waiving and its ramifications and hence was able to make an informed, intelligent decision. Notwithstanding the failure to demonstrate deficient performance, Power cannot establish the prejudice prong under Strickland because it is not reasonably probable, given the nature of all the additional mitigation, that this altered picture would have led to the imposition of a life sentence, outweighing the multiple substantial aggravators at issue in this case.

2. Power cannot show entitlement to relief on his "improper shackling" claim, because to the extent he is challenging the trial court's alleged order shackling him in front of the jury, that claim is procedurally barred; and, to the extent he is claiming ineffective assistance of counsel for failing to

object to the “shackling,” there is competent, substantial evidence to support the trial court’s finding that Power did not present any witnesses to prove that he was shackled or restrained in view of the jury in any way during the trial.

3. Power cannot show entitlement to relief on his “interviewing jurors” claim, because to the extent he is claiming his rights were violated due to his inability to interview jurors, the trial court correctly found that claim procedurally barred; and, to the extent he is claiming ineffective assistance of postconviction counsel, the trial court correctly found that claim not cognizable in this proceeding.

4. Power cannot show error on the part of the trial court on the argument before this Court, that the order was not found in the defense files, as that was not the argument made below. Moreover, Power cannot show error by the trial court as he failed to come forward with any evidence that the Office of the State Attorney was involved in any way in writing the order or that they had any ex parte contact with the judge.

5. Power’s allegation of an incomplete and inaccurate record is not cognizable in the instant action because it was raised and decided on direct appeal.

6. In this claim, Power simply presents bare bones claims of ineffective assistance counsel. Power makes no attempt to address the trial court’s rulings that these claims have already been found meritless by this Court in this case on

direct appeal - or in another case equally controlling the trial court's resolution of the claim. Therefore, Power has utterly failed to show any entitlement to relief on these claims.

7. Given Petitioner's complete failure to address the trial court's ruling on his claim of improperly introduced non-statutory aggravating circumstances, there has been no showing that the trial court erroneously found this claim procedurally barred and without merit.

8. As the alleged failure of the trial court to consider mitigating evidence could have been raised on direct appeal, the trial court correctly found this claim procedurally barred.

9. Power's substantive claim of prosecutorial misconduct is procedurally barred. Further, notwithstanding the form of the argument, Power has failed to show that any of the statements to which no objection was raised, or the combined effect of them, warranted the granting of a new trial.

10. Power's argument that the jury was improperly instructed on flight is procedurally barred, inaccurate, and meritless. Thus, no entitlement to relief has been, or can be, demonstrated.

11. Power argues that execution by electrocution and/or lethal injection constitutes cruel and unusual punishment under the constitutions of both Florida and the United States, and asserts that he is raising the instant issue to preserve the

arguments as to the constitutionality of the death penalty. The State does not concede that this cursory argument preserves any issue for further review; however, as argued, no response is otherwise necessary.

12. Power argues that he is insane to be executed, and that he is raising the instant unripe claim to preserve it for federal review. Power's claim is not subject to federal review unless and until it is ripe and exhausted in the State courts.

13. As Power has failed to brief and explain what the alleged cumulative errors are, and what their impact is on this case, this claim is waived.

ARGUMENT

Jurisdiction

This Court has jurisdiction pursuant to Article V, section 3(b)(1) of the Florida Constitution.

ISSUE I

WHETHER POWER'S TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE, PREPARE, AND PRESENT MITIGATION EVIDENCE; AND, WHETHER POWER'S TRIAL COUNSEL FAILED TO DETERMINE THAT POWER'S WAIVER OF THE PRESENTATION OF MITIGATION EVIDENCE WAS KNOWING, INTELLIGENT, AND VOLUNTARY?[1]

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

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[1] In the interest of completeness, and for ease of review, the State's will address the instant issue following the format used by the trial court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Appellant alleges that: "Mr. Power received ineffective assistance of counsel because his trial attorney failed to obtain an adequate mental health evaluation and background on Mr. Power for [the] penalty phase. Mr. Power failed to make a knowing and intelligent waiver of his rights at the penalty phase. Trial counsel was ineffective for failing to investigate his client's capability to make that waiver, and for failing to, at least, proffer that evidence to the court." (IB, 12).

The legal test to be employed by a court reviewing claims of ineffective assistance of counsel was set out by the United States Supreme Court in Strickland v. Washington, 104 S.Ct. 2052, 2065 (1984); accord Williams v. Taylor, 120 S.Ct. 1495 (2000) (recent decision affirming that merits of ineffective assistance claim are squarely governed by Strickland). The

United States Supreme Court articulated the test in the following way:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

Thus, in order to prove ineffective assistance of counsel, a defendant must establish that (1) counsel's performance was deficient and (2) there exists a reasonable probability that but for counsel's unprofessional errors the results of the proceeding would be different. Further, unless a defendant makes both showings it cannot be said that the conviction resulted from a breakdown of the adversary process that renders the result unreliable. Strickland.

> In a capital case, this two-part test applies to claims of ineffective assistance of counsel during the sentencing phase, as well as the guilt phase of the trial, because a "capital sentencing proceeding ... is sufficiently like a trial in its adversarial format and in the existence of standards for decision ... that counsel's role in the proceeding is comparable to counsel's role at trial--to ensure that the adversarial testing process works to produce a just result under the standards governing decision." Collier v. Turpin, 177 F.3d 1184, 1198 (11th Cir.1999) (quoting Strickland, 466 U.S. at 686-87, 104 S.Ct. 2052).

Grayson v. Thompson, 257 F.3d 1194, 1215 (11th Cir. 2001).

Below, the trial court applied Strickland to Petitioner's claim(s) of ineffectiveness of counsel. (R, 3734). More specifically, the circuit court addressed the instant claim(s) and concluded:

CLAIM V
A. Failure to adequately investigate, prepare, and present Power's mitigation evidence

> Mr. Power alleges counsel was ineffective for failing to adequately investigate, prepare, and present mitigation evidence. He asserts that counsel failed to provide him with a competent mental health expert who would have conducted an appropriate examination and assisted in evaluation, preparation, and presentation of his defense. He discusses his documented mental problems and cites the evaluation submitted during a Seminole County trial which outlined his manic depression, risk for suicide, treatment with medication, history of "huffing" gasoline, and mother's ingestion of alcohol during her pregnancy with him. In addition, he details the abusive, impoverished environment in which he was raised and the mental states of some of his family members. Mr. Power contends that his family and friends were available and willing to provide mitigation and that records were available, had counsel sought them out.
>
> In its Response, the State counters that the record shows Mr. Power was fully informed on this point and instructed his trial defense counsel not to present background and mental health information. The State cites to hearings in which defense counsel and Mr. Power himself told the court that Mr. Power did not want to present testimony of his family or about his background because doing so would be tantamount to an admission of guilt.
>
> The only witness presented by the defense during the penalty phase was Dr. Michael Radelet who testified as to Mr. Power's lack of future dangerousness and the high cost of executing defendant versus sentencing him to life in prison. No personal background or mental health experts testified. However, this failure to investigate and present mitigation may have been the result of restrictions Mr. Power placed on defense

counsel. The defense filed a demand for , discovery early in the case. (R. 2698-99). Counsel filed a motion to permit the defense to hire a private investigator as well as a forensic psychiatrist/psychologist to aid defense counsel in preparation of its defenses. (R. 2822-23, 2902-03). After the guilt phase of the trial, defense counsel told the court that it did not want to participate in discovery regarding the penalty phase. (R. 2106). The State then undertook to investigate Mr. Power's background, and the court file shows that the State sent a number of letters to defense counsel attaching various material.[6] The State deposed both Mr. Power's father, Robert Power, Sr., and brother, William Gary Power, with the defense in attendance.

> 6 See Lerner letter to Blankner, dated 6/20/90, filed 6/25/90, attaching Mr. Power's California prison records; Lerner letter to Blankner, dated 7/10/90, filed 7/25/90, attaching Mr. Power's Osceola County school response to request for records and 7/10/90 report from investigator Amy Harmon re: interview of Wayne and Nathan Groves ; Lerner letter to Blankner, dated 7/10/90, filed 7/25/90, attaching Mr. Power's California prison medical and psychiatric records; Lerner letter to Blankner, dated 7/10/90, filed 7/25/90, attaching Mr. Power's South Carolina Department of Probation, etc. records; Lemer letter to Blankner, dated 7/25/90, filed 8/1/90, attaching three reports of Investigator Amy Hannon (one which concerned Mr. Power's California prison records, one which referenced Mr. Power's huffing gasoline fumes, and one which referenced other psychiatric, medical and incarceration information on Mr. Power).

In addition, the State filed a motion for a neurological exam to be performed on Mr. Power at the county's expense. (R. 3181-83). At the hearing on this motion, conducted July 12, 1990, defense counsel indicated that Mr. Power did not wish to present mitigation evidence. (R. 3336). The State contended that in its role to see that justice was done and to insure effective assistance of counsel, it still wanted the exam. (R. 336-37). Defense counsel argued that Mr. Power's position all along in the case was that he was innocent of these charges and to present mitigating evidence would, in Mr. Power's opinion,

make it appear that he was either admitting or conceding his guilt. (R. 3338). The court granted the motion, nevertheless. (R. 3338, 3179-80). Afterward, the judge cleared the courtroom for an in camera hearing. (R. 3345). In the hearing, the judge and defendant had the following exchange:

Judge: Okay. Mr. Blankner - Mr. Power, Mr. Blankner has indicated to me that you did not-it is your desire not to present any mitigating circumstances.

The reason being that to present any mitigating circumstances, would somehow be tantamount to an admission of, or guilt in this case. Is that your position, sir?

Defendant: An admission or a justification for something that can't be justified. Yes, that's my position.

(R. 3352, transcript of in camera hearing 7/12/90, pgs. 2-3). The judge took time to explain the penalty phase to Mr. Power and to warn him that presenting no mitigating testimony would place him in a hazardous position. The judge also stated that defense counsel believed there were mitigating circumstances which should be presented, and that a special jury instruction could be drafted by the court to allay Mr. Power's fears that the jury would hold the presentation of mitigating evidence against him. Mr. Power stated that he had no questions. (R. 3352, pg. 7).

Later, during a hearing set by the State for perpetuation of the medical examiner's testimony for the penalty phase, the State noted its concern that the defense had not yet filed anything to show it was preparing for the penalty phase. (R. 3329). The State asserted there was no indication that the defense was following up on records it had received from the State dealing with mitigation issues, and requested another in camera hearing on this issue. (R. 3329). During that hearing, conducted October 11, 1990, the judge again addressed the status of mitigation investigation in the case:

Mr. Blankner: ...As far as presenting witnesses through Mr. Power's family, how I would like to present, or in my opinion, would be helpful in a mitigating

circumstance, Mr. Power has advised me a couple weeks ago that he does not wish us to present that evidence at this time. He doesn't think that it's particularly helpful in his case. It is his position that he is innocent. That if it's mitigation, it still tends to leave an inference in anybody's mind, as far as he's concerned, that he is clearly guilty.

There are arguments he wishes me to make and he may very well, testify himself at the hearing regarding certain matters that the State intends to produce. But he does not wish to have his family and his background with regard to living with them, and what occurred during his life, brought up at this point. And he - therefore, I have not supplied the State with a witness list.

Now, the State has taken the deposition of his father, they've taken deposition of Billy Power; they have listed the other Power relatives, including his mother. They know those people so they can't really say they're prejudiced. And I've advised them that if it came to it, and I can convince Mr. Power that I could, I would present his mother as well. But at this point, there are no other relatives that I would present. If they wish to attempt to take her deposition, that is fine. I've advised them that she may refuse to testify about certain matters - although I'm assuming she could be held in contempt for not so doing. But that's the situation we are in right now.

Am I correct, Mr. Power? Did I accurately State it? What the court is concerned with is that, is that a few years from now, what the prosecutor state. That this will come up and we didn't -

Defendant: I heard what he said.

Mr. Blankner: In the penalty phase of the case.

Judge: Mr. Power, do you -

Mr. Blankner:

> I advised the court and I would like Mr. Power to know I've advised the court to know it's Mr. Power's defense, and he has a right to present what he wants as long as he's competent and sane and makes that decision knowingly, it's his privilege to present what he wishes and what -

(R. 3333, transcript of in camera hearing 10/11/90, pgs. 3-5).

The court again advised Mr. Power of the danger of refusing to present mitigation and of his right to do so even though defense counsel thought it was in Mr. Power's best interest to go forward with the mitigation witnesses. Mr. Power signed a release for medical records. The judge then further questioned Mr. Power:

Judge: ... What about the presentation of witnesses? And you family members. Your attorney indicated that he thinks that's going to be very helpful in your behalf.

Defendant: I disagree.

Judge: Okay

Mr. Blankner: He has a right to.

Judge: As long as you do. But as long as you do that knowingly, and you understand that his failure to present them at some time in the future will not be grounds for you coming back to set aside any verdict that the, or any judgment that may be rendered.

Defendant: I fully understand that.

Judge: Okay. And you thoroughly discussed what they could testify to, pro and con, how it would help you and how it would hurt you.

Mr. Blankner: To be frank, I have talked to all of them. In fact, Mr. Power's mother talked tome at length, before this case came up, in the previous case. So that's why I was keenly interested in the information. And I can understand why he feels the way he feels. And I think it is a matter of judgment and a matter of, of, of tactics, to some extent. I think it would be helpful. And I've said that all along and he knows that. But he knows what - why I think it would be helpful and we have gone over it at length and I've talked to his mother at length. She won't talk to me any more about it and, and to my investigator. But the one time he contacted her, she said she will deny ever having told me what she told me. And that's her privilege at this point.

Defendant: That was at my request because I informed her that I didn't want to present them as witnesses and asked her not to speak any further about things regarding my case or my past.

Judge: Okay

Mr. Blankner: I know if Mr. Power changes his position, she would tell me what she told me before.

(R. 3333, pgs. 7-9).

Both the judge and defense counsel continued to explain to Mr. Power why the mitigation-, testimony would be helpful in this case and emphasized the jeopardy Mr. Power was placing himself in for failing to present this testimony. The judge stated:

Judge: ... I just want you to understand that you're not going to be able to come back later and say, I changed my mind. I think it would be better and my attorney should have presented those. Your attorney clearly indicated he wants to present those

and it's your decision not to do so at this point.

Defendant: I understand that.

Judge: Okay. And we have afforded you every opportunity to try and protect your concern about a tacit admission here.

(R. 3333, pgs. 12-13).

At the penalty phase, defense counsel planned to have corrections officers testify, but he informed the court that Mr. Power did not want them to do so:

Mr. Jaeger:

We have consulted with our client at length about his matter. He has decided that he does not want us to call the correctional officers at this point. After consulting and talking the matter over at length, that's his decision. I believe that's a decision Mr. Power certainly has a right to make. And Mr. Power has used his cognitive skills in making that decision in withing the pros and cons. I think he has done so in his best interest.

Judge: Mr. Power, you have thoroughly discussed this with you attorneys?

Defendant: I have.

Judge: They have advised you? Given their advice.

Defendant: They have

Judge: You're satisfied with your decision at this point?

Defendant: I am.

Judge: You do not intend to then present the witnesses that you have been , subpoenaed as part - as far as the corrections officers?

Defendant: That's correct.

(R. 24443(sic)-44).[7]

> 7 In addition, Mr. Power actively participated in the discussion about mitigators on which the court would instruct the jury. (R. 2552-56). The State expressed concern about the striking of mitigating circumstances by the defense, but the court agreed that some should be stricken since they could almost be seen as aggravators if no evidence was presented to support them (R. 2554). Similarly, in the guilt phase the defense stated, and Mr. Power himself indicated, that Mr. Power did not want the jury to be instructed on any lesser included offenses. (R. 1817-19, 1838-40, 2097-98). Finally, Mr. Power indicated on the record several times during the case that he had no complaints to put on the record about the evidence generally presented in his case. (R. 1808, 2100-02, 2565-66).

Generally, relevant factors for review of a claim like this one include counsel's failure to investigate and present available mitigating evidence, along with the reasons for not doing so. Rose 675 So. 2d at 571. Mr. Power's restrictions on counsel must taken into consideration when determining whether counsel was ineffective in failing to investigate and prepare mitigating evidence. In Rutherford v. State 727 So. 2d 216, 225 (Fla. 1998), the Florida Supreme Court held that trial counsel did not provide ineffective assistance during the penalty phase of capital murder trial by failing to investigate, develop, and present mitigating evidence regarding defendant's harsh childhood and his Vietnam war experience. There, the court noted:

> the trial court found no deficiency because "any failure to present additional mitigating testimony [in this regard was] more the responsibility of Mr. Rutherford than his counsel. He refused to help his counsel develop mitigation ... [and] insisted on pursuing the defense of innocence." Moreover, he not only refused to cooperate, but actually encouraged his parents not to speak with defense investigators. The trial court concluded that "[g]iven the limitations created by Mr.

> Rutherford's refusal to assist in a viable defense, counsel made reasonable tactical decisions with respect to the presentation of mitigating evidence about Mr. Rutherford's entire background inclusive of his childhood and war record."

Id. at 225. The Florida Supreme Court found Mr. Rutherford's uncooperativeness at trial discredited his claim that counsel was deficient for not investigating and presenting mitigation regarding his harsh childhood and military history.

At the evidentiary hearing, Mr. Blankner testified that he spoke with Mr. Power's family, obtained school records, obtained the California prison and psychiatric records; spoke-with= California mental health experts who treated Mr. Power, and spoke with Dr:-Merikangas after -reviewing his report. He also hired a private investigator to investigate witnesses for the penalty phase, despite Mr. Power's objections. However, Mr. Power continuously stated he would not allow Mr. Blankner to present evidence of his childhood sexual abuse, neglect, drug use, or mental problems in mitigation. Mr. Power articulated tactical and strategic reasons for his decision, and counsel was obliged to follow his instructions. The record is clear that Mr. Power was adequately advised of the dangers of his decision and even encouraged to abandon it in favor of allowing counsel to present mitigating evidence. In the face of such urging even by the trial judge on two separate occasions, Mr. Power steadfastly refused. He cannot now claim counsel was ineffective for following his own explicit instructions.

B. Failure to determine whether Power's waiver of presenting mitigation evidence was knowing, intelligent, and voluntary

Mr. Power claims that counsel should not have blindly followed is waiver of an investigation into circumstances which might have provided mitigation for the penalty phase. He asserts that he was incapable of making any valid waiver of his rights because of his mental deficiencies, and argues that counsel was aware or should have been aware that he was unable to make any knowing and intelligent waiver due to his depression and organic brain damage. In Koon v. Dueeer. 619 So. 2d 246, 250 (Fla. 1993), the court addressed the appropriate procedure for trial courts to follow when a capital murder defendant wishes to waive the presentation of mitigating evidence in a penalty phase:

> When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

As noted above, during the in camera hearings defense counsel indicated he had made some investigation and believed that it would be in Mr. Power's best interest to present certain mitigating evidence. The judge also inquired into Mr. Power's ability to knowingly and intelligently waive the presentation of mitigating evidence:

Judge: ... Mr. Powers indicated a knowledge of criminal justice in the trial court process throughout this trial. I'm sure that he's making a, what he believes to be a wise decision. But I just caution him that it may not be his best decision. But, if it is, I want it clearly on the record it's his decision knowledgeably made and - you're not on any medication at this point, are you?

Defendant: No, sir.

Judge: Your mind is clear?

Defendant: In my opinion.

Judge: It might be?

Defendant: No, I said in my opinion.

Judge: In your opinion.

Mr. Blankner: In his opinion, his mind is clear.

Judge: You're not hearing voices?

Defendant: No, I'm not.

Judge: Okay.

Mr. Blanker: He's not under any certain medical treatment at all.

Judge: I understand that.

Mr. Blankner: As long as I've know Mr. Power, he did not appear, whenever I talked to him, to need medical treatment.

Judge: Appears extremely rational.

Mr. Blankner: Yes, sir.

(R. 3333, pgs. 12-13).

Thus, the record seems to refute any contention that Mr. Power did not knowingly and intelligently waive his right to present mitigating evidence. However, again, since there was such a clear lack of mitigation presented in this case, this issue was addressed during the evidentiary hearing. Therefore, collateral counsel presented expert testimony to support its contention that Mr. Power was not in a position to knowingly and intelligently waive the presentation of mitigation at his penalty phase.

Dr. James Merikangas, a psychologist and neurologist, testified that he conducted a brief evaluation at the Osceola County Jail in 1987 at the Osceola County Jail and found Mr. Power to be quite depressed. He explained depression interferes with a person's judgments and "whole cognitive electoral process." He recommended additional testing to detect brain damage or dysfunction and stressed the need for medical, school, and jail records as well as interviews with family members. However, he was never contacted further by defense counsel.

Dr. Thomas Hyde, a behavioral neurologist, testified that he had conducted an extensive interview with Mr. Power for the evidentiary hearing, reviewing numerous background materials and speaking with Mr. Power's mother. He found several abnormalities that suggested severe frontal lobe dysfunction, which would have affected reasoning and impulse control. He also concluded that Mr. Power suffered from major recurrent depression and post Itaamatic-stress - disorder, all

of which would have clouded his judgment and impaired his reasoning ability. He added that Mr. Power's impairments would probably not have been apparent to a lay observer, and collateral counsel argues it was impossible for counsel to accurately gauge them on his own.

Dr. Barry Crown, a clinical psychologist, also examined Mr. Power for the evidentiary hearing. He found significant neuropsychological deficits and impairments indicative of brain damage, which would have resulted in difficulties in reasoning, judgment, and appreciation of long-term consequences. Dr. Faye Sultan, another clinical psychologist, testified that she had reviewed Mr. Power's school and prison records and spoken with his family members, learning details of his sexual abuse by Grady Highsmith, physical abuse by his father, his mother's mental illness, his malnutrition and drug abuse, and the overall chaotic and disturbed nature of life in his home. She concluded he suffered from brain damage and major depression, severe recurrent without psychotic features, so he would have been incapable of making rational decisions.

Dr. William Anderson, a deputy medical examiner, testified that toxic agents such as those inhaled when huffing gasoline can alter the brain, change behavior patterns, and cause psychosis.

Dr. Sidney Merin examined Mr. Power for the State in preparation for the evidentiary hearing. He conceded that depression can impact a person's ability to make choices, but testified that he found Mr. Power suffered only from an "illusion of depression." He administered various tests but because his data was incomplete, the other experts who testified for Mr. Power were unable to interpret it or respond adequately to his conclusions.

Dr. Michael Gutman conducted a competency evaluation in 1988 and augmented it with a, review of records supplied prior to the hearing. He testified that in his opinion, Mr. Power was competent to waive mitigation. However, he did not interview Mr. Power in person again in preparation for the evidentiary hearing.

Collateral counsel also presented a number of other witnesses, friends and family members, who testified that they would have been available to present mitigating evidence in the form of details about Mr.

Power's dysfunctional family background, including the poverty, physical and sexual abuse, neglect, and drug use. These witnesses included his brother, Russell Power; cousin, David White; sister, Kimberly Power; cousin, Anna Chestnut; maternal aunt, Joanne Flores; brother, Michael Parton; and two investigators, Jeff Walsh and Paul Mann.

Collateral counsel argues that its experts conducted live interviews rather than merely relying on a review of records. Counsel further argues it is impossible to tell whether Mr. Power knew in detail the substance of the mitigation he was waiving, because it is not set forth on the record, even in the in camera hearings. Collateral counsel has submitted a great deal of very compelling information which the jury should indeed have heard prior to rendering its sentencing recommendation, and its experts were much more compelling and credible than those presented by the State.

Nevertheless, this court also finds that Mr. Power was firm and unwavering in his decision to refuse to allow counsel to present mitigation, and that he was capable of making this decision in a reasoned, well-informed manner. While the experts indicated his history and psychological problems may have affected his ability to make rational decisions, that retrospective diagnosis appears to be belied by the record, particularly the transcripts of the July and October 1990 in camera hearings, in which Mr. Power shows himself to be an active participant in his defense team, insistent upon proclaiming his innocence, and capable of articulating his preferred strategy and his rationale for that strategy.

Finally, throughout the course of the evidentiary hearings conducted in January and April 2001, this court had the opportunity to observe Mr. Power in person. At all times, he appeared to be alert and intelligent, he was engaged in the proceedings and frequently communicated with his attorneys. Granted, many years have passed since the date of the **trial,** but this court adds its own observations to those of the doctors who have also recently examined Mr. Power to arrive at a final conclusion on his overall competence. While he was certainly must have been affected by the trauma of his childhood and by his psychological impairments, he was still reasonably capable of making an informed waiver of mitigation. In the final analysis, it was not a wise decision he made when he chose to waive mitigation, but it was his to

> make and counsel was not ineffective for following his instructions. *See Koon v.* Dugger, 619 So. 2d 246 (Fla. 1993).

(R 3719-32).

Initially, the State points out that Power's trial counsel cannot be deemed deficient for failing to foresee subsequent case law that may have benefitted Power. See Anderson v. State, 822 So.2d 1261, 1268 (Fla. 2002)(holding that "[T]rial counsel cannot be deemed deficient for failing to foresee *Koon.*) Yet Power is before this Court seeking reversal, in large part, based upon this Court's ruling in Muhammad v. State, 782 So.2d 343 (Fla. 2001). (IB, 12, 66-67). However, "[i]t is clear that Muhammad is not applicable to the instant case because it was decided on January 18, 2001 - [over ten years] after [Power's] sentencing on November [8, 1990]." Ocha v. State, 826 So.2d 956, 962 (Fla. 2002)(noting that the Muhammad opinion specified that the PSI requirement was prospective only). Therefore the State will restrict its argument to addressing whether counsel provided reasonably effective assistance at the time of Power's trial and sentencing.

In Anderson, this Court addressed a claim of ineffective assistance of counsel for allegedly failing to make a complete record regarding mitigation witness testimony that could have been presented, after the defendant had explicitly waived his right to present mitigating evidence. Anderson, 822 So.2d at 1268. After noting that counsel could not be deemed deficient

for failing to foresee Koon, this Court concluded that there was no error in the trial court's summary denial of the claim because the record conclusively demonstrated compliance with the procedure that Koon later held must be followed when a defendant waives the presentation of mitigating evidence. Id. The trial court below correctly reached a similar result.

As in Anderson, counsel proffered the witnesses[2] that he believed could have benefitted Power, and the trial court engaged in an on-the-record colloquy concerning his wish to waive presentation of penalty phase evidence. Additionally, the instant record shows that Counsel informed the court that he had discussed at length the possible mitigating evidence, including the mental mitigation, with Power prior to the hearings. (R, pp. 3722-25 & State's Exhibit 2, pp. 6-7). As such, the instant record more than satisfies the standard counsel was held to by this Court in Anderson. Anderson, 822 So.2d at 1268.

Regarding Power's competence to waive the presentation of mitigation evidence, Dr. Gutman testified that he evaluated Power on March 20, 1988, at the request of the circuit judge. (R, 1123). Dr. Gutman testified that:

> Well, in the Mental Status Examination, he, he Showed, he was -- he was in jail garb, he carried a large portfolio of legal papers into the interview room, he had blonde hair, tattoos on his arm, his speech was rational, spontaneous and straight

[2]Including members of Power's family, who were no longer cooperating pursuant to instructions from Power.

> forward, his mood was neutral to serious, his thought processes were goal directed and logical and his thought content showed no psychotic symptoms such as hallucinations, delusions, tangential thinking, ideas of reference. He was knowledgeable about his legal issues and he responded to questioning concerning the type of sentence he could get, what outcomes could occur, assisting his counsel in his own defense and he was able to relate to me information, although he chose not to talk about the alleged offense, he did -- was able to talk about other issues dealing with his criminal defense. So I felt that he was able -- he was competent to proceed and able to assist counsel in his own defense.

(R, 1124–25, & Defense Exhibit 4 (Gutman's Report)).

Further, Dr. Merin examined Power on October 3, 2000; and, when questioned whether he had an opinion within a reasonable degree of psychological certainty as to Power's mental status at the time that Judge Formet held his two in camera hearings with him where inquiry was made into why Mr. Powers was deciding not to present mental health status and family background mitigation, Dr. Merin testified that: "he was quite capable of reasoning, of making decisions, he was free of debilitating mental or emotional problems at that time and at that time was quite capable and free to make the decisions as he would have liked." (R, 1012). Dr. Merin also testified that he:

> found nothing in his history, the documents that I reviewed that would constitute the basis for him having made judgments on the basis of some significant mental impairment. I would add, and understanding that he arose out of what we now refer to as a dysfunctional family but he was making decisions pretty much all through his life, decisions from his earliest years and those decisions were self-serving, they were not bizarre, they did not reflect any, any psychotic thought

> processes but they were decisions he was making that he considered to be available and appropriate for himself.

(R, 1012).

Although the trial court found the defense experts testimony “more compelling” and credible, the court added its own observations to those of the doctors who had also recently examined Mr. Power to arrive at a final conclusion on Power’s overall competence. The trial court concluded that “[w]hile he was (sic) certainly must have been affected by the trauma of his childhood and by his psychological impairments, he was still reasonably capable of making an informed waiver of mitigation. In the final analysis, it was not a wise decision he made when he chose to waive mitigation, but it was his to make and counsel was not ineffective for following his instructions.” (R, 3732). The reports and testimony of Dr. Gutman and Dr. Merin support the trial court’s conclusion.

Therefore, Power cannot show entitlement to reversal on the instant claim(s) as there is competent, substantial evidence to support the trial court’s finding that counsel sufficiently prepared for the presentation of mitigation prior to Power’s waiver, and that Power reasonably understood what he was waiving and its ramifications and hence was able to make an informed, intelligent decision. Anderson v. State, 822 So.2d 1261 (Fla. 2002); Koon v. Dugger, 619 So. 2d 246 (Fla. 1993).

Notwithstanding the failure to demonstrate deficient performance, Power cannot establish the prejudice prong under Strickland because "it is not reasonably probable, given the nature of all the additional mitigation, that this 'altered picture would have led to the imposition of a life sentence, outweighing the multiple substantial aggravators[3] at issue in this case.'" Sweet v. State, 810 So.2d 854, 866 (Fla. 2002) (quoting Rutherford v. State, 727 So.2d 216, 226 (Fla. 1998)). Power was not deprived of a reliable penalty proceeding. Id.

ISSUE II

WHETHER POWER'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO, AND THEREBY PRESERVE, THE ALLEGED "SHACKLING OF MR. POWER IN FRONT OF THE JURY?"

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial

[3] "(1) the defendant was previously convicted of a felony involving the use or threat of violence; (2) the homicide was committed while the defendant was engaged in the commission of the crimes of sexual battery, burglary, and kidnapping; (3) the homicide was especially heinous, atrocious, or cruel...." Power, 605 So.2d at 860.

court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

After finding the issue of excessive security procedurally barred because it was already addressed on direct appeal, the circuit court addressed the instant claim and found:

> Mr. Power also claims counsel was ineffective for failing to object to improper shackling or excessive security measures. This claim was addressed at the evidentiary hearing. However, he did not present any witnesses to prove that he was shackled or restrained in any way during the trial. Mr. Blankner testified on Mr. Power's behalf but admitted that he could not remember. The State presented witnesses - Lee County Deputy Sheriff Robert B. Forrest III, trial clerk Patrice Riggall, and court reporter Jackie Folk - who refuted Mr. Power's claims. Deputy Forrest, who was present during the entire trial, testified that he discussed security measures with the judge, who was adamant that Mr. Power not be tried in shackles. As a result, Mr. Power was not in shackles during either the guilt or penalty phases. Ms. Riggall also testified that the judge made it clear he did not want Mr. Power wearing shackles in the courtroom because he did not want the jury to see them. She said the Lee County deputies were not happy about this arrangement but deferred to the wishes of the judge, who was very stern on this point. She was at the trial every day and did not see Mr. Power in shackles. Finally, Ms. Folk testified that she, too, was familiar with the judge's procedures. She, too, was at the trial every day and did not see Mr. Power in shackles.

(R, 3760-61).

Although Power claims that "Wesley Blankner testified that he remembered Mr. Power being shackled during the trial

and recalled an apron around the defense table to prohibit the jury from seeing Mr. Power shackled," (IB, 73), the record actually reflects that Blankner testified as follows:

> Q Okay. Also like to ask you if you have any recollection of Mr. Power being shackled during this trial?
>
> A Yes
>
> Q What is you recollection?
>
> A I remember couple things during this trial. ... There was a time he was shackled, **if I'm not incorrect**, in the trial. ...
>
> ***
>
> Q Do you recall if Mr. Power's shackles, I think they were leg shackles, hands free?
>
> A **I can't tell you for sure.** We would want his hands free. Whether [the] court did it down there or not **I don't know**. I believe they were but if Mr. Powers would have much better memory than I would.
>
> Q Do you recall if Mr. Power's shackles could be heard during the trial behind the apron?
>
> A **No.** I would hope not. **I couldn't guarantee one way or the other.** If we thought there had been any problem we would have moved for mistrial like we did about the gun.

(R, 1455)(emphasis supplied).

Clearly, Blankner's testimony did not include any definite recollection in support of the specifics of the instant allegation of improper shackling. However, he did testify that if he had thought the shackling was a problem he would have moved for a mistrial.

Next, Power represents to this Court that "Judge Nancy Clark, a State witness, testified that she remembered that Mr.

Power was shackled on his feet." (IB, 74). However, that is a misrepresentation of the record. The record actually reflects that Judge Clark testified as follows:

> Q During the course of the trial, do you remember one way or the other as to whether or not Mr. Power was shackled or not? Do you remember that issue coming up?
>
> A **No. I don't remember.** I can - I can recall that **I don't remember** being visually shackled under - with his hands on display **but I can't say** if he - my common sense tells me he would have been shackled with his feet **but I do not recall that**.

(R, 1112-13). Clearly, Judge Clark's testimony did not include any recollection in support of the instant allegation of improper shackling.

Power uses his version of the above testimony to assert that "[b]ecause of the discrepancy in the testimony, the only way to resolve this issue is to interview the jurors and determine if the shackling influenced their decision in any way." (IB, 75). The weakness with this argument is that the only discrepancy is between Power's version of the record and the record.

Power cannot show entitlement to relief on the instant claim, because to the extent he is challenging the trial court's alleged shackling of Power, that claim is procedurally barred; and, to the extent he is claiming ineffective assistance of counsel for failing to object to the "shackling," there is competent, substantial evidence to support the trial court's finding that Power "did not present

any witnesses to prove that he was shackled or restrained in any way during the trial." (R, 3760).

ISSUE III

WHETHER POWER'S CLAIM REGARDING HIS INABILITY TO INTERVIEW JURORS IS A CLAIM COGNIZABLE IN THE INSTANT ACTION?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

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Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." See State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Power argues that "[t]he failure to allow Mr. Power the ability to interview jurors is a denial of access to the courts of this state under article I, section 21 of the Florida Constitution. Rule Regulating the Florida Bar 4-3.5(d)(4) is unconstitutional on both state and federal

grounds." (IB, 77). The circuit court addressed the instant claim and concluded:

> The Florida Supreme Court has held this claim procedurally barred if not raised on direct appeal. *Ragsdale v. State,* 720 So. 2d 203, 205 (Fla. 1998). Further, the court has also cautioned against permitting jury interviews to support allegations for postconviction relief. *Johnson v. State,* 593 So. 2d 206, 210 (Fla. 1992), *cert. denied,* 506 U.S. 839 (1992). However, there are methods by which jurors may be interviewed. *See Baptist Hosp. of Miami, Inc. v. Mater,* 579 So. 2d 97, 100 (Fla. 1991) (inquiry of jurors after trial is never permissible unless moving party has made sworn factual allegations that, if true, would require trial court to order new trial using standard adopted by Supreme Court in *State v. Hamilton,* 574 So. 2d 124 (Fla. 1991), holding that moving parties first must establish actual juror misconduct in juror interview and once that is done, moving party is entitled to new trial unless opposing party can demonstrate that there is no reasonable possibility the juror misconduct affected verdict). Mr. Power's allegations do not reach this standard. All of the occurrences raised in this claim which may have prejudicially influenced the jurors are issues which could have been or were raised on direct appeal.
>
> In addition, any assertion of ineffective counsel on this claim could only point to ineffective assistance of collateral counsel. Such a claim is not cognizable in this proceeding. *See Lambrix v. State,* 698 So. 2d 247 (Fla. 1996), *cert. denied,* 522 U.S. 1122 (1998) (claims of ineffective assistance of postconviction counsel do not present a valid basis for relief).

(R, 3756-57).

Power cannot show entitlement to relief on the instant claim, because to the extent he is claiming his rights were violated due to his inability to interview jurors, the trial court correctly found that claim procedurally barred; and, to the extent he is claiming ineffective assistance of postconviction counsel, the trial court correctly found that

claim not cognizable in this proceeding. See Ragsdale v. State, 720 So.2d 203, 206 n.2 (Fla. 1998); Lambrix v. State, 698 So.2d 247 (Fla. 1996).

ISSUE IV

WHETHER POWER'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S ALLEGED PREPARATION OF THE SENTENCING ORDER?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." See State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Power argues that "[t]rial counsel was ineffective for failing to object to the State's preparation of the of the sentencing order." (IB, 82). The circuit court addressed the instant claim and concluded:

> Certainly the appearance of an unsigned sentencing order in the files of the State and defense attorneys can be explained in several ways. It is equally conceivable that the trial judge could have had ex parte contact with Mr. Power's defense counsel and asked that counsel to prepare the sentencing order since an unsigned copy was found in his files, as well. However, this claim was addressed at the evidentiary hearing. The State presented the testimony of prosecutors. Phillip Townes and Nancy Clark, secretary Arlene Zayas, court reporter Jackie Folk Cunningham, and trial clerk Patrice Riggall. Mr. Townes and Ms. Clark testified that the prosecution team was out having dinner the night before the order was read and had no contact with the judge. Ms. Zayas testified that she was not asked to prepare documents of any kind that night and that the prosecution team did not even bring a typewriter with them to the penalty phase of the trial. Ms. Cunningham testified that the judge called her the night before the order was read and asked her to proofread it because he had been up all night preparing it. Finally, Ms. Riggall testified that there were problems getting the order copied at the courthouse and that copies had to be prepared for the trial attorneys and for the press. Even Mr. Blankner testified that it would not have been like the prosecutors to have engaged in such conduct.
>
> The trial judge, Gary Formet, died in December 1996. However, the testimony of the others who took part in the trial, as state attorneys or as court support staff, clearly demonstrates there was no impropriety in the process of preparing the sentencing order. All who testified refuted the allegation that the Office of the State Attorney was involved in any way in writing the order or that they had any ex parte contact with the judge.

(R, 3733-34).

Initially, the State would note that although Power argues to this Court, without any record support, that “an unsigned sentencing order was found in the files of the State Attorney, but was not found in the files of the defense attorneys;” below, he asserted “[t]rial counsel was, or should have been aware, of

the state's preparation of the sentencing order, since his files also contain a copy of the unsigned order." (R, 2316 at n.5). Thus, Power cannot show error on the part of the trial for concluding no deficiency had been demonstrated as the defense file also contained an unsigned order, on the argument before this Court, that the order was not found in the defense files, as that was not the argument made below. Moreover, Power cannot show error by the trial court as he failed to come forward with any evidence "that the Office of the State Attorney was involved in any way in writing the order or that they had any ex parte contact with the judge."

ISSUE V

WHETHER POWER'S ALLEGATION OF AN INCOMPLETE AND INACCURATE RECORD IS COGNIZABLE IN THE INSTANT ACTION?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." See State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Power argues that there were several unrecorded sidebars and that the trial transcript is riddled with obvious typographical errors that render the transcript nonsensical in places. (IB, 82). The circuit court addressed this claim and concluded:

> Point XVI of the initial appellate brief addressee Mr. Power's inability to have effective assistance of counsel and full review due to the unreliability of the trial transcript. The Florida Supreme Court rejected this claim as meritless . *Power*, 605 So. 2d at 864. Thus, it is procedurally barred. In addition, counsel's performance was not deficient for failing to assure the record was complete, since the Florida Supreme Court found this argument to be without merit. As for any claim that appellate or collateral counsel was ineffective due to not having a complete record, such a claim is not cognizable in these proceedings. *See Lambrix v. State,* 698 So. 2d 247 (Fla. 1996), *cert. denied,* 522 U.S. 1122 (1998).

(R, 3763-64).

Regarding Power's challenge to the trial transcript, as in Walton, Power "'in a strikingly direct fashion, simply proceeds in his postconviction appeal to reargue the precise claim addressed by this Court'" in Power v. State, 605 So.2d 856, 864 (Fla. 1992). Walton v. State, 28 Fla. L. Weekly S183 (Fla. Feb. 27, 2003). "Clearly, this type of reargument is improper, and this claim is barred." Id. Thus, Power, like Walton, cannot show error on the part of the trial court for concluding this aspect of the instant claim is barred.

Regarding Power's challenge to the transcript of the post-conviction hearing, that aspect of the instant claim is not sufficiently pled to allow the formulation of a response. Other than claiming to have identified 78 errors below, Power does not

disclose what any of these alleged errors were or how he was prejudiced by these alleged errors. "'The purpose of an appellate brief is to present arguments in support of the points on appeal.' Duest v. Dugger, 555 So.2d 849, 852 (Fla.1990). Because [Power's] bare claim is unsupported by argument, this Court [should] affirm[] the trial court's summary denial of this subclaim. See Teffeteller v. Dugger, 734 So.2d 1009, 1020 (Fla.1999); Coolen v. State, 696 So.2d 738, 742 n. 2 (Fla.1997)." Lawrence v. State, 27 Fla. L. Weekly S877 (Fla. Oct. 17, 2002).

ISSUE VI

WHETHER POWER'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO "CONSTITUTIONAL ERROR[S]?"

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." See State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Power argues that his trial counsel was ineffective for failing to object to the jury instructions regarding "A. HAC, B. Burden Shifting, C. Automatic Aggravating Circumstance." (IB, 83). The circuit court addressed these claims and concluded:

> A. HAC
>
> Point XV of the initial appellate brief argued that the trial court erred in its consideration of aggravating circumstances that were not supported by the evidence. The brief specifically asserted that the State failed to prove beyond a reasonable doubt that the murder of Angeli Bare was especially heinous, atrocious, or cruel. The Florida Supreme Court found no abuse of discretion in the court finding this aggravator. *Power,* 605 So. 2d at 863-64.
>
> Further, point XVII of the initial appellate brief argued that §921.141(5)(h), Florida Statutes, was unconstitutionally vague and the jury instruction thereon did not provide adequate guidance. The Florida Supreme Court found this claim meritless, noting specifically that
>
> > [t]he trial court in this case instructed the jury on this aggravating circumstance using the limiting construction adopted by this Court in *State v. Dixon,* 283 So. 2d 1, 9 (Fla. 1973), *cert. denied,* 416 U.S. 943 (1974), and approved by the United State Supreme Court in *Proffitt v. Florida,* 428 U.S. 242 (1976). Consequently, the jury instruction given in this case is not unconstitutionally vague. *See Fspinosa v. Florida,* 505 U.S. 1079 (1992); *Sochor v. Florida,* 504 U.S. 527 (1992) (Stevens,J., dissenting).
>
> *Power,* 605 So.2d at 864, n. 10. Thus, these claims are procedurally barred because they were raised on direct appeal.
>
> In addition, counsel's performance was not deficient. On April 9, 1990, counsel filed a motion to declare this portion of the death penalty statute unconstitutional. (R. 2853-68). After a hearing, the court denied the motion. (R. 2209-13, 2957). Counsel again objected to the application of this aggravator at the charge conference, but the court determined the

instruction for the aggravator applied and the instruction was given. (R. 2537-45, 2564, 2592). Defense counsel even objected to the instruction again after it was given. R 2596).

(R, 3754-55).

B. Burden Shifting

The Florida Supreme Court has held that similar claims were procedurally barred because they should have been raised on direct appeal. *See Ragsdale v. State,* 720 So. 2d 203, 205, n. 1-2 (Fla. 1998); *Demps v. Dugger,* 714 So. 2d 365, 367 (Fla. 1998); *Van Poyck v. State,* 694 So. Zd 686, 698-99, n.8 (Fla. 1997), *cert. denied,* 522 U.S. 995 (1997) (claim contending that the prosecutorial argument as well as the jury instructions improperly shifted the burden of proof during the penalty phase proceedings should have been raised on direct appeal).

In addition, counsel's performance was not deficient. On April 9, 1990, counsel filed a motion to declare §921.141, unconstitutional on the basis that, as applied, the statute contained an unconstitutional presumption of death. (R. 2869-74). Counsel ably argued the motion during a pretrial hearing. (R. 2213-18). The lower court denied this motion on May 14, 1990. (R. 2956). Counsel also argued during the penalty phase charge conference that the weighing instruction would lead the jury to believe that it should merely count up the numbers of aggravators and mitigators and compare. (R. 2558-60). The lower court amended the instruction as the defense requested to note that the comparison would be qualitative, not quantitative. (R. 2560). That amended instruction was then given to the jury. (R. 2594-95).

(R, 3737-38).

C. Automatic Aggravating Circumstance

Point XVIII of the initial appellate brief raised the issue of the automatic aggravator as part of the argument that Florida's capital sentencing statute is unconstitutional on its face and as applied. As noted above, the *Power court* found the statute constitutional, although it did not specifically address this argument. *Power,* 605 So. 2d at 864. Other decisions of the Florida Supreme *Court* have determined that this argument is procedurally barred when it has already been raised on direct appeal. *Parker v. State,* 718 So.

> 2d 744, 746 (Fla. 1998). Regardless, the Florida Supreme *Court* has recently upheld this aggravator. *Hudson v. State,* 708 So. 2d 256, 262 (Fla. 1998); *Blanco v. State,* 706 So. 2d 7, 11 (Fla. 1997).
>
> In addition, counsel's performance was not deficient. On April 9, 1990, counsel filed a motion to declare §921,141, Florida Statutes, unconstitutional based on this same argument: (R. 2875-82). The parties argued the motion at a pretrial hearing. (R. 2224-25). The motion was denied in an order entered May 22, 1990. (R. 2265, 3042). Counsel also objected to using this aggravator for record purposes during the penalty phase charge conference. (R. 2535-36).

(R, 3743).

In his brief to this Court, Power simply presents bare bones claims of ineffective assistance counsel. Power makes no attempt to address the trial court's rulings that these claims have already been found meritless by this Court in this case on direct appeal - or in another case equally controlling the trial court's resolution of the claim. Therefore, Power has utterly failed to show any entitlement to relief on these claims.

ISSUE VII

> WHETHER POWER'S ALLEGATION OF IMPROPERLY INTRODUCED NON-STATUTORY AGGRAVATING CIRCUMSTANCES IS COGNIZABLE IN THE INSTANT ACTION?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged:

"'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." See State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Power argues that the prosecutor impermissibly argued victim impact evidence based on the testimony of victims of a prior crime. (IB, 85). The circuit court addressed this claim and concluded:

> The statement at issue was included within assistant state attorney Townes' discussion of the heinous, atrocious, and cruel aggravator:
>
> > Judge is also going to instruct you that you can consider whether the crime for which the defendant is to be sentenced was especially heinous, atrocious and cruel. And he is going to tell you what those words mean. I think he is going to tell you that heinous means extremely wick, or shockingly evil. It is for to search your hearts in the light of society's value, and decide whether the crimes against that child were extremely wicked and shockingly evil, and whether it is homicide, including the events that led up to it, was extremely wicked and shockingly evil. He will tell you that atrocious means outrageously, wicked and vile. He will tell you that cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. What we do know about the defendant is that he enjoyed the suffering of others. Aneeli didn't survive to tell us what happened, but when we listened to the stories of Ms. Wallace, when we listened to the testimony of the Warden

> children, we realized that he takes pleasure in inflicting pain.
>
> (R. 2575-76). [Emphasis added].
>
> The Florida Supreme Court has held that such claims should be raised on direct appeal. *See Diaz v. Dugger,* 719 So. 2d 865, 868 (Fla. 1998) (claim involving use of non-statutory aggravating factors found procedurally barred); *Torres Arboleda v. Dugger,* 636 So. 2d 1321, 1323 (Fla. 1994) (claim that prosecutor improperly argued non-statutory aggravating factors held procedurally barred). Here, the underlying issue actually was raised on direct appeal. Point XV of the initial appellate brief argued that the trial court erred in considering aggravating circumstances which were not supported by the evidence, and specifically asserted the State failed to prove beyond a reasonable doubt that the murder was especially heinous, atrocious, or cruel. The Florida Supreme Court found no abuse of discretion in the court's finding of this aggravator. Power, 605 So. 2d at 863-64. Also, point XVII of the initial appellate brief argued that §921.141(5)(h), Florida Statutes, was unconstitutionally vague and the jury instruction thereon did not provide adequate guidance. The Florida Supreme Court also found this claim to be without merit.

(R, 3738-79). The trial court properly found this claim procedurally barred and without merit.

In his initial brief, Power simply copied the argument, including the lone sentence alleging "deficient assistance of counsel," made in his third amended Rule 3.850 motion. (R, 2324-25 & IB, 84-85). However, "'[t]he purpose of an appellate brief is to present arguments in support of the points on appeal.' Duest v. Dugger, 555 So.2d 849, 852 (Fla.1990). Because [Power's] bare claim is unsupported by argument, this Court [should] affirm[] the trial court's summary denial of this subclaim. See Teffeteller v. Dugger, 734 So.2d 1009, 1020 (Fla.1999); Coolen v. State, 696 So.2d 738, 742 n. 2

(Fla.1997)." Lawrence v. State, 27 Fla. L. Weekly S877 (Fla. Oct. 17, 2002).

Notwithstanding Power's failure to provide an appellate argument - argument addressing the claimed errors in the trial court's ruling, the record shows, as outlined by the circuit court:

> Furthermore, counsel's performance was not deficient. Counsel did not object to the specific statement at issue in this claim, but throughout the guilt phase, he kept evidence and testimony of Mr. Power's prior crimes, together with victim impact evidence, away from the jury. On April 9, 1990, counsel filed a motion to declare §921.143, Florida Statutes, unconstitutional as it related to victim impact evidence. (R. 2883-86). After a pretrial hearing, the trial court granted. this motion. (R. 2218-19, 3004). In addition, when the State filed a notice of intention to use collateral crimes evidence, counsel objected and after a hearing, the court excluded mention of collateral crimes. (R. 2914-40, 2995-3003, 307, 2266-2322). The Florida Supreme Court noted that the State was unsuccessful in attempting to introduce evidence that Mr. Power had been convicted of committing other sexual batteries the month before the present killing. *Power,* 609 So.2d at 861. Counsel objected to various other statements during the trial which he felt violated the trial court's ruling on collateral crimes evidence. (R. 1531, 1585-1602). In addition, counsel objected to the application of the heinous, atrocious, and cruel aggravator at the charge conference, but the court determined the instruction applied. (R. 2537-45, 2564, 2592). Counsel even objected to the instruction again after it was given. (R. 2596).

(R, 3739-40), that any claim of deficient performance by counsel is without merit. Moreover, prejudice could never have been established on this record.

ISSUE VIII

WHETHER POWER'S CLAIM THAT THE TRIAL COURT FAILED TO FIND STATUTORY AND NON-STATUTORY MITIGATION IN THE RECORD IS COGNIZABLE IN THE INSTANT ACTION?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." See State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Power argues that "[t]he court erroneously failed to find statutory and non-statutory mitigation on Mr. Power's behalf." (IB, 85). The circuit court addressed this claim and concluded:

> Generally, a claim that a trial court erred by failing to consider mitigating evidence must be presented on direct appeal. *Rivera v. State,* 717 So. 2d 477, 480 (Fla. 1998); *Cherry v. State,* 659 So. 2d 1069, 1071 (Fla. 1995). In addition, arguments that death penalty is not effective as deterrent and that it costs state more to execute inmates than to incarcerate them for life are political questions rather than relevant concerns to be resolved during a trial. *Johnson v. State,* 660 So. 2d 648, 663 (Fla. 1995), *cert. denied,* 517 U.S. 1159 (1996). Mr. Power has not adequately alleged the failure of the court to consider any other mitigating circumstances.

(R, 3740).

Power does not address the trial court's finding that this claim was barred because it could or should have been raised on direct appeal. Nonetheless, as this Court recently held in Cherry v. Moore, 27 Fla. L. Weekly S810 (Fla. Oct. 3, 2002), the alleged failure to consider mitigating evidence was procedurally barred because it was raised on direct appeal. Thus, it cannot be argued that the alleged failure of the trial court to consider mitigating evidence could not have been raised on direct appeal in the instant case. As such, the trial court correctly found this claim procedurally barred.

ISSUE IX

WHETHER POWER'S CLAIM OF PROSECUTORIAL MISCONDUCT IS COGNIZABLE IN THE INSTANT ACTION?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." See State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Power argues that "[t]he prosecutor's acts of misconduct, both individually and cumulatively, deprived Mr. Power of his right under the Sixth, Eighth, and Fourteenth Amendments." (IB, 87). The circuit court addressed this claim and concluded:

> Point II of the initial appellate brief raised the issue of prosecutorial misconduct, specifically asserting that the trial court erred in denying the defense motion for mistrial when the, prosecutor pointed out Mr. Power's failure to testify during closing argument. The Florida Supreme Court found that this error was harmless under the circumstances of this case: *Power*; 605 So. 2d at 861. Therefore, the substance of this claim, which cites several of these prosecutorial misconduct related errors, was raised on direct appeal. See also *LeCroy v. Dugger,* 727 So. 2d 236, 241 (Fla. 1998) (claim of prosecutorial misconduct held procedurally barred).
>
> Counsel's performance was not deficient. Arguably, the motion has not sufficiently alleged these numerous transgressions. Nevertheless, counsel did object to the State's alleged comments on Mr. Power's right to remain silent, and moved for a mistrial specifically on that basis and generally on other prior comments of the State. (R. 1983-84). The court denied the motion for mistrial. Counsel also objected to the State's comments "I point to the defendant and I say he is guilty as charged and the evidence shows it." (R. 1985-87). The court sustained that objection.

(R, 3741-42).

Again, Power has simply filed the exact argument made below. (R, 2328-34). So, not only does Power not address the trial court's ruling that this claim was found harmless by this Court on direct appeal; he does not address how this claim differs from the direct appeal claim, or why any such variation could not or should not have been raised on direct appeal, or why any such variation would not also have been found harmless by this Court. Nonetheless, Power's "substantive claims of prosecutorial

misconduct could and should have been raised on direct appeal and thus are procedurally barred from consideration in a postconviction motion." Spencer v. State, 28 Fla. L. Weekly S35 (Jan. 9, 2003).

Regarding an ineffective assistance of trial counsel claim, as argued below by the State, Power's record excerpts, with no cites provided, are taken out of context and, as such, are insufficiently pled. For example, Power quotes the prosecutor's statement that "[b]ecause a police officer's interest is to see justice done. He has got no interest in seeing innocent people convicted." (IB at 87). By not identifying the context in which this statement was made, Power is attempting to suggest improper bolstering of a State witness by the prosecutor. However, a review of the record reveals that this comment was part of an attempt to explain to the jury the forthcoming instruction that they take into consideration whether or not the witness has an interest in how the case is decided. (R, 1948). The prosecutor went on to explain that the instruction was referencing witnesses with personal stakes in the outcome of the case, not necessarily the witnesses to the crime. (R, 1948-49). Thus, it is not clear that the statements were even objectionable. Further, the prosecutor's statement "I point to the defendant and I say he is guilty as charged and the evidence shows it," was objected to by trial counsel, and the objection was sustained by the trial court. (R, 1985). Power has failed to show that any of the statements, or the combined effect of them,

warranted the granting of a new trial; therefore, it has not been shown that, under the guidelines of Strickland, counsel's performance was deficient to the point of depriving Power of the effective assistance of counsel.

ISSUE X

WHETHER POWER'S CLAIM THAT THE JURY WAS IMPROPERLY INSTRUCTED ON FLIGHT IS COGNIZABLE IN THE INSTANT ACTION?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." See State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Power's argument consists of two sentences: (1)"This flight instruction was improper and it was error to give it to the jury." (2)"Trial counsel was ineffective for failing to object to this improper instruction." (IB, 93). The circuit court addressed this claim and concluded:

Point IV in the initial appellate brief addressed the issue of the propriety of the trial court granting the state's request for a jury instruction on flight. In its opinion, the court stated:

> Power's third point on appeal is that the trial court erred in instructing the jury on-flight-and in denying Power's request for a limiting instruction. The State maintained that the flight instruction was warranted because the evidence indicated that Power ran away- after he robbed Welty in the field behind the Bare home. Defense counsel pointed out that when Welty first spotted Power, Power was walking casually. Thus, defense counsel asked the court to narrow the flight instruction by informing the jury that the instruction applied only to the robbery of Welty because there was insufficient evidence of flight from the murder, burglary, sexual battery, and kidnapping.

Power, 605 So. 2d at 861. The court held that while it had recently abolished the flight instruction in *Fenelon v. State,* 594 So. 2d 292 (Fla. 1992), giving the instruction, even if error, was harmless beyond a reasonable doubt in this case. *Id* Therefore, this claim is procedurally barred because it was raised on direct appeal.

In addition, counsel's performance was not deficient. Counsel objected to the instruction several times. (R. 1821, 1841-43, 1845, 1936-37, 2075). The instruction was given at the end of the guilt phase, at which time counsel objected again. (R. 2089, 2098).

(R, 3753-54).

As shown in the Circuit Court’s order, Power’s argument to this Court is procedurally barred, inaccurate, and meritless. Thus, no entitlement to relief has been demonstrated.

ISSUE XI

WHETHER FLORIDA’S DEATH PENALTY STATUTE UNCONSTITUTIONALLY PERMITS CRUEL AND UNUSUAL PUNISHMENT?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." See State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Power argues that "[e]xecution by electrocution and/or lethal injection constitutes cruel and unusual punishment under the constitutions of both Florida and the United States." (IB, 94). The circuit court addressed this claim and correctly concluded: "Since the motion and response were filed, the Florida Supreme Court has issued legislation establishing the option of execution by lethal injection. *See Sims v. State*, 754 So.2d 657, 664-665 (Fla. 2000). Therefore, this claim is moot." (R, 3764). Power does not attempt to show error by the trial court, and asserts that he is raising the instant issue to preserve the arguments as to the constitutionality of the death penalty. The State does not concede that this cursory argument

preserves any issue for further review; however, as argued, no response is otherwise necessary.

ISSUE XII

WHETHER POWER'S UNRIPE CLAIM THAT HE IS INSANE TO BE EXECUTED EXHAUSTS ANY ISSUE FOR FEDERAL REVIEW?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." See State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Power argues that he is insane to be executed, and that he is raising the instant unripe claim to preserve it for federal review. (IB, 94). The circuit court addressed this claim and concluded that it was insufficiently pled. (R, 3758).

Power cites to Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998), to support his argument that he must raise this unripe

claim to preserve it for review in future proceedings and in federal court. (IB, 94). However, Martinez-Villareal's *"Ford"* claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time. Id. at 1622. Here, Power's claim is also premature and not subject to federal review unless and until it is ripe and exhausted in the State courts.

ISSUE XIII

WHETHER POWER'S CUMULATIVE ERROR CLAIM ADEQUATELY EXPLAINS HIS ARGUMENT TO ALLOW REVIEW BY THIS COURT?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." See State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Power argues that he did not receive the fundamentally fair trial to which he is entitled under the Eighth and Fourteenth Amendments. (IB, 95). The circuit court addressed this claim and concluded that "[s]ince all of the foregoing claims have been found to be without merit [or procedurally barred], this claim is likewise denied." (R, 3765).

Notwithstanding the lack of merit to this claim, as Power has "failed to brief and explain what the alleged cumulative errors are, and what their impact is on this case., ... the claim is waived." Anderson v. State, 822 So.2d 1261, 1268 (Fla. 2002).

CONCLUSION

Based on the foregoing, all relief should be denied.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to: Pamela H. Izakowitz, CCRC - South, 303 S. Westland Ave., P.O. Box 3294, Tampa, FL 33601-3294, by MAIL on April ____, 2003.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
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